STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16932
OML-AO-4544

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

January 2, 2008

Mr. Joseph Ely
[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. Ely:

We are in receipt of your correspondence in which you request that we contact the Town Board of Rhinebeck and the Board of the Public Access Northern Dutchess Area (PANDA) to inform them of their obligations under both the Freedom of Information and Open Meetings Laws.

Applicable to all government agencies in New York, the Freedom of Information Law requires that records be made available to the public, subject to certain limitations, and pursuant to certain time limits. Similarly, the Open Meetings Law grants public access to meetings of all government bodies held to discuss public business. The law also requires that there be notice of all meetings and that minutes be prepared. It is our general view that town officials are aware of these statutory requirements.

While the Committee on Open Government is authorized to issue advisory opinions concerning application of these laws, this office has no authority to enforce the law or compel an entity to comply with the statutory provisions. At your request, and by copy of this letter, we inform the Town and PANDA Boards of our availability to provide training and educational presentations designed to enhance understanding of and compliance with the Freedom of Information and Open Meetings Laws. If members of either or both boards are interested in having a presentation in their community, we encourage them to contact us directly.

As you know, there are a number of valuable resources available on our website. It is our hope that the materials and opinions available online are educational and persuasive.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Hon. Barbara Cunningham
Bill Nieves

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4545

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January 7, 2008

E-Mail

TO: Ms. Melinda Major

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. Major:

I have received your letter concerning "workshop meetings that are held with closed doors" by the Board of Trustees of the Village of Wilson, adding that "occasionally the meeting times are changed without any notification..."

In this regard, this office, the Committee on Open Government, is the agency designated by law to provide advice and opinions relating to the Open Meetings Law. That being so, I offer the following comments.

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

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

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

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

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

Based upon the direction given by the courts, when a majority of the Board convenes to discuss the Village business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law, even if it is characterized as a "workshop."

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

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

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

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

Lastly, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that an executive session may properly be held. Paragraphs (a) through (h) of §105(1) of the law specify and limit the grounds for entry into executive session. Therefore, a public body cannot exclude the public from a meeting to discuss the subject of its choice.

I hope that I have been of assistance.

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4546

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January 8, 2008

E-MAIL

TO: Stan Merritt

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. Merritt:

I have received your inquiry concerning access to minutes of executive sessions held by a board of education.

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

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

In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available within two weeks of the meetings. There is no requirement, however, that an agency, such as a school district, post minutes or other records on its website.

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

Those circumstances would arise, for example, when a board initiates charges against a tenured person pursuant to §3020-a of the Education Law, which requires that a vote to do so be taken during an executive session. The other instance would involve a situation in which action in public could identify a student. When information derived from a record that is personally identifiable to a student, the federal Family Educational Rights and Privacy Act (20 USC §1232g) would prohibit disclosure absent consent by a parent of the student. Since §106(2) of the Open Meetings Law states that minutes need not include information that may be withheld under the Freedom of Information Law, and since unproven charges and records identifiable to students may be withheld, minutes containing those kinds of information would not be accessible to the public.

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

RJF:tt

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OML-AO-4547

VIA EMAIL

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, January 08, 2008 10:20 AM
To: 'Chuck Lesnick'
Subject: RE: Email address

Dear Councilman:

As you know, when a matter is exempted from the Open Meetings Law, the provisions of that statute do not apply. Section 108 of the OML exempts political party caucuses, defining causes to mean deliberations of the legislative body of a city who are members or adherents of the same political party. I am not aware of any provisions of law requiring notice to other members or officials of the same party with respect to such caucus gatherings, or required attendance at such gatherings.

Further, there is nothing that I know of that would prohibit a caucus from gathering in a public building. As we discussed, it is generally my impression that when a political caucus is held during a public meeting, it is typically held in another room of the same building.

Although our office has not previously addressed either of these issues in writing, on a related note, I note that some "caucuses" must be held open to the public, and in that regard, I attach the following advisory opinion:

http://www.dos.state.ny.us/coog/otext/o2856.htm

I hope this is helpful to you.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State

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OML-AO-4548

VIA EMAIL

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, January 17, 2008 4:59 PM
To: Brenda Adams, Town Clerk
Subject: Open Meetings Law - judicial proceeding

Brenda:

This will confirm our telephone conversation that, yes, I believe a court-ordered pre-trial settlement conference at which a quorum of a town board is present, is exempt from the provisions of the Open Meetings Law. As you mentioned, section 108(1) of the Open Meetings Law exempts judicial proceedings from all provisions of the Open Meetings Law. It is my opinion that settlement negotiations held before a court can be considered judicial proceedings, and would therefore be exempt from the provisions of the Open Meetings Law.

I hope this is helpful to you.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
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OML-AO-4549

VIA EMAIL

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, January 23, 2008 11:16 AM
To: Brenda Adams, Town Clerk
Subject: FW: Open Meetings Law - judicial proceeding

Brenda,

In keeping with the opinion articulated below, I believe that if a mediation proceeding is initiated either pursuant to court order or subsequent to the commencement of litigation, it would be a "judicial or quasi-judicial proceeding" exempt from the Open Meetings Law (section 108(1)).

I hope this is helpful to you. If you would prefer a formal advisory opinion please let me know. Thank
you.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State

Please note that we've moved!! Although our phone, fax and email remain the same, the new office
address is:

One Commerce Plaza
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-4550

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January 23, 2008

E-MAIL

TO: Ray Levato

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. Levato:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to a gathering of a majority of the members of the Monroe County Industrial Development Agency. Apparently you attended an Agency meeting held on the first floor of the Ebenezer Watts Building at which you were required to provide your name, address and affiliation in order to gain entrance to the meeting. You indicated that, typically, access to the second floor of the Watts Building is restricted for security purposes, that the first floor is routinely used for news conferences with no security sign in, and that this requirement was in effect for this meeting only. We believe that requiring the public to provide identification prior to gaining access to a public meeting is inconsistent with the Open Meetings Law, and we offer the following comments.

First, the provisions concerning industrial development agencies are found in Article 18-A of the General Municipal Law, and §856(2) of the General Municipal Law states in part that an industrial development agency "shall be a corporate governmental agency, constituting a public benefit corporation." A public benefit corporation is a "public corporation" as that term is defined by §66(1) of the General Construction Law. Further, §856(3) of the General Municipal Law states that a majority of the members of an industrial development agency "shall constitute a quorum."

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

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

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

Based upon the foregoing, it is clear in our view that the members of an industrial development agency constitute a "public body" subject to the Open Meetings Law, for they perform a governmental function for a public corporation. 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).

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

Section 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 a neighboring county, or a member of the press, would have an equal 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, residence or affiliation in order to attend a meeting. To do so, in our view, would have a chilling effect on public attendance and would not be in keeping with the spirit and intent of the law.

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

FOIL-AO-4551

Albany, New York 12231
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January 30, 2008

Mr. Robert Kushner
[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. Kushner:

I have received your letter and apologize for the delay in response. You indicated that the East Williston Union Free School District Board of Education toured various schools without notification to the public and asked whether so doing violated the Open Meetings Law.

From my perspective, based on the language of the Open Meetings Law and judicial decisions, the site visits as you described them likely fall outside the coverage of 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 quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

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

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

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

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

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

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

I hope that the foregoing enhances your understanding 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- 4552

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January 30, 2008

E-Mail

TO: Mr. Patrick Dedman

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. Dedman:

I have received your letter and apologize for the delay in response. You have raised questions concerning certain practices of the Village of Afton in relation to the Open Meetings Law.

Having reviewed §104 of the Open Meetings Law concerning notice of meetings, you asked whether "a one time posting at the local designated spot and a one time publication of when the regular meetings are to be held is sufficient." In situations in which a schedule of regular meetings has been established, it has been advised that notice of the time and place given once to the news media indicating the schedule and posting continuously in a designated, conspicuous public location satisfies the requirements of the Open Meetings Law, except in circumstances in which unscheduled meetings may be held. In those latter instances, an additional notice of the time and place must be given to the news media and posted in the designated location.

Next, you referred to "emergency" or "special" meetings and asked whether it is "appropriate for the board to discuss and take action on other 'Non-Emergency' issues during the 'Special Meetings'." In this regard, the Open Meetings Law makes no reference to emergency or special meetings, and a public body, such as a village board of trustees, may, in my opinion, take action as it sees fit at any meeting, whether it is a regularly scheduled or other meeting. I note, however, 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

cc: Board of Trustees

STATE OF NEW YORK
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January 30, 2008

Ms. Rose Floramo
[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. Floramo:

I have received your letter and appreciate your kind words. I hope, too, that you will accept my apologies for delay in response.

You referred to motions for entry into executive sessions to discuss "litigation or personnel issues" and specifically mentioned discussions of grievances.

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

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

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

The provision that deals with litigation is §105(1)(d), which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

Based on the foregoing, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion [see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, Supreme Court, Chemung County, April 1, 1983]. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

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

Lastly, the Committee on Open Government has recommended a variety of legislation designed to improve the operation of the Open Meetings Law that appears in its annual report to the Governor and the State Legislature. The Committee's latest report will soon be available on the Committee's website and the sponsors of bills are identified in the report.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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January 30, 2008

Mr. Jerry Brixner
[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. Brixner:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response. You raised several issues relating to meetings and hearings as conducted by the Town of Chili Planning Board.

In this regard, first, a "meeting" is often different from a hearing. A meeting is generally a gathering of quorum of a public body, such as a planning board or a town board, for the purpose of discussion, deliberation, and potentially taking action within the scope of its powers and duties. A hearing is generally held to provide members of the public with an opportunity to express their views concerning a particular subject, such as a proposed budget, a local law or a matter involving land use. Hearings are often required to be preceded by the publication of a legal notice. In contrast, §104(3) of the Open Meetings Law specifies that notice of a meeting must merely be "given" to the news media and posted. Further, there is no requirement that a newspaper, for example, publish a notice given regarding a meeting to be held under the Open Meetings Law. I note, too, that a meeting of a public body held in accordance with the Open Meetings Law can only occur with the presence of a quorum. A hearing, on the other hand, can be conducted without a quorum present.

Second, while I know of no judicial decisions rendered in New York concerning the ability of those to speak at either meetings or hearings, in my opinion, the principles pertinent to that issue would be the same. In short, I believe that an entity has the authority to adopt rules or procedures to govern its own proceedings. Those rules or procedures, however, must be reasonable. In my view, it would be unreasonable, for example, to authorize those with one point of view to speak for ten minutes or perhaps without limitation, while permitting those with a different view to speak for three minutes or not at all. Further, while a hearing may be held for the purpose of enabling the public to speak, the Open Meetings Law is silent on the matter. Therefore, although many public bodies permit members of the public to speak during meetings in accordance with their rules of procedure, there is no obligation to do so.

Lastly, you raised issues relating to an agenda. Here I point out that the Open Meetings Law makes no reference to an agenda. A public body may prepare an agenda, but it is not required to do so. Similarly, there is nothing in the law requiring that a public body abide by its prepared agenda or that prohibits a public body from revising an agenda.

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: Planning Board
Hon. Richard Brongo

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January 30, 2008

E-Mail

TO: Mr. William D. White

FROM: Robert J. Freeman, Executive Director

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

Dear Mr. White:

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

You indicated that you serve as a member of the Oswego City School District Board of Education and that the Board conducted an executive session to discuss you, stating that the matter was "personal." You added that the discussion apparently related to an email you sent to the Board President in which you referred to the Superintendent as [redacted]

You asked whether "this [is] ex-session material" and whether you have "the right to release those emails to anyone [you] would choose..." In this regard, I offer the following comments.

First, as a general matter, 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 executive session. Paragraphs (a) through (h) of §105(1) specify and limit the grounds for conducting an executive session.

Although an issue may be "personal" or involve a "personnel" matter, I point out that those terms do not appear in the Open Meetings Law. The only ground for entry into executive session that might have related to the matter that you described, §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..."

From my perspective, unless the Board discussed the possibility of your removal, §105(1)(f) would not have applied, and the matter should have been discussed in public.

You also referred to "emails between board members" that include comments such as yours and asked whether you have the right to disclose them. From my perspective, email kept, transmitted or received by a school district official in relation to the performance of his or her duties is subject to the Freedom of Information Law, even if the official uses his private email address and his own computer.

The scope of the Freedom of Information Law is expansive, for it encompasses all government agency records within its coverage. Section 86(4) of that statute defines the term "record" expansively to include:

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

Based upon the language quoted above, documentary materials need not be in the physical possession of an agency, such as a school district, to constitute agency records; so long as they are produced, kept or filed for an agency, the law specifies and the courts have held that they constitute "agency records", even if they are maintained apart from an agency's premises.

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

Also pertinent is the first decision in which the Court of Appeals dealt squarely with the scope of the term "record", in which the matter involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" and found that the

documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" [Westchester-Rockland Newspapers v. Kimball, 50 NY2d 575, 581 (1980)].

The point made in the final sentence of the passage quoted above appears to be especially relevant, for there may be "considerable crossover" in the activities of District officials In my view, when the officials communicate with one another in writing, in their capacities as government officials, any such communications constitute agency records that fall within the framework of the Freedom of Information Law.

In a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

The definition of the term "record" also makes clear that email communications between or among board members fall within the scope of the Freedom of Information Law. Based on its specific language, if information is maintained by or for an agency in some physical form, it constitutes a "record" subject to rights of access conferred by the Freedom of Information Law. The definition includes specific reference to computer tapes and discs, and it was held soon after the reenactment of the statute that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS2d 688, 691 (1980); aff'd 97 AD2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS2d 558 (1981)]. Whether information is stored on paper, on a computer tape, or in a computer, it constitutes a "record." In short, email is merely a means of transmitting information; it can be viewed on a screen and printed, and I believe that the email communications at issue must be treated in the same manner as traditional paper records for the purpose of their consideration under the Freedom of Information Law.

Third, the foregoing is not intended to suggest that the email communications to which you referred must be disclosed in their entirety. Like other records, the content of those communications is the primary factor in ascertaining rights of access.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. The records at issue, because they involve communications between or among agency officials, fall with one of the exceptions, §87(2)(g). Due its structure, however, that provision may require substantial disclosure. Specifically, §87(2)(g) enables an agency to withhold records that:

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

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.

Lastly, the Freedom of Information Law is permissive. Although an agency may withhold records or portions of records, it is generally not required to do so. The only instances in my opinion in which records cannot be disclosed to the public would involve those in which a statute, an act of Congress or the State Legislature, forbids disclosure. For instance, the federal Family Educational Rights and Privacy Act ("FERPA") generally prohibits school officials from disclosing information that is personally identifiable to a student without the consent of a parent. In the situation that you described, I know of no law that would prohibit that disclosure of the kinds of email to which you referred.

I hope that I have been of assistance.

RJF:jm

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January 30, 2008

E-Mail

TO: Ms. Diane Mancuso

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. Mancuso:

I have received your letter and hope that you will accept my apologies for the delay in response. You have raised a series of questions relating to the Open Meetings Law and certain practices of your school district.

In this regard, I offer the following comments.

First, you questioned how minutes of a meeting can include information that was never discussed during a meeting. You referred to the public being told that a "lawsuit could not be discussed, then the terms appear in the minutes." While the Open Meetings Law authorizes a public body, such as a board of education, to discuss a pending lawsuit during an executive session [see §105(1)(d)], any action taken with respect to the suit should have occurred, in my opinion, in public and recorded in the minutes.

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.

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.

Next, you wrote that an agenda appears on the District's website 24 hours before meetings, and you asked whether notice must be posted 72 hours before meetings.

I note at the outset that there is nothing in the Open Meetings Law that requires the preparation of an agenda. A public body may choose to do so, but there is no obligation to do so. Similarly, there is no obligation to post notice (or any other information) on a website. Section 104 of the Open Meetings Law, however, pertains to notice and requires that notice of the time and place of meetings be given to the news media and posted in one or more conspicuous, public locations. Specifically, that provision states that:

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

If a public body has developed a schedule of meetings to be held over the course of a year or other period, it has been advised that notice given once to the news media and continuously posted would satisfy the requirements of the law, except in circumstances in which an unscheduled meeting may be held. In that instance, an additional notice must be given.

Next, 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.

You referred to a district policy of acknowledging correspondence. In short, there is no provision of law that requires that correspondence be mentioned or acknowledged.

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

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

Based upon the foregoing, minutes must be prepared and made available within two weeks of meetings.

It is noted that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know

what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

To enhance compliance with and understanding of the Open Meetings Law, it is suggested that you share this response with that board and administrators.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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January 30, 2008

Mr. Robert E. Doocey
[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. Doocey:

I have reviewed your letter addressed to Camille Jobin-Davis, the Committee's Assistant Director.

You requested an advisory opinion concerning "the actions of our Queens Community Board #5 (QCB5) in censoring a speaker during the Public Forum Period of the regularly scheduled Community Board Meeting of July 11, 2007." Attached to your letter is an essay that you prepared that begins with a recitation of the first amendment, which grants freedom of speech. You then referred to a statement read by a resident concerning the destruction of trees and wrote as follows:

> "Christina read her statement from prepared text. The initial portion - the bulk - of the statement described the destruction. The last two or three sentences made reference to the disgraced city council member [redacted] as the initiator of the destruction of the trees to spite those who wanted the land converted to a park.
>
> "She started this statement, 'We don't need an investigation or a trial to determine if [redacted] is a rapist. It's obvious that Councilman [redacted] rapes everyone of is constituents on a daily basis by selling out our community and our history to developers.' At the mention of the word 'rape' associated with [redacted], the board members erupted into chaos. As one writer described the scene: 'the barnyard animals were braying, howling, stomping their feet and pounding the tables.' Vincent Arcuri, the Community Board Chairman, pulled the microphone away from Christina, preventing her from completing her statement, and, by so doing, prevented interested listeners from hearing her statement.
>
> "Mr. Arcuri made no effort at all to honor the oath of office that he took to 'protect and defend the constitution' upon becoming Chair of CB5. He swore to protect and defend the entire constitution. The oath did not include any promise to protect the members of the organization or members of the community from hearing and

addressing harsh issues. Certainly, the oath never includes any promise to protect and defend any elected officials or the organization itself."

You indicated in your letter that Councilman [redacted] was indicted for rape in early July.

In this regard, while the Constitution guarantees the right to speak, I do not believe that there is a constitutional right to do so at meetings of public bodies, such as community boards. The right to attend meetings of public bodies is statutory. Absent the enactment of the Open Meetings Law or similar provisions of law, there would be no right to attend meetings of public bodies. Further, the Open Meetings Law indicates that the right to attend is not absolute, for §105(1) includes eight grounds for discussing public business in private during "executive sessions."

Similarly, the Open Meetings Law is silent with respect to the ability of those in attendance to speak or otherwise participate. Therefore, a public 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. 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.

It has been advised in the past that rules involving public participation may include reasonable provisions concerning time limits for individuals' comments, as well as decorum. For instance, if the presence of signs or placards precludes persons who attend meetings from being able to observe the proceedings, I believe that a public body could adopt a rule prohibiting or limiting their use. Similarly, it has been advised that public body's rules may prohibit language that is risque or generally objectionable based on community standards.

While I know of no judicial decision that deals with the kind of situation that you described, I would conjecture that a court would sustain a rule that authorizes a public body to prohibit the use of what is clearly inflammatory language by a speaker.

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: Community Board #5
Vincent Arcuri, Chair

STATE OF NEW YORK
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February 7, 2008

Hon. Liz Krueger
New York State Senator
Room 302
Legislative Office Building
Albany, NY 12247

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

Dear Senator Krueger:

I have received your letter and appreciate your kind words.

Attached to your letter is a copy of correspondence sent by John B. Kiernan to the Hon. Stan Lundine in Mr. Lundine's capacity as a member of the New York State Commission on Local Government Efficiency and Competitiveness ("the Commission") in which Mr. Kiernan referred to the status of the Commission under the Open Meetings Law. Having received several calls concerning a closed meeting held by the Commission, I am familiar with the issue. In short, based on a judicial decision that dealt with essentially the same issue, it appears that the Commission is not required to give effect to the Open Meetings Law.

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

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

Based on the foregoing, a public body is, in my view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body.

Several judicial decisions indicate generally that advisory bodies, other than those consisting of members of a governing body, that have no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [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.).

On the other hand, if an entity consisting of two or more members that functions as a body has the authority to take action, i.e., through the power to allocate public monies or make determinations, the Court of Appeals has held that the entity would constitute a public body subject to the Open Meetings Law [see e.g., Smith v. City University of New York, 92 NY 2d 707 (1999)].

The decision to which Mr. Kiernan alluded, New York Public Interest Research Group, supra, involved an entity created by former Governor Cuomo, the "Governor's Advisory Commission to Make Findings and Recommendations about Problems Relating to Liability Insurance." Like the Commission that is the subject of your letter, the entity in that case was also designated by means of an executive order, and in consideration of its role, the court concluded that:

> "...the Commission is an advisory body which lacks the power to transact public business. It cannot make law, adopt regulations or direct any changes in State law or policy. It has no direct impact on the functioning of this state. Accordingly, the Commission is not subject to the OML."

The Supreme Court's ruling was affirmed with no opinion by the Appellate Division, and a motion for leave to appeal to the Court of Appeals was denied.

In consideration of the similarity between the entity at issue in New York Public Interest Research Group, as well as the holdings in the other decisions involving advisory bodies cited above, again, it does not appear that the Commission is subject to the Open Meetings Law.

It is noted that the Committee on Open Government in several of its annual reports to the Governor and State Legislature recommended that the Open Meetings Law be amended to include

advisory bodies created by the an executive or governing body within the definition of "public body" in an effort to bring them within the coverage of the Open Meetings Law. Those recommendations, however, did not receive serious consideration, and no similar recommendation has been offered recently. If you are interested in developing legislation to deal with the issue, I would be most pleased to work with you and your staff.

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

Sincerely,

Bob Freeman

Robert J. Freeman
Executive Director

RJF:jm

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February 8, 2008

E-Mail

TO: Hon. Eileen Patterson, Village of Warwick

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. Patterson:

I have received your inquiry concerning the Village of Warwick Board of Trustees' ability to meet with its attorney "to receive counsel" outside the coverage of the Open Meetings Law.

In this regard, there are two vehicles that may authorize a public body to discuss public business in private. One involves entry into an executive session. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. 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 members
> meeting pursuant to a motion identifying the g
> the subject or subjects to be considered, a pub
> an executive session for the below enumerated

As such, a motion to conduct an executive session must include ...ject 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", and §108 of the Open Meetings Law contains three exemptions. When an exemption applies, the Open

Meetings Law does not, and the requirements that would operate with respect to executive sessions are not in effect. Stated differently, to discuss a matter exempted from the Open Meetings Law, a public body need not follow the procedure imposed by §105(1) that relates to entry into an executive session. 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."

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

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

RJF:jm

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February 12, 2008

E-MAIL

TO: Camille Reid

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. Reid:

I have received your letter concerning the status of a committee meeting and whether there may be an impact if "a member of the board wishes to attend." It is assumed that the committee consists of two or more members of the board to which you referred. Based on that premise, I 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)].

Second, when a committee consists solely of members of a public body, I believe that the Open Meetings Law is applicable, for a committee composed of two or more board members constitutes a "public body."

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

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

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

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

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

In view of the amendments to the definition of "public body", 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, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see General Construction Law, §41). For example, in the case of a committee consisting of three, its quorum would be two.

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

If a majority of the committee meets to conduct a meeting of the committee, and other board members attend the meeting by sitting in the audience as observers, the gathering, in my view, would have constituted a meeting of the committee, but not a meeting of the board. In that situation, the presence of the other board members in my opinion would have no impact on the event.

I hope that I have been of assistance.

RJF:tt

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February 13, 2008

E-MAIL

TO: Rose Floramo

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. Floramo:

I have received your letter and hope that you will accept my apologies for the delay in response. You raised the following question: "When entering into executive session for personnel, what can be said if it is a grievance or raises?"

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

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

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

Second, although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters

that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

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

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

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

With respect to the topics to which you referred, the subjects of grievances can vary greatly. Some might deal with policy, in which case it is unlikely that there would be a basis for entry into executive session. On the other hand, if, for example, a grievance relates to the health condition of a specific employee, I believe that there would be basis for conducting an executive session. When the discussion relates to raises, the question involves whether the matter relates to an individual's performance, in which case the focus would be a "particular person" and in which there would be a proper basis for conducting an executive session, or whether the matter involves "across the board" raises, i.e., for all senior staff. In that latter instance, the focus would not involve any particular individual, and in my view, an executive session could not validly be held.

Lastly, when §105(1)(f) can properly be cited to conduct an executive session, 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.

I hope that I have been of assistance.

RJF:tt

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February 15, 2008

Mr. Greg Walsh
[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. Walsh:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to a gathering of the Board of Fire Commissioners of the Gordon Heights Fire District. Although the Board permitted the public to make comments, the members refused to answer questions, and refused to allow you to tape or video record the gathering, based on an alleged "homeland security policy". In this regard, we offer the following comments.

First, while the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law §100), the law is silent with respect to public participation. Consequently, by means of example, if a public body, such as the Board of Fire Commissioners, 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.

Second, please note that meetings are different from hearings. A meeting is generally gathering of quorum of a public body for the purpose of discussion, deliberation, and potentially taking action within the scope of its powers and duties. A hearing is generally held to provide members of the public with an opportunity to express their views concerning a particular subject, such as a proposed budget, a local law or a matter involving land use. 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.

With respect to the ability to tape record or video record open meetings, there is nothing in the Open Meetings Law that addresses the issue. There is a series of decisions, however, pertaining to the use of recording equipment at meetings and in our opinion, they consistently apply certain

principles. One is that a public body, such as the Board of Fire Commissioners, 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 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 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 added).

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, 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 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, it is our opinion that there is no basis for a blanket denial of the use of video or tape recording devices at a meeting of a public body. Further, in response to the Board of Fire Commissioner's assertion that tape recording would be contrary to a "homeland security policy", it is our opinion that such policy would not be supported by a court and is not grounded in law.

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Board of Fire Commissioners
Bruce Greif

STATE OF NEW YORK
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February 20, 2008

E-MAIL

TO: Kathie Wilcox

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. Wilcox:

I have received your letter and hope that you will accept my apologies for the delay in response. You enclosed minutes of an executive session held by the Cortland County Legislature and questioned the propriety of the executive session.

Based on a review of the minutes, it appears that the executive session may be segmented in into three topics. The first involved a description of the procedure and criteria used in relation to the construction of a County facility and the acquisition of land for the siting of such a facility. The second involved a discussion of particular possible sites, including details indicating their location. The third involved details concerning the distinction between leasing or buying a parcel of real property.

In my view, the first and third aspects of the discussion should have occurred in public. It is possible that elements of the second focusing on specific parcels could validly have been discussed in executive session.

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

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

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

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

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

In this instance, the matter involves not one but several parcels. That being so, it is possible that public discussion relative to a particular parcel could affect negotiations and, therefore, the price that might be paid for other parcels where no final price has yet been established. In those or similar situations, insofar as publicity would "substantially" affect the value of those parcels, and an executive session might properly be held. However, in other situations in which publicity would have little or no impact upon the value of real property, I do not believe that there would be a basis for conducting an executive session.

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

I hope that I have been of assistance.

RJF:tt

cc: Cortland County Legislature

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 20, 2008

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 facts presented in your correspondence.

Dear Mr. Mallette:

I have received your letter and the materials relating to it. Please accept my apologies for the delay in response. Having reviewed the materials, I offer the following comments.

First, in a request to the records access officer of the Town of Cicero, you sought information by raising a series of questions, i.e., What is the total Police Budget for the year 2007", "What portion has been spent to date", "Who made the decision on who gets a cell phone", etc. In this regard, it is emphasized that the Freedom of Information Law does not require that government officers or employees supply information in response to questions. They may choose to do so and often do, but they are not required to do so to comply with the Freedom of Information Law. That statute pertains to existing records, and §89(3)(a) states in part that an agency, such as a town, is not required to create a record in response to a request. Therefore, if for example, there is no record indicating a department's expenditures to date, there would be no obligation to prepare a new record containing that information. In the future, rather than seeking information by raising questions, it is suggested that you request existing records, i.e., records identifying individuals to whom the Town has issued cell phones.

Second, one request involved the "backgrounds" of two Town employees. As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (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 that are irrelevant to the performance of one's duties may generally be withheld. However, based on judicial decisions, those portions of such a record or its equivalent detailing one's prior public employment and other items that are matters of public record, general educational background, licenses and certifications, and items that indicate that an individual has met the requisite criteria to serve in the position, must be disclosed.

Lastly, you questioned the propriety of an executive session held by the Town Board concerning "a possibility of some acquisition of some land by the Town..." Here I direct you to the Open Meetings Law. That law, analogous to the Freedom of Information Law, is based on a presumption of openness. Meetings of public bodies must be conducted open to the public, except to the extent that an executive session may properly be conducted in accordance with paragraphs (a) through (h) of §105(1). Consequently, a public body, such as a town board, cannot enter into an executive session to discuss the subject of its choice. From my perspective, the grounds for entry into executive session are based on the need to avoid some sort of harm that would arise by means of public discussion, and that is so with respect to the only ground for entry into executive session that appears to be relevant in relation to the matter.

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

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

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

A key question, in my view, involves the extent to which information relating to possible real property transactions has become known to the public. The more that is known, the less likely it is that publicity would have an impact on the value of a parcel or in some way damage the interests of taxpayers. It has been advised that when a municipality is seeking to purchase a parcel and the public is unaware of the location or locations under consideration, it is possible if not likely that premature disclosure or publicity would indeed substantially affect the value of the property. In that kind of situation, publicity might result in speculation or offers from others, thereby precluding the municipality from reaching an optimal price on behalf of the taxpayers. However, when details concerning a potential real property transaction, such as the location and potential uses of the property, are known to the public, publicity would have a lesser effect or impact on the value of the parcel. Again, the more that is known to the public, the less likely it is that publicity would affect the value of a parcel.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Hon. Tracy Cosilmon

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February 20, 2008

Mr. Sanjay Kapur
[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. Kapur:

As you are aware, I have received your letter concerning the status under the Open Meetings Law of several entities operating within the State University. Please accept my apologies for the delay in response.

The entities at issue are the University Faculty Senate, the Faculty Council of Community Colleges, and the Student Assembly. I have contacted the Office of Counsel at the State University to obtain information pertaining to those entities, and University Counsel, Nicholas Rostow, has advised that none are subject to the Open Meetings Law. Based on a review of the regulations pertaining to those entities and their functions, I agree that two do not appear to fall within the coverage of the Open Meetings Law; the remaining entity, however, is in my view required to comply with that statute.

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

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

Based on the foregoing, a public body is, in my opinion, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body. I note, too, that the definition refers to committees, subcommittees and similar bodies of

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

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

On the other hand, if an entity consisting of two or members that functions as a body has the authority to take action, i.e., through the power to allocate public monies or make determinations, the Court of Appeals, the state's highest court, has held that the entity would constitute a public body subject to the Open Meetings Law. In a case dealing with a student government body at a public educational institution ("the Association, Inc."), the Court provided guidance concerning the application of the Open Meetings Law, stating that:

> "In determining whether an entity is a public body, various criteria and benchmarks are material. They include the authority under which the entity was created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies.
>
> "This Court has noted that the powers and functions of an entity should be derived from State law in order to be deemed a public body

> for Open Meetings Law purposes (*see, Matter of American Socy. for Prevention of Cruelty to Animals v Board of Trustees of State Univ. of N.Y.*, 79 NY2d 927, 929). In the instant case, the parties do not dispute the CUNY derives its powers from State law and it surely is essentially a public body subject to the Open Meetings Law for almost any imaginable purpose. The Association, Inc. contends, on the other hand, that is a separate, distinct, subsidiary entity, and does not perform any governmental function that would render it also a public body.
>
> "It may be that an entity exercising only an advisory function would not qualify as a public body within the purview of the Open Meetings Law...More pertinently here, however, a formally chartered entity with officially delegated duties and organizational attributes of a substantive nature, as this Association, Inc. enjoys, should be deemed a public body that is performing a governmental function (*compare, Matter of Syracuse United Neighbors v. City of Syracuse*, 80 AD2d 984, 985, *appeal dismissed* 55 NY2d 995). It is invested with decision-making authority to implement its own initiatives and, as a practical matter, operates under protocols and practices where its recommendations and actions are executed unilaterally and finally, or receive merely perfunctory review or approval...This Association, Inc. possessed and exercised real and effective decision-making power. CUNY, through its by-laws, delegated to the Association, Inc. its statutory power to administer student activity fees (*see*, Education Law §6206[7][a]). The Association, Inc. holds the purse strings and the responsibility of supervising and reviewing the student activity fee budget. (CUNY By-Laws §16.5[a]). CUNY's by-laws also provide that the Association, Inc. 'shall disapprove any allocation or expenditure it finds does not so conform, or is inappropriate, improper, or inequitable,' thus reposing in the Association, Inc. a final decision-making authority... [Smith v. CUNY, 92 NY2d 707; 713-714 (1999)].

According to 8 NYCRR §331, the University Faculty Senate "shall be concerned with effective educational policies and other professional matters within the university." It is my understanding that the Faculty Senate does not have the authority to make policy or otherwise take binding action. Similarly, the Articles of Organization of the Faculty Council of Community Colleges indicate that the Faculty Council is authorized to "focus on matters relating to community college faculty and make recommendations regarding academic concerns and issues, policies, and programs." I have found no material indicating that its recommendations are or must be adopted. Based on the foregoing, I believe that a court would likely determine that neither the University Faculty Senate nor the Faculty Council of Community Colleges constitutes a public body or, therefore that either would be required to give effect to the Open Meetings Law.

I believe, however, that the Student Assembly is a public body subject to the Open Meetings Law. Most significantly, 8 NYCRR §341.2(b) requires that the Student Assembly "shall provide...a procedure for electing the student member of the State University of New York Board of Trustees..." As you are aware, the Board of Trustees is the governing body of the University system, and §341.10(a) specifies that the president of the Student Assembly "shall...serve as the student member of the State University of New York Board of Trustees."

In short, through the exercise of its obligation to develop a procedure for the election of a member of the University's governing body, I believe that the Student Assembly performs a binding decision-making function regarding the membership and composition of the governing body. For that reason, the Student Assembly in my opinion constitutes a public body subject to the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Nicholas Rostow
Joel Pierre-Louis

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February 20, 2008

Ms. Carol M. Solari-Ruscoe
[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. Solari-Ruscoe:

I have received your correspondence and hope that you will accept my apologies for the delay in response. The issues that you raised relate to the Clinton-Essex-Warren-Washington Health Insurance Consortium ("the Consortium").

Before focusing on the specific issues that you raised, I note that the Consortium is, in my opinion, an "agency" as that term is defined in §86(3) of the Freedom of Information Law, and that its governing body is a "public body" subject to the Open Meetings Law.

Section 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."

As I understand the matter, the Board of Directors of the Consortium carries out its duties in accordance with the authority conferred by Articles 5-G of the General Municipal Law and 47 of the Insurance Law. With respect to the former, §119-o(1) of the General Municipal states in relevant part that:

> "In addition to any other general or special powers vested in municipal corporations and districts for the performance of their respective functions, powers or duties on an individual, cooperative,

> joint or contract basis, municipal corporations and districts shall have the power to enter into, amend, cancel and terminate agreements for the performance among themselves or one for the other of their respective functions, powers and duties on a cooperative or contract basis or for the provision of a joint service..."

In Article 47 of the Insurance Law, §4701(a) states that:

> "Cooperative health risk-sharing agreements allow public entities to: share, in whole or part, the costs of self-funding employee health benefit plans; provide municipal corporations, school districts and other public employers with an alternative approach to stabilize health claim costs; lower per unit administration costs; and enhance negotiating power with health providers by spreading such costs among a larger pool of risks."

