STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4716

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January 2, 2009

Mr. Richard Koubek
[redacted]

The staff of the Committee on 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. Koubek:

As you are aware, I have received your letter concerning the status of local advisory councils created pursuant to Part 341 of the regulations promulgated by the Commissioner of what had been known as the Department of Social Services (18 NYCRR). Please accept my apologies for the delay in response.

The regulations, which have the force and effect of law, indicate in §341.1 that each social services district "shall establish an advisory council" that must consist of a minimum of twenty members and include recipients of public and medical assistance, providers of social services, medical services and domiciliary care, and members of the general public, including representatives of various specified groups whose functions relate to social services. An advisory council "shall be involved, in an advisory capacity only, in policy development, program planning and program evaluation....with respect to public assistance, medical assistance and services." Section 342 requires the commissioner of a social services district to "have administrative responsibility for organization of meetings of the advisory council on a regular basis and for activities associated therewith including preparation of agendas, minutes and reports." In addition, §342 requires that a social services district "submit to the department [the state agency that oversees social services districts] such reports on the activities of the advisory council as the department may from time to time direct."

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

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

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

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

In this instance, however, although a local advisory council may or may not have the ability to make determinations, it is a creation of law that has a permanent existence, it performs functions in the development of policy and programs in particular areas of social services.

In the decisions cited earlier, none of the entities were designated by law to carry out a particular duty and all had purely advisory functions. More analogous to the status of local advisory councils is the decision rendered in MFY Legal Services v. Toia [402 NYS 2d 510 (1977)]. That case involved an advisory body created by law to advise the Commissioner of the State Department of Social Services.

Perhaps most significant is a decision rendered by the Court of Appeals, the state's highest court, in which it was found that:

> "In determining whether an entity is a public body, various criteria and benchmarks are material. They include the authority under which the entity was created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies.
>
> "This Court has noted that the powers and functions of an entity should be derived from State law in order to be deemed a public body for Open Meetings Law purposes (*see, Matter of American Socy. for Prevention of Cruelty to Animals v Board of Trustees of State Univ. of N.Y.*, 79 NY2d 927, 929). In the instant case, the parties do not dispute that CUNY derives its powers from State law and it surely is essentially a public body subject to the Open Meetings Law for almost any imaginable purpose...
>
> "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)" [Smith v. CUNY, 92 NY2d 707; 713-714 (1999)].

In sum, because a local advisory council is a creation of law, is required by law to include representation from particular aspects of those involved in social services, and is authorized to perform particular functions, based on the direction of judicial decisions, it would appear that such an entity constitutes a "public body" required to comply with the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17481
OML-AO-4717

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January 2, 2009

E-Mail

TO: Mr. Thomas H. Finnegan

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. Finnegan:

As you are aware, I have received your letter concerning your efforts in obtaining minutes of meetings of the East Meadow Fire District Board of Commissioners. Please accept my apologies for the delay in response.

In this regard, I offer the following comments.

First, the Board is clearly a "public body" required to comply with the Open Meetings Law, and §106 of that law requires that minutes of open meetings be prepared and made available on request within two weeks of the meetings to which they pertain.

Second, when a request is made to inspect paper records that are accessible in their entirety, no fee can be charged. When photocopies of records up to nine by fourteen inches are requested, an agency may charge a maximum of twenty-five cents per photocopy [see Freedom of Information Law, §87(1)(b)(iii). I note, too, that it has been held that an agency must accept cash payment of fees for copying (see Reese v. Mahoney, Supreme Court, Erie County, June 28, 1984).

Third, §89(3)(b) of the Freedom of Information Law states in relevant part that all entities subject to that law "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...to the extent practicable...and provided that the written requests do not seek a response in some other form."

Lastly, you referred to a delay in response by the District, an issue that was addressed in previous correspondence.

I hope that I have been of assistance.

RJF:jm

cc: Board of Commissioners

OML-AO- 4718

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, January 21, 2009 3:17 PM
To: Ms. Paula Piekos
Cc: Freeman, Robert (DOS)
Subject: RE: Open Meetings Law

Paula:

In response to your questions, I offer the following:

First, the "litigation" exception (OML section 105[1][d]), which authorizes a public body to enter into executive session to discuss "proposed, pending or current litigation", has been interpreted by the courts to permit a public body to discuss litigation strategy behind closed doors, so as not to divulge its strategy to its adversary.

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

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

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 planning board." If the planning 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 planning board, 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.

Second, there is no requirement to televise meetings in the Open Meetings Law. Accordingly, as far as I know, a decision to televise a meeting or meetings is at the discretion of the Common Council. However, the public must be given notice of all meetings, regardless of whether they are televised, and the public must be permitted to attend and observe the proceedings. "Meeting" has been defined by New York's highest court as a gathering of a quorum of a public body for the purpose of conducting public business. For a more in depth discussion regarding "meetings" please see http://www.dos.state.ny.us/coog/otext/o4067.htm and other Open Meetings Law advisory opinions on our website under "M" for "Meetings".

Third, and finally, with regard to the Open Space Acquisition Committee, although the City may make the Committee's inventory meetings open to the public, it is likely that the Committee is not a "public body" and that therefore the Open Meetings Law would not apply. Typically, committees with advisory powers only are not subject to the Open Meetings Law. Of course, this would not affect your ability to speak to any of the members.

I hope that this is helpful to you. Please feel free to take a look at advisory opinions mentioned above, in addition to others on our website regarding Open Meetings Law, organized by key phrase. Should you require a more formal written opinion, please note that we currently have a 5 to 6 month backlog. Thank you.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
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OML-AO-4719

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, January 21, 2009 4:24 PM
To: Ms. Paula Piekos
Subject: RE: Open Meetings Law

Paula, one last point in follow up – please note that there is no requirement that notice of meetings be published in the newspaper. The Open Meetings Law requires in part that "public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before such meting." (section 104[1]). Camille

Camille S. Jobin-Davis, Esq.
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OML-AO-4720

From: Freeman, Robert (DOS)
Sent: Thursday, January 29, 2009 12:51 PM
To: Christine Murphy
Subject: Political committee

Dear Ms. Murphy:

I have received your inquiry in which you questioned the status of a certain political party meeting in relation to the Open Meetings Law.

You indicated that the town board in your community consists of 2 republicans and three democrats, and that the three democrats "have requested a meeting with the Democratic Committee to discuss the Committee's status i.e. plans for support, campaigns, caucus, etc."

In my opinion, the gathering as you described it would clearly be exempt from the coverage of the Open Meetings Law for two reasons. First, a "meeting" according to §102(1) of that law is a convening of a majority of a public body for the purpose of conducting public business. The gathering in question, as I understand it, would not involve public business, but rather political party business. And second, §108(2)(a) of the Open Meetings Law exempts "deliberations of political committees conferences and caucuses" from the requirements of that law. Further, paragraph (b) states that:

> "for purposes of this section, the deliberations of political committees, conferences and caucuses means a private meeting of members of the senate or assembly of the state of New York, or of the legislative body of a county, city, town or village, who are members of 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..."

In short, it is reiterated that the meeting to which you referred would, in my opinion, be exempt from the Open Meetings Law.

I hope that I have been of assistance.

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January 29, 2009

Mr. Peter Spaet
Vice President for Academic Affairs
Student Association, UUW 203
Binghamton University
P.O. Box 6000
Binghamton, NY 13902

The staff of the Committee on 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. Spaet:

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 an advisory opinion concerning the status of committees of the Faculty Senate at the State University at Binghamton. The Faculty Senate, according to your letter, "is the University's primary academic governance body, and is charged with the responsibility to formulate many of the institution's academic policies" pursuant to the University's Faculty by-laws. Those by-laws also "provide for the existence of various subsidiary committees of the Faculty Senate and require that actions of these committees be approved by the Faculty Senate as a whole..."

One of the subsidiary committees of the Faculty Senate is the University Undergraduate Curriculum Committee (UUCC), which "is charged to review and create proposals for University-wide curricular policies, and recommend Senate action on these matters." You suggested that the Faculty Senate's review of the UUCC's reports is "perfunctory", that during the period of 2004 - 2008, the Faculty Senate approved "52 of 52" of the Committee's reports, in most instances, "with minimal or no discussion prior to a vote lacking opposition." Nevertheless, the Committee's Chairperson has contended that the Committee's functions are advisory and, therefore, that its meetings are not subject to the Open Meetings Law.

Based on the following analysis, I respectfully disagree.

By way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that

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

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

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

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members of the Faculty Senate, which clearly appears to be a public body [see Perez v. City University of New York, 5 NY3d 922 (2003)], would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)].

I note that the decision cited above, Syracuse United Neighbors, dealt with two committees that were characterized as advisory. Nevertheless, the court considered their roles realistically and found that:

> "While neither of the committees here usurp the powers of other municipal departments and their recommendations may be characterized as advisory only, in that they did not bind the common council or other city departments it is clear that their

> recommendations have been adopted and carried out without exception. To hold that they are not public bodies would be to exalt form over substance...To keep their deliberations and decisions secret from the public would be violative of the letter and spirit of the legislative declaration in section 95 [now section 100] of the Public Officers Law" (id., 985).