Further, subdivision (e) and (f) of §4702 respectively provide as follows:

> "(e) 'Municipal cooperative health benefit plan' or 'plan' means any plan established or maintained by two or more municipal corporations pursuant to a municipal cooperation agreement for the purpose of providing medical, surgical or hospital services to employees or retirees of such municipal corporations and to the dependents of such employees or retirees.
>
> (f) 'Municipal corporation' means within the state of New York, a city with a population of less than one million or a county outside the city of New York, town, village, board of cooperative educational services, school district, a public library, as defined in section two hundred fifty-three of the education law, or district, as defined in section one hundred nineteen-n of the general municipal law."

Based on the foregoing, the participants in the consortium have been given the legal authority to create a cooperative health benefit plan in furtherance of their official governmental functions, powers and duties. If that is so, the Board of Directors conducts public business and performs a governmental function for a group of public corporations, i.e., school districts. In short, given the characteristics of the Consortium, again, I believe that it is a "public body" required to comply with the Open Meetings Law.

Lastly, the foregoing is not to suggest that the meetings of the Board of Directors must be conducted in public in their entirety. As you may be aware, every meeting of a public body is required to be preceded by notice given in accordance with §104 of the Open Meetings Law, and every meeting must be convened as an open meeting. Nevertheless, in view of the functions of the Board of Directors, it is likely that some aspects of its business could be conducted during validly convened executive sessions. For example, there may be instances in which it considers collective

bargaining negotiations or the financial or medical history of a particular person. In those kinds of circumstances, executive sessions could likely be held pursuant to §105(1)(e) or (f) of the Open Meetings Law.

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

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

Since a municipal corporation is a kind of public corporation (see General Construction Law, §66), the Consortium is, in my view, an agency required to comply with the Freedom of Information Law.

One element of your correspondence deals with the "subject matter list." As a general matter, the Freedom of Information Law pertains to existing records, and an agency is not required to create a record in response to a request [see §89(3)]. Similarly, if records that once existed have legally been disposed of or destroyed, the Freedom of Information Law would not apply.

An exception that rule relates to the subject matter list. Specifically, §87(3) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain...
>
> c. a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

The "subject matter list" required to be maintained under §87(3)(c) is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. Further, the regulations promulgated by the Committee on Open Government state that such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested [21 NYCRR 1401.6(b)]. I emphasize that §87(3)(c) does not require that an agency ascertain which among its records must be made available or may be withheld. Again, the Law states that the subject matter list must refer, in reasonable detail, to the kinds of records maintained by an agency, whether or not they are available.

It has been suggested that the records retention and disposal schedules developed by the State Archives and Records Administration at the State Education Department may be used as a substitute for the subject matter list. It is suggested that you ask to review the retention schedule applicable to the College. Alternatively, you could request a copy of the schedule from the State Archives and Records Administration by calling (518)474-6926.

I note that in one aspect of a request made pursuant to the Freedom of Information Law, you asked for an "explanation of how the proposed activity is consistent with specific grant selection criteria." Again, the Freedom of Information Law pertains to existing records, and if no "explanation" exists, an agency would not be required to create a record containing the information sought.

Next, as you are aware, a grant application submitted by one agency, such as the Consortium, to another agency would constitute intra-agency material falling within the coverage of §87(2)(g) of the Freedom of Information Law. That provision authorizes an agency to withhold records that:

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

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

You referred in one letter to the unanimous approval of a resolution by the governing body of the Consortium and indicated that the approval was made without any public discussion. Due to the absence of discussion, you asked for a "ruling as to whether the vote taken on this resolution is valid..." Your inference, I believe, is that there must have been a private discussion prior to the approval of the resolution.

In this regard, first, the authority of this office involves providing advice and opinions; it is not empowered to issue a "ruling" that is binding or which has the force of law.

Second, the unanimous approval without discussion does not necessarily suggest that a meeting was held in contravention of the Open Meetings Law. There are numerous instances in which written materials distributed to members of public bodies in advance of their meetings enable them to take action with little or no discussion. Further, action taken by a public body remains valid unless and until a court renders a determination to the contrary.

Lastly, §106 of the Open Meetings Law pertains to minutes of meetings and provides what might be characterized as minimum requirements concerning the contents of minutes. Subdivision (1) concerning minutes of open meetings states that:

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

In short, so long as minutes consist of a record or summary of motions, proposals, resolutions, action taken and the vote of the members, the minutes would be adequate to comply with law. They may be more detailed, but there is no requirement that they be expansive.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Teri Calabrese-Gray
Tammy Johnson
Susan Watson

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February 22, 2008

E-Mail

TO: Mr. Robert W. Engle

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Engle:

I have received your letter and note that the advisory jurisdiction of the Committee on Open Government relates to the Freedom of Information and Open Meetings Laws. Therefore, I have neither the jurisdiction nor the expertise to offer an opinion concerning the issues raised in your second letter.

However, with respect to the first, in any instances in which a public body, such as a town board or a village board of trustees, votes to take some sort of action, minutes must be prepared, whether the vote is taken during an open meeting or an executive session. Specifically, §106 of the Open Meetings Law contains requirements concerning the preparation and availability of minutes and states that:

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

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

With respect to the statute of limitations regarding the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules, §107 of the Open Meetings Law states in relevant part that:

> "[t]he statute of limitations in an article seventy-eight proceeding with respect to an action taken at executive session shall commence to run from the date the minutes of such executive session have been made available to the public."

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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February 22, 2008

E-Mail

TO: Ms. Marilyn Bartelotte

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. Bartelotte:

As you are aware, I have received your letter in which you requested an advisory opinions relating to the Open Meetings Law. Please accept my apologies for the delay in response.

You referred to a proposal to develop property adjoining property that you own in the Town of Boonville. Prior to a public hearing on the matter, all five members of the Town's Zoning Board of Appeals "came in one vehicle and walked over and took measurements of the property together." You wrote that the Board, which was observed on the property by you and your husband for thirty minutes, "together, reviewed, took measurements, and obviously discussed the matter..." You confirmed with the Town Clerk, who also serves as secretary for the Zoning Board of Appeals that no notice was given prior to the gathering.

You questioned the status of the gathering under the Open Meetings Law, and in this regard, I offer the following comments.

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

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

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

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

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

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

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

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

Based on the foregoing, if the gathering occurred solely for the purpose of observation and acquiring information regarding the property, judicial precedent indicates that the Open Meetings Law would not have applied. However, if its purpose also included discussions or deliberations concerning its observations or acquisition of information regarding the parcel, the gathering would, in my opinion, have constituted a "meeting" that should have been preceded by notice given in accordance with §104 of the Open Meetings Law and held in a manner consistent with that statute.

I hope that I have been of assistance.

RJF:jm

cc: Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4520

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February 22, 2008

E-MAIL

TO: Frank A. Libordi

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. Libordi:

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

You raised the following questions: "If a reporter is a secret member of a committee appointed by the Board of Education, are his notes considered minutes, and can they be requested under FOIA...?"

In this regard, first, I do not believe that an appointment of an individual to a committee by a board of education can be "secret." Any action taken by a board of education must occur during a meeting held open to the public in accordance with the Open Meetings Law. Further, minutes of meetings must consist of a record or summary of any action taken by the board. Any such minutes must be prepared and accessible to the public within two weeks of a meeting (see Open Meetings Law, §106).

Second, assuming that a person takes notes in his or her capacity as an appointee of a board of education, while I do not believe that the notes could be characterized as minutes, I believe that they would constitute "records" that fall within the coverage of the Freedom of Information Law.

That statute pertains to all records of an agency, such as a school district or board of education, and §86(4) defines the term "record" expansively to include:

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

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

Based upon the language quoted above, notes need not be in the physical possession of a school district or board to constitute an agency record; so long as they are produced, kept or filed for an agency, the law specifies and the courts have held that they constitute an "agency record", even if they are maintained apart from an agency's premises.

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

In a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

In short, when records are prepared by an individual for an agency, I believe that they are subject to rights of access.

Third, 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.

Without knowledge of the contents of records, I cannot offer specific guidance concerning public rights of access. However, in the context of the functions of a board of education, several exceptions to rights of access may be relevant. Section 87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is the federal Family Educational Privacy Act (20 USC §1232g), which generally prohibits the disclosure of records identifiable to students, unless a parent consents to disclosure. Section 87(2)(b) deals with information identifiable to any person and authorizes an agency to withhold records the disclosure of which would constitute an unwarranted invasion of personal privacy. Also relevant may be §87(2)(g), which permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

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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February 22, 2008

Hon. Harry B. Bronson
Hon. Willie J. Lightfoot
Monroe County Legislature
96 Mt. Vernon Avenue
Rochester, NY 14620

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

Dear Legislators Bronson and Lightfoot:

I have received your letter and the materials relating to it. You have requested an advisory opinion concerning "the manner in which a committee of the Monroe County Legislature entered into an executive session and the propriety of the topics discussed therein."

According to your letter:

> "On January 17, 2008 a special meeting of the Public Safety Committee of the Monroe County Legislature was convened to discuss the appointment process of the county's next public defender. At this meeting a motion was made to enter into executive session, at the advice of the County Attorney, to discuss the first item on the special meeting's agenda, 'Establish the Questions and Process by which we will interview the applicants.'"

You expressed the belief that:

> "...this motion violates Section 105 of Open Meetings Law as the maker of the motion did not include statutory language addressing the confidentiality of information to be discussed and the matter as presented in the agenda does not meet the requirements for executive session."

During the meeting, there was "disruption by members of the public", and the Committee "exited chambers." Following the disruption, a quorum of the Committee returned "where the chair recessed the meeting until January 26, 2008." You added that:

> "On January 22, 2008, the Public Safety Committee convened their regularly scheduled meeting with an entirely different agenda. This meeting was held and adjourned with no discussion of the agenda items of the January 17 special meeting. We question whether the chair has the authority to convene a new meeting of the Public Safety committee while a prior meeting is still in recess."

Notwithstanding the reference to continuation of the meeting of January 17 to January 26, "to [y]our knowledge, no meeting was held on the 26th." However, Committee members were notified on February 7 that the meeting would be reconvened on February 9, and you expressed the opinion that the Committee Chair lacks the authority "to hold a meeting in recess for a three-week period." When the meeting was held on February 9:

> "...no public forum was held at the beginning of this meeting. Immediately at the opening of the February 9 meeting, a committee member made a motion to enter into executive session. He did not state the justification for entering into executive session when making the motion, which was seconded and adopted."

In conjunction with the foregoing, you sought an opinion concerning the following questions:

> 1.) Is it appropriate to discuss the process in which public defender applicants will be interviewed in executive session. Also, please clarify what justification should be given in a motion to enter into executive session.
>
> 2.) Was the chair of the committee required to give public notice that the January 26 meeting was canceled or further postponed.
>
> 3.) Did the February 9 meeting require a public forum as it had a different agenda and the items on the previous agenda were not discussed.
>
> 4.) Is it appropriate for the committee chair to hold a meeting in recess for a three-week period."

In this regard, I offer the following comments.

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

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

In consideration of the last clause quoted above, it is clear that a committee consisting of two or more members of the County Legislature constitutes a "public body" required to comply with the Open Meetings Law.

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

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

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

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

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise 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 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 or perhaps the creation or elimination of positions, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". For example, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In the circumstance that you referenced, a discussion of the process in which applicants for a position would be interviewed, the focus would not involve "particular person." However, when the discussion involves the qualification of particular candidate for the position, I believe that an executive session could properly be held.

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)].

Next, you asked whether a public vote of the cancellation or postponement of a scheduled meeting was required to have been given. In short, the Open Meetings Law contains no such requirement. However, it has been advised, based on considerations involving reasonableness and courtesy, that notice of a cancellation or postponement be given to the members of a public body and the recipients of the initial notice of meeting, and that notice of the cancellation or postponement be posted at the location or locations designated by a public body for posting of notice of its meetings.

You asked whether the meeting of February 9 required a "public forum." If I understand the question correctly, it is whether the public must have been given the opportunity to speak at that meeting. In this regard, while the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100), the Law is silent with respect to public participation. Consequently, by means of example, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally.

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

I note, too, that there are federal court decisions indicating that if commentary is permitted within a certain subject area, negative commentary in the same area cannot be prohibited. It has been held by the United States Supreme Court that a school board meeting in which the public may speak is a "limited" public forum, and that limited public fora involve "public property which the State has opened for use by the public as a place for expressive activity" [Perry Education Association v. Perry Local Educators' Association, 460 US 37, 103. S.Ct. 954 (1939); also see Baca v. Moreno Valley Unified School District, 936 F. Supp. 719 (1996)]. In Baca, a federal court invalidated a bylaw that "allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter (District employees' conduct or performance)" (id., 730). That prohibition "engenders discussion artificially geared toward praising (and maintaining) the status quo, thereby foreclosing meaningful public dialogue and ultimately, dynamic political change" [Leventhal v. Vista Unified School District, 973 F.Supp. 951, 960 (1997)]. In a decision rendered by the United States District Court, Eastern District of New York (1997 WL588876 E.D.N.Y.), Schuloff, v. Murphy, it was stated that:

> "In a traditional public forum, like a street or park, the government may enforce a content-based exclusion only if it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. Perry Educ. Ass'n., 460 U.S. at 45. A designated or 'limited' public forum is public property 'that the state has opened for use by the public as a place for expressive activity.' Id. So long as the government retains the facility open for speech, it is bound by the same standards that apply to a traditional public forum. Thus, any content-based prohibition must be narrowly drawn to effectuate a compelling state interest. Id. at 46."

The court in Schuloff determined that a "compelling state interest" involved the ability to protect students' privacy in an effort to comply with a federal law requiring that information identifiable to students be kept confidential, but that expressions of opinions concerning "the shortcomings" of a law school professor could not be restrained.

Since you referred to the agenda, I point out that the Open Meetings Law contains no provision concerning agendas or whether they must be followed if prepared. It is suggested that you ascertain whether the County Legislature has adopted rules pertaining to agendas.

Lastly, you questioned the propriety of a Committee chair holding a meeting "in recess for a three week period." There is no reference in the Open Meetings Law to a "recess." However, a delay in reconvening for a period of days or weeks could not, in my opinion, be equated with or considered to be a continuation of a single meeting. Rather, I believe that any new convening would constitute a new meeting that must be preceded by notice given pursuant to §104 of the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: County Legislature

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 22, 2008

Ms. Sonja Hedlund
[redacted]

Ms. Barbara Gref
[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. Hedlund and Ms. Gref:

I have received your letter and appreciate your suggestion and kind words. You have requested an advisory opinion concerning "three recent incidents in which [you] believe the Town of Callicoon has run afoul of the New York State Open Meetings Law."

The first involved a situation in which the Town Board approved a motion to conduct an executive session for a "personnel discussion." The closed session was held for twenty minutes, and upon returning to the open meeting, "the board approved a resolution creating a $10,000 salary for the position of part-time Deputy Code Enforcement Officer."

From my perspective, there was likely no basis for conducting an executive session to discuss the salary accorded to the 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. While one of the grounds for entry into executive session often relates to personnel matters, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

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

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

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

To attempt to clarify the Law, the Committee on Open Government 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, creation or elimination of positions, or the salary accorded to a position, regardless of who might hold that position, I do not believe that

§105(1)(f) could be asserted, even though the discussion may relate to "personnel". In the circumstance that you described, the issue would not have focused on any "particular person", nor would it have involved the subjects relating to a particular person delineated in §105 (1)(f). In short, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) or corporation 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).

Third, you referred to a motion that the Town Board should hold "a special emergency meeting", and a member of the Board said that "notice of the meeting should be given but that time did not allow notice to be given." That being so, a "waiver" was prepared providing as follows:

> "We the Town of Callicoon Town Board, waive advertisement and notice of special emergency meeting held at the Town Hall, Jeffersonville, NY on Friday, January 4, 2008."

In short, there is no provision in the Open Meetings Law that authorizes a public body to waive the notice requirements. Specifically, §104 of that statute provides that:

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

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

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

> "Whether abbreviated notice is 'practicable' or 'reasonable' in a given case depends on the necessity for same. Here, respondents virtually concede a lack of urgency: They deny petitioner's characterization of the session as an 'emergency' and maintain nothing of substance was transacted at the meeting except to discuss the status of litigation and to authorize, pro forma, their insurance carrier's involvement in negotiations. It is manifest then that the executive session could easily have been scheduled for another date with only minimum delay. In that event respondents could even have provided the more extensive notice required by POL §104(1). Only respondent's choice in scheduling prevented this result" [524 NYS2d 643, 645 (1988)].

I point out that §62 of the Town Law includes reference to special meetings of town boards. That provision pertains to notice to the members of a board and requires that written notice be given to the members not less than two days prior to a special meeting. That requirement is separate and distinct from the obligations concerning notice imposed by the Open Meetings Law.

Next, you referred to a motion to conduct an executive session for a "personnel discussion" that led to action to approve "a banking resolution detailing whom from the town government could sign checks drawn on the town's account." For reasons described earlier in relation to the first situation that you described, it appears unlikely that an executive session could properly have been held.

Moreover, 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, reference was made to a "workshop." In my view, which is based on judicial precedent, there is no legal distinction between a "workshop" and a "meeting." In this regard, I offer the following comments.

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

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

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4573

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March 3, 2008

Hon. David F. Gantt
Member of Assembly
74 University Avenue
Rochester, NY 14605

The staff of the Committee 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 Assemblyman Gantt:

I have received your letter and the news articles relating to it. You have requested an advisory opinion concerning an incident involving the Monroe County Legislature.

By way of background, the matter relates to the process by which the Legislature selected a new public defender following the retirement of an individual who served in that position for approximately thirty years. Because the propriety of the process became a topic of controversy, your letter and the news articles indicate that approximately two-hundred people sought to attend a meeting of the Legislature on February 12. You added that a sign indicating the occupancy limit in the Legislature's chamber "had been changed from 186 to 75." Consequently, although the chamber ordinarily would have enabled most of those interested in attending to do so, the reduction of the limit precluded many from attending. According to a news account of the gathering, before people were permitted to gain entry into the chamber:

> "Their belongings were searched for weapons and they were scanned with a metal detector wand. As the meeting began Gantt was removed after yelling 'Let our people in now!' Sister Grace Miller of the Sisters of Mercy was hustled out of the room by deputies. A man who stood up in her defense was thrown against the wall, handcuffed, and taken out of the room. Miller and the bystander were charged with disorderly conduct."

The news article also indicates that, after the meeting began, "deputies hovered over the crowd," and when people were permitted to address the Legislature, they "were escorted to the podium and to and from the bathroom by armed deputies."

Based on the foregoing, I offer the following comments.

I note at the outset that §103(a) of the Open Meetings Law states in part that "Every meeting of a public body shall be open to the general public..." Further, the intent of the Open Meetings Law is clearly stated in §100 as follows:

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

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

Although the Open Meetings Law does not directly address matters involving the ability to speak at meetings or the conduct of public bodies or those who attend meetings, it has been advised in a variety of contexts that every law must be implemented in a manner that gives reasonable effect to its intent. Additionally, as a general matter, a public body has the authority to adopt rules and procedures to govern its own proceedings. Nevertheless, the courts have found that those rules must be reasonable. For instance, in a decision rendered in 1963 concerning the use of tape recorders, it was found that the presence of a tape recorder, which then was a large and obtrusive device, would detract from the deliberative process and that, therefore, a policy prohibiting its use was reasonable [Davidson v. Common Council, 40 Misc.2d 1053]. However, when changes in technology enabled the public to use portable, hand-held tape recorders, it was found that their use would not detract from the deliberative process, because those devices were unobtrusive. Consequently, it was also found that rules adopted by public bodies prohibiting their use were unreasonable [People v. Ystueta, 99 Misc.2d 1105 (1979); Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985).

In my view, there are several issues relating to the reasonableness of certain actions relating to the event.

First, in various locations, those entering buildings in which meetings subject to the Open Meetings Law are being held must pass through a metal detector before attending. When there is a possibility of violence, it would not be unreasonable in my opinion for a public body to require that people do so prior to attending a meeting. Whether the use of metal detection devices was reasonable concerning the meeting at issue but not others in my opinion would depend on a likelihood of the possibility of violence or harm.

Second, the reduction of the number of those who could attend was, in my opinion, unreasonable. In situations involving different facts but the same principle, it has been advised that if it is known in advance of a meeting that a larger crowd is likely to attend than the usual meeting location will accommodate, and if a larger facility is available, it would be reasonable and consistent with the intent of the law to hold the meeting in the larger facility. Conversely, assuming the same facts, I believe that it would be unreasonable to hold a meeting in a facility that would not accommodate those interested in attending.

The preceding paragraph appeared in an advisory opinion rendered in 1993 and was relied upon in Crain v. Reynolds (Supreme Court, New York County, NYLJ, August 12, 1998). In that decision, the Board of Trustees of the City University of New York conducted a meeting in a room that could not accommodate those interested in attending, even though other facilities were available that would have accommodated those persons. The court in Crain granted the petitioners' motion for an order precluding the Board of Trustees from implementing a resolution adopted at the meeting at issue until certain conditions were met.

In this instance, the chamber was large enough to accommodate most of those interested in attending, and I believe that reducing the number of those who could gain entry was unreasonable, particularly if those permitted to attend were required to be subject to search through the use of a metal detecting wand. While there might have been a possibility of disruption, it would seem that the likelihood of violence or a shooting would have been less than significant. That being so, as many as the chamber could accommodate should in my opinion have been permitted to attend. Again, the Open Meetings Law provides any member of the public with the right to attend meetings of public bodies. Since, according to discussions with members of the news media and others, there were empty seats in the chamber, the failure or refusal of the Legislature to permit the attendance of as many as possible in the chamber would, in my opinion, constitute a failure to comply with the Open Meetings Law.

Third, for the reason mentioned earlier, that those authorized to attend were first searched with a metal detecting wand, being escorted to the podium by sheriff's deputies prior to addressing the Legislature was, in my view, unreasonable. In short, having law enforcement officers present in the chamber may have been reasonable. However, a requirement that those desiring to speak be "escorted" to the podium by a law enforcement officer was, based on the facts known to me, unreasonable and unnecessarily intimidating to many. Having discussed the matter with several people familiar with the incident, some individuals refrained from offering comments due to a sense of intimidation.

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

I believe that it should do so in accordance with reasonable rules that treat members of the public equally.

Although there is a constitutional right to engage in free speech, it is our view that there is no constitutional right to do so at meetings of public bodies. The right to attend those meetings is conferred by statute, and as you are aware, a public body is permitted to exclude the public from executive sessions held in accordance with §105(1) of the Open Meetings Law.

When a public body chooses to permit the public to speak at meetings, as suggested earlier, I believe that it should do so through the adoption and implementation of reasonable rules. As stated in §153(8) of the County Law, "the board of supervisors [the County Legislature in this instance] shall determine the rules of its procedure." That provision clearly confers the authority on the Legislature to establish rules concerning the opportunity of those in attendance to speak or otherwise participate at meetings. Just as clearly in my opinion, the Legislature may adopt rules to prevent verbal interruptions, shouting or other outbursts, as well as slanderous or obscene language; similarly, I believe that it may regulate movement in order to preclude interference with meetings that would otherwise prevent those in attendance from observing or hearing the deliberative process.

It does not appear however, that any such rules, if such rules exist, were described or announced before or during the event. This is not intended to suggest that the Legislature could not properly have removed you or others from its meeting if you disrupted its proceedings. Rather, it is possible that some of the controversy associated with the meeting might have been avoided had rules of procedure or decorum been made known to those who attended or sought to attend the meeting.

In an effort to enhance understanding of and compliance with applicable law, a copy of this opinion will be sent to the Monroe County Legislature.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: County Legislature

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17025
OML-AO-4574

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March 3, 2008

James T. Evans, M.D., FACS
President, Medical-Dental Staff
Erie County Medical Center Corporation
462 Grider Street
Buffalo, NY 14215

The staff of the Committee 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 Dr. Evans:

As you are aware, I have received your letter in which you referred to an opinion rendered on October 3 of last year in which it was advised that the Board of Directors of Western New York Health System ("WNYHS") constitutes a "public body" required to comply with the Open Meetings Law. The basis of the opinion involved the fact that every member of the Board had been designated by the Commissioner of Health, and that the Board was charged with the responsibility to "bring about a single unified joint governance" as the result of a merger of the Erie County Medical Center and Kaleida Health. You wrote that you serve as a member of the Board and asked that I reaffirm that meetings of the Board are subject to the Open Meetings Law.

When the October 3 opinion was prepared the entity at issue had not been incorporated. However, you wrote that WNYHS was incorporated as a not-for-profit corporation on October 25. You added that:

> "All of the existing board members were appointed by the N.Y. Commissioner of Health, Richard F. Daines, M.D. Seven of those appointees serve in official capacity to represent public institutions at his direction (Erie County Medical Center Corporation and the State University of New York at Buffalo are the public institutions involved). Although there are representatives of public institutions and the receipt of public money for purposes of public good is contemplated, counsel for WNYHS has verbally advised the Board that in his opinion the Open Meetings Law does not apply because WNYHS is a not-for-profit organization."

I respectfully disagree with that conclusion.

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

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

Based upon the language quoted above, a public body, in brief, is an entity consisting of two or more members that conducts public business and performs a governmental function for one or more governmental entities.

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

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

In consideration of the foregoing, as a general matter, the Freedom of Information Law pertains to entities of state and local government in New York.

Although not-for-profit corporations typically are not governmental entities and, therefore, fall beyond the scope of the Freedom of Information and Open Meetings Laws, the courts have found that the incorporation status of those entities is, alone, not determinative of their status under the statutes in question. Rather, they have considered the extent to which there is governmental control over those corporations in determining whether they fall within the coverage of those statutes.

In the first such decision, Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], the issue involved access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are

> delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

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

> "The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations (see, e.g., Irwin Mem. Blood Bank of San Francisco Med. Socy. v American Natl. Red Cross, 640 F2d 1051; Rocap v Indiek, 519 F2d 174). The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus, the BEDC is a 'governmental entity' performing a governmental function for the City of Buffalo, within the statutory definition.
>
> "The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo...In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments," (id., 492-493).

More recently, in a case involving a not-for-profit corporation, the "CRDC", the court found that:'

> "The CRDC denies the City has a controlling interest in the corporation. Presently the Board has eleven members, all of whom

> were appointed by the City (see Resolution #99-083). The Board is empowered to fill any vacancies of six members not reserved for City appointment. Of those reserved to the City, two are paid City employees and the other three include the City mayor and council members. Formerly the Canandaigua City Manager was president of the CRDC. Additionally, the number of members may be reduced to nine by a board vote (see Amended Certificate of Incorporation Article V(a)). Thus the CRDC's claim that the City lacks control is at best questionable...

I note that the Appellate Division unanimously affirmed the findings of the Supreme Court regarding the foregoing [292 AD2d 825 (2002)].

In short, the Commissioner of Health has complete control over the membership of the Board of Directors of WNYHS. That being so, and in consideration of the judicial decisions cited earlier, I believe that the Board of Directors of WNYHS remains a "public body" required to comply with the Open Meetings Law, despite its status as a not-for-profit corporation.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Thomas Conway, General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 4, 2008

E-MAIL

TO: Argie Bowman

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. Bowman:

I have received your letter concerning your right to attend meetings of the board and trustees of a homeowners association.

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

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

Based on the foregoing, as a general matter, the Open Meetings Law applies to entities of state and local government. It does not apply to private organizations, such as the association to which you referred.

It is suggested that you, with others, attempt to amend the by-laws of the association in a manner that guarantees residents' opportunity to be aware of the decision making process.

I regret that I cannot be of greater assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4576

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March 5, 2008

E-Mail

TO: Ms. Mary Cedeno

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. Cedeno:

I have received your letter in which you questioned whether there are laws that "allow for the public to speak at Town meetings."

In this regard, I know of no law that requires that a public body, such as a town board, to permit the public to speak at its meetings. While the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100), the Law is silent with respect to public participation. Consequently, by means of example, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally.

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

I hope that I have been of assistance.

RJF:jm

OML-AO-4577

From: Jobin-Davis, Camille (DOS)
Sent: Monday, March 10, 2008 1:06 PM
To: Hon. Tedra Cobb, St. Lawrence County Legislature
Subject: Open Meetings Law - public body`

Tedra:

As promised, the following are links to advisory opinions pertaining to public bodies:

http://www.dos.state.ny.us/coog/otext/o4232.htm

http://www.dos.state.ny.us/coog/otext/o3858.htm

http://www.dos.state.ny.us/coog/otext/3396.htm

Most valuable, I think, are the paragraphs that analyze the different types of groups or entities that may or may not be public bodies, depending on their characteristics, and therefore subject to the Open Meetings Law. As you know, if an entity is not a "public body" as defined by the law, then none of the OML requirements to post notice of the meeting, provide public access or take minutes apply.

I hope these are helpful. Please call if you have questions.

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518

te

State of New York
Department of State
Committee on Open Government

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OML-AO-4578

VIA EMAIL

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, March 12, 2008 12:22 PM
To: 'rschechter
Subject: Minutes

Richard:

Yesterday we discussed the following scenario: a real estate broker and a municipality reach an agreement to sell a municipally owned property for a certain price. The municipality agrees to the price, but authorizes someone else, perhaps the municipal attorney, to negotiate the terms of the purchase contract, and authorizes the mayor or the supervisor to execute the purchase contract on behalf of the municipality.

We discussed what the minutes from the decision of the municipality would look like, and you asked whether the record of the vote would have to include the agreed upon dollar amount.

In response, it is my opinion that the law would require that the dollar amount be included in the record of the vote. Section 106(1) of the Open Meetings Law provides direction concerning the contents of minutes of meetings and states that:

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

Based on the foregoing, if, for instance, a consensus motion includes the appointment of a number of people, I believe that the minutes would be required to identify each person appointed and the position to which he or she was appointed. In a decision that may be pertinent to the matter, Mitzner v. Goshen Central School District Board of Education [Supreme Court, Orange County, April 15, 1993], the case involved a series of complaints that were reviewed by the School Board president, and the minutes of the Board meeting merely stated that "the Board

hereby ratifies the action of the President in signing and issuing eight Determinations in regard to complaints received from Mr. Bernard Mitzner." The court held that "these bare-bones resolutions do not qualify as a record or summary of the final determination as required" by §106 of the Open Meetings Law. As such, the court found that the failure to indicate the nature of the determination of the complaints was inadequate. In the context of your question, I believe that, in order to comply with the Open Meetings Law and to be consistent with the thrust of the holding in Mitzner, minutes must indicate in some manner the precise nature of the Board's action.
In addition, §87(3)(a) of the Freedom of Information Law states that: "Each agency", which includes a board of education, "shall maintain...a record of the final vote of each member in every agency proceeding in which the member votes." Therefore, when the Board takes action, a record must be prepared that indicates the manner in which each member cast his or her vote. Typically, that record is included as part of the minutes.

I hope this is helpful to you.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4529

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March 13, 2008

E-MAIL

TO: Theresa Grafflin

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Ms. Grafflin:

I have received your letter concerning the "right to video tape common council meetings, caucuses and committee meetings."

In this regard, first, a common council or a committee consisting of two or more of its members would, in my view, clearly constitute a "public body" subject to the Open Meetings Law. Political caucuses, however, are exempt from the coverage of that statute [see §108(2)].

Second, there is nothing in the Open Meetings Law that addresses the right to record meetings. 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 has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

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

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

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

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

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

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

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

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

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

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

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

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

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

Blanket prohibition of audio recording is not permissible, and it is likely that the appellate courts would find that also to be the case with blanket prohibitions of video recording. However, what might be reasonable in one physical setting - a village board restricting camcording to the rear area of *its* meeting room - might not be in another - the larger chambers of a county legislature (OML-AO-1317, supra). It might well be reasonable in a village or other space-restricted setting to restrict the number of camcorders to one, as the court system may with its pooling requirement for video coverage of trials (22 NYCRR Parts 22 and 131). Such a requirement might be viewed as unreasonable in a large county legislative chamber or where a local board of education is conducting a meeting in a school auditorium.

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

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

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

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

I note that the same conclusion was reached more recently in Csorny v. Shoreham-Wading River Central School District [759 NYS 2d 513, 305 AD2d 83 (2003)].

I hope that I have been of assistance.

RJF:tt

FOIL-AO-17052
OMC-AO-4580

From: Freeman, Robert (DOS)
Sent: Wednesday, March 19, 2008 12:28 PM
To: Ms. Mary Cedeno

Dear Ms. Cedeno:

I have received your letter concerning "meeting terminology", and you referred to such items as "move to", tabling, ayes, nays, etc.

In short, those terms are generally not found in a law such as the Open Meetings Law. They are based on an entity's own rules of procedure. In terms of legal requirements, a motion is simply a proposal to have an entity, such as a public body required to comply with the Open Meetings Law, vote on a matter. Typically, although not required by a law, a motion is "seconded" by a person other than the member who introduced the motion. Also, the Open Meetings Law requires that minutes of meetings include a record or summary of motions, proposals resolutions, action taken and the vote of the members. With respect to "ayes and nays", the Freedom of Information Law has long required that a record be prepared when a vote is taken that indicates how each member of a government body cast his or her vote.

I hope that I have been of assistance.

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STATE OF NEW YORK
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March 20, 2008

E-Mail

TO: Ms. Theresa Hurley

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. Hurley:

I have received your letter in which you asked whether a superintendent of schools has a right to attend executive sessions of a board of education.

In this regard, §105(2) of the Open Meetings Law states that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." Based on that provision, I believe that only the members of a public body, such as a board of education, have the right to attend an executive session. While a public body may permit others to attend, those who are not members have no right to attend.

The issue concerning the superintendent's right to attend emanates from §§2508(1) and 2566(1) of the Education Law, both of which state that:

> "The superintendent of schools of a city school district shall possess, subject to the bylaws of the board of education, the following powers and be charged with the following duties:
>
> 1. To be the chief executive officer of the school district and the educational system, and to have a seat on the board of education and the right to speak on all matters before the board, but not to vote."

In consideration of the foregoing, if a superintendent is a member of a board of education, he or she would have the right to attend executive sessions; conversely, if he or she is not considered a member of the board, I do not believe that the superintendent would have the right to do so.

While I am not an expert concerning the Education Law, it appears that §2502 indicates who "qualifies" and in fact is a "member" of a city school district board of education. That provision states in subdivision (2) in relevant part that:

> "Each board of education shall consist of five, seven or nine members, to be known as members of the board of education...Members of such board shall be elected by the qualified voters at large of the school district at annual school district elections..."

As I interpret the language quoted above, the members of a board of education are those persons elected to the board. A superintendent is not elected; rather, he or she is appointed by the board, the governing body of the school district, to serve in his or her position. A superintendent carries out his or her duties pursuant to law, as well as a contract delineating his or her compensation and benefits. Board members do not carry out their duties pursuant to any similar contractual agreement; the voters elect them to serve for specific terms.

In consideration of the foregoing, I do not believe that a superintendent is a member of a board of education, a public body. In my opinion, therefore, a superintendent does not have the right to attend an executive session of the board. Again, a board of education may choose to authorize the attendance of a superintendent at its executive sessions, but in my view, it is not required to do so.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4582

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March 21, 2008

Hon. Charlotte R. Richmond
Town Clerk
Town of Henderson
11821 Town Barn Road
Henderson, NY 13650

The staff of the Committee on 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. Richmond:

I have received your letter in which you questioned the ability of the Town Board to conduct an executive session to discuss "possible litigation."

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

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

> "The purpose of paragraph d is 'to enable a public body to discuss pending litigation privately, without baring its strategy to its

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17074
OML-AO-4583

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March 25, 2008

E-MAIL

TO: Charles Pernice

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. Pernice:

I have received your letter in which you refer to a refusal by the Hepburn Library in the Town of Norfolk to disclose its records based on its attorney's contention that the Library is not an "agency" required to comply with the Freedom of Information Law.

From my perspective, whether the Library receives nearly all of its funding from the government is not determinative of whether it is subject to the Freedom of Information Law. If it is a municipal or a school district library, I believe that its records clearly fall within the coverage of that law. However, if it is a not-for-profit corporation known as an association or free association library, the Library would not, in my opinion constitute an "agency."

By way of background, §86(3) of the Freedom of Information Law defines the term "agency" to mean:

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

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

Second, in conjunction with §253 of the Education Law and the judicial interpretation concerning that and related provisions, I believe that a distinction may be made between a public

library and an association or free association library. The former would in my view be subject to the Freedom of Information Law, while the latter would not. Subdivision (2) of §253 states that:

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

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

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

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

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

The Open Meetings Law, which is codified as Article 7 of the Public Officers Law, is applicable to public and association libraries due to direction provided in the Education Law. Specifically, §260-a of the Education Law states in relevant part that:

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

Again, since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries must be conducted in accordance with that statute, even though the records of those entities fall beyond the coverage of the Freedom of Information Law.

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

RJF:tt

cc: Hepburn Library

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4584

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March 25, 2008

E-MAIL

TO: Ellen Simpson

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. Simpson:

I have received your letter in which you asked whether a library board of trustees may "provide a quorum for a meeting" through the use of "either teleconferencing or telephone conferencing in real time."

While the distinction between "teleconferencing" and "telephone conferencing" is not entirely clear, from my perspective, a library board of trustees or any public body required to comply with the Open Meetings Law 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.

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 my opinion be inconsistent with law.

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

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

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

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

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

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

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

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

> reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

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

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

> "...there is a question as to whether the series of telephone calls among the individual members constitutes a meeting which would be subject to the Open Meetings Law. A meeting is defined as 'the official convening of a public body for the purpose of conducting public business' (Public Officers Law §102[1]). Although 'not every assembling of the members of a public body was intended to fall within the scope of the Open Meetings Law [such as casual encounters by members], ***informal conferences, agenda sessions and work sessions to invoke the provisions of the statute when a quorum is present and when the topics for discussion and decision are such as would otherwise arise at a regular meeting' (Matter of Goodson Todman Enter. v. City of Kingston Common Council, 153 AD2d 103, 105). Peripheral discussions concerning an item of public business are subject to the provisions of the statute in the same manner as formal votes (see, Matter of Orange County Publs. v. Council of City of Newburgh, 60 AD2d 309, 415 Affd 45 NY2d 947).
>
> "The issue was the Town's policy concerning tax assessment reductions, clearly a matter of public business. There was no physical gathering, but four members of the five member board discussed the issue in a series of telephone calls. As a result, a quorum of members of the Board were 'present' and determined to publish the Dear Resident article. The failure to actually meet in person or have a telephone conference in order to avoid a 'meeting' circumvents the

> intent of the Open Meetings Law (see e.g., 1998 Advisory Opns Committee on Open Government 2877). This court finds that telephonic conferences among the individual members constituted a meeting in violation of the Open Meetings Law..."

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

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

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

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4585

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March 26, 2008

E-MAIL

TO: Philip C. Barnes

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. Barnes:

I have received your letter in which you asked whether a village board of trustees is "required to have minutes taken during a budget workshop where a department head is explaining and attempting to justify his needs...." and whether there should be prior notice given concerning the workshop.

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

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

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

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

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

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

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

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 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."

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

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

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

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

Lastly, since the Open Meetings Law does not require the preparation of detailed or expansive minutes, I point out that it has been held that a member of the public may use a tape recorder at open meetings.

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-4586

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March 26, 2008

Dr. Peter M. Byron, President
Great Sacandaga Lake Association
P.O. Box 900
Northville, NY 12134

The staff of the Committee on 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. Byron:

We are in receipt of your request for an advisory opinion regarding application of the Freedom of Information Law to the Hudson River-Black River Regulating District. Specifically, you asked about the timeliness of the District's responses, the contents of meeting minutes, and access to electronic records. The District responded to your request by submitting correspondence dated January 22, 2008, a copy of which is enclosed herein. In an attempt to address the issues raised in both of the submissions, we offer the following comments.

First, as you know, 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 in 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within

> twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgment is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

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

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a

> standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

With respect to the particular circumstances of your request for records presented at a September 10, 2007 Board Meeting, we note that the District responded within five business days of receipt of your request. Although there might have been some confusion, it is clear that your request was received on September 11 and that the District's acknowledgment was sent on September 17. The District then followed up in writing within an additional twenty business days, indicating that paper copies of the records were available at the Sacandaga Field Office, that one of the records was available online, and that if you preferred to have copies mailed to you, you should submit payment to the District.

The following day, Saturday, October 6, 2007, you wrote to the District via email and asked for a link to the online records and asked whether the remaining records were available electronically. On October 15, 2007 the District responded with a link to the online record, an electronic copy of the minutes, an explanation of why preparation of the minutes was delayed, and clarification that one record was not available electronically.

In our opinion, it is implicit in a request for records sent via email that the records be transmitted electronically, unless specific direction is provided to the contrary. As you noted, §89(3) of the Freedom of Information Law was amended in 2006 to require agencies that are able to accept requests via email to respond to such requests by electronic mail. Accordingly, while it is not clear why the District did not initially provide a link to the records that were available on the District's

website, we believe that would have been the most expedient response. In our view, when a request is made for access to records via email, the intent of the law is best served by responding with an electronic version of the records sought if they are available, or a link to the corresponding webpage.

With respect to your concerns about the District's response to your request for an electronic copy of the minutes, from our perspective, it is clear that minutes must be prepared and made available to the public within two weeks of the meetings to which they relate.

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

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

In view of the foregoing, it is clear in our opinion that minutes of open meetings must be prepared and made available "within two weeks of the date of such meeting." Because it is likely that the minutes did not exist at the time you requested them (one day after the meeting), it is our opinion that the District could have immediately indicated that to be so. Instead, a few weeks later, the District indicated that the minutes were "available for pickup". Again, in our opinion, once they are prepared, the District should have forwarded an electronic copy of the records in response to your request.

With respect to your question concerning the adequacy of the minutes, we note that §106(1) of the Open Meetings Law pertains to minutes of open meetings and requires that :

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

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

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

Review of the minutes you provided indicates that after an informal competitive bid process in accordance with the District's purchasing policy, the District unanimously approved a resolution to purchase a compact track loader. Further, and with respect to the record of the unanimously approved resolution to award public relations consulting services work, our review of the minutes indicates the name of the winning firm and the period of the service contract. In our opinion, these minutes include sufficient information to ascertain the nature of the District's action.

We note that if underlying factual information such as a purchase price or the amount of the lump sum awarded to the winning firm are set forth in a resolution, such resolution could be attached to or incorporated by reference into the minutes. Although in our opinion it is not necessary to do so, it is a simple method of ensuring that information is readily available.

Finally, we note that while an agency is not required to create a record in response to a request, it is our view that if the agency has the ability to scan records in order to transmit it via email, and when doing so will not involve any effort additional to an alternative method of responding, it would be required to scan the records. For example, when copy machines are equipped with scanning technology that can create electronic copies of records as easily as paper copies, and the agency would not be required to perform any additional task in order to create an electronic record as opposed to a paper copy, we believe that the agency is required to do so. Further, it appears in that instance that transferring a paper record into electronic format would diminish the amount of work imposed upon the agency in consideration of the absence of any need to collect and account for money owed or paid for preparing paper copies, and the availability of the record in electronic format for future use.

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.

cc: William L. Busler

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4587

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March 28, 2008

Ms. Jennifer L. Simmons
[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. Simmons:

As you are aware, I have received your letter in which you raised a variety of questions concerning the implementation of the Open Meetings Law by the Pawling Free Library, which is an association library. An attempt will be made in the following remarks, but not necessarily in the order in which you presented them, to address the questions that relate to that statute.

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

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

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

Second, 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 library board of trustees gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law.

Third, every meeting must be preceded by notice of the time and place. Specifically, §104 of the Open Meetings Law states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and

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

In consideration of the foregoing, I point out that a public body is required only to provide notice of the time and place of a meeting. There is nothing in the Open Meetings Law that requires that notice of a meeting include reference to the subjects to be discussed. Similarly, there is nothing in that statute that pertains to or requires the preparation of an agenda.

Section 104 imposes a dual requirement, for notice must be posted in one or more designated, conspicuous, public locations, and in addition, notice must be given to the news media. The term "designated" in my opinion involves a requirement that a library board, 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 the library has been designated as a location for posting notices of meetings, the public has the ability to know where to ascertain whether and when meetings of a school board will be held.

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

Next, §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. While there is no requirement that the public be informed of whether a public body intends to return to the open meeting following an executive session, I believe that it would be considerate and courteous to do so.

Further, 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 library board may not conduct an executive session to discuss the subject of its choice; rather, its ability to do so is limited to those topics delineated in paragraphs (a) through (h) of §105(1).

Pertinent to the issues that you raised is §105(1)(f), which 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."

Based on the foregoing, I believe that library board may enter into executive session to discuss a matter leading to the appointment of a particular person or persons to the board. Similarly, in my view, it may discuss an employee's performance under paragraph (f) during an executive session.

Lastly, 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, technically I do not believe that minutes must be prepared. If action is taken during an executive session, minutes reflective of the action, the date and the vote must generally be recorded in minutes pursuant to §106(2) and made available within a week of the executive session. If no action is taken, there is no requirement that minutes of the executive session be prepared.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees, Pawling Free Library

OML-AO-4588

From: Freeman, Robert (DOS)
Sent: Friday, March 28, 2008 4:10 PM
To: 'thurley
Subject:

Dear Ms. Hurley:

With respect to the issue that you raised, the interpretation of laws that relate to a superintendent's right to attend an executive session, I cannot advise as to which law takes precedence or overrides the other. However, you expressed the belief that a provision in superintendent's contract that confers the right of the superintendent to attend all executive sessions "is a violation of the OML." In short, I disagree. Section 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." In my opinion, if a board of education approves a provision in a contract with a superintendent, by a majority vote of its members, permitting that person to attend all executive sessions, the superintendent would be "authorized by the public body" to do so during the duration of the contract. From my perspective, that kind of agreement would not be inconsistent with the Open Meetings Law.

Robert J. Freeman
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OML-AO-4589

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March 31, 2008

Mr. Paul G. Loehr
[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. Loehr:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain proceedings of the Planning Board of the Town of Alden. Specifically, you request clarification regarding public participation at Planning Board meetings, the rights of the public to observe and hear the Board's deliberations, access to records discussed at the meeting, and enforcement mechanisms available to the public. In this regard, we offer the following comments.

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

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

The Planning Board is a statutory creation (see Town Law §271) that carries out necessary and integral functions imposed by law. In our opinion, the conclusion that a planning board is a public body can be reached by viewing the definition of "public body" in terms of its components. A planning board is an entity consisting of more than two members; it is required in ou 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 for a public corporation, a town.

In sum, based on the rationale offered in preceding analysis, it is our view that a planning board is clearly a "public body" required to comply with the Open Meetings Law.

Second, with respect to the capacity to hear what is said at meetings, note §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 our 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, we 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 our view situate itself and conduct its meetings in a manner in which those in attendance can observe and hear the proceedings. To do otherwise would in our opinion be unreasonable and fail to comply with a basis requirement of 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", 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.

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

There are federal court decisions indicating that if commentary is permitted within a certain subject area, negative commentary in the same area cannot be prohibited. It has been held by the United States Supreme Court that a school board meeting in which the public may speak is a "limited" public forum, and that limited public fora involve "public property which the State has opened for use by the public as a place for expressive activity" [Perry Education Association v. Perry Local Educators' Association, 460 US 37, 103. S.Ct. 954 (1939); also see Baca v. Moreno Valley Unified School District, 936 F. Supp. 719 (1996)]. In Baca, a federal court invalidated a bylaw that "allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter (District employees' conduct or performance)" (id., 730). That prohibition "engenders discussion artificially geared toward praising (and maintaining) the status quo, thereby foreclosing meaningful public dialogue and ultimately, dynamic political change" [Leventhal v. Vista Unified School District, 973 F.Supp. 951, 960 (1997)]. In a decision rendered by the United States District Court, Eastern District of New York (1997 WL588876 E.D.N.Y.), Schuloff, v. Murphy, it was stated that:

> "In a traditional public forum, like a street or park, the government may enforce a content-based exclusion only if it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. Perry Educ. Ass'n., 460 U.S. at 45. A designated or 'limited' public forum is public property 'that the state has opened for use by the public as a place for expressive activity.' Id. So long as the government retains the facility open for speech, it is bound by the same standards that apply to a traditional public forum. Thus, any

> content-based prohibition must be narrowly drawn to effectuate a compelling state interest. Id. at 46."

Although there may be issues involving demeanor that are not addressed in the law, in the context of the specific issues that you raised, we believe that a court would determine that a public body may limit the amount of time allotted to person who wishes to speak at a meeting, so long as the limitation is reasonable. Similarly, it is our view that the Planning Board may limit comments to matters involving Board business.

Further, with regard to your questions concerning access to records discussed at a meeting, although an agency may respond to an oral request made under the Freedom of Information Law, §89(3) of that statute authorizes an agency to require that a request be made in writing. While a board may choose to furnish information or records during a meeting, it may require that a request be made in accordance with its rules and regulations adopted under the Freedom of Information Law.

Although the Board could disclose copies of documents during meetings, we do not believe that it would be obliged to do so. Rather, the Board could, in our opinion, require that an applicant request the records in writing during the time set forth in its rules and regulations.

The Committee on Open Government has recognized that members of the public have at times been frustrated at meetings due to their inability to gain access to records discussed at meetings. Consequently, for many years the Committee has recommended legislation on the subject. This year, identical bills have been introduced in the Assembly and the Senate to amend §103 of the Open Meetings Law as follows:

> "A record which is available pursuant to article six of this chapter, including any proposed resolution, law, rule, regulation, policy or any amendment thereto, that is scheduled to be presented and discussed by a public body at an open meeting shall be made available for review to the public upon request at lease seventy-two hours prior to such meeting, or as soon as practicable. Copies of such record shall be made available for a reasonable fee as determined in the same manner as provided in article six of this chapter."

If the legislation is enacted, the kind of records you discussed would be among those that must be made available either prior to or during an open meeting.

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

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

However, the same provision states further that:

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

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

On behalf of the Committee on Open Government we hope that 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-4590

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April 1, 2008

E-MAIL

TO: George Heidcamp

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. Heidcamp:

I have received your letter in which you indicated, as a member of the Saugerties School District Board of Education, that a motion was approved for entry into executive session to discuss collective negotiations and the employment history of particular individuals under consideration for appointment. On the "public portion" of the agenda under the heading of "Education and Curriculum" was reference to a "Presentation on Technology Program." However, when the executive session was held, the items mentioned in the motion were not discussed. Rather, you wrote that the "Superintendent discussed the Presentation on Technology Program," and that the Board president contended that the technology program could be discussed during the executive session. You have sought my opinion on the matter.

Assuming the accuracy of the facts as you presented them, I believe that the Board failed to comply with the Open Meetings Law. 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..."

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

and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

In the context of the facts that you presented, I believe that the Board was restricted to discussing the two items referenced in its motion for entry into executive session and barred from discussing any different subject, such as the technology program.

Moreover, as suggested above, the topics that may be considered during an executive session are limited to those appearing in paragraphs (a) through (h) of §105(1) of the Open Meetings Law. While I am not familiar with the specific nature of the discussion relating to the technology program, based on a review of the eight grounds for conducting an executive session, it is unlikely, in my view, whether any could justifiably have been asserted to discuss the program.

I hope that I have been of assistance.

RJF:tt

cc: Board of Education
Superintendent

OML-AO-4591

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, April 02, 2008 10:07 AM
To: 'Mr. Bruce Greif
Subject: RE: is this an open meeting (Ethics Board)

Dear Sir,

In my opinion, an Ethics Board is a public body" subject to the Open Meetings Law, as outlined in the advisory opinion at the following link: http://www.dos.state.ny.us/coog/otext/o3712.htm (Please note in particular the paragraphs following "Second,...".) As such, it would be subject to all the provisions of the Open Meetings Law, including the requirement that there be a proper purpose for entry into executive session (section 105[1]) and that minutes are taken (section 106).

I hope this is helpful.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518

b

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17102
OML-AO-4592

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April 3, 2008

E-MAIL

TO: Thomas H. Finnegan

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. Finnegan:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information and Open Meetings Laws to the East Meadow Board of Fire Commissioners. You indicated that your son, who is 15 years old, has repeatedly been excluded and ultimately banned from meetings and that requests for records sent to the Board have gone unanswered. In this regard, we offer the following comments.

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

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

Section 174(6) of the Town Law states in part that "A fire district is a political subdivision of the state and a district corporation within the meaning of section three of the general corporation law". Since a district corporation is also a public corporation [see General Construction Law, §66(1)], a board of commissioners of a fire district in our view is clearly a public body subject to the Open Meetings Law.

Second, with respect to the ability of a person to attend a meeting of a public body, regardless of age or gender or residence, we 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 our 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, we 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 permit anyone and everyone who wishes to attend, the opportunity to attend to observe and hear the proceedings, regardless of age, gender or residency. To do otherwise would in our opinion be unreasonable and fail to comply with a basic requirement of the Open Meetings Law.

Third, 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 or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Again, a fire district is a public corporation. Consequently, we believe that it is an "agency" required to comply with the Freedom of Information Law.

The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law 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 in 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

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

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents

> requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

Finally, legislation enacted in 2006 broadened the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law. 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.

On behalf of the Committee on Open Government we hope that this is helpful to you. In an effort to enhance compliance with and understanding of the above, a copy of this opinion will be forwarded to the Board.

CSJ:tt

cc: Board of Fire Commissioners

FOIL-AO-17105
OML-AO-4593

From: Freeman, Robert (DOS)
Sent: Monday, April 07, 2008 1:19 PM
To: Tedra L. Cobb, St. Lawrence County Legislature
Cc: Steven G. Leventhal
Subject: RE: help on ethics code
Attachments: F9522.wpd

Hi - -

As suggested during our conversation, it appears that the structure of the proposal is derived from standards applicable to the Commission on Government Integrity (formerly the State Ethics Commission). That entity operates pursuant to the provisions of §94 of the Executive Law. Paragraph (a) of subdivision (17) of that statute specifies that the records the Commission are not subject to the FOIL (Article 6 of the Public Officers Law), and that only certain records listed in that provision are accessible to the public; similarly, paragraph (b) states that the meetings of the Commission are not subject to the Open Meetings Law (Article 7 of the Public Officers).

There are no similar statutes that deal with the records and meetings of a municipal ethics board. Consequently, records and meetings of those boards are subject to both the FOIL and the Open Meetings Law. As you know, both laws are based on a presumption of access. FOIL states that all records are accessible, except those records or portions thereof that fall within one or more of the exceptions to rights of access appearing in paragraphs (a) through (j) of §87(2); meetings of public bodies, such as ethics boards must be conducted open to the public, unless an executive session may be held in accordance with the provisions of paragraphs (a) through (h) of the Open Meetings Law.

Limiting the openness of records and meetings in the proposal offered for review would likely result in a variety of difficulties. In short, insofar as the proposal is inconsistent with FOIL or the Open Meetings Law, both of which are state statutes, they would be void. It noted that it has been held on several occasions that a local law or ordinance, for example, cannot create confidentiality when rights of access are conferred by a statute [see e.g., Morris v. Martin, 55 NY2d 1026 (1982)]. Further, §110(1) of the Open Meetings Law states, in essence, that any provision of a local enactment that is more restrictive than that statute is superseded. This is not intended to suggest that all records and meetings of a municipal ethics board must be open, for exceptions to rights of access often are pertinent in relation to the duties of those boards (see attached advisory opinion).

Rather than attempting to specify what is open or closed, it is suggested that any statement of intent might more appropriately indicate that the Ethics Board will abide by the provisions of the FOIL and the Open Meetings Law.

I hope that this is of value. If you would like to discuss the matter further, please feel free to call.

Robert J. Freeman, Executive Director
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tedra

OML-AO-4594

From: Freeman, Robert (DOS)
Sent: Tuesday, April 08, 2008 9:59 AM
To: Mr. Newman

Dear Mr. Newman:

I have received your inquiry in which you referred to a gathering during which an applicant for a special use permit, two of your neighbors, the town supervisor and a town councilman attended. It is your view that the gathering should have been public.

In this regard, a "meeting", according to the Open Meetings Law and judicial decisions, is a gathering of a majority of a public body, such as a town board, for the purpose of conducting public business. The situation that you described involved only two of the five members of the town board. That being so, the gathering would not have constituted a "meeting" of a public body and the Open Meetings Law, therefore, would not have applied.

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-4595

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April 8, 2008

E-MAIL

TO: Hon. Janet Brahm

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. Brahm:

I have received your letter in letter in which you indicated that members of the Callicoon Town Board "always signed a waiver waiving advertisement for an emergency meeting", and that you were "told this is not allowed." If that is so, you asked what can be done "if an emergency meeting is held say in 15 minutes and no time let the media know."

In this regard, there is nothing in the Open Meetings Law that refers to or permits a public body, such as a town board, to waive the notice requirements imposed by that law. Section 104 of the Open Meetings Law pertains to notice and provides that:

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

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less

than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Although the Open Meetings Law does not make reference to "special" or "emergency" meetings, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning, emailing 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, §62(2) of the Town Law refers to "special meetings" of town boards and states that: "The supervisor of any town may, and upon written request of two members of the board shall within ten days, call a special meeting of the town board by giving at least two days notice in writing to members of the board of the time when and the place where the meeting is to be held." No reference is made to the subject matter to be considered.

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

RJF:tt

STATE OF NEW YORK
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OML-AO-4596

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April 9, 2008

E-MAIL

TO: David Newman

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. Newman:

I have received your letter in which you referred to "workshop meetings" conducted by the Town of Wales and asked why there are no minutes prepared relating to those gatherings.

From my perspective, there is no legal distinction between a meeting characterized as "formal" and a so-called "workshop." In this regard, I offer the following comments.

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

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

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

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

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

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

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

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

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

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

Lastly, since the Open Meetings Law does not require the preparation of detailed or expansive minutes, I point out that it has been held that a member of the public may use a recording device at open meetings so long as the device is neither obtrusive nor disruptive.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4597

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April 11, 2008

E-Mail

TO: Mr. Thomas W. Clothier

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. Clothier:

I have received you letter in which you questioned the propriety of a limitation imposed by a town board on the amount of time, five minutes, that members of the public may speak at meetings.

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

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

While public bodies have the right to adopt rules to govern their own proceedings [see e.g., Town Law, §63; Education Law, §1709(1)], the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rules prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that

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

In sum, based on the foregoing, I 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 to certain times, topics and duration.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4598

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April 11, 2008

Ms. Susan I. Ward
[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. Ward:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain proceedings of the Zoning Board of Appeals in the Town of Alexandria. You indicated that you were denied access to a December 3, 2007 gathering of the Board prior to its officially scheduled public meeting, based on an explanation that the Board was in an executive session. Minutes from the December 3, 2007 meeting contain no reference to the executive session, at which applicants before the Board were present with their attorneys. In this regard, we offer the following comments.

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

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

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

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

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

Based on the foregoing, minutes need not consist of a verbatim account of everything that was said; on the contrary, so long as the minutes include the kinds of information described in §106, we believe that they would be appropriate and meet legal requirements. Most importantly, we emphasize our opinion that minutes must be accurate.

In an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this response will be sent to the Zoning Board of Appeals. On behalf of the Committee on Open Government we hope that this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Norris Handschuh

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4599

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April 16, 2008

E-MAIL

TO: Valerie J. Masterson

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. Masterson:

I have received your letter in which you indicated that you serve as a member of the Stillwater School Board of Education, and you questioned the propriety of an executive session held recently by the Board.

Specifically, you wrote that "the board president announced that we were going into executive session for a personnel matter", but that when the closed session began, she indicated that its purpose involved "the fact that [you are] asking for information from our Superintendent and business administrators." Although you suggested that the subject matter was inappropriate for consideration in executive session, the president said that the closed session was being held to avoid embarrassing you. You said that you would not be embarrassed and "had no problem with holding the discussion in public." Nevertheless, the executive session continued. If the session was improperly held, you asked whether you would "have a problem if [you] let people know what happened during the executive session."

From my perspective, there was no basis for conducting executive session, and you are free to discuss or disclose any aspect of the executive session that was improperly held. In this regard, I offer the following comments.

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

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

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

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

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

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

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

Based on the facts that you presented, the issue, your requests for information, in my opinion clearly do not fall within the parameters described in §105(1)(f) or any other ground for entry into executive session. Further, it has been advised on numerous occasions that "embarrassment" is not one of the grounds for entry into executive session.

Third, in an effort to enhance compliance with the Open Meetings Law, I point out that even when §105(1)(f) may be validly asserted, it has been advised that a motion describing the subject to be discussed as "personnel" or "personnel issues" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an

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

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

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

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

Lastly, assuming that the preceding analysis is accurate and that the executive session should not have been held, I know of no basis for precluding you from discussing or disclosing information derived from or acquired during the executive session. In short, since the discussion in executive

session should have occurred in public, I believe that you or any other person present at the executive session may disclose and discuss what transpired.

A copy of this opinion will be forwarded to the Board of Education.

I hope that I have been of assistance.

RJF:tt

cc: Board of Education

OML-AO - 400

From: Freeman, Robert (DOS)
Sent: Wednesday, April 16, 2008 11:47 AM
To: Mr. Paul Wolf
Subject: Cancelling a meeting

Dear Mr. Wolf:

I have received your inquiry in which you wrote that the board that you serve will not have a quorum present at its next meeting and asked whether you may "simply send out a notice cancelling the meeting which is still 10 days away."

In this regard, there is no provision in the Open Meetings Law pertaining to the cancellation of a meeting. However, it is recommended that you do as you suggested. In short, in my opinion, it would be reasonable and appropriate to provide notice of the cancellation to the news media outlets in receipt of the initial notice of the meeting, as well as others that are likely to make contact with persons who might have been interested in attending the meeting, and to post notice of cancellation of the meeting at the location or locations where notice of meetings of the board is posted.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
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OML-AO-4601

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, April 16, 2008 4:03 PM
To: Bruce Greif
Subject: RE: exec session ?? - "stipend" for volunteer

Bruce,

Thank you, and I am happy to hear that the work of our office has had a positive effect!

If I understand your first question correctly, you ask whether a public body could consider compensation for an individual in executive session. My answer would have to be qualified, that it depends on the nature of the conversation. If the conversation is whether to compensate volunteers, then I believe the discussion should be held in public. On the other hand, if the conversation is whether a particular person's performance merits compensation or a reward of some sort, then I think it may be an appropriate topic for executive session. Of course any vote to appropriate funds would have to be held in public session.

Similarly, my answer to your second question must also be qualified. If a public body intends to discuss how W-2s are printed, or whether the agency will privatize the printing of 1099 forms, then I believe the discussion should be held in public. You would need to give me more factual information, such as the nature of the conversation or the exact words of the motion to enter into executive session in order for me to form an opinion on the situation.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518

bruce

OML-AO-4602

From: Freeman, Robert (DOS)
Sent: Thursday, April 17, 2008 9:39 AM
To: Hon. Sherrie Jacobs, Town Clerk, Town of Conklin

Dear Ms. Jacobs:

I have received your letter and tried to reach you by phone without success. However, I would like to offer the following brief comments.

First, in my view, the function of the Town Attorney involves providing legal advice and opinions. I do not believe that the Attorney is authorized to direct or require that minutes be prepared in a particular manner. Second, based on §30 of the Town Law, as Town Clerk, preparation of minutes is included among your powers and duties. Third, implicit in any requirement that minutes be prepared is that they be accurate. As do many clerks, you indicated that meetings of the Town Board are tape recorded and used as an aid in ensuring that the minutes are accurate. In a decision rendered by the Appellate Division involving a different issue, the ability of the public to tape record open meetings, the Court rejected the Board's prohibition of the use of recording devices, stating that: "Clearly if the Board were to prohibit the use of pen, pencil and paper, because of the potential for misquotation, such a restriction would be unreasonable and arguably violative of the 1st Amendment. A contemporaneous recording of a public meeting is undoubtedly a more reliable, accurate and efficient means of memorializing what is said at the proceeding" [Mitchell v. Board of Education, 113 AD2d 924,925 (1985)].

In short, although a Board member has indicated that "he did not say what the minutes state that he said", the tape recording, according to the Court, is a reliable and accurate record of what was said. Therefore, assuming that the minutes that you prepared accurately reflect what was recorded, I do not believe that the minutes merit or require alteration or that the Attorney or Board member can "instruct" you to do so.

I hope that I have been of assistance.

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

OML-AO-4603

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April 17, 2008

Mr. George K. Arthur
Secretary
Buffalo Fiscal Stability Authority
154 Roebling Avenue
Buffalo, NY 14215-3308

The staff of the Committee on 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. Arthur:

As you are aware, I have received your letter in which you raised questions relating to the Open Meetings Law and the ability of a public authority to deny access to information requested by a member of its governing body, such as yourself.

According to your letter, in November, 2007, the Chairman of the Buffalo Fiscal Stability Authority ("the Authority") "appointed a three person committee for the purpose of conducting a search for an executive director of the authority", and you asked to be notified of meetings of that committee and for the names of "all applicants who applied for the position." You indicated that your requests to be notified of the meetings were "ignored" and that notices were not given to any members of the Authority Board. In addition, also in November, you were elected as Secretary of the Authority and pointed out that the Authority's by-laws state that, in that role, you "shall act as Secretary at all meetings of the committee." That being so, unless you are notified of the meetings, you wrote that you cannot carry out your duties.

Among the questions that you raised is whether "a committee meeting [is] subject to the same rules as the authority" and whether "the public and press [must] be notified."

In this regard, by way of background, §3852 of the Public Authorities Law states that the Authority is "a corporate governmental agency...constituting a public benefit corporation", and §3853 provides that its governing body consists of nine directors. Its charge, in brief, involves monitoring and advising the City of Buffalo concerning the City's financial matters.

Several judicial decisions indicate 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 nine, a quorum would be five. If that body designates a committee of three, a quorum of the committee would be two.

Because the committee to which you referred is, in my opinion, a public body, it is required to provide notice of its meetings in accordance with §104 of the Open Meetings Law. That provision states that:

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

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.

Since notice of meetings must be given to the public by means of posting and to the news media, it is clear in my opinion that notices of meetings of the Authority and its committees are accessible to Authority members.

Next, you asked whether "executive sessions [may] be called without first calling a regular meeting." Here I point out that every meeting must be convened as an open meeting, and that

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

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

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

Lastly, you asked whether members of the Authority may "be denied access to any and all information in the possession of the authority that is needed to carry out his/hers official duties." I know of no statute that specifies that a member of governing body enjoys access to "any and all information" in possession of the entity served by that body. From my perspective, the Freedom of Information Law, the statute within the advisory jurisdiction of this office, 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 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. An authority 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). 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, it appears that a member seeking records could be treated in the same manner as the public generally.

It is suggested that, in the absence of any Authority rule or by-law, you might recommend that such a provision be adopted that specifies that Authority members should have the ability to obtain Authority records when seeking the records in the performance of their duties, and when a request is not unreasonable or unduly burdensome.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

OML-AO-4604

From: Freeman, Robert (DOS)
Sent: Friday, April 18, 2008 11:51 AM
To: MULLEN, VICTORIA
Subject: RE:

Hi - -

If the situation that you described includes the presence of a majority of a town board, and if the members of that board function as a body, I believe that the gathering would be a meeting of the board that should be preceded by notice and conducted open to the public. I note, too, that in a decision rendered nearly thirty years ago, it was held that a joint meeting of two boards is subject to the Open Meetings Law. Therefore, if there is a quorum of any of the four boards that you mentioned and their members function as a body, each would be required to abide by the Open Meetings Law.

Hope all is well and that you'll enjoy the weekend.

Robert J. Freeman
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OML-AO-4605

From: Freeman, Robert (DOS)
Sent: Tuesday, April 22, 2008 8:31 AM
To: Mr. David Newsman
Subject: RE: Open Meetings Law Questions

In brief, the entities to which you referred are, in my view, clearly "public bodies" required to comply with the Open Meetings Law. Therefore, they are required to provide notice in accordance with §104 of that statute. I point out, however, that §104 specifies that the notice given pursuant to that section need not be a legal notice. That being so, although a newspaper, for example, might receive notice of a meeting, there is no requirement imposed upon the newspaper (or any other news media outlet in receipt of the notice) to print the notice or publicize the meeting. There have been many instances in which public bodies have complied with law by giving notice to the news media and posting notice, but in which the news media, for whatever the reason, chooses not to publicize the meeting.

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

FOIL-AO-17128
OML-AO-4606

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April 22, 2008

E-MAIL

TO: Bob Magee

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. Magee:

I have received your letter concerning the deliberations of a board of assessment review and whether the Open Meetings Law permits the public to attend those deliberations.

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 they came to a 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..."

I hope that I have been of assistance.

RJF:tt

OML-AO-4607

From: Freeman, Robert (DOS)
Sent: Wednesday, April 23, 2008 11:08 AM
To: Mr. F. Pirelli

Dear Mr. Pirelli:

The Open Meetings Law specifies that minutes of open meetings must be prepared and made available to the public on request within two weeks. Although many boards approve their minutes, there is nothing in the Open Meetings Law or the Village Law that requires that they do so. From my perspective, when action is taken at a meeting, it is effective immediately, unless the motion or resolution regarding the action provides contrary direction. Whether minutes are approved is, in my opinion, irrelevant.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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April 23, 2008

E-MAIL

TO: Mary Anne Kowalski

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. Kowalski:

We are in receipt of your requests for advisory opinions concerning application of the Freedom of Information and Open Meetings Laws to various requests for records directed to, and proceedings of the Seneca County Industrial Development Agency. In order to address your many concerns in a logical fashion, we will issue a series of advisory opinions regarding related topics. This first opinion will address issues regarding the propriety for motions made for entry into executive sessions for three general types of purposes: "personnel", "real estate matters" and "possible litigation".

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

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

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

Second, although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, from 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.

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 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.

You indicated that in December of 2007, the Board entered into executive session with no explanation, and that "After this executive session, the board reconvened and announced their recommendations of individuals for appointment to the IDA board." Although there is no record of a motion, if the discussion in executive session were limited to consideration of the qualifications and experience of individuals under consideration for appointment, we believe the discussion would have been appropriate for consideration in executive session.

Next, from our perspective, the grounds for entry into executive session are based on the need to avoid some sort of harm that would arise by means of public discussion, and that is so with respect to the second ground for entry into executive session upon which the Agency relied.

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

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

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

of its capacity to perform its functions appropriately and in the best interest of the public. It is clear that §105(1)(h) does not permit public bodies to conduct executive sessions to discuss all matters that may relate to the transaction of real property; only to the extent that publicity would "substantially affect the value of the property" can that provision validly be asserted.

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

You provided the following opinion with respect to the real estate transactions that were being discussed in executive session:

> "According to the very limited information available about any of the sales of public lands to project sponsors, the sales prices do not appear to be at or above fair market value, some properties would be transferred for no payment. Open discussion would not adversely affect the price of land to be conveyed for free or less than its value, so it is hard to see how the exception for real estate would apply."

If that is the case, that publicity would have little or no impact upon the value of real property, in our opinion, there would be no basis for entry into executive session. However, in other situations in which publicity would "substantially" affect the value of real estate, we believe an executive session may properly be held.

Further and in construing the third basis for entry into executive session referenced above, the litigation exception, 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 Seneca County Industrial Development Agency." If the Agency 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 Agency, 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.