According to your letter, the reports of the UUCC have been adopted without alteration by the Faculty Senate for several years. Due to the similarity between the situation that you described and that described in passage quoted above, again, I believe that the UUCC constitutes a "public body" 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: Sara A. Reiter

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February 4, 2009

Mr. Steve A. Tiska
[redacted]

The staff of the Committee 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. Tiska:

As you are aware, we have received your correspondence, and I hope that you will accept our apologies for the delay in response. You have attempted to obtain information from the Masonville Fire District, and based on a review of the materials, I offer the following comments.

It is emphasized at the outset that the Freedom of Information Law pertains to existing records and §89(3)(a) of that law states in relevant part that an agency is not required to create a record in response to a request. Various aspects of your requests appear to involve an attempt to obtain information, explanations or answers to questions rather than records. For example, you asked the records access officer that he "describe the issues and plan to address them as this affects the Town's Master Plan". From my perspective, that is not request for records. In the future, it is suggested that you request records rather than information that may or may not exist in the form of a record or records.

In a related vein, another aspect of a request involved a "copy of the minutes indicating the non compliance of the Fire House with the ADA regulations" and that "This should indicate the corrective action required." I have no knowledge of the content of minutes of meetings of the Board of Fire Commissioners. However, the Board is subject to the Open Meetings Law, and §106(1) of that statute prescribes what might be considered to be minimum requirements concerning the contents of minutes of meetings. That provision states that:

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

I am unaware of whether the information that you seek appears in minutes or was required to be included in minutes. If action was taken by the Board, I believe that it must be memorialized in minutes in accordance with the provision quoted above.

With respect to the "status" of the "Old Masonic Hall", my understanding is that the issue relates to asbestos and the reasons indicating why the county would not tear down the building. In this regard, I am unaware of the content of any such documentation. However, communications between the Fire District, or internal records prepared by the County, would fall within the coverage of §87(2)(g) of the Freedom of Information Law. That provision states 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:jm

cc: Ed Brayman, Records Access Officer

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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 5, 2009

Mr. Kevin Gorman
[redacted]

The staff of the Committee on 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. Gorman:

I have received your letter and hope that you will apologize for the delay in response. You have raised questions concerning the City of Yonkers Charter Revision Commission in relation to its meetings and votes.

In this regard, as you may recall, an opinion was prepared at your request in 1994 advising that a city's charter revision commission created in accordance with §36 of the Municipal Home Rule Law constitutes a public body required to comply with the Open Meetings Law.

With respect to your questions, you asked first whether there is a distinction between "resolutions" and "interim resolutions." I am unfamiliar with the latter and would conjecture that it is a term that has been used based on custom or internal rules. There is no reference to "interim resolutions" in any statute with which I am familiar.

Next, a valid meeting may be held and action taken only when a quorum of a public body has convened. A quorum, according to §41 of the General Construction Law, which is entitled "Quorum and majority", is a majority of the total membership of a public body. That statute also provides that "not less than a majority of the whole number may perform and exercise [any] power, authority or duty." Stated differently, a public body cannot do what it is empowered or authorized to do, except by means of an affirmative vote of a majority of its total membership.

With respect to minutes, direction concerning their content and the time within which they must be prepared and made available to the public is found in §106 of the Open Meetings Law. That provision states that:

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

Lastly, the Freedom of Information Law has included an "open vote" requirement since its enactment in 1974. Specifically, §87(3)(a) of the Freedom of Information Law provides that:

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

Based upon the foregoing, when a final vote is taken by an "agency" subject to the Freedom of Information Law [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 when it is cast. In my view, so long as a record is prepared that indicates the manner in which each member cast his or vote, an entity would be acting in compliance with the open vote requirements imposed by those statutes. I note that the decision cited above referred to "open voting" in the context of both open and executive sessions. Since the Open Meetings Law permits public bodies to vote in proper circumstances during an executive session [see §§105(1) and 106(2) and (3)], it is clear in my view that roll call voting in public is not required.

Although the record of votes by members ordinarily is included in minutes, there is no requirement that it be included in minutes. While such a record must be prepared and made available, the Court of Appeals, the state's highest court, has held that such a record may be maintained separate from the minutes [Perez v. City University of New York, 5 NY3d 522, 530 (2005)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Charter Revision Commission

STATE OF NEW YORK
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February 4, 2009

Mr. Ed Ciffone
[redacted]

The staff of the Committee on 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. Ciffone:

We are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to proceedings of the Yorktown School Board that you recorded on May 12, 2008. Please accept my apology for the delay in responding. The recording that you submitted raised a number of issues, all of which we will attempt to address with the following comments.

First, to summarize the conversation recorded in the electronic file that you submitted, during the public comment portion of a Board meeting, after you requested that a Board member respond to allegations of discriminatory and anti-semitic comments filed in a police incident report, you were repeatedly asked to stop talking, and told that the issues you raised were not relevant to District business. Eventually, you were granted an additional two minutes to speak, informed that you would lose the ability to speak during public comment periods at the discretion of the President if you did not maintain professionalism and respect, and that you must limit your comments to District business.

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

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

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

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

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

In the context of the specific issues that you raised, we believe that a court would determine that the Board may limit the amount of time allotted to persons who wish to speak at a meeting, so long as the limitation is reasonable, and that three minutes appears to be reasonable. Similarly, it is our view that the Board may limit comments to matters involving District business. However, if the Board permits the public to praise an individual Board member or an employee during the public comment period, in our opinion, there would be no basis to prohibit or prevent a person from making negative comments, or raising allegations that would reflect in a negative manner on that person. Again, the Open Meetings Law does not address whether and/or how an elected official responds to questions.

Further, from our perspective, although the President presides at Board meetings, it is questionable whether s/he may validly determine unilaterally whether the subject matter or comment proposed by a person desiring to speak involves District business. S/he is but one member of the

Board, and we believe that the Board, if necessary, should determine by means of a majority vote of its total membership if there is a question or disagreement regarding whether a subject relates to District business. We believe that the Board in that circumstance should determine whether the subject may be raised, rather than the President doing so alone.

Finally, we advise you to inquire whether the School Board has adopted rules or bylaws governing "professionalism and respect", or the decorum of those present during the public comment portion of public meetings. In our opinion, if a police report has been filed about discriminatory comments made by an elected official, it is not necessarily disrespectful or unprofessional to raise the issue during a public comment period.

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: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4725

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February 18, 2009

Hon. Gordon Jenkins
Mayor
Village of Monticello
2 Pleasant Street
Monticello, NY 12701

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

Dear Mayor Jenkins:

I have received your letter in which you requested an opinion concerning the validity of a resolution adopted by the Village of Monticello Board of Trustees during a "work session."

By way of background, you wrote that, during a meeting held on January 5, the Board determined to schedule a "work session" on January 8. The discussion concerning the scheduling of the work session "took place during an open session at which members of the public and press were in attendance." However, you wrote that "other than the announcement at the meeting, no other notice of the 'work session' was made or sent to the press." On January 8,the Board met and adopted a resolution, and you questioned whether "this resolution under these circumstances [is] valid."

In this regard, I offer the following comments.

First, in my view, there is no legal distinction between a "work session" 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 "work session."

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

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

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

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

In the context of your inquiry, due to the presence of the news media, I believe that the requirement that the news media receive notice of a meeting was satisfied. However, the requirement that notice be posted was not apparently met. If that is so, the Board, in my opinion, would not have fully complied with the Open Meetings Law.

With respect to the validity of the Board's action, §107 of the Open Meetings Law provides in part that action taken in private that should have been taken in public may be invalidated by a court. The action taken in this instance appears to have occurred in public. Further, the same provision states that an unintentional failure to fully comply with the notice requirements imposed by §104 of the Open Meetings shall not alone constitute a basis for action taken by a public body.

In sum, I believe that the action taken by the Board remains valid unless and until a court renders determination to the contrary. Further, under the circumstances, it is unlikely, in my view, that a court would do so.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Village Manager

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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COML-AO-4726

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February 18, 2009

Ms. Lori Kemp
[redacted]

The staff of the Committee on 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. Kemp:

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

The matter involves a denial of your request made to the Town of Carmel for the decision and orders issued by the Town's Zoning Board of Appeals. According to your letter, the Town Attorney directed the Secretary to the Board "to refuse" to give you copies the records, and the Town Clerk informed you that the record sought is "an intra-agency document" that could be withheld.

In this regard, I offer the following comments.

First, §30 of the Town Law provides in part that the Town Clerk is the legal custodian of all Town records, irrespective of the physical location of the records. Further, I believe that the Town Clerk has been designated as the "records access officer" for purposes of implementation of the Freedom of Information Law. The records access officer has the duty of coordinating the Town's response to requests (see 21 NYCRR §1401.2). While she may heed the advice of the Town Attorney, I believe that, as records access officer, she has the authority to respond to a request for records and determine rights of access.

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.

Although I agree that the record or records at issue may be characterized as "intra-agency" in nature, that alone is not determinative of the Town's obligation to disclose. It is true that one of the exceptions to rights of access pertains to intra-agency documents, but due to the structure of that provision, it often requires disclosure. Specifically, §87(2)(g) of the Freedom of Information Law 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. A decision or an order would, in my view, reflect a final agency determination required to be disclosed pursuant to section 87(2)(g)(iii).