Further, with respect to your questions concerning 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."

When action is taken in private in violation of the Open Meetings Law, a court is authorized to invalidate such action. We recommend that you consult with an experienced private attorney when considering legal action to invalidate actions of the IDA.

Finally, we note that the NYS Authority Budget Office, in its February 12, 2008 review of the practices of this Agency, determined as follows:

> "According to Agency officials, the details of specific projects are generally discussed in executive session and not in open meetings because there is concern that, should details become public, surrounding counties may attempt to steer existing and prospective businesses away from the County. They believe that by keeping discussions private, there is less of a chance that this will occur, and indicted that they enter executive session at the advice of counsel. By doing so, the Board believes that it is acting in the economic interests of Seneca County. But this approach, in addition to the Board's reliance on informal procedures and undocumented updates, is inconsistent with the intent of the Open Meetings law, which stipulates that public business be conducted in an open and public manner."

We are in agreement with the Authority Budget Office's findings that this approach is inconsistent with the intent of the Open Meetings Law, and would reiterate, as above, that the Agency may only enter into executive session for purposes enumerated in the law.

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

CSJ:tt

cc: Patricia Jones
Monica Novack
Stephen Dennis
Justin Miller
Seneca County IDA Board
Kenneth Lee Patchen, Jr., Secretary to the Board

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April 23, 2008

E-MAIL

TO: Mary Anne Kowalski

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. Kowalski:

We are in receipt of your requests for advisory opinions concerning application of the Freedom of Information and Open Meetings Laws to various requests for records directed to, and proceedings of the Seneca County Industrial Development Agency. In an effort to address your concerns in a logical fashion, this is the second in a series of opinions prepared at your request. Here, we will address issues regarding access to minutes of the Agency, responses to requests for records sent electronically, and mandatory time limits for responding to requests.

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

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

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

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

In view of the foregoing, it is clear in our 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 we are aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that 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, we believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

Although there is no requirement to do so, we welcome the Agency's decision to post minutes on its website, We agree that the advantages of proactive disclosure are obvious. The public can gain access to information of importance quickly, easily, and at no cost; the government, by anticipating the interest in certain information, eliminates the need to engage in the administrative tasks associated with receiving requests for records, locating the records, making them available after producing photocopies, printouts, or downloading information onto a computer tape or disk, calculating and collecting a fee for copying and perhaps putting documents in the mail. In short, in our opinion, placing frequently requested public records on the internet is positive.

Next, as you may know, in August of 2006, the Legislature amended §89(3) of the Freedom of Information Law to require agencies to receive and respond to requests for records via email, as follows:

> "b) All entities shall, provided such entity has reasonable means available, accept requests for records submitted in the form of electronic mail and shall respond to such requests by electronic mail..."

Accordingly, it is our opinion, that if an agency has the ability to receive and respond to requests via email, it must do so. In your case, in light of the Agency's demonstrated ability to provide access to electronic copies of records via email, in our opinion, it is under a legal obligation to consistently respond via email to your emailed requests. In our view, sending a letter by U.S. mail in response to an email request is not in keeping with the intent or language of the law, especially when records were previously provided to you via email.

Finally, 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 in 2005 stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, when records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a delay in disclosure. As the Court of Appeals, the state's highest court, has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as

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

In a judicial decision concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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

CSJ:tt

cc: Patricia Jones
Monica Novack
Stephen Dennis
Justin Miller
Seneca County IDA Board
Kenneth Lee Patchen, Jr., Secretary to the Board

STATE OF NEW YORK
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FOIL-AO-17133
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April 23, 2008

E-MAIL

TO: Mary Anne Kowalski

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. Kowalski:

We are in receipt of your requests for advisory opinions concerning application of the Freedom of Information and Open Meetings Laws to various requests for records directed to, and proceedings of the Seneca County Industrial Development Agency. In an effort to address your concerns in a logical fashion, this is the third in a series of opinions being provided to you. In this opinion, we will address issues regarding minutes of executive sessions and the appropriation of public money.

In response to your request for a copy of the minutes from a recent executive session, the Agency indicated as follows:

> "1) Pursuant to and in accordance with the Public Officers Law, there are no minutes of Executive Sessions as no agency actions may be taken in Executive Session
>
> 2) There was no specific Agency action taken with respect to a motion to dismiss the appeal, other than verbal authorization granted by the Agency's Executive Director pursuant to the Agency's standing authorization to Agency Staff and Counsel to represent the Agency's interests..."

We agree with your comment that it "seems to me that a 'verbal authorization' to represent the Agency is indeed an agency action", and in this regard, we offer the following comments.

First, as you are aware, the Open Meetings Law contains direction concerning minutes of meetings and provides what might be viewed as minimum requirements pertaining to their contents. Specifically, §106 states that:

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

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

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 must 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 Agency reached a "consensus" that is reflective of its final determination of an issue, or gave "verbal authorization" to take action on a particular issue, we believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted. We note that §87(3)(a) of the Freedom of Information Law states that "each agency shall maintain...a record of the final vote of each member in every agency proceeding in which the member votes." As such, members of public bodies cannot take action by secret ballot.

Further, §105(1) of the Open Meetings Law prohibits the appropriation of money during executive session. To the extent that any of the above noted transactions required the appropriation of public money by the Agency, in our opinion such authorization is required to be made during the public portion of the meeting and must be memorialized in the minutes.

As referenced in a previous opinion to you, the enforcement mechanism under the Open Meetings Law permits an aggrieved person to bring an Article 78 proceeding to invalidate action taken in private in violation of the law. You indicated that "The IDA and the EDC have acquired, sold, transferred and leased many pieces of real and personal property, yet the public minutes do not reflect votes or the terms of the sales or acquisitions." If this statement is accurate, that there is no record of Agency approval to purchase, sell, transfer or lease real or personal property, it may be opinion that if a legal action were brought in a timely manner, a court could invalidate such transactions as beyond the scope of the Agency. If Agency approval is not required, on the other hand, it is likely this would not be the outcome.

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

CSJ:tt

cc: Patricia Jones
Monica Novack
Stephen Dennis
Justin Miller
Seneca County IDA Board
Kenneth Lee Patchen, Jr., Secretary to the Board

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

OML-AO-4611

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April 23, 2008

E-MAIL

TO: Mary Anne Kowalski

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. Kowalski:

We are in receipt of your requests for advisory opinions concerning application of the Freedom of Information Law and Open Meetings Laws to various requests for records directed to, and proceedings of the Seneca County Industrial Development Agency. In an effort to address your concerns in a logical fashion, this is the fourth and final opinion in a series of opinions being provided to you. In this opinion, we will address issues regarding notice and appropriate locations of meetings of both the Seneca County Industrial Development Agency ("Agency") and the Seneca County Economic Development Corporation ("Corporation").

With regard to notice, you indicated that "At 8:42 AM this morning, I (along with the press and other interested parties) received the notice of an Economic Development [Corporation][1] meeting. The meeting was scheduled to begin at 9:00 AM this morning." In this regard, we offer the following comments.

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.

[1]It appears that this was a mistaken reference to the Economic Development "Committee." If that assumption is incorrect, please advise, and we will revise our opinion accordingly.

> 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."

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 emailing the local news media and by posting notice in one or more designated locations.

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

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

From 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. Again, without more information, it is difficult to ascertain whether the notice emailed to you was appropriate.

Second, we note that regular meetings of the Agency are held at "Abigail's Restaurant" and that there is an indication that a special meeting of the Agency was held at the "Holiday Inn". A meeting of the Corporation, on the other hand, was held at the County Building, in the Board of Supervisors Room.

With regard to the location of meetings, there is nothing in the Open Meetings Law that specifies where meetings must be held. The only provision that deals directly with the issue is §103(b), which states that public bodies must make or cause to made reasonable efforts to hold meetings in locations that offer barrier-free access to physically handicapped persons. Perhaps equally pertinent is §100 of the Open Meetings Law, the Legislative Declaration, which states that:

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

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

From our perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. Whether a meeting is held on public or private property, to give reasonable effect to the law, we believe that meetings should be held in locations in which those likely interested in attending and observing the deliberative process have a reasonable opportunity to do so. Because people are expected to purchase food in a restaurant, that kind of site would, in our view, be inappropriate for conducting a meeting of a public body. On the other hand, if a private room is reserved for a particular function, and there is no expectation to purchase food or drink, that may be an appropriate venue.

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

CSJ:tt
cc: Patricia Jones
Monica Novack
Stephen Dennis
Justin Miller
Seneca County IDA Board
Kenneth Lee Patchen, Jr., Secretary to the Board

STATE OF NEW YORK
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April 24, 2008

E-MAIL

TO: Stacey M. Bottoni

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. Bottoni:

As you are aware, I have received your correspondence in which you questioned the status of a "Comprehensive Planning Committee" in the Town of Prattsburgh. As I understand your description of the Committee, it consists of a "core group" of seven, including you and one other member of the Town Board. The Committee functions informally and is "is simply gathering information and setting recommendations for the Town Board's approval." If that is so, it appears that the Committee is not required to comply with the Open Meetings Law.

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

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

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

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

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.

Lastly, my question involving the composition of the Committee related to the possibility that it might be a "special board", an entity created pursuant to §272-a of the Town Law. Because a special board is a statutory creation with a specific duty to be accomplished, it has been advised that such a board is a public body required to comply with the Open Meetings Law. Section 272-a entitled "Town comprehensive plan" defines "special board" in subdivision (2)(c) of §272-a to mean:

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

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

it is not a special board, for the reasons suggested earlier, I do not believe that it is subject to the Open Meetings Law.

I hope that I have been of assistance.

RJF:tt

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April 25, 2008

Hon. Kathleen Russo
Councilwoman, Town of Varick
5280 Route 89
Romulus, NY 14541

The staff of the Committee on 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. Russo:

We are in receipt of your request for assistance with respect to the behavior of certain officials in your town, including the town attorney, and others who serve with you on the town council. You indicated that the town attorney shared details of your pending divorce during an executive session of the town board, against your wishes, and that in response, certain members of the board exited the meeting, indicating their non-involvement with the matter. You requested that we investigate and take action with respect to this incident.

Please be advised that the Committee on Open Government is authorized to issue legal opinions regarding application of the Freedom of Information and Open Meetings Laws. Neither the Committee nor its staff is empowered to investigate the complaints you have made or to compel a public body to behave in a certain manner; however, to the extent that issues regarding the Open Meetings Law, have been raised, we offer the following comments.

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

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

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

a public body may not conduct an executive session to discuss subjects other than those indicated in its motion or in the grounds for entry into executive session delineated in paragraphs (a) through (h) of §105(1). If board members exited the meeting when the conversation shifted away from Town business, we believe that they acted reasonably. When a topic begins to be considered that does not fall within the stated ground for discussion in executive session, it is our view that all board members should either return to the public portion of the meeting or terminate the session.

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

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

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

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COMMITTEE ON OPEN GOVERNMENT

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April 25, 2008

Ms. Christine Malafi
County Attorney
County of Suffolk Department of Law
P.O. Box 6100
Hauppauge, NY 11788-0099

The staff of the Committee on 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. Malafi:

I have received your letter in which you sought an advisory opinion concerning "the propriety of entry into executive session by the Suffolk County Legislature in order to discuss the imminent sale of the Suffolk County Health Plan" (hereafter "the Plan").

You indicated by way of background that the County manages the Plan and does so "as if it were a health insurance company" - - an entity in competition with private firms, competing for the business of providing a service for a fee to Suffolk County residents." You added that the County and potential purchasers of the Plan "have signed confidentiality agreements regarding the sale, in order to protect trade secrets and other information, which, if disclosed, would cause substantial injury to the competitive position of such enterprises, including the County Plan."

Reference was made in your letter to §105(1)(f) of the Open Meetings Law, which permits a public body, such as the County Legislature, 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..."

You indicated that the Legislature will discuss "the financial and credit history of potential corporate purchasers" of the Plan. Insofar as that is so, I believe that the Legislature clearly has the authority to enter into executive session.

A contention was also offered concerning the application of §105(1)(h), which permits a public body to conduct an executive session to discuss:

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

Although you wrote that "the Plan is neither real estate nor a security, the rationale for authorizing entry into executive session would certainly apply to the sale of the Plan....Similar to the sale and acquisition of both real estate and securities, the sale of the Plan involves appraisals of the both the Plan and the potential purchasers that are based on 'thought process and professional judgement which cannot be classified as mere data gathering'", citing General Motors Corporation v. Town of Massena, 180 Misc.2d 682, 684 (1999).

In my view, §105(1)(h) would not serve as a valid basis for entry into executive session. Its language is precise and limited to matters involving real property or securities transactions. Moreover, it has been held on several occasions that the "the topics discussed during the executive session must remain within the exceptions enumerated in the statute" and that the exceptions to openness "must be narrowly scrutinized" [see e.g., Gordon v. Village of Monticello, 207 AD2d 55,58 (1994)].

I note too that General Motors Corporation, supra, involved the interpretation of the Freedom of Information Law. Although that statute and the Open Meetings Law are designed to require disclosure, except in circumstances in which grounds for denial of access to appearing in §87(2) of the former and the grounds for entry into executive session appearing in §105(1) of the latter may apply, those provisions are separate and distinct. Further, there are instances in which records may be withheld under the Freedom of Information Law, but the subject of those records must be discussed in public to comply with the Open Meetings Law. For instance, a written opinion expressed by staff concerning a change in policy could be withheld under §87(2)(g) of the Freedom of Information Law, but there would likely be no basis for entry into executive session to discuss an issue of that nature. The reverse may be true as well. A public body may conduct an executive session, for example, to discuss hiring an individual. However, if that person is hired, minutes identifying the individual would be accessible under the Freedom of Information Law.

In your reference to the Freedom of Information Law, two of the grounds for denial were cited. Section 87(2)(c) permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards...", and §87(2)(d) authorizes a denial of access insofar as disclosure "would cause substantial injury to the competitive position of a commercial enterprise..." While those provisions might enable the County to withhold records or portions of records relating to the sale of the Plan, again, they are separate from the grounds for entry into executive session found in the Open Meetings Law.

Most importantly in relation to your question, the foregoing as it relates to the Freedom of Information Law does not, in my view, diminish or alter the ability of the County Legislature to conduct executive sessions as appropriate in accordance with §105(1)(f) of the Open Meetings Law.

Lastly, since you referred to confidentiality agreements, while there is nothing of which I am aware that would require any of the participants in the transaction to make verbal disclosures, based on the language of the Freedom of Information Law and its judicial construction, a "confidentiality clause" is, in my view, irrelevant in considering rights of access to records.

It has been held in variety of circumstances that a promise or assertion of confidentiality cannot be upheld, unless a statute specifically confers confidentiality. In a decision rendered by the Court of Appeals, it was held that a state agency's:

> "long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt..." [Washington Post v. Insurance Department, 61 NY 2d 557, 565 (1984)].

In short, I believe that the ability to withhold records is limited to the grounds for denial appearing in the Freedom of Information Law, notwithstanding an agreement regarding confidentiality.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jessica Hogan

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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April 28, 2008

Mr. Daniel T. Warren
[redacted]

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

Dear Mr. Warren:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to meeting of the West Seneca Town Board. You indicated that meetings of the Zoning Board of Appeals and the Planning Board typically start at 7 or 7:30 pm, but that "the annual organization[al] meetings have been held at 5:00 pm most recently and under previous administrations the organizational meeting was held at 1:00 pm." You expressed the belief that conducting organizational meetings at 5 pm or 1 pm is unreasonable, based on Goetchius v. Board of Education Supreme Court, Westchester County, New York Law Journal, August 8, 1996, and our advisory opinion no. 2648a. In this regard, we offer the following comments.

In our view, although questions may be raised concerning the time of the organizational meeting, holding an annual organizational meeting at a different time than regular monthly meetings is not necessarily unreasonable.

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

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

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

In our opinion, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In the Goetchius decision that you referenced, the court dealt in part with meetings of a board of education held at 7:30 a.m., and 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, we believe that similar factors would be present with respect to the ability of Town residents to attend meetings. 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 view of the decision cited above, the reasonableness of conducting meetings at 7:30 a.m. is in our view questionable.

The question that you raise is different: whether it is reasonable to schedule a meeting during regular business hours, or immediately thereafter. We know of no judicial decisions that addresses the issue. In our view, because organizational meetings are typically held only once a year, and many public bodies conduct organizational meetings on January 1, which is a public holiday, it does not necessarily follow that holding the organizational meeting at 5 pm or 1 pm would discourage or hinder attendance. Further, in our opinion, holding a meeting during regular business hours would not be unreasonable.

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

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April 29, 2008

E-MAIL

TO: Philip C. Barnes

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. Barnes:

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

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

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

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 Village of Watkins Glen." 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 Village 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.

Second, there is no requirement that minutes of meetings be posted on a website. An agency may choose to do so, but there is no obligation to do so.

I hope that I have been of assistance.

RJF:tt

cc: Board of Trustees

OML-AO-4617

From: Freeman, Robert (DOS)
Sent: Wednesday, April 30, 2008 3:46 PM
To: Cathy Pisani, City of Peekskill

Hi - -

If the responses by the members are construed as votes and action taken, I believe that, if challenged, the action would be found to be a nullity. In short, voting and action may validly occur only within the confines of a meeting held in accordance with the Open Meetings Law. If the communications represent something other than voting or action, the answer would likely be different.

Robert J. Freeman
Executive Director
Committee on Open Government
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OML-AO-4618

From: Freeman, Robert (DOS)
Sent: Friday, May 02, 2008 8:24 AM
To: 'MULLEN, VICTORIA'
Subject: RE:

Good morning - -

Two members of the Town Board do not constitute a quorum and, therefore, the Open Meetings Law would not apply to your board. However, if a quorum of the City Council is present, it would be a meeting of the Council that falls within the requirements of the Open Meetings Law. Further, in that situation, as you suggested, there would likely be no basis for entry into executive session.

Hope all is well.

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

OML-AO-4619

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May 2, 2008

E-Mail

TO: Ms. Sue 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 information presented in your correspondence.

Dear Ms. Smith:

I have received your letter and the material associated with it. As I understand the matter, an "informational meeting" was initially conducted at a place of business and then moved to an apple orchard. It appears that several people participated, including members of a local planning board constituting less than a quorum of that board, as well as a member of the Orleans County Planning Board and a representative from the Department of Agriculture and Markets.

In this regard, I offer the following comments.

First, a "meeting", according to §102(1) of the Open Meetings Law, is a gathering of a quorum of a public body, such as a town board or planning board. If less than a quorum was present at the gathering at issue, the Open Meetings Law would not have applied.

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

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

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

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

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

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

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

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

> "...site visits or tours by public bodies should be conducted solely for the purpose of observation and acquiring information, and...any discussions or deliberations regarding such observations should occur

in public during meetings conducted in accordance with the Open Meetings Law."

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

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17150
OML-AO-4620

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May 2, 2008

Ms. Bonnie Holmes
[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. Holmes:

As you are aware, I have received your correspondence in which you sought opinions concerning the Katonah Lewisboro School District and its Board of Education in relation to a matter involving the Freedom of Information and Open Meetings Laws.

The issues that you raised pertain to a situation in which a community member serving on the District's finance committee became aware that a custodian had been transferred from the night shift to the day shift, but was authorized to retain his night differential in pay, an amount involving an overpayment of approximately twelve thousand dollars. When a member of the Board asked how the District might recoup the money, he was, according to your letter, "silenced by the Superintendent who said he could not talk about it in public." Thereafter, you requested the document that authorized the transfer and were told by the Superintendent that no such document exists. It is your belief that the document does in fact exist.

In this regard, 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.

Additionally, §89(8) of the Freedom of Information Law and §240.65 of the Penal Law, entitled "Unlawful prevention of public access to records", include essentially the same language. Specifically, the latter states that:

> "A person is guilty of unlawful prevention of public access to records when, with intent to prevent the public inspection of a record pursuant to article six of the public officers law, he willfully conceals or destroys any such record."

From my perspective, the preceding may be applicable in two circumstances: first, when an agency employee receives a request for a record and indicates that the agency does not maintain the record even though he or she knows that the agency does maintain the record; or second, when an agency employee destroys a record following a request for that record in order to prevent public disclosure of the record.

The issues involving the Open Meetings Law relate to the Superintendent's opinion that, in your words, the controversy deals with "a Personnel Matter and could not be discussed in public." In my view, if the statement attributed to Superintendent was accurately expressed, it is erroneous. Section 105(1) of the Open Meetings Law prescribes a procedure that must be accomplished by a public body, such as a board of education, before an executive session may be held. Specifically, the introductory language of that provision states that:

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

Based on the foregoing, the Open Meetings Law is permissive; even when a matter *may* be discussed in executive session, there is no requirement that it *must* be discussed in executive session. Stated differently, 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 must be held even though a public body has the right to do so. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public, or table the matter for discussion in the future. Similarly, although the Freedom of Information Law permits an agency to withhold records in accordance with the grounds for denial of access, it has been held by the Court of Appeals, the state's highest court, that the exceptions are permissive rather than mandatory, and that an agency may choose to disclose records, even though the authority to withhold exists [Capital Newspapers v. Burns], 67 NY 2d 562, 567 (1986)].

I note, too, that the term "personnel" appears nowhere in the Open Meetings Law and, in my opinion, is greatly overused. While some discussions relating to personnel may properly be discussed in executive session, many others must be discussed in public. The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

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

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

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

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

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

If the issue before the board involved the manner in which money might be recouped, and not discipline or penalty that might be imposed on a "particular person", it does not appear that there would have been a basis for conducting an executive session. On the other hand, insofar as it dealt with the possibility of discipline, a sanction or a penalty to be imposed with respect to a particular employee, to that extent, I believe that an executive session could properly be held.

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

In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Appellate Division stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must

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

Based on the foregoing, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion [see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, Supreme Court, Chemung County, April 1, 1983]. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Robert J.Roelle

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 4621

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May 5, 2008

Ms. Sonja Hedlund
[redacted]

Ms. Barbara Gref
[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. Hedlund and Ms. Gref:

I have received your letter and the materials relating to it and hope that you will accept my apologies for the delay in response. You have sought an advisory opinion concerning three incidents that you believe indicate that "the Town of Callicoon Town Board has run afoul of the New York State Open Meetings Law."

The first pertains to an executive session held to engage in a "personnel discussion" which led to the creation of a parttime position of deputy code enforcement officer at a salary of ten thousand dollars. Another relates to a different meeting during which, again, the basis of the executive session was "a personnel discussion", and the discussion appears to have involved approval of "a banking resolution detailing whom from the town government could sign checks drawn on the bank's account." The remaining incident dealt with "an unadvertised town board 'workshop'" during which a motion was made to conduct a "special emergency meeting." Based on a contention that time did not allow notice to be given, a "waiver" of notice was prepared and signed by the members of the Board.

In this regard, I offer the following comments.

First, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is

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

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

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

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

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

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

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

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

> "...the medical, financial, credit or employment history of a <u>particular</u> person or corporation, or matters leading to the appointment,

> employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department or perhaps the creation or elimination of positions, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". For example, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In the circumstance that you described, the issue would not have focused on any "particular person", nor would it have involved the subjects relating to a particular person delineated in §105 (1)(f). In short, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981).

Insofar as the discussion at the first meeting involved the creation of a position or the salary that should be accorded to that position, I do not believe that there would have been a basis for conducting an executive session. Similarly to the extent that the discussion involving the ability to sign checks dealt with the functions associated with certain position in Town government, an executive session, in my opinion, could not validly have been held. In neither of those instances would the focus have been a "particular person" in relation to a subject found in §105(1)(f).

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

The Appellate Division 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)].

Second, there are two statutes that relate to notice of special meetings held by town boards. The phrase "special meeting" is found in §62(2) of the Town Law. That provision, from my perspective, deals with unscheduled meetings, rather than meetings that are regularly scheduled, and states in relevant part that:

> "The supervisor of any town may, and upon written request of two members of the board shall within ten days, call a special meeting of the town board by giving at least two days notice in writing to the members of the board of the time when and place where the meeting is to be held."

The provision quoted above pertains to notice given to members of a town board, and the requirements imposed by §62 are separate from those contained in the Open Meetings Law.

Section 104 of the Open Meetings Law provides that:

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

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

Significantly, there is nothing in the Town Law or the Open Meetings Law that makes reference to or authorizes that notice of meeting be waived.

Lastly, based on the judicial interpretation of the Open Meetings Law, there is no legal 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)].

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 constitute a "meeting" subject to the Open Meetings Law that must be preceded by notice given in accordance with §104 of the Law. Further, unless the Town Board has adopted a rule to the contrary, nothing would preclude the Board from taking action at a work session. Similarly, the Board is subject to the same requirements pertaining to notice, openness, and the ability to enter into an executive session relative to a work session or workshop as a regular meeting.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 5, 2008

Mr. Joseph W. Sallustio, Jr.
[redacted]

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

Dear Mr. Sallustio:

I have received your letters and hope that you will accept my apologies for the delay in response. In brief, the issues that you raised involve the ability of the Rome Common Council to receive legal advice from its attorney in private.

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

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

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

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

are not in effect. Stated differently, to discuss a matter exempted from the Open Meetings Law, a public body need not follow the procedure imposed by §105(1) that relates to entry into an executive session. Further, although executive sessions may be held only for particular purposes, there is no such limitation that relates to matters that are exempt from the coverage of the Open Meetings Law.

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

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

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

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

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

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

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

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

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

> "While there is no question that Executive Sessions can be conducted for proper reasons and that an exception exists under the Open Meetings Law for attorney-client privileged communications, the scope of that privilege is limited. Once the legal advice is offered, discussions with regard to substance (e.g.) the closing date of a bus system, do not fall within the privilege of the exception. See Exhibit C, April 8, 1996 Open Meetings Law Advisory Opinion #2595, Robert J. Freeman, Executive Director of Committee on Open government at page 4:
>
> > "I note that the mere presence of an attorney does not signify the existence of an attorney-client relationship; in order to assert the attorney-client privilege, the attorney must in my view be providing services in which the expertise of an attorney is needed and sought. Further, if at some point in a discussion, the attorney stops giving legal advice and a public body may begin discussing or deliberating independent of the attorney. When that point is reached, I believe that the attorney-client privilege has ended and that the body should return to an open meeting."

The same kind of analysis would apply in considering rights of access conferred by the Freedom of Information Law. That statute, like the Open Meetings Law, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

The first exception to rights of access, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." Therefore, legal advice sought by a client and rendered by the client's attorney would be exempted from disclosure pursuant to §4503 of the Civil Practice Law and Rules.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Common Council

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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 5, 2008

Mr. Rick Shanks
[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. Shanks:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests for records made to the Catskill Fire Company, Catskill Fire Department and the Village of Catskill. In short, you made many requests to the Village, the Fire Company and the Fire Department, and have received very little in response. The records that you have requested, in our opinion, should be made available to you in large part, although there are portions that are not required to be made available. In an attempt to address the issues raised in your correspondence, we offer the following.

First, regardless of whether the records you requested are maintained by the Village, the Fire Company and/or the Fire Department, we believe that all three entities are required to comply with the Freedom of Information Law. That statute 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."

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 department and its fire companies, the Court of Appeals, found that volunteer fire entities, 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 department's fire fighting duties, the Court held that the documents constituted "records" subject to the Freedom of Information Law [see §86(4)].

In consideration of the legislative intent of the Freedom of Information Law to which the Court of Appeals referred, as well as the direction provided by the Court, we believe that records concerning volunteer firefighters should be accorded the same treatment for purposes of that statute as records pertaining to public employees generally. Again, the Court emphasized that it is "incumbent on the state and its localities to extend public accountability wherever and whenever feasible", and in view of the relationship between the Village, the Fire Company and the Fire Department, there is, in our opinion, an obligation on the part of all three entities to disclose their records in a manner that guarantees accountability.

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

Your intended use of the records is irrelevant to your rights of access. When records are accessible under the Freedom of Information Law, it has been found that they must be made available to any person, notwithstanding one's status or interest [see 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 Health and Hosps. Corp., 62 NY 2d 75 (1984)]. Conversely, insofar as the records sought fall within a ground for denial, we believe that they may be withheld, irrespective of the purpose of the request.

Minutes of the meetings of the boards of the Village, the Fire Company and the Fire Department, for example, must be prepared and made available to the public within two weeks of the meetings to which they relate.

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

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

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

There is nothing in the Open Meetings Law or any other statute of which we are aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have 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, we believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

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

Please note 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 to 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)].

A final issue with respect to minutes is the maintenance of a roll call sheet that would indicate the identities of those who are present at a public meeting. Because persons who attend public meetings have no expectation that their attendance would be kept a private matter, in our opinion, there would be no basis in the law to deny access to any such sheets.

With respect to disclosure of a list of firefighters who are removed from an active membership roster, and a list of individuals sent registered letters of dismissal, in our opinion, an agency would not have a basis in the law to deny access to such records, if they exist. One of the exceptions to rights of access pertinent to an analysis, due to its structure, often requires substantial disclosure, and we believe that to be so in this instance.

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

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. In our opinion, therefore, a list of the names of those firefighters who were removed from an active membership roster, or sent letters of dismissal, would be required to be made available upon request.

With respect to tape recordings or video recordings or recordings made on a mobile phone, the Freedom of Information Law is applicable to all agency records and §86(4) of that statute defines the term "record" expansively to include:

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

In our view, one of the grounds for denial may be relevant to an analysis of rights of access. The extent to which it may properly be asserted is, in our opinion, dependent on the nature of the depictions in the audio and visual recordings.

Relevant is §87(2)(b), which authorizes an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy."

In a case involving a request for videotapes made under the Freedom of Information Law, it was unanimously found by the Appellate Division that:

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

Nevertheless, the Court stated that "portions of the tapes showing inmates in states of undress, engaged in acts of personal hygiene or being subjected to strip frisks" could be withheld as an unwarranted invasion of personal privacy (id., 112), and that "[t]here may be additional portrayals on the tapes of inmates in situations which would be otherwise unduly degrading or humiliating, disclosure of which 'would result in *** personal hardship to the subject party' (Public Officers Law § 89 [2] [b] [iv])" (id.). The court also found that some aspects of videotapes might be withheld on the ground that disclosure would endanger the lives or safety of inmates or correctional staff under §87(2)(f).

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

In sum, based on the language of the Freedom of Information Law and its judicial interpretation, we believe that the agency in possession of the recordings you seek is required to review each recording falling within the scope of your request to attempt to ascertain the extent to which their contents fall within the grounds for denial appearing in the statute. Recordings of a public meeting, of course, would be available in their entirety.

Likewise, the "contents of personnel files" of public officials and employees would be required to be disclosed only to the extent that disclosure would not cause "an unwarranted invasion of personal privacy."

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

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

The other ground for denial of significance, as previously noted with respect to a list of names of firefighters, is §87(2)(g), which would require disclosure of those portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations. Again, as previously noted, 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.

If there are allegations or charges of misconduct that have not yet been determined or did not result in a finding of misconduct, the records relating to such allegations may, in our view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Similarly, to the extent that charges are dismissed or allegations are found to be without merit, we believe that records of those charges may be withheld. With respect to records reflective of disciplinary action taken against a public employee who is not a police or correction officer, such records must in our view be disclosed.

Insofar as you have requested "personnel files" of police officers, we note that §87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used "to evaluate performance toward continued employment or promotion" are confidential.

Based on the language of §50-a of the Civil Rights Law, various aspects of a personnel file pertaining to a police officer are exempt from disclosure, such as evaluations of performance, complaints and related records pertaining to allegations of misconduct. Other aspects of a personnel file, i.e., those portions that are not used "to evaluate performance toward continued employment or promotion", would not be subject to that statute. It is our opinion, therefore, that the agency would be required to review the contents of the personnel files of the officers, and determine which portions are required to be made available to you.

Whether your requests were sent directly to the appropriate agency or forwarded to the appropriate agency, each of the agencies to which you directed your requests are required to comply with the time limits set forth in the Freedom of Information Law. In an effort to avoid lengthening the text of this advisory opinion, the following is a link to an explanation of the time limits hereto: http://www.dos.state.ny.us/coog/explaination05.htm. As explained in the attached materials, should any of these agencies continue to deny access to records that are required to be made available to

you, or continue to ignore written requests and appeals, you have the authority to bring a judicial proceeding to compel disclosure.

We note that legislation enacted in 2006 broadened the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law. Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

Finally, you allege that a certain recording may have been intentionally destroyed. In this regard, we note that §89(8) of the Freedom of Information Law and §240.65 of the Penal Law include essentially the same language. Specifically, the latter states that:

> "A person is guilty of unlawful prevention of public access to records when, with intent to prevent the public inspection of a record pursuant to article six of the public officers law, he willfully conceals or destroys any such record."

From our perspective, the preceding may be applicable in two circumstances: first, when an agency employee receives a request for a record and indicates that the agency does not maintain the record even though he or she knows that the agency does maintain the record; or second, when an agency employee destroys a record following a request for that record in order to prevent public disclosure of the record. We do not believe that §240.65 applies when an agency denies access to a record, even though the basis for the denial may be inappropriate or erroneous, when an agency cannot locate a record that must be maintained, or a record is destroyed prior to receipt of a request for that record under the Freedom of Information 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: Catskill Fire Company
Village of Catskill Fire Department
Village Clerk

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May 5, 2008

E-Mail

TO: Hon. Lisette Hitsman, Supervisor, Town of Union Vale

FROM: Robert J. Freeman, Executive Director RF

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

Dear Supervisor Hitsman:

I have received your proposed policy/procedure for public comment at meetings of the Union Vale Town Board. In general, I believe that it is reasonable. However, I question the need for or propriety of requiring those who desire to address the Board to identify themselves by name and address, particularly in consideration of your intent to prevent "the same subject being brought up meeting after meeting." The issue, based on your intent, appears to involve the subject matter of comments, not necessarily the identities of those who seek to speak.

As you may be aware, §103(a) of the Open Meetings Law states meetings of public bodies "shall be open to the general public." Since any person may attend a meeting of a public body, irrespective of his or her status, interest, or residence, I do not believe that person can be required to provide his or her identity or address as a condition precedent to attending or participating in the same manner as other members of the public.

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. Similar kinds of comments might arise in relation to town business or town employees. 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 that I have been of assistance.

RJF:jm

OML-AO-4625

From: Jobin-Davis, Camille (DOS)
Sent: Friday, May 09, 2008 4:26 PM
To: Ms. Bonnie Holmes
Subject: Open Meetings Law - internal audit

Bonnie:

As promised, this will confirm my opinion that there is no basis in the Open Meetings Law for a school board to enter into executive session to discuss issues with respect to an internal audit.

Please note that pursuant to the Education Law, an audit committee of a school district may enter into executive session for purposes in addition to those set forth in the Open Meetings Law, as outlined in section 2116-c. Specifically, subdivision (7) of section 2116-c permits, in part, as follows:

"...a school district audit committee may conduct an executive session pursuant to section one hundred five of the public officers law [the Open Meetings Law] pertaining to any matter set forth in paragraphs b, c, and d of subdivision five of this section."

Subdivision (5) provides as follows:

"5. It shall be the responsibility of the audit committee to:

(a) provide recommendations regarding the appointment of the external auditor for the district;

(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 the trustees or board of education in interpreting such documents;..." (emphasis mine)

In sum, the language of paragraphs (b), (c) and (d) provides additional grounds for an audit committee to enter into executive session, and limits those discussions to those concerning external audits only.

Subdivision (6) of section 2116-c of the Education Law refers specifically to an audit committee's responsibilities with respect to internal audits, however, it does not include language granting additional grounds for entry into executive session. I have attached a copy of the entire text of Education Law section 2116-c.