Lastly, a zoning board of appeals is a "public body" required to comply with the Open Meetings Law, and to comply with that law, a decision and order could have been adopted or approved only during an open meeting. Further, §106 of the Open Meetings Law requires the preparation of minutes of meetings, and the minutes must be disclosed within two weeks of the meetings to which they pertain. That being so, there is no valid reason for withholding a decision or order, nor is there a valid basis, in my view, for delaying disclosure for a lengthy period of time.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Zoning Board of Appeals
Hon. Ann Garris
Anthony Mole

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4727

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February 18, 2009

Hon. Michael Fragin
Trustee
Village of Lawrence
196 Central Avenue
Lawrence, NY 11559

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

Dear Trustee Fragin:

I have received your letter and appreciate your interest in compliance with law. You included the language of portions of the Village code of the Village of Lawrence, and based on a review of those provisions, I believe that several are inconsistent with state statutes and are invalid. In this regard, I offer the following comments.

It is noted at the outset that §110 of the Open Meetings Law, entitled "Construction with other laws", pertains to the relationship between that statute and other provisions. Subdivision (1) states that:

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

Based on the foregoing, a village board or other public body could not adopt a provision that is more restrictive with respect to public access than the Open Meetings Law. Again, any such provision would be "deemed superseded" by the Open Meetings Law.

Language that you highlighted states that: "Meetings of the Board need not be public unless the Board so determines." That provision is, in my opinion, clearly more restrictive than the Open Meetings Law. A "meeting", according to §102(1) of that statute and judicial interpretations, includes any gathering of a majority, a quorum, of a public body for the purpose of conducting public business, even if there is no intent to take action, and irrespective of the characterization of the gathering [see e.g., Orange County Publications v. City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)]. Further, §103 requires that meetings of public bodies, such as a village board of trustees or a zoning board of appeals, are open to the general public and must be preceded by notice given to the public by means of posting and to the news media pursuant to §104. Perhaps most importantly, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public unless there is a basis for entry into executive session. Paragraphs (a) through (h) of §105(1) of the Law specify and limit the grounds

for conducting an executive session. In short, a public body cannot engage in closed or executive sessions to discuss the subjects of its choice, for the Open Meetings Law details the subjects that may properly be discussed in private.

Another provision that you highlighted pertains to the Zoning Board of Appeals and states that: "All meetings of the Board of Appeals, except for the purpose of deliberation, shall be public." Although the deliberations of zoning boards of appeals for a time had been exempt from the coverage of the Open Meetings Law, that has not been so for more than twenty-five years. By way of historical background, numerous problems and conflicting interpretations arose under the Open Meetings Law as originally enacted with respect to the deliberations of zoning boards of appeals. In §108(1), the Law had exempted from its coverage "quasi-judicial proceedings". When a zoning board of appeals deliberated toward a decision, its deliberations were often considered "quasi-judicial" and, therefore, outside the requirements of the Open Meetings Law. As such, those deliberations could be conducted in private. Nevertheless, in 1983, the Open Meetings Law was amended. In brief, the amendment to the Law indicates that the exemption regarding quasi-judicial proceedings may not be asserted by a zoning board of appeals. As a consequence, zoning boards of appeals are required to conduct their meetings pursuant to the same requirements as other public bodies subject to the Open Meetings Law.

Lastly, the Village code as it pertains to the Board of Appeals states that "The concurring vote of a majority of the members present shall be necessary for a decision." Relevant in relation to the quoted language is section 41 of the General Construction, entitled "Quorum and majority", which was enacted in 1909. The cited provision states that:

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

Based upon the language quoted above, a quorum is a majority of the total membership of a public body, notwithstanding absences or vacancies. Further, in order to carry a motion or take action, there must be an affirmative vote of a majority of the total membership. Therefore, if a public body consists of seven members, four affirmative votes would be needed to approve a motion, even if as few as four members are present.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4728

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February 18, 2009

E-Mail

TO: Hon. Margaret J. Orrange, Town Clerk

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Margaret:

I have received your letter in which you raised several issues and questions, and I will attempt to address each of them.

The matter relates to meetings conducted by the Town Board of the Town of North Collins "entirely" in executive session for the purpose of negotiating salaries of individuals who are not members of public employee unions. In this regard, as you are aware, paragraphs (a) through (h) of §105(1) of the Open Meetings Law. Since the discussion did not involve union members, the only exception that may be relevant is paragraph (f), which authorizes a public body, such as a town board, to enter into executive session to discuss:

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

If the discussion involved the salaries of groups of individuals, such as all town board members, or all appointees, across the board, the focus would not have involved any "particular person", and I do not believe that an executive session could properly have been held.

Next, you wrote that the Town Attorney indicated that there is no provision that would have permitted you to be present during an executive session. That is not so, §105(2) of the Open Meetings Law specifies that a public body may authorize you or others to attend.

Lastly, because you were not present at the meetings during which the discussions to which you referred occurred, you asked "how do [you] report these meetings in the minutes?" In this regard, §106 of the Open Meetings Law pertains to minutes of meetings. With respect to executive sessions, if no action is taken during those sessions, there is no requirement that minutes be prepared. With respect to open portions of a meeting, the law requires that minutes, at a minimum, consist of a record or summary of motions, proposals, resolutions, action taken, and votes of the members. If, for example, the only action taken during a meeting involved a motion to enter into executive session, the minutes must include reference to such a motion and the vote of the members.

Section 30(1) of the Town Law states that the town clerk shall attend all meetings of the town board and prepare minutes. However, subdivision (10) of §30 provides that:

> "In the event that the town clerk is absent or unable to act and there is no duly appointed and qualified deputy town clerk present and able to act, the town board may appoint as deputy town clerk any person other than a member of the town board, provided, however, that such person be qualified as provided in section three of the public officers law and section twenty-three of this chapter."

As I understand the foregoing, if neither the clerk nor a deputy clerk is available to take minutes at a town board meeting, the board can designate any resident of the town, other than a member of the board, to do so.

It is suggested that minutes include reference to any of the actions required to be recorded pursuant to the Open Meetings Law (i.e., a motion to enter into executive session), with a notation that you were absent from the meeting.

I hope that I have been of assistance.

RJF:jm

cc: Town Board

OML-AO-4729

From: Jobin-Davis, Camille (DOS)
Sent: Monday, February 23, 2009 4:58 PM
To: Tony Ceretto, Village of Port Chester
Subject: Open Meetings Law - paper ballot

Tony:

Take a look at a more recent case: Perez v. City University of New York 5 NY3d 522 (2005) – in support of my opinion that a public body may vote by paper ballot, as long as there is a record of how each member voted. No anonymous voting allowed, however, there is no prohibition against a written vote as opposed to roll call.

I hope that this helps!

Camille

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

OML-AO- 4730

TO: Peter Meyer, Hudson City School District Board of Education

FROM: Robert J. Freeman, Executive Director

DATE: March 2, 2009

Dear Mr. Meyer:

Based on the language of the Open Meetings Law and judicial decisions, public bodies, such as boards of education, cannot conduct meetings by means of telephone conferencing, nor can members vote or take action by use of the telephone.

Attached is an advisory opinion that considers the issue in greater detail.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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>
> From: pbmeyer@verizon.net [mailto:pbmeyer@verizon.net]

.pe

OML-AO-4731

From: Freeman, Robert (DOS)
Sent: Monday, March 02, 2009 9:32 AM
To: Peter Meyer, Hudson City School District Board of Education
Subject: RE: voting by phone

Any gathering of a majority of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, even if there is no intent to take action, and regardless of the means by which it is characterized. Assuming that a majority of the Board will be present, the "Budget Workshop" to which you referred is a meeting that must be preceded by notice. Further, every meeting must be convened as an open meeting and conducted open to the public, unless and until a topic arises that may be considered in an executive session. When discussing budget related issues, it is unlikely that any of the grounds for entry into executive session would apply.

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March 2, 2009

E-mail

TO: Mr. Frank Klein

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. Klein:

We are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to members of a public body voting to appoint a person to a particular position without articulating the name of the appointee. You noted that because a board has two weeks to prepare minutes, without clarifying the motion, the public has no ability to determine the nature or the specifics of the vote. In this regard, we offer the following comments.

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

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

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

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

When the actions taken do not involve consideration of how well or poorly particular public employees are carrying out their duties, we do not believe that there would be a basis for conducting an executive session.

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

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

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

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

In short, the characterization of 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; however, there is no legal obligation to name the "particular person."

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

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

In sum, it is likely that if, after an executive session discussion, a school board determines to take action with respect to a particular person, the name of the person would not be required to be mentioned at the time of the vote in public session. For example, if a school board were to discuss potential candidates to hire during executive session, and upon returning to public session move to offer employment to a particular candidate, indicated by number or code, in our opinion, no names would be required to be mentioned at the meeting or in the minutes of the public session.

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

CSJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17557
OML-AO-4738

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March 4, 2009

Mr. John L. Grogan
[redacted]

The staff of the Committee on 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. Grogan:

As you are aware, I have received your correspondence concerning your efforts in gaining access to records "associated with a property reassessment done by GAR Associates of Buffalo in contract with the City of Kingston, N.Y." I hope that you will accept my apologies for the delay in response.

Please note that the opinions rendered by this office are advisory, and that the Committee on Open Government has no enforcement authority. Based on a review of the materials, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3)(a) states in relevant part that an agency, such as the City of Kingston, is not required to create a record in response to a request. Insofar as the information sought does not exist in the form of a record or records, the Freedom of Information Law would not apply.