OML-4626

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, May 13, 2008 12:19 PM
To: Bonnie Holmes
Subject: RE: (no subject)

Dear Bonnie:

The Board is correct insofar as they agree to have a discussion in executive session confined to the behavior of an individual employee. Perhaps an individual employee is named and/or faulted in the audit report. The discussion in executive session must be limited, and the board must return to the public session when they are no longer discussing an individual employee's employment history. See the following advisory opinion: http://www.dos.state.ny.us/coog/ftext/F15887.htm, especially the analysis pertaining to the Weatherwax case.

My apologies for not indicating this particular nuance in my earlier opinion to you. This is the first time the school district has mentioned this issue?

See the following advisory opinion for a more general discussion about executive session, FOIL, and consultant reports: http://www.dos.state.ny.us/coog/ftext/f7683.htm (especially the language following the paragraph that starts "In the case of the management study…".)

I hope these are helpful.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
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http://www.dos.state.ny.us/coog/coogwww.html

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DEPARTMENT OF STATE
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May 16, 2008

Mr. Frederick H. Monroe
Executive Director
Adirondack Local Government Review Board
P.O. Box 579
Chestertown, NY 12817

The staff of the Committee on 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. Monroe:

In your capacity as Executive Director of the Adirondack Park Local Government Review Board ("Review Board"), you requested an opinion concerning the Freedom of Information and Open Meetings Laws as they relate to a draft mediation protocol for an application filed by Preserve Associates, LLC regarding the Adirondack Club and Resort, Adirondack Park Agency Project No. 2005-100. Specifically, you indicated that the proposed protocol "includes a confidentiality agreement which all parties will be required to sign on April 23rd in order to participate in the mediation." You requested our views regarding "whether or not [you] may sign the confidentiality agreement on behalf of the Review Board; whether [you] may discuss tentative and final agreements and proposed stipulations with the Review Board in executive session; and whether documents that come into [your] possession during the mediation would be subject to the Freedom of Information Law." Subsequently, our office received a copy of the final version of the mediation protocol from the Adirondack Park Agency. Therefore, we offer the following comments pertaining to the final protocol ("protocol").

First, with respect to provisions in the protocol regarding the "confidentiality" of statements or verbal descriptions of the mediation process, as you are likely aware, the Open Meetings Law is applicable to public bodies, and §102(2) defines the phrase "public body" to mean:

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

Based on provisions of Executive Law, we believe that the Adirondack Park Local Government Review Board is a public body that falls within the requirements of the Open Meetings Law. Created through legislation enacted in 1973, the Review Board is comprised of 12 members, each of whom is a resident of a county wholly or partly within the Adirondack Park, and is appointed by the legislature of the county in which the member resides. In addition to its responsibility to advise and assist the Adirondack Park Agency, §803-a of the Executive Law provides that:

> "7. In addition to any other functions or duties specifically required or authorized in this article, the review board shall monitor the administration and enforcement of the Adirondack park land use and development plan and periodically report thereon, and make recommendations in regard thereto, to the governor and the legislature, and to the county legislative body of each of the counties wholly or partly within the park."

From our perspective, each of the conditions necessary to conclude that the Review Board constitutes a public body can be met. There are twelve members who conduct public business collectively as set forth in the statute. By so doing and carrying out their powers and duties, the members of the Review Board perform a governmental function for the state. While we know of no specific reference to a quorum requirement, a separate statute, §41 of the General Construction Law, requires that "Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly as a board or similar body", they may carry out their duties only through the presence of a quorum and action taken by majority of the vote the total membership of such entity.

We note that the protocol requires all signatories to keep "the development of the agendas for the mediation sessions as well as the substantive discussions held during the mediation sessions" confidential "to the fullest extent as allowed by law" (page 3), and further requires that "Nothing in this agreement precludes the parties from informing the party's decision makers regarding all aspects of the mediation process including substantive and procedures issues discussed in the mediation process. Such information will be kept confidential" (page 4). With respect to public statements the Protocol indicates that "The parties have agreed to preserve the confidentiality of the mediation in order to advance the mediation process" (page 4). And further, "Except as provided herein, nothing in this agreement precludes any party from issuing media releases, participating in public discussions, taking public positions or any other activity involving the proposed ACR Project or to appear before any local, state or federal agency that may be considering an application for the ACR Project, provided that the mediation sessions remain confidential" (pages 4-5).

If you were to have signed this Protocol on behalf of the Review Board, we believe that neither you nor the Review Board would have been able to fulfill the above outlined commitments, and concurrently comply with the Open Meetings Law.

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

It is emphasized 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. 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.

Further, it has been held judicially that :

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

We stress that a public body may validly conduct an executive session only to discuss one or more of the subjects listed in §105(1) and that a motion to conduct an executive session must be sufficiently detailed to enable the public to ascertain that there is a proper basis for entry into the closed session. In our opinion there is no basis in the law to enter into executive session to discuss the particulars of a mediation process regarding an application pending before the Adirondack Park Agency.

It is likely that the provision which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation" (§105[1][d]) would not apply. While the courts have not sought to define the distinction between "proposed" and "pending" or "pending" and "current" litigation, they have provided direction concerning the scope of the exception in a manner consistent with the general intent of the grounds for entry into executive session. Specifically, it has been held that:

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

In view of the foregoing, the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, so as not to divulge its strategy to its adversary, who may be present with other members of the public at the meeting. We note too, that the Concerned Citizens

decision cited in Weatherwax involved a situation in which a town board involved in litigation met with its adversary in an executive session to discuss a settlement. The court determined that there was no basis for entry into executive session; the ability of the board to conduct a closed session ended when the adversary was permitted to attend.

In the context of the matter at issue, there is no litigation pending between or among the parties to the mediation process, and both the developer and the other signatories, who may have interests adverse to each other, are present during the course of the mediation sessions. Accordingly, while one could contractually agree not to make statements to the press, or to refrain from answering questions about the process from the public, in our opinion, a quorum of the members of the Review Board would not be permitted to discuss the mediation process, or receive a briefing from you, in executive session. If you were required to obtain approval from the Review Board in order to proceed with an issue during the mediation process, for example in our opinion, it is likely that there would be no basis for the Review Board to discuss the issue in executive session.

We turn now to the issue of public access to records created and/or received and/or reviewed during the mediation process. Before addressing the individual restrictions proposed by the Protocol, we note that it has been held in variety of circumstances that a promise or assertion of confidentiality cannot be upheld, unless a statute specifically confers confidentiality. In Gannett News Service v. Office of Alcoholism and Substance Abuse Services [415 NYS 2d 780 (1979)], a state agency guaranteed confidentiality to school districts participating in a statistical survey concerning drug abuse. The court determined that the promise of confidentiality could not be sustained, and that the records were available, for none of the grounds for denial appearing in the Freedom of Information Law could justifiably be asserted. In a decision rendered by the Court of Appeals, it was held that a state agency's:

> "long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt..." [Washington Post v. Insurance Department, 61 NY 2d 557, 565 (1984)].

We note that the while minutes of the mediation sessions will not be prepared, the protocol permits that each party "may keep notes of the mediation sessions". The protocol requires that "Such notes will remain confidential to the fullest extent as allowed by law."

With respect to the status of notes of meetings it is emphasized that the Freedom of Information Law is applicable to all agency records, that both the Adirondack Park Agency and the Review Board are "agencies" subject to the law, and that §86(4) of that statute defines the term "record" expansively to include:

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

The Court of Appeals has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended

that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

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

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

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

Perhaps most pertinent is a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he prepared the notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

The protocol further requires that "The mediation process, including but not limited to, the development of the agendas for the mediation sessions as well as the substantive discussions held during the mediation sessions, shall be kept confidential by the parties and the mediator to the fullest extent as allowed by law." Insofar as an agenda is created or an attendee during the mediation process makes notes indicating the parties' agreement to the items on an agenda for the next mediation session, we believe these materials would be "records" subject to rights conferred 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. Perhaps most pertinent here is §87(2)(g) which states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

Accordingly, we believe that notes created by public officials or employees of the Adirondack Park Agency and/or the Review Board during the course of the mediation process in question are "records" that fall within §87(2)(g). To the extent that such notes detail factual information, in our opinion, they would be required to be made public.

Similarly, although the protocol requires that "At the conclusion of the mediation process, or any mediation session, upon the request of a party which provided documents or other material to one or more parties, the recipients shall return the same to the originating party without retaining copies", in our opinion, such documents and materials are "records" that fall within the coverage of the Freedom of Information Law. Returning the document to the provider, in our view, would not remove the agency's responsibility to give effect to the Freedom of Information Law.

In keeping with the foregoing, we believe that other aspects of the protocol dealing with disclosure are inconsistent with law, particularly a provision requiring that "The parties and the mediator agree that government officials will seek to exempt from disclosure pursuant to the Freedom of Information Law all documents and records prepared for purposes of the mediation process. The parties, their designated representatives and consultants, as well as the mediator will not disclose information regarding the process, including draft and final settlement terms, to third parties, unless all parties agree otherwise" (page 3). Again, a promise or agreement regarding confidentiality cannot be sustained when none of the grounds for denial appearing in the Freedom of Information Law may justifiably be asserted.

In sum, insofar as the protocol may be inconsistent with the Open Meetings and Freedom of Information Laws, we believe that it is invalid and unenforceable.

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Mitchell Goroski

FOIL-AO-17174
OML-AO-4628

From: Jobin-Davis, Camille (DOS)
Sent: Monday, May 19, 2008 2:18 PM
To: Mr. Benja Schwartz
Subject: RE: a follow up to the email sent May 6th, 2008

Dear Mr. Schwartz:

In response to your question, my only concern would be whether the minutes are sufficiently descriptive to enable the public and others (i.e., future municipal officials), to ascertain the nature of the action taken. Is the reference number "2008-492" a contract number? Was the agreement described earlier in the minutes?

This is not to suggest that every aspect of the agreement must be memorialized in the minutes, but that the minutes should reflect, in my opinion, at a minimum, the nature of the agreement, or perhaps the town employee's name. As you may know, it is likely that the agreement itself is public. Based on the absence of information in the attached email, it is also likely that it would be difficult for the Town's records access officer to locate the agreement, upon receipt of a request.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
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http://www.dos.state.ny.us/coog/coogwww.html

OML-AO-4629

From: Jobin-Davis, Camille (DOS)
Sent: Monday, May 19, 2008 3:13 PM
To: 'Diana Wilson'
Subject: Open Meetings Law - meeting/quorum

Dear Ms. Wilson:

In order to qualify as a "meeting" of a public body subject to the Open Meetings Law, a quorum of the public body must be present. When less than a quorum of the Town Board gathers (2 of 5) with one member of the Planning Board, there is no quorum of either public body and therefore, the Open Meetings Law does not apply. Those who are gathered could always invite the public to attend, of course, however, however, the Open Meetings Law does not apply.

If you are interested, there are many advisory opinions under "M" for Meeting or "Q" for Quorum on our website, that address this and other related issues. Advisory opinions regarding the Open Meetings Law can be found at the following page:
http://www.dos.state.ny.us/coog/oindex.html

I hope this is helpful.

Camille

Camille S. Jobin-Davis, Esq.
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OML-AO-4630

From: Jobin-Davis, Camille (DOS)
Sent: Monday, May 19, 2008 2:52 PM
To: Bonnie Holmes
Subject: RE: External Audit Executive Session Katonah Lewisboro

Dear Bonnie:

You are correct. Pursuant to the Education Law, an audit committee of a school district may enter into executive session for purposes in addition to those set forth in the Open Meetings Law, as outlined in section 2116-c. I know it's a lot of legal language, but essentially, subdivision (7) of section 2116-c permits, in part, as follows:

"...a school district audit committee may conduct an executive session pursuant to section one hundred five of the public officers law [the Open Meetings Law] pertaining to any matter set forth in paragraphs b, c, and d of subdivision five of this section."

Subdivision (5) provides as follows:

"5. It shall be the responsibility of the audit committee to:

(a) provide recommendations regarding the appointment of the external auditor for the district;

(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 the trustees or board of education in interpreting such documents;..."

In sum, the language of paragraphs (b), (c) and (d) provides grounds for an audit committee to enter into executive session in addition to those that exist in the Open Meetings Law. It appears that the school board intends to meet with an external auditor in executive session "prior to the commencement of the audit", which, in my opinion, would be appropriate under section 2116-c(5)(b).

Camille

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bonnie

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4631

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May 21, 2008

Mr. William H. Hill
West Babylon Taxpayers Association Inc.
[redacted]

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

Dear Mr. Hill:

I have received your letter in which you referred to a request by a resident of the West Babylon Union Free School District to conduct a "public safety survey of a street crossing" thought to be dangerous. Although a study was conducted and a crossing guard assigned to the site, the resident requested an additional investigation to determine whether his/her child could receive bus transportation. The Board of Education indicated that such an investigation would cost six thousand dollars, and the President suggested that the issue be discussed during an executive session. You objected, but the Board's attorney apparently advised that an executive session could be held because "there were possible legal implications."

I have also received a letter from the President of the Board, indicating that you "shouted [your] objection from [your] seat" and "did not wait to be addressed, or acknowledged, as requested of every resident."

In this regard, I offer the following comments.

First, I believe that a public body, such as a board of education, is authorized to adopt reasonable rules to govern its own proceedings [see Education Law, §1709(1)]. The Board may, in my opinion, authorize members of the public to speak or preclude interruptions, shouting or outbursts in accordance with such rules.

Second, notwithstanding the foregoing, it does not appear that the subject at issue could properly have been discussed during an executive session. That a matter may involve "legal implications" does not necessarily enable a public body to enter into executive session.

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

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

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

In the instant situation, in my view, only to the extent that the Board discussed litigation strategy could an executive session have properly been held.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Carmine Galletta

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17178
OML-AO-4632

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May 21, 2008

Mr. Henry Silverman
[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. Silverman:

I have received your letter in which you described difficulty in obtaining records from the Town of Riverhead, specifically, a video recording and minutes of a meeting held by the Town Board on April 13, 2006. Although a DVD of the meeting was given to you, you wrote that it "does not work" and that a second request is being ignored. You asked that I "investigate" the matter.

As indicated in a letter addressed to you on April 24, 2007, the Committee on Open Government has neither the jurisdiction or the resources to conduct an investigation. Nevertheless, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and I point out that, pursuant to rules adopted pursuant to Article 57-A of the Arts and Cultural Affairs Law, audio and video recordings of meetings must be retained for a minimum of four months. Following the expiration of that period, they may be discarded or, when possible, erased and reused. Whether recordings of meeting of the Town Board are routinely kept for more than four months is unknown to me. If they continue to exist, I believe that they must be made available in accordance with the Freedom of Information Law.

Second, judicial decisions indicate that the public may audio or video record open meetings of public bodies, so long as the use of a recording device is neither obtrusive nor disruptive [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)].

Lastly, a "work session" is a "meeting" subject to the Open Meetings Law [see Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)]. That being so, minutes of work sessions must be prepared and made available in accordance with

§106 of that law. Section 106(1) provides what might be viewed as minimum requirements concerning the contents of minutes and states that:

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

Only to the extent that the events referenced above occur, i.e., the making of motions, proposals, resolutions or actions taken, must minutes be prepared.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 4633

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May 21, 2008

E-Mail

TO: Mr. David Radovanovic

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. Radovanovic:

I have received your letter in which you raised issues involving the Village of Saugerties pertaining "to Open Meetings Laws and general governance laws."

In this regard, I point out that the advisory jurisdiction of the Committee on Open Government in the context of the issues raised relates to the Open Meetings Law. Specific guidance cannot be offered concerning "general governance laws." Since several of the issues raised relate to the authority of the Mayor, it is suggested that you review §4-400 of the Village Law, which describes the powers and duties of a mayor of a village.

Insofar as the issues that you raised relate to the Open Meetings Law, I offer the following comments.

First, §104 the Open Meetings Law requires that every meeting of a public body, such as a village board of trustees, must be preceded by notice given to the news media and to the public by means of posting. However, the requirement merely involves notice indicating the time and place of a meeting. There is no obligation imposed by the Open Meetings Law concerning the subject or subjects to be considered during a meeting.

Similarly, the Open Meetings Law includes no reference to agendas. A public body may choose to prepare an agenda, but it is not required to do so. Further, if an agenda is prepared, unless a public body has adopted a rule to the contrary, there is no obligation to abide by the agenda.

Next, in instances in which action may be taken only by a board of trustees, and not by a mayor acting unilaterally, the action may be taken only at a meeting held in accordance with the Open Meetings Law. In those cases, action is valid only pursuant to a vote approved by an affirmative vote of a majority of the total membership of the board (see General Construction Law, §41).

Lastly, §105(1) of the Open Meetings Law permits a public body to conduct an executive session for reasons specified in paragraphs (a) through (h) of that provision. To do so, a motion must be made during an open meeting, indicating the subject or subjects to be discussed, and the motion must be carried by a majority vote of the total membership of a public body. Therefore, a public body may choose to conduct executive sessions in appropriate circumstances, but it is not required to do so.

One of the grounds for entry into executive session authorizes a public body to conduct a closed session to discuss or engage in collective bargaining negotiations with a public employee union. Although the Open Meetings Law imposes no requirement that an executive session must be held, it has been found, based on past practice and the provisions of the Taylor Law, which deals with the relationship between public employers and public employee organizations, that collective bargaining negotiations must be conducted in private [County of Saratoga v. Newman, 476 NYS2d 1020 (1984)]. Although I disagree with the determination, it is the only judicial decision that addresses the issue that you raised and, therefore, has precedential effect.

I hope that I have been of assistance.

RJF:jm

cc: Board of Trustees

OML-AO - 4634

From: Freeman, Robert (DOS)
Sent: Thursday, May 22, 2008 4:42 PM
To: sarah blackmer
Subject: RE: School Board member attendance in executive session

The Open Meetings Law in §105(2) indicates that the members of a public body, such as a board of education, have the right to attend an executive session held by the public body. That being so, I do not believe that the president of a board has the authority to "send" another member out of an executive session. The member may, however, excuse or recuse him/herself for consideration of a matter in the event of a possible conflict of interest or other ethical concern.

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

FOIL-AO-17189
OML-AO-4635

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May 27, 2008

Ms. Bonnie Holmes
[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. Holmes:

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

According to your letter, the president of the Katonah Lewisboro School District Board of Education "is making BOE decisions in private without notifying all BOE trustees" and "[m]inority BOE members are left out of the loop." Additionally, you wrote that you requested a record from the district that you believe exists, that you were told that there is no record, but that you "know for a fact that the document does...exist."

In this regard, I offer the following comments.

First, from my perspective, a public body, such as a board of education, may validly conduct a meeting or carry out its authority only at a meeting during which a majority of its members has physically convened or during which a majority has convened by means of videoconferencing, and even then, only when reasonable notice is given to all of the members.

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

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

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

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

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

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

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

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

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

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

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

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

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

In view of that definition and others, I believe that a meeting, i.e., the "convening" of a public body, involves the physical coming together of at least a majority of the total membership of such a body, i.e., the 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 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. Moreover, §41 requires that reasonable notice be given to all the members. If that does not occur, even if a majority is present, I do not believe that a valid meeting could be held or that action could validly be taken.

In short, in a situation in which only the Board is authorized to take action or make a decision, clearly a single member may not validly do so unilaterally. Rather, in that situation, action may be taken only at a meeting preceded by reasonable notice given to all of the members, and by means of an affirmative vote of a majority of the Board's total membership.

Lastly, although the issue was considered in an earlier opinion addressed to you, 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, while I am not suggesting that they apply, §89(8) of the Freedom of Information Law and §240.65 of the Penal Law include essentially the same language, and the latter states that:

> "A person is guilty of unlawful prevention of public access to records when, with intent to prevent the public inspection of a record pursuant to article six of the public officers law, he willfully conceals or destroys any such record."

In my view, the preceding may be applicable in two circumstances: first, when an agency employee receives a request for a record and indicates that the agency does not maintain the record even though he or she knows that the agency does maintain the record; or second, when an agency employee destroys a record following a request for that record in order to prevent public disclosure of the record. I do not believe that §240.65 applies when an agency denies access to a record, even though the basis for the denial may be inappropriate or erroneous, or when an agency cannot locate a record that must be maintained.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Education

OML-AO-4636

From: Freeman, Robert (DOS)
Sent: Tuesday, May 27, 2008 11:02 AM
To: Mr. Ron Lombard, News 10 Now
Subject: Cameras in City Hall

Dear Mr. Lombard:

As indicated in my voice message, the policy adopted by the Binghamton City Council appears to be reasonable.

It is noted that the functions of this office relate to the Open Meetings Law, which is silent regarding the use of cameras or recording devices at open meetings of public bodies. However, there are several judicial decisions indicating that anyone may record an open meeting, so long as the use of the recording device is neither disruptive nor obtrusive. With respect to the use of cameras or recording devices in City Hall in contexts other than meetings subject to the Open Meetings Law, again, I know of no statute that deals with the issue. I believe that the general principle is that a government agency has the authority to adopt reasonable rules in relation to its activities and the activities occurring in government facilities.

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

Robert J. Freeman
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OML-AO-4637

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May 27, 2008

E-Mail

TO: Mr. Rick Vogan

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. Vogan:

As you are aware, I have received your letter concerning an issue arising in relation to the Open Meetings Law. Please accept my apologies for the delay in response.

You indicated that you serve on a board of education and that the owner of a business adjacent to district property has expressed interest in purchasing a portion of the parcel. You wrote that it was suggested that the Board could discuss the matter in executive session "because it could involve potential litigation. It is your view that neither the exception concerning discussions involving litigation nor that pertaining to the sale of real property would apply, because "the possible sale or lease has already been discussed in public..."

I agree with your understanding of the law, and in this regard, I offer the following comments.

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

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

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

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

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

The provision pertaining to a real property transaction, §105(1)(h) permits a public body to enter into executive session to discuss:

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

In my opinion, the language quoted above, like the other grounds for entry into executive session, is based on the principle that public business must be discussed in public unless public discussion would in some way be damaging, either to an individual, for example, or to a government in terms

of its capacity to perform its functions appropriately and in the best interest of the public. It is clear that §105(1)(h) does not permit public bodies to conduct executive sessions to discuss all matters that may relate to the transaction of real property; only to the extent that publicity would "substantially affect the value of the property" can that provision validly be asserted.

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

I hope that I have been of assistance.

RJF:jm

OML-AO-4638

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, May 29, 2008 10:04 AM
To: Ms. Bonnie Holmes
Subject: RE: Executive Session May 22,2008 to discuss Internal Audit Report

Ms. Holmes:

My sincere apology for not responding sooner. I was out of the office unexpectedly last week, and then misplaced your emails. I just received a copy of the opinion that Mr. Freeman wrote to you on May 27, 2008, and believe it may address the questions you raised in this email and the others that you recently sent.

In addition, the following may be of interest to you: when there is an intent to ensure the presence of less than a quorum at any given time in order to evade the Open Meetings Law, there is a judicial decision that infers that such activity would contravene that statute. As stated in Tri-Village Publishers v. St. Johnsville Board of Education:

"It has been held that, in order for a gathering of members of a public body to constitute a 'meeting' for purposes of the Open Meetings Law, a quorum must be present (Matter of Britt v County of Niagara, 82 AD2d 65, 68-69). In the instant case, there was never a quorum present at any of the private meetings prior to the regular meetings. Thus, none of these constituted a 'meeting' which was required to be conducted in public pursuant to the Open Meetings Law.

"We recognize that a series of less-than-quorum meetings on a particular subject which together involve at least a quorum of the public body could be used by a public body to thwart the purposes of the Open Meetings Law...However, as noted by Special Term, the record in this case contains no evidence to indicate that the members of respondent engaged in any attempt to evade the requirements of the Open Meetings Law" [110 AD 2d 932, 933-934 (1985)].

In Tri-Village, the Court found no evidence indicating an intent to circumvent the Open Meetings Law when a series of meetings were held, each involving less than a quorum of a board of education. Nevertheless, one might interpret the passage quoted above to mean that, when there is an intent to evade the law by ensuring that less than a quorum is present, such an intent would violate the Open Meetings Law. If there was an intent to circumvent the Open Meetings Law in the context of the situation of your concern, it is possible that a court would find that the Open Meetings Law has been infringed.

Again, my apology for not responding sooner. I hope this is helpful.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
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OML-AO-4639

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, May 28, 2008 5:04 PM
To: Amy Fischetti
Subject: Open Meetings Law - public body

Amy:

As per our conversation, this will confirm that in my opinion the board of the Colonial Farmhouse Restoration Society of Bellerose, Inc. is not a public body subject to the Open Meetings Law. My opinion is based on the information you provided and my review of the Society's website, including that the Society is contractually obligated and licensed to operate the museum, which is owned by the New York City Department of Parks; that it is not a public corporation; that while there are two ex officio members of the board from the city and the county, the remaining board members are elected by dues-paying Society members; and, that the mission of the Society is not a statutory county or city obligation.

Here is a link to an advisory opinion that I found helpful:

http://www.dos.state.ny.us/coog/otext/o3194.htm

Should you require an advisory opinion, please inform in writing. Thank you, and I hope this is helpful to you.

Camille

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OML-AO-4640

From: Jobin-Davis, Camille (DOS)
Sent: Monday, June 02, 2008 2:55 PM
To: Mr. Thomas Ledbetter, Newark Board of Education Member
Subject: RE: Open Meetings Law - executive session

Thomas:

In response, and hopefully to clarify my opinion, if part of what individual board members intend is to seek removal of another board member, and they want to discuss the board member's behavior in light of this possibility, then I believe the discussion in executive session is appropriate. If the purpose of the executive session is only to criticize a board member's behavior, on the other hand, then I do not believe it is an appropriate topic for executive session.

With respect to the motion, I believe it should be "I move to enter into executive session to discuss matters leading to the removal of a particular person."

I hope this is helpful.

Camille

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OML-AO-4641

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June 5, 2008

E-Mail

TO: Mr. Michael Thayer

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. Thayer:

I have received your letter in which you asked whether there are "any regulations about having alcohol served and/or consumed at a public meeting." Further, if a meeting is held "in a building with a liquor license that allows alcohol", you asked whether "officers and the public at a public meeting [may] have alcohol at the meeting during session."

In this regard, there is nothing in the Open Meetings Law or any other law of which I am aware that deals with the consumption of alcohol during an open meeting of a public body held in accordance with that statute. However, as a general matter, a public body has the authority to adopt reasonable rules to govern its own proceedings. Therefore, if a public body wants to prohibit the consumption of alcohol during its meetings, I believe that it would have the authority to do so as a means of ensuring decorum and the avoidance of disruption.

Since you referred to a meeting that might be held in a facility that is licensed to serve liquor, I note that it has been advised that it may be unreasonable and, therefore, contrary to law, for a public body to conduct a meeting in a restaurant, for example. Although the Open Meetings Law does not specify where meetings must be held, §103(a) of the Law states in part that "Every meeting of a public body shall be open to the general public..." Further, the intent of the Open Meetings Law is clearly stated in §100 as follows:

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

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

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

From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In my opinion, it would be inappropriate and inconsistent with the Open Meetings Law to hold a meeting in a restaurant or other facility where those who attend are expected to make a purchase. Any member of the public has the right to attend meetings of public bodies. In my view, the location of the meeting in that instance would serve as an impediment to free access by the public.

I hope that I have been of assistance.

RJF:jm

OML-AO-4642

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, June 10, 2008 9:26 AM
To: Debra Urbano-DiSalvo, Village Attorney, Village of Hempstead
Subject: Open Meetings Law - attorneys fees to municipality

Debra:

In response to your question, please be advised that section 107(2) of the Open Meetings Law gives the court the discretionary authority to award costs and reasonable attorneys fees "in its discretion, to the successful party." Accordingly, it is my opinion that a court could award attorneys fees to a municipality that successfully defended itself in an Article 78 proceeding.

Please note that while I believe that a court could award attorneys fees to a successful municipality, I know of no case law in which court has made such an award.

I hope this is helpful. Thank you for your attention yesterday.

Camille

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June 12, 2008

Mr. Michael J. Kolesar
Comptroller
Town of Greenburgh
177 Hillside Avenue
Greenburgh, NY 10607

The staff of the Committee on 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. Kolesar:

I have received your inquiry concerning a "preliminary budget planning meeting" held by a town board in which department heads "prepare various scenarios which involve the elimination of personnel." You wrote that a discussion of that nature "may involve...why this person vs. some other person, and thus almost or in fact is a performance discussion." If that occurs, you asked whether there is a "basis for keeping the meeting closed to the general public."

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

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

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

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

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

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

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

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department or perhaps the creation or elimination of positions, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". For example, if a discussion involves staff reductions or layoffs due to budgetary concerns, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoff relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In none of the instances described would the focus involve a "particular person" and how well or poorly an individual has

performed his or her duties. 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).

If, however, a discussion focuses on a particular employee and his or her performance, to that extent, an executive session would likely be permissible. In that situation, the discussion would pertain to the "employment...history of a particular person..." It is my understanding, though, that layoffs in many instances must be based on seniority. When that is so, the performance of individual employees likely is not at issue.

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

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

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the

> 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

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 - 4644

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June 13, 2008

Mr. Don Airey
DESCO Associates LLC
P.O. Box 439
Richmondville, NY 12149

The staff of the Committee on 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 and apologize for the delay in response. You have questioned the propriety of a practice of the Richmondville Town Board that permits people to speak at meetings, so long as they "not quote any source or expert unless [they] have that expert **physically present** at the meeting (emphasis yours).

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

While public bodies have the right to adopt rules to govern their own proceedings, the courts have found in a variety of contexts that such rules must be reasonable. 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)].

In this instance, in consideration of the infinite number of sources or experts that may exist, as well as the ability to demonstrate and determine individuals' status as experts or the names of publications through the use of written materials, I believe that a court would find the requirement to which you referred to be unreasonable and, therefore, invalid.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

OML-AO-4645

From: Freeman, Robert (DOS)
Sent: Thursday, June 19, 2008 9:38 AM
To: David Newman

Dear Mr. Newman:

As you know, I have received your inquiry concerning unapproved minutes stamped as "draft copy" that are later approved without change. You asked whether it is proper for the clerk to "cross out the Draft Copy and then stamp them Approved."

In short, there is nothing in either the Freedom of Information or Open Meetings Laws that deals with the issue. From my perspective, the clerk's proposal is reasonable. Further, if a question later arises concerning the content of your copy of the minutes, it can be compared with the minutes maintained by the clerk.

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

OML-AO-4646

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June 19, 2008

Hon. William Collier
Supervisor
Town of Catlin
1448 Chambers Road
Beaver Dams, NY 14812

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

Dear Supervisor Collier:

I have received your letter in which you requested an advisory opinion "concerning a Town Clerk's responsibilities concerning the minutes for Town Board meetings." You wrote that minutes of those meetings "are always late."

In this regard, from my perspective, it is clear that minutes must be prepared and made available to the public within two weeks of the meetings to which they relate, irrespective of whether they are approved.

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

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

In view of the foregoing, again, 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.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Tina Scriven, Town Clerk
Hon. Charles Austin, Councilmember
Hon. Gail McIntire, Councilmember
Hon. Adam Wead, Councilmember
Timothy Mattison, Town Attorney

OML-AO-4647

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, June 24, 2008 4:36 PM
To: Christian L. Vischi, Town Clerk-Treasurer, Village of Earlville
Subject: RE: Freedom of Information Law

Christian:

In response to your query, please note that a "meeting" is a gathering of a quorum of a "public body" for the purpose of discussing public business. The Open Meetings Law does not apply when there is no quorum present. In your example of a gathering of the Mayor, the Clerk and the consultant engineer, the OML would not apply because none of those persons are members of the same public body.

A "public body" is an entity consisting of two or more persons charged with performing a governmental function. This may be the distinction which is confusing. In a village, the village board is a public body. Generally, a gathering of a quorum of the board to discuss village business would be a meeting. When less than a quorum of the board is present, however, even when discussing village business, the OML does not apply.

I hope this is helpful.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
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STATE OF NEW YORK
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June 25, 2008

Mr. Don Airey
DESCO Associates LLC
P.O. Box 439
Richmondville, NY 12149

The staff of the Committee on 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 and hope that you will accept my apologies for the delay in response.

You referred to a "secret" meeting of the Richmondville Setback Committee, an entity whose members were appointed by the Town Board. The meeting at issue was held without prior notice to the public, and the Chair of the Committee contended that the Open Meetings Law does not apply.

Assuming that the Committee includes persons other than members of a statutory body, such as the town board or a planning board, and that it has no power to take final and binding action, I would agree that it is not required to comply with the Open Meetings Law.

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

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

Based on the foregoing, a public body is, in my view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body. The definition refers to committees, subcommittees and similar bodies of a public body, and judicial interpretations indicate that if a committee, for example, consists solely of members of a particular public body, it constitutes a public body [see e.g., Glens Falls Newspapers

v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993)]. For instance, in the case of a legislative body consisting of seven members, four would constitute a quorum, and a gathering of that number or more for the purpose of conducting public business would be a meeting that falls within the scope of the Law. If that entity designates a committee consisting of three of its members, the committee would itself be a public body; its quorum would be two, and a gathering of two or more, in their capacities as members of that committee, would be a meeting subject to the Open Meetings Law.

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

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

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Marty Thornsen, Chair, Setback Committee

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4649

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June 25, 2008

Mr. Barton D. Graham
[redacted]

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

Dear Mr. Graham:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response.

According to your letter, you are a former member of the Elmira City School District Board of Education, and a controversy arose concerning a Board election in 2007 that was discussed during an executive session. The minutes indicate that a motion was made to enter into executive session "for discussions about proposed, pending or current litigation." Following that executive session, you and others were told that "any matters considered or discussed in that meeting is [sic] confidential, cannot be mentioned or disclose in public and can lead to sanctions under GML 805 (otherwise known as the Nett decision), and presumably subject to Sec. 195 of the Penal Code."

You have raised a series of issues relating to the foregoing, and to the extent that they relate to the statutes within the jurisdiction of this office, I offer the following comments.

First, I am unaware of the specific nature of the discussion during the executive session to which you referred. However, I point out that §105(1)(d) of the Open Meetings Law, the so-called litigation exception, has been construed to permit a public body, such as a board of education, to conduct an executive session to discuss its litigation strategy in private, so as not to divulge its strategy to its adversary, who may be present at the meeting. Concurrently, it was held that the mere threat, fear or possibility of litigation, without more, was insufficient to justify holding an executive session [see Weatherwax v. Town of Stony Point, 97 AD2d 840 (1983)].

As you suggested, it has also been held that a verbatim rendition of a ground for entry into executive session fails to comply with the Open Meetings Law. Specifically, in Daily Gazette v. Town Board, Town of Cobleskill, it was 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].

Further, in a decision rendered by the Appellate Division, one of the issues involved the adequacy of a motion to conduct an executive session to discuss what was characterized as "a personnel issue", and it was held that:

> "...the public body must identify the subject matter to be discussed (see, Public Officers Law § 105 [1], and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY2d 807)" [Gordon v. Village of Monticello, 207 AD 2d 55, 58 (1994)].

Because a motion must name the case that is the subject of a discussion in executive session, I do not believe that disclosure of the index number relating to that case could be construed as a failure to abide by the decision of the Commissioner in Application of Nett and Raby (No. 15305, October 25, 2005). In short, when the name of a judicial proceeding is made in a motion to enter into executive session, which is required to comply with the Open Meetings Law, I do not believe that the index number relating to the proceeding could be characterized as "confidential."

Second, I disagree with the Commissioner's decision in Nett.

Even when there was a basis for entry into executive session, there is no obligation to convene in private. Section 105(1) prescribes a procedure that must be accomplished in public before an executive session may be held. That provision states that:

> " Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

If no motion is made to enter into executive session, or if a motion to conduct an executive session is not approved, a public body is generally free to discuss issues in public.

The only instances, in my view, in which members of a public body are prohibited from disclosing information would involve matters that are indeed confidential because a statute forbids disclosure. 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."

The Commissioner's decision states as follows:

> "In addition to a board member's general duties and responsibilities, General Municipal Law §805-a(1)(b) provides that no municipal officer or employee (including a school board member) shall 'disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests.' It is well settled that a board member's disclosure of confidential information obtained at an executive session of a board meeting violates §805-a(1)(b) (see Applications of Balen, 40 Ed Dept Rep 250, Decision No. 14,474; Application of the Bd. of Educ. of the Middle Country Central School Dist., 33 id. 511, Decision No. 13,132; Appeal of Henning and Rohrer, 33 id, 232, Decision No. 13,035).
>
> "Less clear is what constitutes 'confidential' information. The term 'confidential' is not defined in the General Municipal Law and the legislative history of §805-a does not provide any additional guidance into the meaning of that word...
>
> "Absent a clear statutory definition, and given the importance of ensuring a uniform application in the educational system, the interpretation of 'confidential' in the school context is a matter best left to the Commissioner (see Komyathy v. Bd. of Educ. Wappinger Central School District No. 1, 75 Misc. 2d 859). Information that is meant to be kept secret is by general definition considered to be 'confidential' (see Black's Law Dictionary [8th Ed. 2004])."

While some interpretations of law might be "best left to the Commissioner", I point out that each of the precedents cited in the excerpt of the decision quoted above involve the Commissioner's own decisions. Avoided, however, are judicial decisions that are contrary to his conclusion.

Many judicial decisions have focused on access to and the ability to disclose records, and this office has considered the New York Freedom of Information Law, the federal Freedom of Information Act, and the Open Meetings Law in its analyses of what may be "confidential." To be confidential under the Freedom of Information Law, I believe that records must be "specifically exempted from disclosure by state or federal statute" in accordance with §87(2)(a). Similarly, §108(3) of the Open Meetings Law refers to matters made confidential by state or federal law as "exempt" from the provisions of that statute.

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

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

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

> "Exemption 3 excludes from its coverage only matters that are:
>
> > *specifically* exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) **requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue**, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.
>
> "5 U.S.C. § 552(b)(3) (1982) (emphasis added). Records sought to be withheld under authority of another statute thus escape the release requirements of FOIA if – and only if – that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure. The Supreme Court has equated 'specifically' with 'explicitly.' *Baldridge v. Shapiro*, 455 U.S. 345, 355, 102 S. Ct. 1103, 1109, 71 L.Ed.2d 199 (1982). '[O]nly *explicitly* non-disclosure statutes that evidence a

> congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption.' *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C.Cir.1979) (emphasis added). In other words, a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure"[Reporters Committee for Freedom of the Press v. U.S. Department of Justice, 816 F.2d 730, 735 (1987); modified on other grounds,831 F.2d 1184 (1987); reversed on other grounds, 489 U.S. 789 (1989); see also British Airports Authority v. C.A.B., D.C.D.C.1982, 531 F.Supp. 408; Inglesias v. Central Intelligence Agency, D.C.D.C.1981, 525 F.Supp, 547; Hunt v. Commodity Futures Trading Commission, D.C.D.C.1979, 484 F.Supp. 47; Florida Medical Ass'n, Inc. v. Department of Health, Ed. & Welfare, D.C.Fla.1979, 479 F.Supp. 1291].

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

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

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

The only situations in which an agency cannot disclose would involve those instances in which a statute other than the Freedom of Information Law prohibits disclosure. The same is so under the federal Act. While a federal agency *may* withhold records in accordance with the grounds for denial, it has discretionary authority to disclose. Stated differently, there is nothing inherently confidential about records that an agency may choose to withhold or disclose; only when an agency has no discretion and must deny access would records be confidential or "specifically exempted from disclosure by statute" in accordance with §87(2)(a).

The same analysis is applicable in the context of the Open Meetings Law. While that statute authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), again, there is no requirement that an executive session be held even though a public body has the right to do so. The introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is

not carried, the public body could either discuss the issue in public or table the matter for discussion in the future.

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

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

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

Based on the foregoing, I believe that the Commissioner's conclusion that information that *may* be withheld or that information that *may* be discussed in executive session is confidential is inaccurate and contrary to the weight of judicial authority.

Lastly, you asked whether former members of a board of education are bound by Nett. In my view, again, the only instances in which a board member, present or former, is prohibited from disclosing information acquired during a properly held closed session would involve those situations in which a statute, i.e., the Family Educational Rights and Privacy Act, forbids disclosure.

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-4650

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June 25, 2008

Mr. Raymond F. Guentner
[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. Guentner:

I have received your letter and the materials relating to it. Please accept my apologies for the delay in response.

Among the materials is a copy of minutes of a meeting of the Board of Education of the Gates-Chili School District indicating that two motions were made and carried during an executive session to increase the salary of the Superintendent. In addition, a news article states that a lump sum retirement incentive payment was approved by the Board of Education of the Greece Central School District during an executive session.

You have asked whether those actions were appropriate and valid. From my perspective, neither board could validly have taken the actions at issue during executive sessions.

In this regard, 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.

Notwithstanding the foregoing, I believe that the actions taken may be found to be null and void only by a court and, unless that occurs, the Boards' actions remain in effect.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education, Gates-Chili School District
Board of Education, Greece Central School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4651

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June 25, 2008

E-Mail

TO: Richard Sullivan, Chair, Town of Highlands Planning Board

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. Sullivan:

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

You wrote that you serve as Chairman of the Planning Board in the Town of Highlands, and you raised a series of issues relating to the use of a television camera at meetings, access to a recording of a meeting, as on a DVD, the content of minutes, and the ability of the public to speak during meetings. In this regard, I offer the following comments.

First, you are correct in your view that minutes of meetings need not be verbatim. On the contrary, the Open Meetings Law provides what might be characterized as minimum requirements concerning the content of minutes. Specifically, §106(1) of that statute pertains to minutes of open meetings and states that:

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

Second, neither the Open Meetings Law nor another statute contain provisions concerning the public's right to speak at meetings or the right to record meetings. However, the courts have held in a variety of contexts that a public body, such as a town board or a planning board, is authorized to adopt reasonable rules to govern its proceedings. Therefore while public bodies are not required to permit the public to speak during meetings, many do so, and when they choose to do so, it has been advised that they adopt reasonable rules that treat those who wish to speak equally.

Similarly, in Mitchell v. Board of Education of Garden City Union Free School District, the Appellate Division unanimously affirmed a decision of Supreme Court, Nassau County, which annulled a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings and directed the board to permit the public to tape record public meetings of the board. 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" [113 AD2d 924, 925 (1985)].

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

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

In view of the judicial determination rendered by the Appellate Division, I believe that a member of the public may tape record open meetings of public bodies, so long as the tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process. I point that essentially the same conclusion was reached with regard to the use of video recording devices in Peloquin v. Arsenault, 616 NYS2d 716 (1994), and later by the Appellate Division in Csorny v. Shoreham-Wading River Central School District [759 NYS2d 513, 305 AD2d 83 (2003)].

Third, in my view, a recording, whether audio or video, of a meeting clearly falls within the coverage of the Freedom of Information Law. That statute pertains to agency records, and §86(4) of the Law defines the term "record" expansively to include:

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

Based on the foregoing, when a town maintains a recording of a meeting, the tape, DVD or film 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, there is case law indicating that a tape recording of an open meeting is accessible for listening and/or copying under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978].

Lastly, the 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 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.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 27, 2008

Mr. Benja Schwartz
Save Cutchogue
[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. Schwartz:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain deliberations of the Town Board of Southold. Your questions pertain to grounds for entry into executive session, and discussions held in private pursuant to the attorney-client privilege. In an effort to provide guidance, we offer the following comments.

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

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

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

It has been held judicially that :

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

> Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807)"

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

With respect to your question concerning the sufficiency of a motion to enter into executive session to discuss "the employment history of a particular person (or persons)" pursuant to §105(1)(f), without repeating legal analysis set forth in previous advisory opinions, this will confirm

that it is our opinion that this motion is proper and sufficient. Such a motion, in our opinion, would not have to identify the person or persons who may be the subject of a discussion, but it would enable those in attendance to have the ability to know that there is a proper basis for entry into an executive session.

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

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

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

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

In response to your question of whether the motion to exclude the public should specifically mention the potential for impact on the property value, in keeping with the provisions cited above, we advise that it should.

With regard to the Town Attorney's ability to discuss matters with the Town Board in private, we note that there is another vehicle for excluding the public from a meeting of a public body. 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.

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm
cc: Town Board
Patricia Finnegan, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 30, 2008

Mr. Leonard D. Summa
[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. Summa:

I have received your letters and the materials relating to them. Please accept my apologies for the delay in response. You raised several issues relating to the implementation of the Open Meetings Law by the Rome City School District Board of Education.

An initial question involves the enforcement of the Open Meetings Law and the penalty that can be imposed when there is failure by a public body, such as the Board of Education, to comply with that law. In this regard, §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 possible issue is whether a failure to comply with the notice requirements imposed by the Open Meetings Law was "unintentional".

In addition, subdivision (2) of §107 authorizes a court to award attorney's fees to the successful party. I note that in a decision rendered by the Court of Appeals, the State's highest court, it was held that when a court determines that a flagrant violation of the Open Meetings Law occurred and when a request is made for an award of attorney's fees, it would be an abuse of discretion not to award such fees [see Gordon v. Village of Monticello, 87 NY 2d 124 (1995)]. I point out, too, that legislation has been approved by both houses of the State Legislature and will be sent to the Governor shortly (A.1033-A). If signed by the Governor, that provision will provide that:

> "If a court determines that a vote was taken in material violation of this article. Or that substantial deliberations relating thereto occurred in private prior to such vote, the court shall award costs and reasonable attorney's fees to the successful petitioner, unless there was a reasonable basis for a public body to believe that closed session could properly have been held."

I am hopeful that the bill will be signed into law and that it will encourage compliance.

Several elements of the materials relate to retreats and work sessions. As those gatherings were described in the materials, I believe that they were clearly "meetings" that should have been conducted in accordance with the Open Meetings Law. Section 102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". 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 situations described in the materials, since retreats clearly involved matters of public business, I believe that they constituted "meetings" required to have been held in a manner consistent with the requirements of the Open Meetings Law.

Lastly, documentation acquired from the District refers to executive sessions held prior to "work sessions." Based on the language of the law and judicial interpretation, an executive session cannot be held prior to a meeting. As you may be aware, the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of

> the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

OML-AO-4654

From: Freeman, Robert (DOS)
Sent: Monday, July 07, 2008 8:08 AM
To: Roy Mallette
Subject: RE: Special meeting notice

Dear Mr. Mallette:

Section 62(2) of the Town Law states in 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 members of the board of the time when and the place where the meeting is to be held." That provision is silent regarding the manner in which the two days ten notice must be given. I point out that §62(2) pertains to notice to the members and is separate from the notice requirements imposed by the Open Meetings Law.

Robert J. Freeman
Executive Director
Committee on Open Government
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OML-AO-4655

From: Freeman, Robert (DOS)
Sent: Wednesday, July 09, 2008 5:11 PM
To: Jane Collins, Superintendent, Salmon River Central School District
Subject: Board member in executive session

Dear Ms. Collins:

I have received your letter in which you wrote that a newly elected member of the Board of Education is the spouse of the District's school business executive. That being so, you raised the following question: "Should this Board member attend an executive session that might involve a personnel matter pertaining to her husband?" Also, if a vote is to occur involving a contract extension or a pay increase for her husband, you asked whether the Board member may vote.

In this regard, the Open Meetings Law does not include provisions concerning recusal or conflicts of interest and, therefore, I have neither the jurisdiction nor the expertise to respond to the second question.

With respect to the first, §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, the only persons who have a right to attend executive sessions are the members of a public body, such as the Board of Education, and it is clear in my view that the newly elected Board member has the right to attend any executive session held by the Board. Again, whether it would be wise or appropriate to do so in instances in which her husband may be affected involves a separate question that is not addressed by the Open Meetings Law.

I hope that I have been of assistance.

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OML-AO-4656

From: Freeman, Robert (DOS)
Sent: Thursday, July 10, 2008 8:16 AM
To: Cathy Pisani, Councilmember, City of Peekskill
Subject: RE: Legal question from the great City of Peekskill

Good morning - -

Unless there is a local law that specifies otherwise, the only people who have the right to attend an executive session are the members of the body conducting the executive session. Section 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." Therefore, in the context of your question, only the members of the Planning Commission have a right to attend an executive session of the Commission. However, the Commission could authorize you or others to attend, assuming that doing so is reasonable under the circumstances.

Hope this helps and that all is well.

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OML-AO-4657

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, July 24, 2008 11:44 AM
To: 'Marcia Rowe Smalt
Subject: Open Meetings Law - public comment

Dear Ms. Marcia Rowe Smalt:

This is in response to the three requests you submitted through the website for the Committee on Open Government.

Your request: "1. If a public body requires prior notification to be placed on the agenda for public comment, how much prior notification is required by law?"

My response: Because a public body may impose reasonable rules for public participation at meetings subject to the Open Meetings Law, the length of time required must be "reasonable". In my opinion, one week prior to the meeting may be reasonable, depending on the circumstances. Please see advisory opinions on our website of OML opinions (http://www.dos.state.ny.us/coog/oindex.html) under "P" for "Public Participation".

Your request: "2. Is it up to the public body as to how long one would have to speak or is there a minimum requirement?"

My response: Essentially, as indicated above, because a public body may impose reasonable rules on public participation, in our opinion the length of time a person is permitted to speak cannot by tied to whether they speak in favor of, or opposed to a particular issue or item. The amount of time each person is permitted to speak must be reasonable, and a public body can adopt reasonable rules to govern public participation. Generally, I believe 3-5 minutes per person is accepted practice. Please see advisory opinions referenced above.

Your request: "3. If a public body has a 5 board panel and 2 of the members or a Mayor and Town Supervisor at a board meeting indicate they would get together at a later date to discuss the particulars of Real Estate transfer of a private building to a village and/or town, is that subject to the open meetings law?"

My response: whether a gathering of public officials is a "meeting" subject to the OML is a question of whether a quorum of a public body is gathered together to discuss the business of the public body. For example, if three members of a five member board gathered to discuss board business, it would be subject to the OML. In your facts, 2 members of a 5 member board gather, but because 2 members do not constitute a quorum, the gathering is not a meeting subject to OML. Similarly, if the Mayor and the Supervisor meet, because they serve on separate boards, that gathering would not constitute a meeting of a quorum of a particular public body. For a more complete legal analysis, please review advisory opinions at the website mentioned above, under "M" for "Meeting".

I hope that this is helpful to you.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
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FOIL-AO-17257
OML-AO-4658

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, July 24, 2008 10:28 AM
To: Mary Maitino
Subject: Open Meetings Law and Freedom of Information Law

Dear Mary Maitino:

This is in response to the request you made through the website of the Committee on Open Government.

I've read your correspondence with the International Charter School of Schenectady, and can confirm your opinion that meeting notices must be posted in a designated location. The following is an advisory opinion to that effect, that I believe you will find helpful: http://www.dos.state.ny.us/coog/otext/o4127.htm You may find it helpful to peruse other advisory opinions on our website of OML opinions (http://www.dos.state.ny.us/coog/oindex.html) under "N" for "Notice".

I also note that your request for a financial report was denied because it had not yet been presented to the Board of Trustees. Although they are in draft form, and may misrepresent the financial status of the school, in my opinion they are records subject to the FOIL, and upon request, must be disclosed in a timely manner. See: http://www.dos.state.ny.us/coog/ftext/f15359.htm

Finally, the following will confirm your opinion that no fee can be required for records that can be transmitted electronically: http://www.dos.state.ny.us/coog/ftext/f15854.htm Additional advisory opinions regarding fees can be found on our website of FOIL opinions (http://www.dos.state.ny.us/coog/findex.html) under "F" for "Fees".

I hope this is helpful to you.

Camille

Camille S. Jobin-Davis, Esq.
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FOIL-AO- 17274
OML-AO- 4659

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, July 30, 2008 1:18 PM
To: Hon. Helen T. Rose, Herkimer County Legislator
Subject: RE: Open Meeting Law

Dear Helen:

In response to your first question, in general, when moving to enter into executive session, a public body must be more articulate than the statutory language of section 105 of the Open Meetings Law. 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)." Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra.

With specific respect to a motion to enter into executive session to discuss litigation, I believe you will find the following advisory opinion directly on point: http://www.dos.state.ny.us/coog/otext/o3654.htm

With respect to your second question, a tape recording of an executive session, made by a public official, would be a record of the agency, subject to FOIL. Although there is no statute or case law that prohibits it, I recommend against it for that very reason. Once the agency receives a FOIL request (recording are required to be kept for a certain period of time), it would be required to obtain the copy from you, and determine which portions were required to be made available.

And third, even when the public is not present at a meeting, I strongly recommend that you formalize your motion to enter into executive session and take the vote to enter into executive session. This will assist in the preparation of minutes, preserve the record in the event that you are challenged, and will, as you said, notify the members that the discussion is sensitive.

I have refrained from using the word "confidential" in my advice to you. That is because only an act of law can make something "confidential" which essentially means that a person is prohibited from disclosing it to others. Example: mental health records are confidential pursuant to the Mental Hygiene Law. Open Meetings Law permits a public body to choose to enter into executive session but does not require it, so. And, in fact, the OML would not apply to a discussion that is made "confidential" by state or federal law – see section 108. Example: attorney-client privileged discussions.

You may want to review advisory opinions under "E" for "Executive session, claim of confidentiality regarding" at the following website: http://www.dos.state.ny.us/coog/oindex.html. Again, although I know of no law that would prohibit someone from disclosing what was said at an executive session, and presumably the First Amendment would protect that ability, whether it

is wise or a good thing to do is another question.

I hope that this is helpful to you. I will be out for the remainder of the day, but will return to the office on Thursday.

Camille

Camille S. Jobin-Davis, Esq.
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4660

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July 31, 2008

Brian Hartson, President
Board of Trustees
Guilderland Public Library
2228 Western Avenue
Albany, NY 12084

Dear Mr. Hartson:

Thank you for allowing me the opportunity to address the members of the Board of Trustees of the Guilderland Public Library. I hope that the information I provided was helpful.

Mr. Ganz asked an interesting question during the course of our discussion, and I would like to take this opportunity to respond more fully. He asked if I was aware of any judicial decisions in which a court found that a subcommittee made up solely of members of a public body was subject to the Open Meetings Law, and in which the court recognized that the subcommittee had no authority other than to advise the public body.

My research reveals that committees of public bodies made up solely of members of the public body are always advisory in nature. Cases that require committees of this type to comply with the Open Meetings Law include Lewis v. O'Connor, Supreme Court, Lewis County, January 21, 1997 (standing committees of the county hospital, made up entirely of members of the hospital's board of managers, with no power to take final action nor bind the board of managers, are public bodies subject to the OML): "To keep their deliberations and decisions secret from the public would be violative of the letter and spirit of the legislative declaration as stated in the Public Officers Law." Lewis, pp 4-5.; Bogulski v. Erie County Medical Center, Supreme Court, Erie County, January 13, 1998 (subcommittee of county hospital's board of managers required to comply with OML); Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 601 NYS2d 29 (3d Dept 1993) (committee of the county board of supervisors required to comply with OML).

In support of this opinion and by way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject also involved a situation

in which a governing body, a school board, designated committees consisting of less than a majority of the total membership of the board. In Daily Gazette Co., Inc. v. North Colonie Board of Education [67 AD2d 803 (1978)], it was held that those advisory committees, which had no capacity to take final action, fell outside the scope of the definition of "public body".

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

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

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

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

In view of the amendments to the definition of "public body", we believe that any entity consisting of two or more members of a public body, such as a committee, a subcommittee or "similar body" consisting of 3 members of the Board of Trustees, would fall within the requirements of the Open Meetings Law when such an entity discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD2d 984, 437 NYS2d 466, (4th Dept. 1981), appeal dismissed 55 NY2d 995, 449 NYS2d 201 (1982)].

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

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

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

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" [Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, 415, affirmed 45 NY2d 947 (1978)].

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

I hope that this is helpful to you. Please let me know if you have any questions, and again, it was a pleasure to meet you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4661

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August 1, 2008

E-Mail

TO: Ms. Leslie Lawler

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. Lawler:

I have received your letter in which you raised issues concerning the content of minutes of meetings of the Peekskill Common Council, and particularly, whether "there are any guidelines regarding presenting the minutes verbatim vs in summary."

As you are aware, §106 of the Open Meetings Law deals directly with minutes of meetings and states that:

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

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

In my opinion, inherent in the law is an intent that its provisions 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, policies and procedures, and the requirement that those provisions must be reasonable. 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 believe that analogous considerations relate to the content of minutes. If references in minutes to comments representing one point of view are lengthy and detailed, but others representing a contrary view are brief or absent, such action would, in my opinion, be unreasonable. As suggested earlier, the contents of minutes should be consistent in their references to comments offered by those who speak.

Lastly, as inferred above, any person may record an open meeting, so long as the use of a recording device is neither disruptive nor obtrusive (see e.g., Mitchell, id.). By so doing, a verbatim account of everything expressed at an open meeting can be preserved.

I hope that I have been of assistance.

RJF:jm

cc: Common Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4662

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August 1, 2008

Mr. Matthew Kuschner
[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. Kuschner:

Your letter addressed to Daniel Shapiro, First Deputy Secretary of State, has been received by this office.

You referred to a meeting of the North Merrick Public Library Board of Trustees during which the Board entered into an executive session, took action during the executive session and later returned to the open meeting. You asked whether the absence of "any vote in public or discussion in public" was " a violation of the Open Meetings Law."

In this regard,§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, 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)].

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

OML-AO-4663

From: Freeman, Robert (DOS)
Sent: Monday, August 04, 2008 10:18 AM
To: Ms. Catherine R. Lawrence
Subject: RE: Advisory Opinion Request

Dear Ms. Lawrence:

I have received your communication in which you asked whether minutes of town board meetings must make reference to notices of claims served upon a town and expressed the view that "each and every communication received by the town should be entered in the minutes..."

In short, there is no such requirement. Section 106(1) of the Open Meetings Law pertains to minutes of meetings of public bodies, such as town boards, and states that: "Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." Therefore, so long as the items referenced in the law are included in minutes, a public body or its clerk would be complying with law. Although minutes may include reference to communications received by the town, there is 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
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.C

OML-AO-4664

From: Jobin-Davis, Camille (DOS)
Sent: Monday, August 04, 2008 3:25 PM
To: Hon. Cathy Gill, Town Clerk, Town of Milan
Subject: Open Meetings Law

Cathy:

In response to your question earlier today, take a look at the following advisory opinion:
http://www.dos.state.ny.us/coog/otext/o2689.htm

In my opinion, the same analysis would apply to recordings of conversations between and among the public during those portions of the meeting when the public body removed itself into executive session – the Town Board could restrict the use of recording devices in the meeting room during that particular period unless the individuals being recorded clearly consent to being recorded.

I hope this is helpful.

Camille

Camille S. Jobin-Davis, Esq.
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17287
OML-AO-4665

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August 5, 2008

Mr. Kenneth Walter
[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. Walter:

I have received your letter and the materials relating to it, and I hope that you will accept my apologies for the delay in response. You raised a variety of issues relating to your efforts in obtaining records, specifically, minutes of meetings of the Sullivan County Community College, via email. Based on a review of the materials, I offer the following comments.

First, §87(4)(c) of the Freedom of Information Law requires that "[e]ach state agency that maintains a website" is required to post certain information and provide a link to the website of this office (emphasis added). A community college is typically a county agency, rather than a state agency. That being so, the requirements imposed by the cited provision do not apply to a community college.

Second, in October of 2006, the Freedom of Information Law was amended to require all agencies, when they have "reasonable means" to do so, to "accept requests in the form of electronic mail and shall respond to such requests by electronic mail..." Therefore, if the Community College has the ability to accept requests made via email and to transmit records through the use of email with reasonable effort, it is required to do so.

Third, reference was made to minutes that had not been 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 been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

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

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

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 legislation enacted in 2006 broadened the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law. Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kathleen Ambrosino

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-17303
OML-AO-4666

Committee Members

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Tedra L. Cobb
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August 18, 2008

Mr. Edward G. Schneider III
[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. Schneider:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to gatherings of the members of the Evans Town Board. Specifically, you inquired about gatherings of Board members in the Supervisor's office prior to regular board meetings, "informal" or "unofficial" meetings, and the lack of debate or discussion before voting on issues at town board meetings. You further inquired about the content and availability of minutes in a particular format. In this regard, we offer the following comments.

First, from our perspective, there is no legal distinction between an "informal" meeting, an "unofficial" meeting, a work session, or a regular meeting.

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

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 an "informal" meeting 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 the taking of minutes as in the case of a formal meeting, as well as the same ability to enter into executive sessions.

Second, with respect to your frustration with the lack of public debate, we note an amendment to §107(1) of the Open Meetings Law recently approved, that is intended to improve compliance and to ensure that public business is discussed in public as required by that law. Effective August 5, 2008, the new provision states that when it is found by a court that a public body voted in private "in material violation" of the law "or that substantial deliberations occurred in private" that should have occurred in public, the court "shall award costs and reasonable attorney's fees" to the person or entity that initiated the lawsuit.

The intent of this amendment, in our opinion, is not to encourage litigation, but to enhance compliance and to encourage members of public bodies and those who serve them to be more knowledgeable regarding their duty to abide by the Open Meetings Law.

Third, 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 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.

Next, although they were previously provided to you, you indicated that now the Town denied access to electronic copies of minutes in the format that you request (WordPerfect), and that the Town Clerk indicated she spoke with the executive director of the Committee, as follows: "Mr. Freeman advised me that as long as the minutes are provided on the Town's website and you have access to the internet that is sufficient and compliant with Freedom of Information and Open Government Laws." In an effort to assist in reaching an amicable resolution of the matter, we offer the following comments.

In our view, the Freedom of Information Law, in terms of its intent and its judicial interpretation, has and should be construed to require agencies to produce accessible information in the format of the applicant's choice, so long as the agency is able to do so with reasonable effort.

Illustrative of that principle is a case in which an applicant sought a database in a particular format, and even though the agency had the ability to generate the information in that format, it refused to make the database available in the format requested and offered to make available a printout. In holding that the agency was required to make the data available in the format requested and upon payment of the actual cost of reproduction, the Court in Brownstone Publishers, Inc. v. New York City Department of Buildings unanimously held that:

> "Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" [166 Ad 2d, 294, 295 (1990)].

Further, in a decision that cited Brownstone, it was held that: "[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape" (Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992).

Consistent with those decisions, earlier this month, the Freedom of Information Law was amended to require that "an agency shall provide records on the medium requested by a person, if the agency can reasonably make such copy or have such copy made by engaging an outside professional service" (§87[5][a]).

In short, assuming that the minutes can be provided in the format you requested, as demonstrated by the Town's previous production of minutes in that format, we believe that the Town is under a continuing obligation to do so.

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

Sincerely,

Camille S. Jobin-Davis /jm

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Hon. Carol A. Meissner

STATE OF NEW YORK
DEPARTMENT OF STATE
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August 18, 2008

Mr. Ray Rice
[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. Rice:

I have received your letter in which you questioned the status of a volunteer fire company under the Open Meetings Law.

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

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

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

I point out that the status of volunteer fire companies had long been unclear. Those companies are generally not-for-profit corporations that perform their duties by means of contractual

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Kevin A. Cahill
Rifton Volunteer Fire Company

STATE OF NEW YORK
DEPARTMENT OF STATE
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August 21, 2008

E-Mail

TO: Ms. Betty Scott

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. Scott:

I have received your letter in which you asked whether "a democratic caucus [may] be held in a city hall with a majority of the City Council present to discuss City business prior to an open informal meeting."

In this regard, 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 quorum of a public body for the purpose of conducting public business is a "meeting" that must be conducted open to the public, whether or not there is an intent to have action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 Ad 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

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

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

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

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

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

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

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

> "for purposes of this section, the deliberations of political committees, conferences and caucuses means a private meeting of members of the senate or assembly of the state of New York, or the legislative body of a county, city, town or village, who are members

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

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

In situations in which all of the members of a legislative body are members of the same political party, relevant is Buffalo News v. Buffalo Common Council [585 NYS 2d 275 (1992), which involved a political caucus held by a public body consisting solely of members of one political party. The court concentrated on the expressed legislative intent regarding the exemption for political caucuses, as well as the statement of intent appearing in §100 of the Open Meetings Law, stating that:

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

In short, based on the decision rendered in Buffalo News, when a legislative body consists solely of members of one political party, a gathering of a majority of that body for the purpose of discussing the business of that body in my view constitutes a "meeting" subject to the Open Meetings Law; only when the members in that circumstance discuss political party business would the gathering be exempt from the coverage of the Open Meetings Law.

I hope that I have been of assistance.

RJF:jm

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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 21, 2008

E-Mail

TO: Ms. Judy Marsh

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. Marsh:

I have received your letter in which you asked whether it is "legal for a public body to conduct a vote for officers or other issues via email."

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.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-17322
OML-AO-4671

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August 21, 2008

E-Mail

TO: Mr. Michael Kaiser

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. Kaiser:

I have received your letter in which you questioned the propriety of a denial of your request for a copy of a tentative collective bargaining agreement. You wrote that the agreement was ratified by the members of the City of Oneida firefighters union and placed on the Common Council's agenda. You requested the document prior to action taken by the Council and were told that it could be withheld, in your words, "because it was an agreement negotiated in executive session dealing with collective bargaining negotiations."

In this regard, the grounds for entry into executive session appearing in the Open Meetings Law in many instances differ with respect to disclosure from the exceptions to rights of access to records appearing in the Freedom of Information Law. Although it is true that discussions involving collective bargaining negotiations may be conducted in executive session pursuant to §105(1)(e) of the Open Meetings Law, I do not believe that the record at issue could properly be withheld under the Freedom of Information Law.

By way of background, 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, only one of the grounds for denial, §87(2)(c), is pertinent to an analysis of rights of access to a tentative agreement in the circumstances described. That provision permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." The key word in that provision in my opinion is "impair", and the question in the context of the award of contracts or, as in this situation, collective

bargaining negotiations, involves whether or the extent to which disclosure would "impair" the process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers. That a contract has not been signed or ratified, in my view, is not determinative of rights of access or, conversely, an agency's ability to deny access to records. Rather, I believe that consideration of the effects of disclosure is the primary factor in determining the extent to which §87(2)(c) may justifiably be asserted.

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

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

In each of the kinds of the situations described above, there is an inequality of knowledge. In the bid situation, the person who seeks bids prior to the deadline for their submission is presumably unaware of the content of the bids that have already been submitted; in the context of collective bargaining, the union would not have all of the agency's records relevant to the negotiations; in the appraisal situation, the person seeking that record is unfamiliar with its contents. As suggested above, premature disclosure of bids would enable a potential bidder to gain knowledge in a manner unfair to other bidders and possibly to the detriment of an agency and, therefore, the public. Disclosure of an records regarding collective bargaining strategy or appraisals would provide knowledge to the recipient that might effectively prevent an agency from engaging in an agreement that is most beneficial to taxpayers.

In a case involving negotiations between a New York City agency and the Trump organization, the court referred to an opinion that I prepared and adopted the reasoning offered therein, stating that:

> "Section 87(2)(c) relates to withholding records whose release could impair contract awards. However, here this was not relevant because there is no bidding process involved where an edge could be unfairly given to one company. Neither is this a situation where the release of confidential information as to the value or appraisals of property could lead to the City receiving less favorable price.
>
> "In other words, since the Trump organization is the only party involved in these negotiations, there is no inequality of knowledge between other entities doing business with the City" [Community Board 7 v. Schaffer, 570 NYS 2d 769, 771 (1991); Aff'd 83 AD 2d 422; reversed on other grounds 84 NY 2d 148 (1994)].

Based on the foregoing, because the record at issue was known to both parties to the negotiations and in fact had been distributed to members of the union, the rationale described above and the judicial decisions rendered to date suggest that §87(2)(c) could not justifiably have been asserted to withhold the record.

Finally, as I understand the matter, collective bargaining negotiations had ended. I recognize that if either side rejected the tentative agreement, the parties might have been forced to reopen the negotiations. Nevertheless, in view of the factors described above, even if that occurred, it does not appear that either party to the negotiations would have been disadvantaged by such a disclosure vis a vis the other. Again, both parties would have been fully aware of the contents of the documentation; there would have been no inequality of knowledge.

I hope that I have been of assistance.

RJF:jm

cc: City of Oneida Common Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4672

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August 25, 2008

Mr. Lanny E. Walter
Walter, Thayer & Mishler, P.C.
756 Madison Avenue
Albany, NY 12208

The staff of the Committee on 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. Walter:

I have received your letter in which you sought an advisory opinion concerning the application of the Open Meetings Law to a committee consisting "only of school board members."

In this regard, when a committee consists solely of members of a public body, such as a school board, I believe that the Open Meetings Law is clearly applicable, for a committee composed two or more school board members itself constitutes a "public body."

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

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

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

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members of a school board, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, a quorum consists of a majority of the total membership of a body (see General Construction Law, §41). For example, in the case of a committee consisting of three, its quorum would be two.

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Education
Sharon L. Francello

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4673

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August 25, 2008

E-Mail

TO: Ms. Jacqueline Haworth

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. Haworth:

I have received your letter in which you sought an advisory opinion concerning the application of the Open Meetings Law to a committee consisting of "three members of the local board of education."

In this regard, when a committee consists solely of members of a public body, such as a board of education, I believe that the Open Meetings Law is clearly applicable, for a committee composed two or more school board members itself constitutes a "public body."

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

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

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

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members of a school board, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, a quorum consists of a majority of the total membership of a body (see General Construction Law, §41). For example, in the case of a committee consisting of three, its quorum would be two.

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

I hope that I have been of assistance.

RJF:jm

cc: Board of Education

OML-AO-4674

From: Freeman, Robert (DOS)
Sent: Tuesday, August 26, 2008 10:35 AM
To: Hon. John Ligon, Thurman Town Board
Attachments: o3331a.wpd

Dear Mr. Ligon:

The issue that you raised has arisen many times over the years, and in my view, the Office of State Comptroller is essentially demanding that public bodies, such as the Town Board upon which you serve, violate the Open Meetings Law by requiring that meetings with its representatives be conducted in private. The only method of gaining the comments and expertise of an auditor would involve ensuring that less than a quorum of the Town Board is present. With less than a quorum the Open Meetings Law does not apply.

Attached is a detailed opinion dealing with the issue.

I regret that I cannot be of greater assistance.

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

FOIL-AO-17328
OML-AO-4675

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August 26, 2008

E-Mail

TO: Mr. Jon Olsen, Town of Montgomery Planning Board

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. Olsen:

I have received your letter and the materials relating to it. In your capacity as a member of the Town of Montgomery Planning Board, you have raised a series of questions concerning a confidentiality agreement ("the Agreement") between the Town and several entities comprising the "Taylor Group", which has sought changes in the Town's zoning law to facilitate the approval and construction of a new facility.

Section 1 of the Agreement refers to information or materials provided to the Town during the course of the Town's review of the project and Taylor's assertion that they may "contain trade secrets, confidential, sensitive or proprietary information or any other information over which the courts recognize protection" and which may be designated as "Confidential Information." Section 2 refers to information that "should be excepted from public disclosure under applicable Disclosure Laws, including without limitation NY Pub. Off. §89(5) and 6 NYCRR §616.7(a)(4)..." Section 6 requires that the Taylor Group may request and the Town agrees to return to Taylor "any documents reflecting Confidential Information and any copies made thereof that the recipient of said information may have made..."