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

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

Based on the foregoing, records kept or produced by, with or for an agency are subject to rights of access. Therefore, if, for example, GAR prepared or maintains records for the City, I believe that they would constitute City records that fall within the coverage of the Freedom of Information Law.

In circumstances in which entities or persons outside of government maintain records for a government agency, it has been advised that requests for those records be made to the records access officer of that agency. Pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), the records access officer has the duty of coordinating an agency's response to requests for records. Insofar as GAR maintains records for the City, to comply with the Freedom of Information Law and the implementing regulations, the records access officer must either direct GAR to disclose the records in a manner consistent with law, or acquire the records from GAR in order that he or she can review the records for the purpose of determining rights of access.

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

The exception of greatest significance, §87(2)(g), potentially serves as one of the grounds for denial of access to records. However, due to its structure, it often requires substantial disclosure. The cited provision permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Records prepared by the assessor or other City officers or employees would constitute "intra-agency" materials that would be accessible or deniable depending on their content.

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

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY

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

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

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

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

Next, in my view, the contract between the City and GAR would be accessible, for none of the grounds for denial of access could properly be asserted to withhold that records.

Lastly, with respect to the proceedings and minutes of the Board of Assessment Review, I refer to the Open Meetings Law. That statute is applicable to public bodies, and §102(2) defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members,

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

In consideration of the foregoing, I believe that a board of assessment review is clearly a "public body" required to comply with the Open Meetings Law.

As a general matter, meetings of public bodies must be conducted in public, unless there is a basis for entry into executive session when an exemption from the Open Meetings Law is pertinent. From my perspective, which is consistent with your understanding, the portion of the meeting of a board of assessment review during which those challenging their assessments are heard must be conducted open to the public. Following oral presentations, a board's deliberations could be characterized as "quasi-judicial proceedings" that would be exempt from the Open Meetings Law pursuant to §108(1) of that statute. It is emphasized, however, that even when the deliberations of such a board may be outside the coverage of the Open Meetings Law, its vote and other matters would not be exempt. As stated in Orange County Publications v. City of Newburgh:

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

Therefore, although an assessment board of review may deliberate in private, based upon the decision cited above, oral presentations before the board, as well as the act of voting or taking action must in my view occur during a meeting held open to the public.

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

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

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

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

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

I point out, too, that §525(2)(a) of the Real Property Tax Law entitled "Hearing and determination of complaints" states in part that:

> "The assessor shall have the right to be heard on any complaint and upon his request his or her remarks with respect to any complaint shall be recorded in the minutes of the board. Such remarks may be made only in open and public session of the board of assessment review."

Based on the foregoing, insofar as the assessor is present for the purpose of offering information or a point of view, I believe that the public, pursuant to the Real Property Tax Law, has the right to be present.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer
Mary Ann Bahruth
Board of Assessment Review

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4734

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March 5, 2009

E-Mail

TO: Ms. Holly Christiana

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

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

Dear Ms. Christiana:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain actions of the Board of Commissioners of the Accord Fire District. You indicated that the Board scheduled an "emergency" meeting for Monday, August 11, 2008, by faxing a notice to the local newspaper, and posting a notice on the door of the firehouse on the morning of August 11. The notice on the door of the firehouse indicated that there was to be a meeting of the Accord Fire District, not the Board of Commissioners, which was, in your opinion, "on purpose, to confuse the public, and make them think it was simply the Company Meeting." You raised several issues in your correspondence, including the appropriateness of a motion for entry into executive session. Based on the information you provided, we offer the following comments.

The initial issue involves notice requirements. In this regard, the Open Meetings Law requires that notice be posted and given to the news media prior to every meeting of a public body, such as a board of commissioners. 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. There is no requirement that notice of a meeting be published in a newspaper.

Although the Open Meetings Law does not make reference to "special" or "emergency" meetings, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning or faxing notice of the time and place of a meeting to the local news media and by posting notice in one or more designated locations.

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

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

> typewritten announcement posted on the central office bulletin board...Special Term could find on this record that appellants violated the...Public Officers Law...in that notice was not given 'to the extent practicable, to the news media' nor was it 'conspicuously posted in one or more designated public locations' at a reasonable time 'prior thereto' (emphasis added)" [524 NYS 2d 643, 645 (1988)].

Based upon the foregoing, absent an emergency or urgency, the Court in Previdi suggested that it would be unreasonable to conduct meetings on short notice, unless there is some necessity to do so. Further, without indicating the correct name of the public body in the notice, the notice would be insufficient.

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

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

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

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

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

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

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

> Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575, 209 AD 2d 55, 58 (1994)].

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

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

CSJ:jm

cc: Board of Commissioners

FOIL-AO-17563
OML-AO-4735

From: Jobin-Davis, Camille (DOS)
Sent: Friday, March 06, 2009 4:21 PM
To: Cleary, Linda (DOS)
Subject: RE: Black Car Fund question

Linda:

You are correct, because the board does not appear to be a "public body" , and it is therefore not subject to OML, it is not subject to the corresponding voting requirements.

Other than the advice in the opinions, which of course, only pertains to bodies that are subject to OML, I don't have much to offer. I think it would be important to check further in the Executive Law, to see if there are any voting requirements specific to the Fund, and to check the Business Corporations Law…

As an aside, I note that the records that DOS obtains from the Fund are subject to FOIL. Whether or not they are required to be made public would, of course, depend on their contents.

I regret I can't be more helpful – please call if you have any questions. I am in on Monday, however, the secretary will not be, so I may have to call you back.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
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OML-AO-4736

From: Freeman, Robert (DOS)
Sent: Tuesday, March 10, 2009 10:36 AM
To: Mr. Thomas H. Frank
Subject: charter schools

Dear Mr. Frank:

I have received your letter, and this is to advise that §2854(1)(e) of the Education Law specifies that the boards of charter schools are subject to the requirements of the Open Meetings Law (Article 7 of the Public Officers Law).

I hope that I have been of 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

OML-AO-4737

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March 10, 2009

Hon. Alice E. Roker
Town Clerk
Town of Yorktown
P.O. Box 703
Yorktown Heights, NY 10598

The staff of the Committee on 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. Roker:

I have received your letter and much appreciate your kind words. You enclosed a copy of a document given to you by a member of the Town Board that "appears to suggest that the Town Board can hold a Special Meeting whenever they want." Further, he "interprets the attached to say that members of the Town Board can even waive the required written notice." You have sought my opinion on the matter.

From my perspective, there are two statutes require notice, the Open Meetings Law, and §62 of the Town Law. Neither makes reference to a waiver of notice. In this regard, I offer the following comments.

Section 104 of the Open Meetings Law states that:

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

> 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 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. In my opinion, the requirements imposed by the Open Meetings Law, which involve notice to the news media and to the public by means of posting, can never be waived.

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)].

As you are aware, §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. Specifically, §62 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 members of the board of the time when and the place where the meeting is to be held."

Like the Open Meetings Law, there is nothing in §62 that refers to or authorizes a waiver of notice. I am mindful of the opinions rendered by the Attorney General and the Comptroller advising that business may validly be conducted at a meeting held on less than two days written notice of the members of a town board, so long as all of the members had actual notice, attended and participated. If that is so, the members may waive the two day written notice requirement. However, I believe that a town board must in all instances comply with the notice requirements found in the Open Meetings Law, for those requirements are separate and distinct from that found in the Town Law. Further, because there is no reference to the ability to waive notice included in §62 of the Town Law, with due respect to the Attorney General and the Comptroller, it is questionable in my view whether a court would reach the same conclusion as they did in consideration of the clear and unequivocal language that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

OML-AO-4738

From: Freeman, Robert (DOS)
Sent: Wednesday, March 11, 2009 9:38 AM
To: Ms. Carol Gillen

Dear Ms. Gillen:

I have received your inquiry, and this is to inform you there is no provision in the Open Meetings Law that pertains to the cancellation of a meeting. It has been advised in the past that, if a meeting is to be cancelled, the news media organizations that received the original notice of the meeting should be notified of the cancellation, and that information concerning a cancellation be posted at the locations where notice was originally posted. Often, too, information regarding a cancellation is given to a local radio or television station that may make contact with those who might have been interested in attending.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
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FOIL-AO-4739

From: Freeman, Robert (DOS)
Sent: Tuesday, March 17, 2009 8:16 AM
To: Roy Mallette
Subject: RE: minutes of meetings

The Open Meetings Law in §106 contains what might be viewed as minimum requirements concerning the content of minutes. At a minimum, they must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of the members. They may contain greater detail, but there is no requirement that additional detail be included. That being so, there is no general obligation to include comments of members of the public offered during a meeting in the minutes.

I hope that the foregoing serves to clarify your understanding.

Robert J. Freeman
Executive Director
Committee on Open Government
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STATE OF NEW YORK
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OML-AO-4740

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March 23, 2009

Mr. John F. Talmage
[redacted]

The staff of the Committee on 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. Talmage:

I have received your letter in which you questioned the propriety of executive sessions held by the Community Preservation Fund Advisory Board, a creation of law, of the Town of East Hampton, "whenever land is discussed."