You added that "the vast majority of information that Planning Board members who have signed the confidentiality agreement have been allowed to view is freely available on the internet and through third party sources..." However, you wrote that the Town Attorney said, in your words, that "it was impractical to determine what information was confidential and what was not, therefore it was all categorized as confidential" That being so, "the attorney for the town has started with the presumption of confidentiality, and prevented all information from reaching the public's scrutiny." Further, you indicate that the Agreement "has repeatedly been used as justification for holding all Town Board discussions about the project in question during Executive Session."

From my perspective, the Agreement and the means by which it has been implemented are contrary to law in several respects. In this regard, I offer the following comments.

First, the Agreement in my opinion is void and unenforceable insofar as it is inconsistent with statutes, such as the Freedom of Information Law. According to judicial decisions, an agency may not render records deniable or confidential by means of an agreement or contract, unless there is a basis for so doing pursuant to one or more of the grounds for denial appearing in the Freedom of Information Law. The first ground for denial in the Freedom of Information Law, §87 (2)(a), refers to records that may be characterized as confidential and enables an agency to withhold records that "are specifically exempted from disclosure by state or federal statute." A statute, based upon judicial interpretations of the Freedom of Information Law, is an act of the State Legislature or Congress [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

The Court of Appeals, the state's highest court, has held that a request for or a guarantee 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 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).

Second, assuming that you have described it accurately, the Town Attorney's suggestion that all of the records at issue be presumptively considered confidential is contrary to the judicial interpretation of the Freedom of Information Law. As indicated earlier, the Freedom of Information Law is based upon a presumption of access. 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 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 reference is made in the materials. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

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

In short, based on the direction given by the Court of Appeals in several decisions, when records are requested, they must be reviewed for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access.

Third, the reference in the Agreement to §89(5) of the Public Officers Law is erroneous. That provision is part of the Freedom of Information Law, and it applies only to only to records submitted a state agency, and for purposes of determining its scope, §87(4)(b) indicates that a "state agency" means "only a state department, board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor." The Town clearly is not a state agency. When §89(5) applies, it enables a commercial entity, at the time that it submits records to a state agency, to identify those records or portions of records that it considers to be deniable under §87(2)(d), the so-called "trade secret" exception to rights of access. If the agency agrees with such a claim, it must keep the records confidential. If a request is made for those records, a procedure is initiated that involves notice to the commercial entity and an opportunity to explain its reasons for claiming that the exception may be asserted. None of that procedural protection is required or authorized in this instance, for, again, §89(5) does not apply to a unit of local government.

Similarly, the reference in the Agreement to 6 NYCRR §616 is misplaced. That provision is a section of the regulations promulgated by the Department of Environmental Conservation and its records. Moreover, it has been found that agencies' regulations are not equivalent to statutes for purposes of §87 (2)(a) of the Freedom of Information Law [see Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982)]. Therefore, insofar as an agency's regulations render records or portions of records deniable in a manner inconsistent with the Freedom of Information Law or some other statute, those regulations would, in my opinion, be invalid. Regulations cannot operate, in my view, in a manner that provides fewer rights of access than those granted by the Freedom of Information Law.

Fourth, once records come into the possession of the Town, I believe that they are Town records that must be retained in accordance with the retention schedules promulgated pursuant to §57.25 of the Arts and Cultural Affairs Law. Those schedules require that records be retained for particular periods of time, and until the minimum retention period is reached, I do not believe that the Town may return records to Taylor, notwithstanding the terms of the Agreement.

Next, the ability of the Town to withhold the records at issue is limited. The key exception in the context of the matter is §87(2)(d), which permits an agency to withhold records or portions thereof that:

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

Therefore, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial entity.

The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

> "...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated."

In my view, the nature of record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

Perhaps most relevant to the analysis is a decision rendered by the Court of Appeals, which, for the first time, considered the phrase "substantial competitive injury" in Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, [87 NY2d 410 (1995)]. In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for

> purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise...
>
> ...[A]s explained in Worthington:
>
> > Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government" (id., 419-420).

Insofar as materials are accessible on the internet or from other public sources, I do not believe that §87(2)(d) may validly be asserted. Other records may be withheld under that provision only to the extent that it can be demonstrated that the exception was properly applied. In the context of a challenge to a denial of access in a judicial proceeding brought under the Freedom of Information Law, the agency denying access, the Town, must meet the burden of proving to the court that disclosure would indeed cause substantial injury to Taylor's competitive position (see Markovitz v. Serio, ___ NY3d ___, June 26, 2008).

Lastly, the grounds for withholding records under the Freedom of Information Law and the grounds for entry into executive session under the Open Meetings Law are not necessarily consistent with one another. There are often instances in which a discussion held by public body, such as a town board or a planning board, must be conducted open to the public, because there is no basis for conducting an executive session, even though records that are the subject of the discussion might be deniable under the Freedom of Information Law, and *vice versa*.

Like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies 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 grounds for entry into executive session. It is unlikely in my view that any of the grounds for entry into executive session would apply with respect to much of the discussion relating to the project. I note that §108(3) exempts matters made confidential by state or federal law from the coverage of the Open Meetings Law. For reasons described earlier, I do not believe that the confidentiality agreement is valid or enforceable or, therefore, that discussions relating to the project would be exempt from the requirements of the Open Meetings Law.

I hope that I have been of assistance.

RJF:jm

cc: Town Board

OML-AO - 4676

From: Freeman, Robert (DOS)
Sent: Thursday, August 28, 2008 8:09 AM
To: MULLEN, VICTORIA. Town of Oswego
Subject: RE: Another Question

Good morning - -

The town clerk is not a member of the board, and §30(1) of the Town Law pertaining to the "Powers and duties of town clerk" states in part that the clerk shall "keep a complete and accurate record of the proceedings of each meeting…" A critical word in the quoted passage in my opinion is "accurate", and it means that the minutes should reflect what in fact occurred during a meeting, rather than the opinions of the author or information that does not reflect what occurred at the meeting.

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

OML-AO- 4677

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August 28, 2008

E-Mail

TO: Mr. Tyler Sawyer

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. Sawyer:

As you are aware, I have received your letter, and I hope that you will accept my apologies for the delay in response. You have sought information concerning the law in relation to a meeting that began at 7 p.m., but lasted until 1:30 a.m.

The meeting in question was held by the Berlin Central School District Board of Education. Although it began "with the usual format", at approximately 8:30, with most of the initial attendees present, it became clear in your opinion:

> "that certain board members already knew what direction they wanted to take when it came to the closing of our rural schools in favor of centralization of the district. But with so many people still in attendance, it also became clear to [you] that they felt the timing was not right to discuss it at that point. That is when Chairman Zwack turned over the meeting to board member Morelli to begin what [you] can only equate as an old time filibuster."

You and others left the meeting as it continued, and you learned the following day that the Board, by a vote of 4 to 3 taken at midnight, determined to close two elementary schools, and that it continued the meeting until 1:30 a.m. "with the discussion of finances that could result in an additional $17 million dollars or more in debt to [y]our district."

You were "shocked" that "any publicly elected school board would ever consider holding proceedings at that unreasonable hour." In this regard, I offer the following comments.

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

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

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

In my opinion, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In this instance, particularly if there was an intent to "filibuster" and to continue the meeting beyond a time that most could reasonably remain, it would appear that the time of the Board's vote and ensuing discussion would be inconsistent with the thrust of the Open Meetings Law.

Second, in a judicial 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).

From my perspective, voting on an issue and discussing matters of great significance to taxpayers in the community so late at night would be found by a court to be unreasonable, particularly under the circumstances that you described. If indeed there was a "filibuster", an effort to delay discussing or acting on issues until those most or all of those interested in attending exited due to the lateness of the hour, it might effectively be contended that there was essentially an intent

to discuss matters of great importance to the public and act in private in contravention of the spirit, if not the letter of the Open Meetings Law.

I hope that I have been of assistance.

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4678

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August 29, 2008

E-Mail

TO: Mr. John Frisch

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. Frisch:

I have received your letter and hope that you will accept my apologize for the delay in response. If a board of education "consistently goes into Executive Session and remains there for hours only returning to open session after midnight when no members of the public remain", you asked whether "they are in violation of the Open Meetings Act."

In this regard, an initial issue in my view involves whether the board has a proper basis for conducting executive sessions in every instance or for as long a time as you describe. As you may be aware, the Open Meetings Law is based on a presumption of openness, requiring that meetings be held open to the public, except to the extent that an executive session may properly be convened. Paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered in executive session. The Open Meetings Law and thousands of advisory legal opinions pertaining to that statute are accessible on our website, and it suggested that you review §105(1) and opinions that may be pertinent. If the board conducts executive sessions for hours at every meeting, I would conjecture that it may be so doing in a manner inconsistent with law.

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

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

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

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

In my opinion, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In this instance, particularly if there is an intent to continue the meetings beyond a time that most could reasonably remain, it would appear that the time of the resumption of the open portions of those meetings would be inconsistent with the thrust of the Open Meetings Law.

In a judicial 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).

From my perspective, voting on issues and discussing matters of significance to taxpayers in the community so late at night would be found by a court to be unreasonable, particularly if there is an intent, an effort to delay discussing or acting on issues, until those most or all of those interested in attending exited due to the lateness of the hour. In that circumstance, it might effectively be contended that there was essentially an intent to discuss matters of great importance to the public and act in private in contravention of the spirit, if not the letter of the Open Meetings Law.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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September 2, 2008

E-Mail

TO: Ms. Nancy Wahlstrom

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. Wahlstrom:

As you are aware, we have received your inquiry concerning the content of minutes. Please accept my apologies for the delay in response.

You indicated that minutes of town board meetings "are not remotely representative of what has occurred..." You referred, for example, to a situation in which a board member raised a question "that he said he wanted on the record", and the town attorney responded. However, there is no reference to either the question or response in the minutes. You added that in some instances, "comments have been selectively included..."

In this regard, I believe that four provisions of law are pertinent to the matter and that they must be carried out reasonably and with consistency. 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).

I do not believe that a member of the board may unilaterally alter or direct that minutes be altered or prepared in a certain manner. 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. To ensure that certain items are included in minutes, a member could introduce a motion to do so. If the motion carries, those items must be included; if it does not, there is no obligation to include them in the minutes.

Lastly, with respect to "selectively" including comments in the minutes, as suggested earlier, minutes of meetings must, in my view, be prepared in a manner that is reasonable and consistent. If comments favoring a particular point of view are included in minutes, to be fair and reasonable, I believe that comments in opposition to that view must also be included.

I hope that I have been of assistance.

RJF:jm

cc: Town Board
Hon. Pamela J. Kula, Town Clerk

OML-AO-468

From: Freeman, Robert (DOS)
Sent: Thursday, September 04, 2008 9:48 AM
To: Ruth Kraft
Subject: RE: SLA meeting agenda

I would like to offer a few observations in relation to your note and the Open Meetings Law.

First, there is no reference in the law to agendas. In short, a public body may choose to prepare and/or follow an agenda, but there is no requirement that an agenda be prepared or heeded. Second, the law confers the right upon the public to attend meetings of public bodies, but it is silent with respect to public participation. Therefore, a public body is not required to permit those in attendance to speak or otherwise participate. Many do so, however, and when a public body chooses to do so, it has been suggested that the body should adopt reasonable rules that treat members of the public equally. And third, as you may be aware, paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the grounds for entry into executive session. Pertinent to the matter described is paragraph (f), which authorizes a public body to conduct an executive session to discuss "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation." If the Board's discussion involved employees as a group and did not focus on any "particular person", I do not believe that an executive session could properly have been held. However, insofar as its discussion focused on or dealt with a particular person, it appears that the closed session would validly have been held.

I hope that the foregoing will serve to clarify your understanding and be useful to you.

Robert J. Freeman
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Committee on Open Government
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September 4, 2008

Ms. Michele Lichy
Executive Director
Cattaraugus-Allegany Workforce
Investment Board, Inc.
One Blue Bird Square, Lower Level
Olean, NY 14760

The staff of the Committee 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. Lichy:

As you are aware, I have received your letter, and again, hope that you will accept my apologies for the delay in response. In your capacity as Executive Director of the Cattaraugus-Allegany Workforce Investment Board, Inc. ("the Board"), you raised issues concerning the obligation imposed by the Freedom of Information Law that requires that an agency must maintain a record in every instance in which final action is taken that indicates the manner in which each member voted. From my perspective, before that issue can be considered, it must be determined whether meetings of the Board are subject to the Open Meetings Law.

Following our initial discussion of that issue, I located two advisory opinions focusing on the status of workforce investment boards ("WIB's") under the Open Meetings Law. In the first, it was advised that WIB's are not subject to the Open Meetings Law, but in the second, it was advised that they are required to comply with that statute. Because the Open Meetings Law applies to public bodies, the issue is whether those entities constitute public bodies.

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

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

Based on the foregoing, to constitute a "public body", an entity must consist of at least two members, conduct public business and perform a governmental function for the state or for one or more public corporations, i.e., municipalities.

The Court of Appeals, the state's highest court, in a case dealing with a "laboratory animals use committee" (a "LAUC") created pursuant to federal law held that "the powers of the LAUC derive solely from Federal law...and for that reason alone...the Committee is not a public body as defined by the Open Meetings Law" [American Society for the Prevention of Cruelty to Animals v. Board of Trustees of the State University of New York, 79 NY2d 927, 929 (1992)].

The federal statute authorizing the creation of a LAUC, 7 USC §2143, states that "each research facility [shall] establish at least one Committee", that "[e]ach Committee shall be appointed by the chief executive officer of each such research facility and shall be composed of not fewer than three members", and that "[s]uch members shall possess sufficient ability to assess animal care, treatment, and practices in experimental research as determined by the needs of the research facility and shall represent society's concerns regarding the welfare of animal subjects used at such facility." In short, the head of every facility, whether public or private, that engages in laboratory research involving animals, was required to establish a LAUC. There is no mandatory legal nexus between a LAUC and state or local government.

In the provisions dealing with WIB's, subdivision (a) of §116 the Workforce Investment Act of 1998 (H.R. 1385) provides that the governor of a state "shall designate local workforce areas within the State". Further, subdivision (c) provides that "a State may require regional planning by local boards", "require" those boards to share information, and "require the local boards for a designated region to coordinate the provision of workforce investment activities..." The introductory portions §117 provide as follows:

> "(a) ESTABLISHMENT. - There shall be established in each local area of a State, and certified by the Governor of the State, a local workforce investment board, to set policy for the portion of the statewide workforce investment system within the local area (referred to in this title as a 'local workforce investment system').
>
> (b) MEMBERSHIP. -
>
> (1) STATE CRITERIA. - The Governor of the State, in partnership with the State board, shall establish criteria for use by chief elected officials in the local areas for appointment of members of the local boards in such local areas in accordance with the requirements of paragraph (2)."

Additionally, the initial provisions of subdivision (c) of §117 state:

> "(A) IN GENERAL. - The chief elected official in a local area is authorized to appoint the members of the local board for such area, in accordance with the State criteria established under subsection (b).
>
> (B) MULTIPLE UNITS OF LOCAL GOVERNMENT IN AREA. -
> (i) IN GENERAL - In a case in which a local area includes more than 1 unit of general local government, the chief elected officials of such units may execute an agreement that specifies the respective roles of the individual chief elected officials -
> (i) in the appointment of the members of the local board from the individuals nominated or recommended to be such members in accordance with the criteria established under subsection (b); and
> (II) in carrying out any other responsibilities assigned to such officials under this subtitle.
> (ii) LACK OF AGREEMENT. - If, after a reasonable effort, the chief elected officials are unable to reach agreement as provided under clause (i), the Governor may appoint the members of the local board from individuals so nominated or recommended."

A LAUC may be established in either a private or a governmental facility, and the case before the Court of Appeals involved a LAUC created at a branch of the State University, which is clearly a governmental entity. In that circumstance, the members of a LAUC are appointed by the chief executive officer at the facility. In the case of a WIB, the Governor and state and local government officials have the authority and often the responsibility to carry out certain functions in implementing federal law. In its consideration of the LAUC, the Court of Appeals found that:

> "...the Open Meetings Law excludes Federal bodies from its ambit.
>
> "The LAUC's constituency, powers and functions derive solely from Federal law and regulations. Thus, even if it could be characterized as a governmental entity, it is at most a *Federal* body that is not covered under the Open Meetings Law" (id., 929).

In the second opinion prepared by this office, it was suggested that the "powers and functions" of a WIB do not "derive solely" from federal law, and that they derive in part from the powers, functions and duties of state and local government officials. That being so, it was advised, in the words of the definition of "public body", that they "conduct public business" and are involved in "performing a governmental function for the state...or for a public corporation", such as a county, city, town or village. If that conclusion is accurate, it was advised that a WIB constitutes a public body subject to the Open Meetings Law.

As I indicated during our conversation, I asked our Assistant Director, also an attorney with years of experience concerning the Open Meetings Law, to review both of the opinions previously rendered and to offer her perspective. She said that she is "clearly on the fence." In my view, if the

question is brought before a court, as in the case of the LAUC, it could be found that a WIB functions solely as result of the enactment of federal law. On the other hand, in consideration of the roles of state and local government officials, a WIB might be found to constitute a public body required to comply with the Open Meetings Law.

Although those officials perform certain functions in relation to WIB's, WIB's are clearly creations of federal law, and the powers and responsibilities of state and local officials in relation to WIB's, as in the case of a LAUC., derive solely from federal law. Consequently, on balance, it would appear that WIB's may not be subject to the Open Meetings Law or the requirements associated with the implementation of that statute.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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OML-AO-4682

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September 4, 2008

E-Mail

TO: Ms. Bette Jayne Spinney

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. Spinney:

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

According to your letter, the Board of Trustees in the Village of Stamford "keeps having executive session meetings", and one such executive session involved discussion of the budget. Further, after a meeting, you indicated that the mayor "asked the board if they wanted to go into executive session to talk about wages for employees." You asked whether that is proper, and expressed the belief that "wages were open to the public."

In this regard, first, 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 during which the public may be excluded.

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

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

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

In most instances, discussions involving a budget must be conducted in public, for none of the grounds for entry into executive session would apply. Often a discussion concerning the budget has an impact on personnel. Nevertheless, and despite its frequent use, the term "personnel" appears nowhere in the Open Meetings Law. It is true that one of the grounds for entry into executive session often relates to personnel matters. From my perspective, however, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

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

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

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

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department or perhaps the creation or elimination

of positions, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". For example, if a discussion involves staff reductions or layoffs due to budgetary concerns, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoff relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In none of the instances described would the focus involve a "particular person" and how well or poorly an individual has performed his or her duties. To reiterate, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981).

Since you referred to discussions relating to "wages for employees", if they involved employees as a group, i.e., consideration of an across the board increase of a certain percentage for all employees of the highway department, and assuming that those employees are not members of a union, there would be no basis for entry into executive session. On the other hand, if the discussion focuses on a particular employee, his/her performance, and whether he/she merits an increase in salary, I believe that §105(1)(f) could properly be asserted. In that situation, the discussion would involve the "employment history of a particular person."

Lastly, although the performance of particular employees may be properly be discussed during an executive session, your comment concerning public to access to wages is accurate. In that context, relevant is the Freedom of Information Law, which pertains to public access to government records. As a general matter, 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.

I note that the grounds for entry into executive session in the Open Meetings Law and the grounds for withholding records under the Freedom of Information Law are not necessarily completely consistent. With respect to your comment, the Freedom of Information Law specifies that each agency, such as a village, must maintain a record indicating the name, public office address, title and salary of every officer or employee of the agency [see §87(3)(b)]. Further, based on judicial decisions, that record or its equivalent has long been accessible to the public.

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

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4683

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September 8, 2008

E-mail

TO: Ms. Deborah V. Gardner

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. Gardner:

I have received your letter in which you referred to the appointment by the Cicero Town Supervisor of "a group of citizens to an 'assessment review committee.'" The committee was designated to offer recommendations concerning the Town's assessment process and its meetings had been open. You wrote, however, that the chair of the committee recently informed you that the meetings will now be closed. You asked whether the meetings are subject to the Open Meetings Law and whether "the minutes that were distributed to members [must] be made available upon request to the public."

In this regard, I offer the following comments.

First, the Open Meetings Law is applicable to meetings of public bodies, and §102(2) 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)].

Based on the facts as you described them and the determinations in the judicial decisions cited above, because it consists of citizens and is authorized only to offer recommendations, I do not believe that the committee constitutes a "public body" or, therefore, that is required to abide by the Open Meetings Law, even though its initial meetings were open to the public.

With respect to minutes or other documentation prepared or received by the committee, the governing provision is the Freedom of Information Law. That law is applicable to all records of an agency, such as a town, and defines the term "record" expansively in §86(4) to include:

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

Due to the breadth of the coverage of the Freedom of Information Law, the minutes to which you referred, as well as another materials kept or produced by or for the Town, are "records" subject to rights of access conferred by that law.

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

RJF:jm

cc: Town Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17350
OML-AO-4684

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

September 8, 2008

E-Mail

TO: Mr. Douglas M. Rogers

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

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

Dear Mr. Rogers:

This is in response to your request for information regarding the Open Meetings Law. In your request, you expressed frustration with what appears to be "back room agreements" between building, planning and engineering offices in the Town of Smithtown. In an effort to provide guidance in these matters, we offer the following comments.

First, the following is a link to an online pamphlet entitled "Your Right to Know": http://www.dos.state.ny.us/coog/Right_to_know.html. The second part of the pamphlet pertains to the Open Meetings Law and meetings of public bodies. The first pertains to access to records of government agencies under the Freedom of Information Law. If you pursue a request for records from the town, you will find that intra-agency and inter-agency communications that contain "final agency policy or determinations" are required to be made available pursuant to §87(2)(g)(iii).

Please note that the Open Meetings Law applies to meetings of public bodies, and that §102(2) of the law defines the phrase "public body" to mean:

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

Based on the definition, the Open Meetings Law pertains to a town board, a planning board, and a zoning board of appeals, for example. It does not apply to gatherings of employees or staff of an agency.

We also note that the Freedom of Information Law pertains to all government agency records and is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

Second, the staff of the Committee on Open Government renders legal advice verbally and in writing. Many of our opinions are available online, through indexes organized by key phrase. If you would like to learn more about particular issues, for example "executive sessions", you could consult the Open Meetings Law index, under "E" for Executive Session.

On behalf of the Committee on Open Government, we trust that this is helpful. Please advise if you have further questions.

CSJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4685

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September 8, 2008

Mr. Jack Kinzie
[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. Kinzie:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain proceedings of the Gloversville Enlarged School District Board of Education. Specifically, you indicated that after the District's annual budget was defeated, the Board met to decide whether to adopt a contingency budget or to reduce the size of the proposed budget and conduct another vote. According to your letter, "[a]fter the audience participation portion of the meeting, the Board went into their marathon executive session [two hours and fifteen minutes] and when they emerged they immediately announced that they were adopting a contingency budget and did so, then and there." In your opinion, "this was a flagrant abuse of the law" and "not the first time the Gloversville Board has violated it." In this regard, we offer the following comments.

First, by way of background, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body, such as the 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, in our opinion, a discussion concerning the repercussions of adopting a contingency budget or modifying the proposed budget and conducting another vote would not likely fall within

any ground for entry into executive session. For example, there would be no basis for entry into executive session to discuss the costs associated with holding a second vote, or the possibilities for reducing spending in the defeated budget proposal to make it more acceptable to voters.

Third, it has been held judicially that :

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

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

Lastly, in response to your request for an "investigation to prevent this from happening again", we note that the Committee on Open Government is authorized by law to render legal advice, yet has no investigatory power. Please note that §107 of the Open Meetings Law 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. "

Further, subdivision (2) of §107 was recently amended (Chapter 397, Laws of 2008) to include and now states 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. If a court determines that a vote was taken in material violation of this article, or that substantial deliberations relating thereto occurred in private prior to such vote, the court shall awards costs and reasonable attorney's fees to the successful petitioner, unless there was a reasonable basis for a public body to believe that a closed session could properly have been held."

The intent of the amendment is not to encourage litigation. On the contrary, it is designed to enhance compliance and to encourage members of public bodies and those who serve them to be more knowledgeable regarding their duty to abide by the Open Meetings Law. Accordingly, a copy of this opinion will be sent to the members of the Board.

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: School Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 4686

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September 9, 2008

E-Mail

TO: Ms. Michele Roberts

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. Roberts:

I have received your letter and apologize for delay in response. Your correspondence pertains to the time within which minutes of meetings, particularly minutes of the Planning Board of the Town of Whitestown, must be accessible to the public.

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

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

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

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

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

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

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

I hope that I have been of assistance.

RJF:jm

cc: Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 17, 2008

E-Mail

TO: Mr. Artie Darrell

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. Darrell:

You have asked for clarification concerning information you may request "when a public meeting goes into executive session." You asked whether you are able to obtain "audio tapes" of that executive session, or only "the final results of the executive session."

In this regard, if a public body enters into an executive session and merely discusses an issue or issues, there is no requirement that minutes or other record of the executive session be prepared. If, however, action is taken during an executive session, minutes of the executive session must be prepared to comply with the Open Meetings Law. Specifically, §106(2) of that Law states that:

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

Lastly, there is no obligation that an executive session be tape recorded. Further, I know of no circumstance in which public bodies as a matter of policy or rule prepare tape recordings of their executive sessions.

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

RJF:jm

OML-AO-4688

From: Freeman, Robert (DOS)
Sent: Wednesday, September 17, 2008 9:37 AM
To: Mr. Bruce Pavalow
Subject: RE: Town Board - Board Development Session

Hi Bruce - -

In short, the gathering that you described would, in my view, clearly constitute a meeting falling within the coverage of the Open Meetings Law. The fact that the board of education held a similar gathering in private is irrelevant, for I believe that doing constituted a failure to comply with law.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
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STATE OF NEW YORK
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September 22, 2008

E-Mail

TO: Mr. Thomas W. Clothier

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. Clothier:

I have received your letter in which you asked whether "a school board [may] limit public input to 3 minutes."

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

From my perspective, any such rules could serve as a basis for preventing verbal interruptions, shouting or other outbursts, as well as slanderous or obscene language or signs; similarly, I believe that the board could regulate movement on the part of those carrying signs or posters so as not to interfere with meetings or prevent those in attendance from observing or hearing the deliberative process. Similarly, a public body's rules pertaining to public participation typically indicate the amount of time during which a member of the public may speak (i.e., no more than three minutes).

I note that while public bodies have the right to adopt rules to govern their own proceedings [see e.g., Education Law, §1709(1)], the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rules prohibited the use of tape recorders

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

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

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17371
OML-AO-4690

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September 23, 2008

Hon. Ricardo Montano
County of Suffolk Office of County
Legislature
Courthouse Corporate Center
820 Carleton Ave., Suite 4300
Central Islip, NY 11722

The staff of the Committee 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 Legislator Montano:

I have received your correspondence and the materials attached to it. The documentation consists of news articles, an excerpt of a transcript of a meeting of June 10 of the Suffolk County Legislature, a resolution to amend the Legislature's rules, and a transcript of the Legislature's meeting of August 19 relating to a proposed change in the rules. You have sought my "impressions and thoughts" concerning the numerous issues raised upon review of their content.

The first article pertains in part to a lawsuit that you initiated and concerns whether an action taken by the Legislature "was improperly discharged from committee because Lindsay", the presiding officer, "cast the decisive vote in favor of the bill without counting his presence as a committee member." The article also indicates that a "consensus formed" during "a closed-door discussion" to appeal a lower court decision to the Appellate Division, that "[n]o formal minutes of the meeting were taken and there was no vote recorded in the public record." According to the article, counsel to the Legislature, George Nolan ,"said no public vote is required", that 12 legislators "backed an appeal", indicating that "It was the sense of the group." He added that "[t]he group made the decision, that they wanted to defend the case."

From my perspective, the foregoing suggests a variety of failures to comply with law. In this regard, I offer the following comments.

First, it is noted that there are two vehicles that may authorize a public body to discuss public business in private. One involves entry into an executive session. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during

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

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

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

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

It has been advised that members of a public body may meet in private to seek legal advice from their attorney, and that when they do so, their communications fall within the attorney-client privilege. Because the communications are confidential, a gathering of that nature would be exempt from the coverage of the Open Meetings Law pursuant to §108(3) of that statute, which exempts from the Open Meetings Law matters made confidential by state or federal law. In situations in which a public body has been sued by one of its own members, that member, in my opinion, could be excluded from a gathering of the other members of the body when they are seeking legal advice. However, the transcript of the June 10 meeting specifies that a motion was made to enter into executive session. Because the gathering was an executive session rather than a matter exempt from the Open Meetings Law, I believe that you, a member of the Legislature, had 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." In short, although you might have been properly excluded from a gathering held outside the coverage of the Open Meetings Law based on the assertion of the attorney-client privilege, in my view, because of the manner in which the Legislature chose to engage in a private discussion, entry into an executive session, you had the right to attend that session.

Second, as indicated earlier, the Legislature took action by reaching a "consensus." In this regard, in Previdi v. Hirsch [524 NYS 2d 643 (1988)], which involved a board of education, the issue pertained to access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was

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

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

Whenever action is taken by a public body, I believe that it must be memorialized in minutes, and §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 my view, when the Legislature reached a consensus reflective of its decision to appeal, that decision, whether it was made in public or during an executive session, was required to have been memorialized in minutes prepared in accordance with §106 of the Open Meetings Law.

There is a related requirement pertinent to the absence of a vote being recorded. Section 87(3)(a) of the Freedom of Information Law provides that:

> "Each agency shall maintain:

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

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

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

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

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

There is nothing in either the Freedom of Information or Open Meetings Laws that specifies that a vote must be accomplished by means of a roll call or that a vote be "announced exactly at 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 her vote, an entity would be acting in compliance with the open vote requirements imposed by those statutes.

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)].

Lastly, attached to your letter is an editorial that appeared in *Newsday* on August 25 critical of a change the Legislature's rules regarding the presiding officer's votes in committees. According to the commentary, "His vote counts to get the bill out of committee, but his presence doesn't count to increase the number of votes needed for a majority." The new provision, in my opinion, is

contrary to a state statute, §41 of the General Construction Law, entitled "Quorum and majority."

The new provision in the Legislature's rules states that:

> "Legislation laid on the table shall be placed on the agenda for consideration by the full Legislature at its next regularly scheduled meeting and shall be eligible for a vote by the full Legislature only if it has been discharged, with or without recommendation, by a majority of the members present and voting and the number of those present and voting to discharge equals in number at least a majority of the entire membership of the Legislative committee to which it has been assigned[, with or without recommendation]. For purposes of this rule, the term 'entire membership of the Legislative committee' shall mean the members appointed to the committee by the Presiding Officer and shall not include the Presiding Officer acting in his or her ex-officio capacity. The 'entire membership of the Legislative committee' shall not increase when the Presiding Officer votes at a committee meeting in his or her ex-officio capacity. For the purposes of this rule, the term 'members present and voting' shall include members casting an abstention" (emphasis included in the text sent).

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." A majority of the members present, unless all are present,

would not constitute a quorum. 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. Moreover, §41 specifies that those powers and duties can only be carried out by means of action approved by "not less than a majority of the whole number."

The new rule also contains an inconsistency involving the role of the Presiding Officer. In one sentence, the rule indicates that the Presiding Officer acting in his or her ex officio capacity is not included as part of the "entire membership of the Legislative committee", but in the next, the rule provides that "The 'entire membership of the Legislative committee' shall not increase when the Presiding Officer votes at a committee meeting in his or her ex officio capacity." In my view, an ex officio member of a entity is a member for all purposes relating to the powers and duties of that entity. That person must in my opinion be included within requirements concerning the presence of a quorum and must be counted as a member when a committee takes action. If my contention is accurate, the presence of that person would alter the meaning of the "entire membership of the Legislative committee", and could alter the number of votes needed to take action. Again, to comply with a state statute, that number cannot be less than a majority of the total membership of the committee.

In an effort to enhance understanding of and compliance with law, a copy of this response will be sent to the County Legislature.

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-4691

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September 29, 2008

E-Mail

TO: Mr. Seth A. Davis

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. Davis:

I have received your letter and hope that you will accept my apologies for the delay in response. You have questioned the authority of the Mayor of the Village of Croton-on-Hudson to allow "speakers who agree with him to speak longer than speakers who disagree with him", to interrupt "critical speakers" or to bar persons from speaking due to their participation on a blog.

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 a village board of trustees, 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., Village Law, §4-412; 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 five minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

I note that there are federal court decisions indicating that if commentary is permitted within a certain subject area, negative commentary in the same area cannot be prohibited. It has been held by the United States Supreme Court that a school board meeting in which the public may speak is a "limited" public forum, and that limited public fora involve "public property which the State has opened for use by the public as a place for expressive activity" [Perry Education Association v. Perry Local Educators' Association, 460 US 37, 103. S.Ct. 954 (1939); also see Baca v. Moreno Valley Unified School District, 936 F. Supp. 719 (1996)]. In Baca, a federal court invalidated a bylaw that "allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter (District employees' conduct or performance)" (id., 730). That prohibition "engenders discussion artificially geared toward praising (and maintaining) the status quo, thereby foreclosing meaningful public dialogue and ultimately, dynamic political change" [Leventhal v. Vista Unified School District, 973 F.Supp. 951, 960 (1997)]. In a decision rendered by the United States District Court, Eastern District of New York (1997 WL588876 E.D.N.Y.), Schuloff, v. Murphy, it was stated that:

> "In a traditional public forum, like a street or park, the government may enforce a content-based exclusion only if it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. Perry Educ. Ass'n., 460 U.S. at 45. A designated or 'limited' public forum is public property 'that the state has opened for use by the public as a place for expressive activity.' Id. So long as the government retains the facility open for speech, it is bound by the same standards that apply to a traditional public forum. Thus, any content-based prohibition must be narrowly drawn to effectuate a compelling state interest. Id. at 46."

The court in Schuloff determined that a "compelling state interest" involved the ability to protect students' privacy in an effort to comply with the Family Educational Rights Privacy Act, but that expressions of opinions concerning "the shortcomings" of a law school professor could not be restrained.

In the context of your inquiry, assuming that the Board of Trustees and/or the Mayor as presiding officer permit those who wish to speak to do so for a particular period of time, each person who wishes to do so must, in my opinion, be given an equal opportunity to do so. Similarly, if the Board and/or Mayor permit positive comments concerning the operation of Village government, I believe that they must offer an equal opportunity to enable those in attendance to offer negative or critical comments.

I hope that I have been of assistance.

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4692

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September 29, 2008

E-Mail

TO: Hon. Robert Engle, Town of Madison Justice

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. Engle:

I have received your correspondence and apologize for the delay in response. The matter involves the ability of the Madison Town Board to meet and vote during a closed session in an effort to "get [you] out of office", the office being that of Town Justice.

In this regard, a public body, such as a town board, is authorized to conduct closed or "executive" sessions for purposes specified in paragraphs (a) through (h) of §105(1) of the Open Meetings Law. Pertinent in the context of the matters that you described is paragraph (f), which permits a public body to enter into executive session to discuss:

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

If the matter discussed by the Board involved the "removal" of a particular person, such as yourself, I believe that the Board could validly have conducted an executive session.

When a public body conducts an executive session and merely discusses a matter or matters and takes no action or vote, there is no obligation to prepare minutes of the executive session. However, a public body may take action during a proper executive session, unless its action is to appropriate public money. If action is indeed taken, minutes must be prepared in accordance with subdivision (2) of §106 of the Open Meetings Law, which states that:

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

Further, subdivision (3) requires that minutes of executive session "shall be available to the public within one week from the date of the executive session."

Lastly, although the time for initiating litigation against a public body is generally four months from its action in accordance with Article 78 of the Civil Practice Law and Rules, §107(3) of the Open Meetings Law states that "The statute of limitations in an article seventy-eight proceeding with respect to an action take at executive session shall commence to run from the date the minutes of such executive session have been made available to the public."