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

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

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

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

that may relate to the transaction of real property; only to the extent that publicity would "substantially affect the value of the property" can that provision validly be asserted.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Community Preservation Fund Advisory Board

OML-AO-4741

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, March 24, 2009 4:15 PM
To: Michael J. Looby, General Counsel, Buffalo Public Schools
Subject: RE: Board of Ed meeting question

Dear Mr. Looby:

Based on your description of the facts, in my opinion, the Finance Committee failed to give proper notice of its meeting, and any action taken during such meeting could be invalidated by a court. In this regard, I offer the following brief comments:

First, if a quorum of the Finance Committee was present, and there were discussions of Finance Committee business, in my opinion, such gathering was a meeting of a public body, subject to the OML (except, see (3), below).

Second, the OML requires, in part, that notice of the time and place of a meeting be conspicuously posted in one or more designated locations and given to the news media prior to a meeting (§104). Once a public body has informed the media that no meeting will take place, and has posted a cancellation notice, in my opinion, it has successfully alerted the media and the public that the meeting will not take place. As you indicated, in this instance, the chair informed individual residents personally, and announced publicly that the meeting would not occur. This is further evidence that there was no notice that the meeting was to be held.

Third, if the failure to provide notice of the meeting could be characterized as intentional (see §107[1]) a court could invalidate any action taken during the meeting.

In direct response to your questions:

(1) I do not believe that the posting of an agenda has any bearing on the issues, for exactly the point that you make – the OML does not require that an agenda be prepared. Insofar as the agenda enables one to distinguish between issues of Executive Committee business and issues of Finance Committee business, it may help a court understand that the business conducted pertained to the Finance Committee;

(2) Cancellation of the meeting precluded discussion of Finance Committee business; and
(3) A public body may not take action unless a quorum is present and to have a quorum reasonable notice must be given to all of its members pursuant to §41 of the General Construction Law. If a member is not notified, even if a majority is present, I do not believe that a valid meeting could be held or that action may validly be taken. (See http://www.dos.state.ny.us/coog/otext/o4250.htm.) If a Finance Committee/board member received notice that the meeting was cancelled, and for the reason did not attend, in my opinion, a valid meeting could not have taken place.

I hope that this is helpful to you. Please let me know if you have further questions.

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
99 Washington Ave, Suite 650
Albany NY 12231

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17600
OML-AO-4742

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March 27, 2009

Ms. Sara Dallas
Director
Southern Adirondack Library System
22 Whitney Place
Saratoga Springs, NY 12866-4596

The staff of the Committee on 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. Dallas:

I have received your correspondence concerning the status of a particular library board of trustees under the Open Meetings Law.

As I understand the matter, the Women's Round Lake Improvement Society obtained a charter for the creation of an association library and designates a "committee" that serves as the board of trustees of the library. The materials relating to the matter that you forwarded, in my view, indicate a misunderstanding of the law. I believe that there has been confusion concerning the obligation of association libraries to disclose records and conduct meetings open to the public. In this regard, I offer the following comments.

First, with respect to access to records, the Freedom of Information Law is applicable to agencies, and §86(3) of that statute defines the term "agency" to mean:

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

Based on the foregoing, an agency, in brief, is an entity of state or local government. Association libraries are typically not-for-profit corporations. Although they may receive funding from the government, they are independent of the government, and the members of their governing bodies are not appointed by the government. That being so, I do not believe that association libraries are "agencies" or, therefore, that they are required to give effect to the Freedom of Information Law.

Second, with respect to the public's right to attend meetings, the Open Meetings Law pertains 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."

Like the Freedom of Information Law, the Open Meetings Law generally applies to governmental bodies. School district public libraries, as well as city, town and other municipal libraries are governmental entities, and their boards of trustees are, in my view, clearly public bodies required to comply with the Open Meetings Law. The boards of private, not-for-profit corporations typically are not required to comply with the Open Meetings.

Nevertheless, third and most significantly, due to the direction provided by a different statute, §260-a of the Education Law, I believe that the boards of trustees of association libraries, as well as certain other non-governmental library boards of trustees, are required to comply with the Open Meetings Law, which is Article 7 of the Public Officers Law. Section 260-a 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."

A careful review of the language quoted above indicates that meetings of boards of trustees of various kinds of libraries, including meetings of boards of trustees of association libraries, must be held in accordance with the Open Meetings Law.

Committees and subcommittees of boards of trustees in cities with a population of a million or more, i.e., those in New York City, must also conduct their meetings in compliance with the Open Meetings Law. Committees and subcommittees of association library boards of trustees that serve anywhere but New York City are not required to comply with the Open Meetings Law. This is not to suggest that committees and subcommittees of boards of trustees of association libraries cannot conduct their meetings in public, but rather that they are not required to do so.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gary Putman

OML-AO-4743

From: Freeman, Robert (DOS)
Sent: Friday, March 27, 2009 12:30 PM
To: Julie Fine, WKBW TV

Dear Ms. Fine:

This to confirm our discussion regarding the status of budget talks involving the Governor and legislative leaders in relation to the Open Meetings Law. That statute applies to meetings of public bodies, and a "public body" is an entity consisting of two or members that carries out a governmental function collectively, as a body. Examples include city councils, boards of education, town boards, etc., as well as the Senate and Assembly. A "meeting" involves a gathering of a quorum, a majority of a public body, for the purpose of conducting public business. Therefore, the Open Meetings Law would apply when a majority of the members of the Senate or Assembly gather to conduct public business. Because the Assembly has 150 members, its quorum is 76; the Senate has 62 members, and its quorum is 32.

Since the budget discussions that are the subject of your interest include far fewer than a majority of either the Senate or the Assembly, those gatherings do not involve a quorum of any particular public body, and the Open Meetings Law does not apply.

I hope that I have been of assistance.

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March 30, 2009

Hon. Christine Bello
Councilwoman
279 Broadway
Newburgh, NY 12550

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

Dear Councilwoman Bello:

I have received your letter in which you raised several questions. As you may be aware, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Open Meetings and Freedom of Information Laws. The questions relate largely to one issue, the ability of a majority of the members of the City Council to take action without informing and in the absence of other members. The matter arose when a memorandum was sent to "department heads informing them that the Mayor and City Council have asked Corporation Council [sic] to restructure the consultant agreement...", which was "troublesome", for you and another councilwoman "were not included in any discussion that would conclude in that decision."

In this regard, I offer the following comments.

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

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

Based upon the foregoing, it is clear in my view that a city council constitutes a "public body" subject to the Open Meetings Law.

Second, from my perspective, a public body 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, but only when reasonable notice is given to all of the members.

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: City Council

STATE OF NEW YORK
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OML-AO-4745

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March 31, 2009

E-Mail

TO: Mr. Steve Norris

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. Norris:

As you are aware, we have located your letter, and I hope that you will accept my apologies for the delay in response.

You referred to minutes of meetings of the Northampton Town Board, and you contended that the Town Clerk "has opted to give a detailed summary of the meeting and that she (in [your] opinion) cherry picks what she reports in her written minutes." You also referred to a conversation that we had in which, in your words, I "indicated that if the Secretary chooses not to summarize but instead gives details - including quotes from the board and the public - then the Secretary is obligated to report 'everything'". You have requested clarification, and in this regard, I offer the following comments.

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

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

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

Based on the language of the law, it is clear, in my view, that minutes need not consist of a verbatim account of everything stated or expressed during a meeting. At a minimum, however, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of the members. They may include additional information, but there is no obligation to do so to comply with law.

Second, in situations in which minutes include more than the minimum information necessary to comply with law, it has been emphasized that their content be consistent, fair, balanced, and above all, accurate. If, for instance, some members of a board are members of one political party, and others are members of a different party, I believe that it would be unreasonable to refer to comments or to include lengthier comments offered only by members of one political party, but fail to make reference to or include commentary equally detailed offered by members of the other party. Similarly, when members of the public are permitted to speak during meetings, although their comments need not be included in minutes, insofar as they are referenced, it has been advised that such references should treat the comments in like manner, irrespective, for example, of whether the comments favor or oppose a particular point of view or course of action. In cases in which there are many comments by the public, it has been suggested that minutes might refer to a certain number in favor, and a certain number opposed, rather than summarizing the comments offered by each speaker.

In short, while I do not believe that the Clerk is required to include "everything" in minutes when details are recorded, in my opinion, to be fair, balanced and reasonable, if comments are recorded in minutes, they should be treated as equally as possible.

Lastly, in situations in which members of the public or a board would like to have a detailed records of deliberations or comments made during a meeting, judicial decisions indicate that anyone may either audio or video record an open meeting, so long as the use of recording equipment is neither disruptive nor obtrusive.

I hope that I have been of assistance.

RJF:jm

cc: Hon. Elaine Mihalek

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

OML-AO-4746

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March 31, 2009

E-Mail

TO: Susan Kross, Fallsburg Library Trustee

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. Kross:

I have received your letter in which you raised issues regarding the operation of the Fallsburg Library Board of Trustees, of which you are a member. You referred to action taken "without a quorum", an effort to reduce the number on the Board from nine to seven, and to "personnel matters" as a basis for conducting executive sessions.

In this regard, I am unaware of the manner in which a library board may alter the number of trustees. However, as the issues that you raised relate to the Open Meetings Law and the ability to take action, I offer the following comments.