I hope that I have been of assistance.

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4693

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September 29, 2008

Ms. Joanne M. Novak
[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. Novak:

We are in receipt of your request for an advisory opinion concerning whether the Hepburn Library of Norfolk is an "agency" subject to the Freedom of Information Law in light of the First Department's decision in Metropolitan Museum Historic District Coalition v. De Montebello, 20 AD3d 28, 796 NYS2d 64 (2005). Our opinion, you indicated, will be instructive to your client, the North Country Library System, in providing clear guidance to any similarly situated member libraries.

In your letter you indicated that the Hepburn Library "receives an appropriation from the Town of Norfolk ... transferred to the library for its sole control and use ... as directed by its Board of Trustees", and that it also receives private donations. You wrote that the Library "recommends a slate of trustees to the Town of Norfolk who then appoints the Board" but that trustee vacancies are filled by the Library Board. You added that the Library sets personnel policy, that the employees are "not public employees" and that the Library "is not controlled in their decision and policy making process by the Town." In an effort to provide guidance with respect to your questions, we 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 of other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

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

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

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

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

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

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

It is emphasized that many libraries are characterized as "public", in that they can be used by the public at large. Nevertheless, some of those libraries are governmental in nature, while others are not-for-profit corporations. The latter group frequently receives significant public funding. Because they are not governmental entities, however, they would not be subject to the Freedom of Information Law.

In addition to the information you provided with respect to the Hepburn Library, we learned from the Hepburn Library website (www.nc3r.org/norfolk/) that it is one of seven Hepburn Libraries in St. Lawrence County, made possible through the donation of A. Barton Hepburn, who also established endowments to ensure their continued operation. The website for the Hepburn Library of Edwards indicates that "Each town agreed to raise a specific amount of tax monies, annually to continue the support of the library" (http://www.herd.org/edwards/library/).

As you note, in 2005 the Appellate Division affirmed a New York County Supreme Court case in which the court determined that the Metropolitan Museum of Art was outside the coverage

of the Freedom of Information Law. In considering its status in relation to that statute, the court found that:

> "...the Museum is a not-for-profit educational corporation controlled by a Board of Trustees consisting of 40 self-elected individuals. The City retains no authority to hire or fire the Museum's Director or President, and no City representatives sit on the Executive Committee, although five of seven ex-officio Trustees are City officials. Moreover, the Museum's operating and capital budgets are primarily privately funded, and its budgets are not subject to City approval or public hearings.
>
> "Since, as the Supreme Court correctly held, the Museum is not controlled by municipal officials, there is no danger that they can act through the Museum in order to shield their actions from public scrutiny, and FOIL's overriding purpose of promoting "open and accessible government... a hallmark of a free society" (Matter of Russo v. Nassau County Community College, 81 NY2d 690, 697, 603 NYS2d 294 [1993]), is not implicated" [Metropolitan Museum Historic District v. DeMontebello, 20 AD3d 28 at 37-38, 796 NYS2d 64 at 71 (1st Dept. 2005)].

In light of this decision, and the information cited above, it appears that the Hepburn Library of Norfolk is a private non-governmental entity; however, it is difficult to render a precise opinion without more explicit judicial guidance.

Consider, for example, the following three judicial decisions regarding not-for-profit corporations and their status as "agencies" subject to the Freedom of Information Law:

In the first, Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], the issue involved access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

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

> become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

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

> "The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations (see, e.g., Irwin Mem. Blood Bank of San Francisco Med. Socy. v American Natl. Red Cross, 640 F2d 1051; Rocap v Indiek, 519 F2d 174). The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus, the BEDC is a 'governmental entity' performing a governmental function for the City of Buffalo, within the statutory definition.
>
> "...In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments," (id., 492-493).

More recently, in a case involving the City of Canandaigua and a not-for-profit corporation, the "CRDC", the court found that:'

> "...The CRDC denies the City has a controlling interest in the corporation. Presently the Board has eleven members, all of whom were appointed by the City (see Resolution #99-083). The Board is empowered to fill any vacancies of six members not reserved for City appointment. Of those reserved to the City, two are paid City employees and the other three include the City mayor and council members. Formerly the Canandaigua City Manager was president of the CRDC. Additionally, the number of members may be reduced to nine by a board vote (see Amended Certificate of Incorporation Article V(a)). Thus the CRDC's claim that the City lacks control is at best questionable.
>
> "...As in Matter of Buffalo News, supra, the CRDC's intimate relationship with the City and the fact that the CRDC is performing its function in place of the City necessitates a finding that it constitutes an agency of the City of Canandaigua within the meaning of the Public Officers Law and therefore is subject to the requirements of the Freedom of Information Law...[Canandaigua Messenger, Inc. v. Wharmby, Supreme Court, Ontario County, May 11, 2001, affirmed 292 AD2d 835 (2002)].

We note that the Appellate Division unanimously affirmed the findings of the Supreme Court regarding the foregoing.

On the one hand, the Town has the power to appoint the members of the Library Board, unless there is a vacancy. In that event, the Town-appointed Board fills the vacancy. On the other,

the Library Board appears to be independent with respect to the development of policy and the day to day operation of the Library. On balance, in our view, due to the direct authority of the Town to appoint, and its indirect authority to fill vacancies on the Board, it is suggested that it would likely be found that the Library is an agency subject to the Freedom of Information Law.

It is noted that confusion concerning the application of the Freedom of Information Law to non-governmental libraries open to the public has arisen in several instances, perhaps because, as you are likely aware, its companion statute, the Open Meetings Law, is applicable to meetings of their boards of trustees. The Open Meetings Law, which is codified as Article 7 of the Public Officers Law, is applicable to public and association libraries due to direction provided in the Education Law. Specifically, §260-a of the Education Law states in relevant part that:

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

Again, since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries must be conducted in accordance with that statute, even though the records of those entities may fall beyond the coverage of the Freedom of Information Law.

Should you wish to submit additional information regarding the status of the Library Board, we would be willing to review our opinion.

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 2, 2008

Mr. Jack Boden
[redacted]

Hon. Vincent C. Martello
Supervisor
Town of Marbletown
P.O. Box 217
Stone Ridge, NY 12484

The staff of the Committee on 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. Boden and Supervisor Martello:

I have received correspondence from both of you dealing with the implementation of the Freedom of Information and Open Meetings Laws in the Town of Marbletown. Based on a review of the documentation, I offer the following comments.

First, a number of requests involve draft minutes of certain boards operating within the government of the Town. From my perspective, draft minutes should be disclosed, on request, as soon as they exist.

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

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

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

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

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

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

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

I point out that there is often a distinction between a "meeting" and a "hearing". The former generally involves a gathering of the members of a public body for the purpose of discussion, deliberation and potentially taking action. The latter typically relates to a situation in which the public is given an opportunity to be heard in relation to a particular matter, such as a town budget or an amendment to a local law. As indicated above, the Open Meetings Law includes requirements concerning the preparation and disclosure of minutes of meetings. I am unaware, however, of similar requirements concerning hearings. Often there is a record, sometimes characterized as minutes, relating to hearings. Nevertheless, I know of no provision that deals specifically with the preparation of a record relating to a hearing or a time within which such a record must be prepared or disclosed. Similarly, the Open Meetings Law, §104, requires that meetings of public bodies be preceded by notice of the time and place "given" to the news media and by means of posting. That section also states that the notice given need not be a legal notice. In contrast, many hearings must be preceded by the publication of a legal notice.

A somewhat related issue concerns the length of time that tape recordings of meetings must be retained. 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."

Section 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.

Because questions regarding the retention of tape recordings of open meetings have been the subject of numerous questions over the course of time, I have learned that the minimum retention period for such records is four months.

Second, one of the issues appears to pertain to the time in which the Town makes records available in response to a request made under the Freedom of Information Law. In my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

Further, 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 in 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 legislation enacted in 2006 broadened the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law. 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.

It is also noted that the regulations promulgated by the Committee on Open Government, which have the force and effect of law, state in 21 NYCRR §1401.7(b) that a person denied access to records must be informed in writing of reason and the right to appeal the denial, as well as the name and address of the person or body to whom an appeal may be directed.

Lastly, a persistent issue relates to records that the Town has employed or retained an attorney to prepare. As you are likely aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. Both of exceptions cited in the correspondence are pertinent in determining rights of access.

The first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101 of the Civil Practice Law and Rules.

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

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

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

The other ground for denial of potential significance, §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 my view be withheld.

In consideration of the foregoing, if an attorney retained or employed by the town, or another town officer or employee, offers an opinion or recommendation, a communication of that nature may be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Cathy Cairo Davis, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-17399
COL-AO-4695

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October 6, 2008

Hon. Teresa E. Pierce
Town Clerk
Town of Wawayanda
P.O. Box 106
Slate Hill, NY 10973

The staff of the Committee on 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. Pierce:

I have received your letter concerning requirements involving minutes of meetings. You sent copies of "worksheets" relating to meetings of the Town of Wawayanda Planning Board and contend that they are insufficient to comply with the Open Meetings Law. The worksheets include minimal information, even when a motion to take action is carried. There is no indication of the nature of action taken or the votes of the members. In this regard, I offer the following comments.

First, the Open Meetings Law is applicable to "public bodies", and a town planning board, based on the definition of "public body" [see §102(2)], as well as the provisions of Article 16 of the Town Law, clearly constitutes a "public body" required to comply with that statute.

Second, §106(1) of the Open Meetings Law provides direction concerning the contents of minutes of open meetings and states that:

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

In a decision pertinent to the matter, Mitzner v. Goshen Central School District Board of Education [Supreme Court, Orange County, April 15, 1993], the case involved a series of complaints that were reviewed by the School Board president, and the minutes of the Board meeting merely stated that "the Board hereby ratifies the action of the President in signing and issuing eight Determinations in regard to complaints received from Mr. Bernard Mitzner." The court held that "these bare-bones resolutions do not qualify as a record or summary of the final determination as

required" by §106 of the Open Meetings Law. As such, the court found that the failure to indicate the nature of the determination of the complaints was inadequate. In the context of your inquiry, I believe that, in order to comply with the Open Meetings Law and to be consistent with the thrust of the holding in Mitzner, minutes must indicate in some manner the precise nature of the Board's action.

Lastly, §87(3)(a) of the Freedom of Information Law provides that:

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

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

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

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

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

There is nothing in either the Freedom of Information or Open Meetings Laws that specifies that a vote must be accomplished by means of a roll call or that a vote be "announced exactly as the same time it is cast." In my view, so long as a record is prepared that indicates the manner in which each member cast his or vote, an entity would be acting in compliance with the open vote requirements imposed by those statutes.

In an effort to enhance knowledge of and compliance with the Open Meetings and Freedom of Information Laws, a copy of this response will be sent to the Planning Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 4696

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October 23, 2008

Hon. Philip E. Zegarelli
Mayor
Village of Sleepy Hollow
28 Beekman Avenue
Sleepy Hollow, NY 10591

The staff of the Committee on 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. Zegarelli:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to gatherings of a majority of the members of the Board of Trustees of the Village of Sleepy Hollow. You related that in March of 2008, majority control shifted to four trustees of the seven member board, who now meet privately "to discuss and decide Village business and other actions prior to official Board sessions." You indicated that one of the four stated that there is an "opinion" that permits their private meetings, but that the opinion has not been shared with you.

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

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

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

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

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

Many local legislative bodies, recognizing the potential effects of the 1985 amendment, have taken action to reject their authority to hold closed caucuses and to continue to conduct their business open to the public as they had prior to the amendment. Since several of those bodies are located in Westchester County, it is suggested that you ascertain whether the Village of Sleepy Hollow took such action, perhaps late in 1985 or soon thereafter.

With respect to members to whom you referred as having an "opinion" concerning the closed caucuses, it is emphasized that this office attempts to offer responses that are based on and consistent with the law, irrespective of our views regarding the propriety of the law. In the context of your inquiry, while we believe that the gatherings in question fall outside the coverage of the Open Meetings, it is noted that the Committee has for years recommended legislation to amend the provisions pertaining to political caucuses in an effort to ensure that public business is discussed in public.

On behalf of the Committee on Open Government, we hope that 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-4697

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October 28, 2008

E-Mail

TO: Mr. Don Garber

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 information presented in your correspondence.

Dear Mr. Garber:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to gatherings of a majority of the members of the Board of Trustees of the Town of Brookhaven prior to publicized meetings of the Board, at which the majority presents resolutions to hire and/or appoint certain individuals to positions in Town government. You asked whether the political party caucus exemption to the Open Meetings Law would apply to a gathering of 3 Republicans and 1 Conservative on a 7-member Board and noted that you have learned anecdotally that "many Towns have a series of one-on-one meetings and bypass the Open Meetings intention."

In our opinion, a gathering of four of the seven members of the Town Board, with the party affiliations that you indicated, would constitute a "meeting" that should be held in accordance with the Open Meetings Law. In this regard, we offer the following comments.

First, by way of background, the definition of "meeting" [see Open Meetings Law, §102(1) has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals 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 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 the Town business, any such gathering, in our 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. Questions concerning the scope of the so-called "political caucus" exemption have continually arisen, and until 1985, judicial decisions indicated that the exemption pertained only to discussions of political party business. Concurrently, in those decisions, it was held that when a majority of a legislative body met to discuss public business, such a gathering constituted a meeting subject to the Open Meetings Law, even if those in attendance represented a single political party [see e.g., Sciolino v. Ryan, 81 AD 2d 475 (1981)].

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

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

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

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

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

Since the gathering described in your letter was attended by members of more than one political party, we do not believe that it could be described as a political caucus exempt from the Open Meetings Law. While discussions regarding applicants for employment may be held in executive session, again, it would appear that the gathering you described was a "meeting" that should have been held in accordance with the Open Meetings Law.

Further, and with respect to your observation about a series of one-on-one meetings, we note that, as a general matter, we do not believe that the Open Meetings Law applies unless a quorum is present. Even when a meeting is scheduled and reasonable notice is given to all the members in a manner consistent with the requirements of §41 of the General Construction Law, but less than a majority attends, the gathering would not constitute a "meeting" and the public would have no right to attend. Section 41 of the General Construction Law, entitled "Quorum and majority", states in relevant part that:

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

The issue in the context of your inquiry involves the application of the Open Meetings Law to a situation in which, by design, a gathering includes less than a quorum of the Board. If there is an intent to ensure the presence of less than a quorum at any given time in order to evade the Open Meetings Law, 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 of an intent to circumvent the Open Meetings Law when a series of meetings was held, each involving less than a quorum of a board of education. However, no court has yet concluded that an attempt to evade the Open Meetings Law by ensuring the presence of less than a quorum constitutes a violation of law.

Finally, while it appears that your suggestions to share information about prospective employees and appointees are wise, perhaps they would best be proposed as bylaws for the Town Board. Thank you for your thoughts on these matters.

CSJ:jm

cc: Town Board

OML-AO-4695

From: Jobin-Davis, Camille (DOS)
Sent: Monday, November 03, 2008 10:38 AM
To: Ms. Bonnie Holmes
Subject: RE: From Bonnie Holmes Fwd: Katonah-Lewisboro UFSD Press Release

Dear Bonnie:

You are correct, the bases for entering into executive session are limited. The provision on which the Board appears to intend to rely on is section 105(1)(h) which provides for an executive session discussion of the following:

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

Accordingly, the Board may go into executive session to discuss the acquisition of real property, "but only when publicity would substantially affect the value thereof."

The following are links to advisory opinions that will help elucidate how we interpret that qualifying phrase:

http://www.dos.state.ny.us/coog/otext/o4165.htm
http://www.dos.state.ny.us/coog/otext/o3764.htm
http://www.dos.state.ny.us/coog/otext/o3665.htm

I hope that these are helpful to you.

Camille

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

OML-AO-4699

From: Jobin-Davis, Camille (DOS)
Sent: Monday, November 03, 2008 3:42 PM
To: Ms. Anna Lillian Moser, North County News
Subject: Open Meetings Law - executive sessions

Anna:

Thank you for your email questions. Mr. Freeman is out of the office for the afternoon, and I returned your telephone call but reached only voicemail, so thought it might make more sense to email.

In response to your first question, a town board can take action during public session on any issue it has the authority to determine. As long as a quorum is present, and the vote is passed by a majority of the members of the board, the presence or absence of the town clerk or town attorney would not be a factor in the validity of the vote. …if your question has to do with the town clerk's responsibility to keep the minutes under Town Law, I think that the responsibility can be delegated, and in any event, as long as the minutes are recorded, the action would be valid.

In response to your second question, if the motion for entry into executive session clarified that the discussion pertained to "the employment history of a particular person" or "matters leading to the promotion of a particular person", then the discussion may have been held in keeping with the Open Meetings Law – see section 105(1)(f). If the discussion in executive session was limited to the Highway Supt's job performance and whether it warranted an increase in salary, then yes, the discussion was held appropriately. On the other hand, if the discussion was one of policy, where the members talked about whether it is wise to compensate a person who holds two positions with two salaries or some portion of both salaries, or if the discussion focused on the town's policy for setting salaries for employees who hold two positions, in my opinion the discussion should have been held in public. If the conversation included both a discussion of his job performance, and a policy discussion, in my opinion it could have been bifurcated between the public and private session.

So, my answer would depend on the language of the motion, then the content of the discussion, which may be a more difficult question to answer.

I hope that this is helpful. Please contact me again if you have further questions.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518
http://www.dos.state.ny.us/coog/coogwww.htm

OML-AO-4700

From: Jobin-Davis, Camille (DOS)
Sent: Monday, November 03, 2008 4:25 PM
To: Dr. Peter Treyz
Subject: RE: executive sessions for school boards to consider

Dear Dr. Treyz:

Earlier today I answered a very similar question in the same school district, advising as follows:

The bases for entering into executive session are limited. The provision on which the Board appears to intend to rely on is section 105(1)(h) which provides for an executive session discussion of the following:

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

Accordingly, the Board may go into executive session to discuss the acquisition of real property, "but only when publicity would substantially affect the value thereof."

The following are links to advisory opinions that will help elucidate how we interpret that qualifying phrase:

http://www.dos.state.ny.us/coog/otext/o4165.htm
http://www.dos.state.ny.us/coog/otext/o3764.htm
http://www.dos.state.ny.us/coog/otext/o3665.htm

Based on your description, if the property is a gift, I find it difficult to see how a discussion of the transaction could affect its value. If what you say is true, that the discussion will focus on the County's restrictions on finances used to develop the property, I am skeptical that the discussion would have an impact on the value of the gifted property.

Perhaps the conversation should be bifurcated so as to discuss things that would affect value in executive session, and discuss things that would not affect value in the public forum.

I hope that this is helpful.

Camille

Camille S. Jobin-Davis, Esq.
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NYS Committee on Open Government
Department of State
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4701

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November 4, 2008

E-Mail

TO: Hon. Robert T. Wood, Supervisor, Town of Oneonta

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Supervisor Wood:

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

First, you requested clarification concerning the status of committees consisting of two members of the Town Board. In this regard, 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 consisting of members of a 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)]. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see e.g., General Construction Law, §41). Therefore, if, for example, the Town Board consists of five, its quorum would be three; in the case of a committee consisting of two, a quorum would be two.

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

The remaining questions involve notice of meetings, and the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. 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.
>
> 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."

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

In the context of your inquiry, if a series of meetings have been scheduled in advance to be held at particular times, the posting of a notice of a schedule of those meetings in a conspicuous public location and transmittal of that notice once to the news media would in my view satisfy §104 of the Open Meetings Law regarding those meetings. The only instances in which additional notice would be required would involve unscheduled meetings that are not referenced in the notice.

Lastly, I believe that notice given by email to the news media is proper. In short, any written notice of the time and place given in accordance with §104 would in my opinion satisfy the requirement concerning notice to the news media.

I hope that I have been of assistance.

RJF:jm

OML-AO-4702

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, November 19, 2008 3:13 PM
To: Mr. Tim Tice
Subject: Open Meetings Law - posting in conspicuous location

Dear Tim:

In response to your email regarding a request for an advisory opinion, please note that I had a telephone discussion with Mayor Ciferri earlier today, and advise as follows:

The following is a link to an advisory opinion concerning the necessity for posting notice of a meeting in a conspicuous location: http://www.dos.state.ny.us/coog/otext/o4325.htm. There is no requirement in the Open Meetings Law that notice of a meeting be published by a newspaper, only that notice be given to the news media.

There is no requirement in the law that a public body prepare an agenda. See, http://www.dos.state.ny.us/coog/otext/o3289.htm. And, regardless of how a meeting is characterized, if a quorum of the public body gathers to discuss public business, it is a "meeting" subject to the law. See, http://www.dos.state.ny.us/coog/otext/o4506.htm.

With respect to your questions concerning access issues, please note the first part of the following opinion: http://www.dos.state.ny.us/coog/otext/o3084.htm

I hope that these links help address your questions. Should you have further questions, or should you wish to continue to request a written advisory opinion based on your email submission, please advise.

Thank you.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
518/474-2518

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4703

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

November 19, 2008

Mr. David C. Ranauro
[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. Ranauro:

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

You raised questions pertaining to an "emergency meeting" held by the Owasco Town Board, and requested a "ruling" concerning its propriety.

In this regard, it is emphasized that the Committee on Open Government is authorized to provide advice and opinions relating to the Open Meetings Law. The Committee is not empowered to issue "rulings", and a public body, such as a town board, is not required to seek approval or permission from this office in advance of a meeting. Nevertheless, in consideration of the situation as you described, I offer the following comments.

It appears that two provisions of law may be pertinent.

First, §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."

Second, separate from §62, which deals with notice of a special meeting to town board members, is §104 of the Open Meetings Law, which 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:

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

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

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-A-4704

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November 19, 2008

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 information presented in your correspondence.

Dear Ms. Lukas:

As you are aware, I have received your correspondence and hope that you will accept my apologies for the delay in response.

In short, it is your contention that the Mayor of the Village of Schuylerville treats you in a manner different from others in relation to your ability to speak during meetings of the Village Board of Trustees.

Although you indicated that you are familiar with advisory opinions rendered by this office concerning the issue, I offer the following comments.

First, while the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100), the Law is silent with respect to public participation. Consequently, by means of example, if a public body, such as the Board of Trustees, 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, 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., Village Law §4-412, §Town Law, §63 and Education Law, §1709), the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925

(1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in our view, would be unreasonable.

There are federal court decisions indicating that if commentary is permitted within a certain subject area, negative commentary in the same area cannot be prohibited. It has been held by the United States Supreme Court that a school board meeting in which the public may speak is a "limited" public forum, and that limited public fora involve "public property which the State has opened for use by the public as a place for expressive activity" [Perry Education Association v. Perry Local Educators' Association, 460 US 37, 103. S.Ct. 954 (1939); also see Baca v. Moreno Valley Unified School District, 936 F. Supp. 719 (1996)]. In Baca, a federal court invalidated a bylaw that "allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter (District employees' conduct or performance)" (id., 730). That prohibition "engenders discussion artificially geared toward praising (and maintaining) the status quo, thereby foreclosing meaningful public dialogue and ultimately, dynamic political change" [Leventhal v. Vista Unified School District, 973 F.Supp. 951, 960 (1997)]. In a decision rendered by the United States District Court, Eastern District of New York (1997 WL588876 E.D.N.Y.), Schuloff, v. Murphy, it was stated that:

> "In a traditional public forum, like a street or park, the government may enforce a content-based exclusion only if it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. Perry Educ. Ass'n., 460 U.S. at 45. A designated or 'limited' public forum is public property 'that the state has opened for use by the public as a place for expressive activity.' Id. So long as the government retains the facility open for speech, it is bound by the same standards that apply to a traditional public forum. Thus, any content-based prohibition must be narrowly drawn to effectuate a compelling state interest. Id. at 46."

In the context of the issues that you raised, I believe that a court would determine that the Board may limit the amount of time allotted to person who wishes to speak at a meeting, so long as the limitation is reasonable. Similarly, it is my view that the Board may limit comments to matters involving Village business or the operation of Village government.

As a general matter, however, I believe that you should be treated in the same manner as others in relation to your ability to speak during Board meetings.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

COL-AO-4705

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November 19, 2008

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 information presented in your correspondence.

Dear Ms. Lukas:

I have received your letter concerning contents of "workshops" held by the Board of Trustees of the Village of Schuylerville.

Since you referred to an advisory opinion rendered by this office dealing with the issue that you raised, the reason for your request for essentially the same response is unclear. Nevertheless, I offer the following comments.

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

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

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

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

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

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

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

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

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

Based upon the foregoing, it is clear in my view that minutes need not consist of a verbatim account of what was said at a meeting; similarly, there is no requirement that minutes refer to every topic discussed or identify those who may have spoken. Although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are taken. It is emphasized, however, that if those kinds of actions, such as motions or votes, do not occur during workshops, technically I do not believe that minutes must be prepared.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4706

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November 19, 2008

Mr. Matthew Kuschner
[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. Kuschner:

I have received your letter concerning whether action taken during an executive session of the North Merrick Public Library Board of Trustees involved the appropriation of public money.

In this regard, the question of what constitutes an appropriation has been discussed with experts concerning fiscal matters at the Office of the State Comptroller. In short, it has been advised that a decision to expend public moneys that were previously budgeted does not constitute an appropriation. In that circumstance, the action taken would involve a decision to allocate or expend money already appropriated. An appropriation, therefore, as I understand the term, involves a decision to spend money not previously allotted or allocated within a budget.

I hope 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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OML-AO-4707

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November 19, 2008

Mr. Matthew Kuschner
[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. Kuschner:

As you are aware, I have received your letter of July 17. As I understand your remarks, the issue that you raised involves the ability of the Board of Trustees of the North Merrick Public Library to take action during an executive session.

Based upon the language of the Open Meetings Law, unless a public body's action involves the appropriation of public moneys, I believe that it may take action during a proper executive session. The introductory language of §105(1) of that statute provides 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..."

The clear inference in the foregoing is that action may be taken during an executive session, again, unless the action is to appropriate public moneys.

Further, §106(2) refers specifically to minutes involving action taken during an executive session, stating that:

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

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

GML AO - 4708

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, November 20, 2008 11:10 AM
To: 'Mark Boylan'
Subject: RE: Open Meetings Law - allegations re elected official

Mark:

In response to your question about the authority to discuss allegations against an elected official in an executive session, our response is that yes, a public body has the authority to discuss matters leading to the discipline or removal of a particular person in executive session (section 105[1][f]). The statute does not differentiate between people who are employed or elected.

I hope that this is helpful.

Camille

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

OML-AO-4709

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, December 04, 2008 4:17 PM
To: Kay Wharmby, Clerk, Village of Fairport
Subject: Open Meetings Law - caucuses

Kay:

As promised, I've pasted the text of Section 108 of the Open Meetings Law below, and underlined the provisions about caucus meetings:

§108. Exemptions. Nothing contained in this article shall be construed as extending the provisions hereof to:
1. judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning boards of appeals;
2. a. deliberations of political committees, conferences and caucuses.
b. for purposes of this section, the deliberations of political committees, conferences and caucuses means a private meeting of members of the senate or assembly of the state of New York, or of the legislative body of a county, city, town or village, who are members or adherents of the same political party, without regard to (i) 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; and
3. any matter made confidential by federal or state law.

Camille S. Jobin-Davis
Assistant Director
NYS Committee on Open Government
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STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4710

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December 10, 2008

Mr. William J. Zwerger
[redacted]

Dear Mr. Zwerger:

Your letter addressed to the Inspector General has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice and opinions pertaining to the Freedom of Information and Open Meetings Laws.

You referred to a meeting held in Syracuse involving the Commissioner of Human Rights, other officials of that agency, representatives of the New York Civil Liberties Union and "members of LGBT advocacy groups." Despite your efforts to learn of the location and to attend, they apparently did not succeed.

In this regard, as a general matter, the right of the public to attend meetings is governed by the Open Meetings Law. The gathering to which you referred, in my view, would not have been subject to the requirements of that statute, because it pertains to meetings of "public bodies." Section 102(2) of that law defines the phrase "public body" to mean:

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

Based on the foregoing, a public body is an "entity" consisting of two or more members either elected or appointed to carry out some governmental function collectively as a body. Examples of public bodies are city councils, town boards, boards of education, county legislative bodies, and the like. Further, a meeting is a gathering of a quorum, a majority of the total membership, of a public body for the purpose of conducting public business.

As you described the gathering, although there may have been several government officials present, no "public body" would have been involved. Consequently, the gathering would not have been subject to the Open Meetings Law, and there would have been no right to attend conferred upon the public.

With respect to the site of the gathering, I point out that the Freedom of Information Law does not require that government employees answer questions; rather, that law deals with existing records. Assuming that a record existed indicating the location of the gathering, I believe that such a record, or the portion of the record indicating the location, would have been accessible to the public under the Freedom of Information Law. However, even if the record had been disclosed, that would not have triggered the application of the Open Meetings Law or required that the meeting be open to the public.

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: William Herbert, NYS Office of the Inspector General

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 10, 2008

E-Mail

TO: Hon. Kareen Tyler, Clerk, Village of Saranac Lake

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. Tyler:

I have received your letter in which you questioned whether verbatim minutes of meetings of the Village of Saranac Lake Board of Trustees should or must be prepared.

From my perspective, there is no provision of law that requires the preparation of verbatim minutes. Further, for reasons to be offered later, I do not believe that verbatim minutes serve Village government or the public well. In this regard, I offer the following comments.

First, §106 of the provides direction concerning the preparation of minutes of meetings of public bodies, such as village boards of trustees, and contains what might be characterized as minimum requirements concerning the content of minutes. Specifically, that provision states that:

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

> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such 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, §4-402 of the Village Law states that you, as Village Clerk, "shall keep a record" of the proceedings of the Board of Trustees, and §4-412 provides the Board with general authority over the government of a village, including the ability to "determine the rules of its procedure."

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 village boards having the authority to adopt rules and procedures pursuant to §4-412 of the Village 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 village 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 village board by the Village Law.

In my opinion, a rule requiring that a village clerk prepare a verbatim account of everything said at every village board meeting would be found by a court to be unreasonable and beyond the authority conferred by law. In consideration of the statutory obligations imposed upon village clerks, 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 village 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 four 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. In short, the preparation of a tape recording of a meeting is less costly and time consuming than preparing verbatim minutes.

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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OML-AO-4712

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December 10, 2008

Ms. Lucille Held
[redacted]

Dear Ms. Held:

This is in response to your inquiry concerning the adequacy of minutes of meetings of the Town Board of the Town of Harrison and rights of access to records, particularly those reflective of the expenditure of public money. In this regard, I offer the following comments.

First, the Open Meetings Law provides direction concerning minutes and states in §106 that:

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

In a decision pertinent to our discussion, Mitzner v. Goshen Central School District Board of Education [Supreme Court, Orange County, April 15, 1993], the case involved a series of complaints that were reviewed by a school board president, and the minutes of the board meeting merely stated that "the Board hereby ratifies the action of the President in signing and issuing eight Determinations in regard to complaints received from Mr. Bernard Mitzner." The court held that

"these bare-bones resolutions do not qualify as a record or summary of the final determination as required" by §106 of the Open Meetings Law. As such, the court found that the failure to indicate the nature of the determination of the complaints was inadequate. In the context of the issues that you raised, I believe that, in order to comply with the Open Meetings Law and to be consistent with the thrust of the holding in Mitzner, minutes must indicate in some manner the precise nature of the Board's action. Stated differently, any action taken by the Board to expend public money, whether the action was taken during an open meeting or an executive session, must, based on the language of the law and judicial precedent, be memorialized in minutes indicating the nature of the action.

Second, aside from minutes of meetings, records containing information concerning the expenditure of public moneys are required to be prepared and made available to the public pursuant to both the Freedom of Information Law and the Town Law. With respect to the Freedom of Information Law, which is based on a presumption of access, none of the exceptions to rights could, in my view, properly be asserted to withhold those records. Section 118 of the Town Law focuses on claims for payment and states that payment cannot be made:

> "...unless an itemized voucher therefor, in such form as the town board or the town comptroller shall prescribe, shall have been presented to the town board or town comptroller and shall have been audited and allowed. Such voucher shall be accompanied by a statement by the officer whose action gave rise or origin to the claim that he approves the claim and that the service was actually rendered or supplies or equipment actually delivered."

In addition, §119(2) of the Town Law states in relevant part that:

> "In a town in which there is a town comptroller, he shall cause each claim presented to him for audit to be numbered consecutively, beginning with the number one in each year and to be stamped or otherwise marked with the date of presentation. The claims shall be available for public inspection at all times during office hours."

In short, I believe that records indicating the allocation or expenditure of public moneys must be prepared and made available, either in minutes of meetings or other records maintained by the Town.

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- 4713

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December 10, 2008

Mr. Gary Jacobson
Town of Rosendale Zoning Code Review Committee
P.O. Box 423
Rosendale, NY 12472

The staff of the Committee 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. Jacobson:

As you are aware, I have received your letter concerning the status under the Open Meetings Law of the Town of Rosendale Zoning Review Committee. You wrote that the Committee was created by resolution, that it includes a member of the Town Board and the Planning Board, and several members of the public as well.

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

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

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

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

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

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

I hope that 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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December 15, 2008

Mr. Alan L. Silverman
Computing Solutions
20 Leonardo Drive
Stone Ridge, NY 12484

The staff of the Committee on 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. Silverman:

I have received your letter in which you raised issues relating to the Town of Marbletown and particularly its Planning Board.

In this regard, it is noted that the implementation of the Freedom of Information Law by the Town has been discussed with various Town officials, and it is my hope that many of the difficulties to which you referred have been resolved. However, as you are likely aware, the Freedom of Information Law as amended in 2005 provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules.

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

In the case of the New York Open Meetings Law, in a statement of general principle and intent, that statute confers upon the public the right to attend meetings of public bodies, to listen to their deliberations and observe the performance of public officials. However, as you may be aware, 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.

On the other hand, a public body may in my view permit the public to speak, and if it does so, it has been suggested that rules and procedures be developed that regarding the privilege to speak that are reasonable and that treat members of the public equally. From my perspective, a rule authorizing any person in attendance to speak for a maximum prescribed time would be reasonable and valid, so long as it is carried out reasonably and consistently.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Planning Board
Hon. Katherine Cairo Davis

STATE OF NEW YORK
DEPARTMENT OF STATE
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December 16, 2008

E-Mail

TO: Mr. Robert Ball

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. Ball:

Please accept my apologies for the delay in response; your correspondence was inadvertently misplaced. You referred to a proposed development in your town, and residents were told by the town attorney that they "could not discuss the subject of this development without the developer present."

From my perspective, the presence of the developer is irrelevant. The primary issue in my opinion involves the ability of the public to speak at meetings. In this regard, I offer the following comments.

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.

The Open Meetings Law, in a statement of general principle and intent, 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, there is nothing in that law that pertains to the right of those in attendance to speak or otherwise participate. Certainly a member of the public may speak or express opinions about meetings or about the conduct of public business before or after meetings to other persons. However, since neither the Open Meetings Law nor any other provision of which I am aware provides the public with the right to speak during meetings, I do not believe that a public body is required to permit the public to do so during meetings.

Certainly a public body may in my view permit the public to speak, and if it does so, it has been suggested that rules and procedures be developed that regarding the privilege to speak that are

reasonable and that treat members of the public equally. In my view, a rule authorizing any person in attendance to speak for a maximum prescribed time or on agenda items only, would be reasonable and valid, so long as it is carried out reasonably and consistently.

Lastly, I do not believe that a town attorney has the authority to determine when and whether the public is permitted speak. Rather, that authority rests with the town board, which, pursuant to §63 of the Town Law, is empowered "to determine the rules of its procedure."

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

RJF:jm