First, having reviewed the Library's website, it appears that it is a school district public library. If that is so, it is clearly a governmental entity, and its board of trustees would constitute a "public body" that falls within the coverage of the Open Meetings Law. Even if that is not so, and the library is a not-for-profit corporation, it would also be required to abide by that statute, I point out that the boards of trustees of a variety of entities characterized as "public libraries" are required to give effect to the Open Meetings Law. Some are governmental entities; others are not-for-profit corporations that typically have a relationship with government but which are not governmental entities. The boards of trustees of both the governmental and non-governmental public libraries are required to comply with the Open Meetings Law pursuant to §260-a of the Education Law, which states that:

> "Every meeting, including a special district meeting, of a board of trustees of a public library system, cooperative library system, public library or free association library, including every committee meeting and subcommittee meeting of any such board of trustees in cities

> having a population of one million or more, shall be open to the general public. Such meetings shall be held in conformity with and in pursuance to the provisions of article seven of the public officers law. Provided, however, and notwithstanding the provisions of subdivision one of section ninety-nine of the public officers law, public notice of the time and place of a meeting scheduled at least two weeks prior thereto shall be given to the public and news media at least one week prior to such meeting."

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

Second, from my perspective, an entity subject to 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, a quorum, 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.

The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision states that:

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

Based on the foregoing, again, a valid meeting may occur only when a majority of the total membership of the Board, 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 the Board have the authority to carry out its powers and duties. Consequently, it is my opinion that the Board may not take action or vote unless reasonable a quorum is present. Since the Board of Trustees consists of nine members, its quorum is five, irrespective of absences of vacancies, and action may be taken only by means of an affirmative vote of a majority of the Board's total membership, which, again, would be five.

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

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

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

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

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

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

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

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

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

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

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

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

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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OML-AO- 4747

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March 31, 2009

E-Mail

TO: Mr. Steven White and Ms. Peggy Hatton

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

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

Dear Mr. White and Ms. Hatton:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request for records made to the East Ramapo Central School District. Specifically, you made the following requests, in relevant part:

"2. Documents prepared for the Building Reorganization Committee.

3. Minutes of the meetings from the Building Reorganization Committee.

4. Names of the Building Reorganization Committee members."

In response, you were informed that "Items 2 through 4 are not subject to the FOIL law. The advisory committee was formed by the Superintendent and not the Board of Education, and the information you requested is not subject to the FOIL statute."

From our perspective, whether the documents were shared with a committee has no bearing on whether they would be subject to the Freedom of Information Law. Further, if we are to understand the contents of those records accurately, there would be no basis for denying access to them. In this regard, we offer the following comments.

First, the Freedom of Information Law 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."

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

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

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).

In short, even though the Committee was created by the Superintendent, any records forwarded to or prepared or acquired by the Committee, by the Superintendent and/or the School District, would constitute "records" subject to rights conferred by the Freedom of Information Law.

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.

An assertion or claim of confidentiality, unless it is based upon a statute, is likely meaningless. When confidentiality is conferred by a statute, an act of the State Legislature or Congress, records fall outside the scope of rights of access pursuant to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v.BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion of confidentiality without more, would not in our view serve to enable an agency to withhold a record.

Based on the preceding remarks, whether the documents were transmitted to the Committee, or whether the Committee was formed by the Superintendent or the School Board, would have no direct impact on whether the records are required to be made public in whole or in part.

With respect to the Committee's responsibility to keep discussion issues "confidential" we note that it is likely that the Committee is not subject to the Open Meetings Law, and that, nevertheless, there is no prohibition against disclosure.

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

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

Based on the foregoing, a public body is, in our view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body. In order to constitute a meeting subject to the Open Meetings Law, a majority of the total membership of a public body, a quorum, must be present for the purpose of conducting public business.

We note that several judicial decisions indicate generally that advisory bodies, other than those consisting of members of a governing body, that have no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151

AD 2d 642 (1989); Poughkeepsie Newspaper v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. In one of the decisions, Poughkeepsie Newspaper, supra, a task force was designated by then Mayor Koch consisting of representatives of New York City agencies, as well as federal and state agencies and the Westchester County Executive, to review plans and make recommendations concerning the City's long range water supply needs. The Court specified that the Mayor was "free to accept or reject the recommendations" of the Task Force and that "[i]t is clear that the Task Force, which was created by invitation rather than by statute or executive order, has no power, on its own, to implement any of its recommendations" (id., 67). Referring to the other cases cited above, the Court found that "[t]he unifying principle running through these decisions is that groups or entities that do not, in fact, exercise the power of the sovereign are not performing a governmental function, hence they are not 'public bod[ies] subject to the Open Meetings Law..."(id.).

Accordingly, based on your description of the Committee as advisory in nature, with a majority of the members being employees of the district, it is likely that the Committee is not subject to the Open Meetings Law. If our assumption is correct and the Open Meetings Law does not apply, although it could choose to do so, the Committee would not be required to hold public meetings nor allow the public to listen or observe its proceedings.

More importantly, however, based on our experience regarding typical discussions at advisory committee meetings, there is no legal basis for prohibiting a member of the Committee from speaking publicly about or disclosing information obtained during a Committee meeting. This is not intended to suggest that such speech or disclosure would be wise or proper in every instance, but rather, that there is no basis in law for prohibiting a person present during an advisory committee meeting for building reorganization from speaking about that meeting.

In our experience, there are few instances in which there would be a prohibition against disclosure. By means of example, the Family Educational Rights and Privacy Act (20 USC §1232g) generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless a parent of the student consents to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted form the coverage of that statute (§108[3]). Committee members and/or employees would be prohibited from disclosing such information, because federal law requires confidentiality.

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

> "...from speaking with the media regarding any policies or activities of the agency without first obtaining permission from the agency's

> media relations department. The City contends that these policies are necessary to meet the agencies' obligations under federal and state law to protect the confidentiality of reports and information relating to children, families and other individuals served by the agencies" (id., 115).

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

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

The Court in that passage highlighted a critical point: that information may be characterized and exempted from disclosure by statute only when a statute forbids disclosure.

In consideration of the possibility of sanctions, we believe that the holding in Harman may be applicable in the instant situation. In creating a "balancing test", it was held in Harman that "where the employee speaks on matters of public concern, the government bears the burden of justifying any adverse employment action" and that:

> "This burden is particularly heavy where, as here, the issue is not an isolated disciplinary action taken in response to one employee's speech, but is, instead, a blanket policy designed to restrict expression by a large number of potential speakers. To justify this kind of prospective regulation, '[t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *NTEU*, 513 U.S. at 468, 115 S. Ct. at 1014 (quoting *Pickering*, 391 U.S. at 571, 88 S.Ct. at 1736)...
>
> > "'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.')

> While the government has special authority to proscribe the speech of its employees , '[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.' *Rankin*, 483 U.S. at 384, 107 S. Ct. at 2896.

> "A restraint on government employee expression 'also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said.' *NTEU*, 513 U.S. at 470, 115 S.Ct. at 1015. The Supreme Court has noted that '[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions.' *Waters v. Churchill*, 511 U.S. 661, 674, 114 S.Ct. 1878, 1887, 128 L.Ed.2d 686 (1994)..." (id., 118-119).

If what you relayed is accurate, that an employee could be fired if he or she publicly expresses an opinion contrary to the Superintendent's, any such rule would appear to be invalid, as the executive order was found to be invalid in Harman. Moreover, it was stressed by the court that the harm sought to be avoided by means of a restriction on speech must be real, and not merely conjectural. It was determined that:

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

Any such rule as referenced above is prospective, for, in the words of Harman, "it chills speech before it happens" and does not focus on any harm that has actually occurred. In short, we believe a rule prohibiting an employee from sharing what was discussed at a meeting stifles free speech in a manner that has been found to be unconstitutional.

In sum, for the reasons expressed in the preceding commentary, we do not believe that a school district rule can prohibit an employee, or any other person, from discussing or disclosing information acquired during a meeting of an advisory body, nor can it require that documents relating to its proceeding be kept confidential, unless a statute, an act of Congress or the State Legislature, expressly forbids disclosure.

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

CSJ:jm

cc: Ira E. Oustatcher, Superintendent
Cathy Russell, District Clerk

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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April 2, 2009

Mr. Ira H. Margolis
[redacted]

The staff of the Committee on 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. Margolis:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain gatherings of government officials and employees from the Town and Village of New Paltz.

Specifically, you expressed frustration concerning closed door meetings between local government officials and officials from the State University of New York at New Paltz (SUNY). You related that although the public and the media are prohibited from attending such meetings, those present include employees of various town and village departments, SUNY employees, representatives of New Paltz businesses who cater to the college and its students, as well as representatives of the SUNY student population.

As you may be aware, the Open Meetings Law is applicable to public bodies, and §102(2) defines the phrase "public body" to mean:

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

Based on the foregoing, a public body is, in our view, an entity consisting of at least two members required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body. In order to constitute a meeting subject to the Open Meetings Law, a majority of the total membership of a public body, a quorum, must be present for

the purpose of conducting public business. Based on your description of these gatherings, at no time is a quorum of a public body present. Accordingly, in our opinion, the Open Meetings Law would not apply.

An additional issue that you raised concerned the location of the gatherings, which are sometimes held on the SUNY campus, sometimes in a private meeting room at a Chamber of Commerce, and sometimes at a village hall, for example. In this respect, again, we know of no provision of law that would require gatherings to be made accessible to the public based on these locations.

The last issue that you raise pertains to a statement that you attribute to the Mayor of the Village of New Paltz, that proceedings of the Village are not subject to the Open Meetings Law. The Open Meetings Law applies to meetings of all public bodies, as set forth above, including village boards of trustees. The notice that you attached to your request is a notice for a public hearing, and, from our perspective, meetings may be different than hearings.

A meeting is generally a gathering of quorum of a public body for the purpose of discussion, deliberation, and potentially taking action within the scope of its powers and duties. A hearing is generally held to provide members of the public with an opportunity to express their views concerning a particular subject, such as a proposed budget, a local law or a matter involving land use. Hearings are often required to be preceded by the publication of a legal notice. In contrast, §104(3) of the Open Meetings Law specifies that notice of a meeting must merely be "given" to the news media and posted. Further, there is no requirement that a newspaper, for example, publish a notice given regarding a meeting to be held under the Open Meetings Law. As indicated earlier, 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.

When a public body permits 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., 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 ten minutes while permitting others to address it for three, or not at all, such a rule, in our view, would be unreasonable.

We note that there are federal court decisions indicating that if commentary is permitted within a certain subject area, negative commentary in the same area cannot be prohibited. It has been held by the United States Supreme Court that a school board meeting in which the public may speak is a "limited" public forum, and that limited public forum involve "public property which the State has opened for use by the public as a place for expressive activity" [Perry Education Association v.

Perry Local Educators' Association, 460 US 37, 103. S.Ct. 954 (1939); also see Baca v. Moreno Valley Unified School District, 936 F. Supp. 719 (1996)]. In Baca, a federal court invalidated a bylaw that "allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter (District employees' conduct or performance)" (id., 730). That prohibition "engenders discussion artificially geared toward praising (and maintaining) the status quo, thereby foreclosing meaningful public dialogue and ultimately, dynamic political change" [Leventhal v. Vista Unified School District, 973 F.Supp. 951, 960 (1997)]. In a decision rendered by the United States District Court, Eastern District of New York (1997 WL588876 E.D.N.Y.), Schuloff, v. Murphy, it was stated that:

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

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

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

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

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Kelly Stengel

OML-AO-4749

From: Freeman, Robert (DOS)
Sent: Monday, April 06, 2009 5:05 PM
To: Chuck Lesnick, President, City Council, City of Yonkers
Subject: RE: Special Meeting Tonight.

Please note that although the Open Meetings Law requires that notice of the time and place of a meeting be given to the news media, there is no obligation on the news media to publish the notice or publicize a meeting. The media may choose to do so, but is not obliged to do so. Similarly, irrespective of when a news media outlet receives notice of a meeting, it is free to publish or publicize when it sees fit to do so, or, again, not at all.

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OML-AO-4750

From: Jobin-Davis, Camille (DOS)
Sent: Monday, April 06, 2009 4:45 PM
To: Mr. Norman Gross
Subject: Advisory Opinions

Norm:

Unfortunately, I was not able to locate an advisory opinion that addressed your specific question. In lieu of such, I offer the following:

In my opinion, it would be reasonable for two school district boards to conduct a joint meeting at the regular meeting site of one or the other school district boards. Especially if the school districts are contiguous, or if there are not an unreasonable amount of miles between the school district meeting sites, it would be efficient, logical and economical, and in this respect would be in keeping with the legislative intent of the Open Meetings Law, "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..." (OML §100).

Additionally, as promised, following are links to advisory opinions regarding access to appointment calendars:

http://www.dos.state.ny.us/coog/ftext/f9191.htm

http://www.dos.state.ny.us/coog/ftext/f15598.htm

Camille

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OML-AO-4751

From: Freeman, Robert (DOS)
Sent: Wednesday, April 08, 2009 2:18 PM
To: Rosalind Lind, Medina Board of Education

Hi Rosalind - -

You described a situation in which the Medina Board of Education, upon which you serve, conducted "an appropriately advertised meeting...to discuss budget proposals." The public and the news media were present at the meeting, and near the end of the meeting, the Board voted to adopt a budget proposal and directed staff to prepare the proposal for a public vote in May. You raised the following question in relation to the foregoing: "as long as we create minutes of that vote, is the vote valid?" You indicated that some Board members believe that it "had to title [y]our notice 'Special Meeting' in order to be able to vote."

In this regard, I know of no law that would require the notice preceding the meeting or minutes of the meeting to indicate that the gathering was a "special meeting." There is no reference in the Open Meetings Law to special meetings, and although the phrase "special meeting" appears in sections 2005 to 2008 of the Education Law, it does not appear that the event to which you referred was a special meeting as that phrase is described in those provisions.

In short, as I understand the matter, the action taken is valid, irrespective of the absence of the characterization of the gathering as a special meeting in the notice that preceded the meeting or the minutes of the meeting.

I hope that I have been of assistance and that you and your enjoy the holiday.

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April 16, 2009

Ms. Dawn V. Powell
[redacted]

The staff of the Committee on 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. Powell:

We are in receipt of your requests for advisory opinions concerning application of the Open Meetings Law to certain proceedings of the Putnam Valley Planning Board.

In specific, you indicated that Planning Board members typically gather in a conference room prior to the 6 PM public meeting and discuss Board business. Usually a quorum of the members is present, and at 6 PM they move into the courtroom for the public meeting. You also indicated that between Planning Board meetings, three members of the Board (a quorum) gather with the Chair of the Zoning Board and the Town Attorney to discuss the draft zoning code, as an advisory committee to the Town Board. In an attempt to address all of the issues that you raised, we offer the following comments.

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

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

Based on the foregoing, a public body is, in our view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body. The definition refers to committees, subcommittees and similar bodies of a public body, and judicial interpretations indicate that if a committee, for example, consists solely of members of a particular public body, it constitutes a public body [see e.g., Glens Falls Newspapers

v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993)]. For instance, in the case of a legislative body consisting of seven members, four would constitute a quorum, and a gathering of that number or more for the purpose of conducting public business would be a meeting that falls within the scope of the law. If that entity designates a committee consisting of three of its members, the committee would itself be a public body; its quorum would be two, and a gathering of two or more, in their capacities as members of that committee, would be a meeting subject to the Open Meetings Law.

In the context of your inquiry, clearly the Planning Board is a public body. Based on the rationale outlined above, in our opinion, a committee whose membership includes a majority of the Planning Board would also constitute a public body subject to the Open Meetings Law, and in any event, a gathering of a quorum of the Planning Board membership to discuss public business would constitute a meeting of the Planning Board regardless of others present.

Second, we note 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 conducted open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 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 Planning Board is present to discuss Planning Board business, any such gathering, in our opinion, would constitute a "meeting" subject to the Open Meetings Law.

Third, as mentioned earlier, 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.

If our assumption is correct, that the "pre-meeting" that you described is a "meeting", it must be preceded by notice of the time and place given to the news media and by means of posting pursuant to §104 of the Open Meetings Law. Therefore, if a pre-meeting is scheduled to begin at 5:45 PM, notice must be given to that effect.

With respect to agendas, in short, there is nothing in the Open Meetings Law or any other law of which we are aware that deals specifically with agendas. While many public bodies prepare agendas, the Open Meetings Law does not require that they do so. Similarly, the Open Meetings Law does not require that a prepared agenda be followed. However, a public body on its own initiative may adopt rules or procedures concerning the preparation and use of agendas.

With respect to your questions regarding meetings, because the Planning Board constitutes a "public body" it is required to prepare minutes in accordance with the Open Meetings Law. Section 106 pertains to minutes of meetings and directs that:

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

Finally, there is nothing in the Open Meetings Law that deals specifically with videotaping public meetings. While a public body is not required to record its meetings, many do so on their own initiative, and, subject to reasonable rules, the courts require that public bodies permit members of the public to videotape public meetings.

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: Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4753

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April 16, 2009

Mr. Robert LoScalzo
[redacted]

The staff of the Committee on 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. LoScalzo:

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

You have sought an advisory opinion concerning issues involving compliance with the Open Meetings Law by Community Board 7 (CB7) in Queens. By way of background, you wrote that CB7 evaluated and conditionally approved a proposed redevelopment in the area of Willets Point pursuant to the New York City Uniform Land Use Review Procedure (ULURP). Soon after doing so, you indicated that:

> "at what had been a regular, scheduled open meeting of CB7, the Board also held a closed-door de-briefing and discussion of the manner in which CB7 had evaluated the proposed redevelopment, including a discussion of how CB7 may improve its procedures for future ULURP analysis and voting. The Board also discussed complaint letters that it received, alleging that the written recommendations prepared by CB7....are defective and must be amended..."

You added that the procedure for conducting an executive session was not implemented prior to the "closed-door" session described in your letter, and that after the gathering in question "[a] representative of CB7's office told [you]...that CB7 properly initiates executive sessions by decision of its Chairman, with no motion and majority vote." He also apparently said that the executive session at issue occurred after the conclusion of the public meeting, which, in your words, "somehow permits the executive session to occur on CB7's unusual terms."

In consideration of the foregoing, I offer the following comments.

First, the term "meeting" [see Open Meetings Law, §102(1)] has been construed broadly include any gathering of a quorum of a public for the purpose of conducting business, irrespective of the absence of an intent to take action, and regardless of the manner in which the gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, affirmed 45 NY2d 947 (1978)]. That being so, the gathering held "after the conclusion of the public meeting" was itself a "meeting" falling within the requirements of the Open Meetings Law.

Second, §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Therefore, 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.

Third, 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 be made in public, it 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. In short, a public body may not conduct an executive session to discuss the subject of its choice.

Having reviewed the eight grounds for entry into executive session, none, as you described the matter, could properly have been discussed in private.

Lastly, assuming that the executive session was improperly held, you asked whether "CB7 may now be compelled to provide an accurate written statement that reveals the nature of conversations that occurred during the so-called executive session..." While I know of no such requirement, I believe any person present at the executive session may describe or provide information to the public concerning the conversation or discussion that occurred during the closed session.

In an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this opinion will be sent to CB7.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Community Board 7

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 17, 2009

E-Mail

TO: Mr. Timothy Tice

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. Tice:

As you are aware, we have received your letter. I hope that you will accept my apologies for the delay in response. Although Ms. Jobin-Davis provided links to various advisory opinions dealing with the issues that you raised, I offer the following comments based on the facts as you described them.

First, §104 of the Open Meetings Law pertains to notice of meetings of public bodies, such as a planning board, and states that:

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

The 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 point out that notice of the time and place of a meeting must merely be "given" to the news media. There is no obligation that a public body place a legal notice to comply with the Open Meetings Law. Further, when the news media receives notice of a meeting, they are under no obligation to publish the notice or publicize a meeting. Because that is so, public bodies may comply with law by providing notice to the news media, but the news media may choose not to disseminate the notice.

Second, in a related vein, the Open Meetings Law make no reference to agendas. Therefore, a public body may choose to prepare an agenda, even though there is no requirement imposed by law to do so. Further, unless a public body has adopted a rule or policy to the contrary, it may follow its agenda, but it is not required to do so

Lastly, since you referred to the location of a meeting as "upstairs" and with "no access for the physically handicapped", I note that §103(b) of the Open Meetings Law states that:

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

Based upon the foregoing, there is no obligation imposed upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings and hearings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the Board has the capacity to hold its meetings in a facility that would better accommodate handicapped persons, I believe that its meetings should be held in the location that is most likely to accommodate the needs of those persons.

I hope that I have been of assistance.

RJF:jm

cc: Planning Board
Board of Trustees

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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April 23, 2009

Mr. John Goetschius
[redacted]

The staff of the Committee on 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. Goetschius:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain proceedings of the Board of Education of the Greenburgh Eleven School District. In an effort to address the issues that you raised, we offer the following comments.

You indicated that the Board utilized the following motion for entry into executive session during numerous meetings, and:

> "**Resolved** that the Greenburgh Eleven Board of Education enters into Executive Session to discuss the employment history of particular persons, collective negotiations under Article 14 of the Civil Service Law, potential litigation and issues involving individual students."

While there is nothing in the Open Meetings Law or any judicial decision of which we are aware that addresses this particular situation, we are concerned that repeated utilization of a motion that encompasses the same four grounds for entry into executive session, over time, may jeopardize the public's confidence that discussions in executive session are appropriate.

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) specify and limit the subjects that may be considered in an executive session, and it is clear in our view that those provisions are generally intended to enable public bodies to exclude the public from their meetings only to the extent that public discussion would result in some sort of harm, perhaps to an individual in terms of the protection of his or her privacy, or to a government in terms of its ability to perform its duties in the best interests of the public.

The provision pertaining to litigation, §105(1)(d), permits a public body to enter into executive session to discuss "proposed, pending or current litigation." While the courts have not sought to define the distinction between "proposed" and "pending" or between "pending" and "current" litigation, they have provided direction concerning the scope of the exception in a manner consistent with the description of the general intent of the grounds for entry into executive session suggested in the preceding paragraph, i.e., that they are intended to enable public bodies to avoid

some sort of identifiable harm. For instance, it has been determined that the mere possibility, threat or fear of litigation would be insufficient to conduct an executive session. Specifically, it was held that:

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

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

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 Board of Education." If the Board seeks to discuss its litigation strategy in relation to a person or entity that it intends to sue, and if premature identification of that person or entity could adversely affect the interests of the District and its residents, it has been suggested that the motion need not identify that person or entity, but that it should clearly indicate that the discussion will involve the litigation strategy. Only by means of that kind of description can the public know that the subject matter may justifiably be considered during an executive session.

With regard to discussions involving collective negotiations, in similar fashion, it has been held that the motion must identify the bargaining unit involved in the negotiations (see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981).

With respect to your questions concerning an individual board member's responsibility to refrain from participating in an executive session discussion that is not in keeping with the law, and whether s/he is prohibited from disclosing improper conduct of executive sessions to the public, we

note that there is nothing in the Open Meetings Law that requires that certain topics be discussed in executive session. Similarly, in our opinion, unless there is a state or federal statute that requires "confidentiality", the member would not be "prohibited" from disclosing what transpired in executive session. Accordingly, we advise board members that when a discussion in executive session shifts to a topic that is not authorized, each board member has a responsibility to alert other board members of the necessity of returning to the public session.

For example, when a discussion by a board of education concerns a record pertaining to a particular student (ie., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. The Family Educational Rights and Privacy Act (20 USC §1232g) generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless a parent of the student consents to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute (see Open Meetings Law §108[3]). In that context, we believe that a board of education, its members and school district employees, would be prohibited from disclosing related information, because a statute requires confidentiality.

We note that in a case in which the issue was whether discussions occurring during an executive session held by a school board could generally be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987). In the context of most of the duties of most municipal boards, councils or similar bodies, there is no statute that *forbids* disclosure or requires confidentiality.

This is not to suggest that it is appropriate to disclose what is discussed in executive session, and certainly, whether it is wise or ethical to disclose information is beyond the scope of this advisory opinion (see Advisory Opinion No. 3929a [www.dos.state.ny.us/coog/otext/o3929a.htm]. On the other hand, we would speculate that if board members were to continue inappropriate discussions in executive session even when prompted to discontinue such practice, disclosure may be the most effective way to prevent further abuse of the law.

Finally, with respect to your questions pertaining to a "retreat", according to your letter the Board discussed "the development of a process of setting goals for the school district." In our view, the "retreat" held for that purpose would constitute a "meeting" subject to the Open Meetings Law, as outlined below.

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

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body will convene for the purpose of conducting public business, such a gathering would, in our opinion, constitute a meeting subject to the requirements of the Open Meetings Law.

The decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings 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 our 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, we 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 our view constitute a meeting of a public body subject to the Open Meetings Law.

In this instance, if the purpose of the retreat was to discuss the development of the board's goal setting process, it is likely that it was a "meeting" subject to the Open Meetings Law.

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: Board of Education

OML-AO-4756

From: Jobin-Davis, Camille (DOS)
Sent: Friday, May 01, 2009 4:43 PM
To: 'Diane Bliss'
Subject: RE: FW: Open Meetings Law - voting

Diane:

Please feel free to disseminate this email as you see fit.

In general, I think that you have accurately summarized the advice that I gave to you. In an effort to clarify even further, and to briefly answer your questions, I offer the following quick comments:

#4: notice of a public meeting must be sent to the media, not just made available

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

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

There are clarifying advisory opinions available on our website under "P" for "Public bodies". Please call when and if you have further questions.

I hope that this helps!

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
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May 4, 2009

Ms. Barbara J. Ahern
Attorney at Law
One Commerce Plaza, Suite 400
Albany, NY 12210

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

Dear Ms. Ahern:

I have received your letter in which you sought an "interpretation of the Open Meetings Law as it applies to the meetings of the Task Force created by Section 50-b of the Workers' Compensation Law."

Section 50-b established a task force on group self-insurance that includes a specific membership and whose chair is appointed by the Governor. Its statutory obligation involves the preparation of a report to the Governor, the Speaker of the Assembly and the Temporary President of the Senate consisting of recommendations concerning:

"1. the prevention of future defaults by group self-insurers;

2. regulation of group self-insurers and its impact and effectiveness;

3. payment of claims insured by defaulted group self-insurers;

4. the long term viability of group self-insurers; and

5. such other topics related to group self-insurers as the task force may deem necessary."

Although the statute specifies that the report containing the recommendations of the Task Force was required to be submitted by February 1 of this year, you wrote that appointments to the Task Force were not made with sufficient time to do so, and that it has scheduled several meetings yet to be held.

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

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

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

In the decisions cited above, none of the entities were created by statute to carry out a particular duty and all had purely advisory functions. More analogous to the matter in my view is the decision rendered in MFY Legal Services v. Toia [402 NYS 2d 510 (1977)].

When an entity is a statutory creation whose existence is preceded by approval of its existence by the Senate and the Assembly and final approval by the Governor, when it has specific statutory duties that must be accomplished, when it has two or more members, and when it can act only by means of a quorum, it is my opinion, and I believe that a court would concur, that such an entity constitutes a "public body" required to give effect to the Open Meetings Law. It is noted that §41 of the General Construction Law pertains to quorum requirements and 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*" (emphasis mine), those persons or officers may do so only by means of a quorum, a majority of the total membership of an entity, and that any such duty may be approved only by means of an affirmative vote of a majority of a majority of the total membership.

In my opinion, in consideration of the statutory charge imposed upon the Task Force, which totals fifteen members (public officers and others representing particular entities), and the obligation to conduct public business by means of a quorum, the Task Force constitutes a public body subject to the Open Meetings Law.

In brief, that statute is based on a presumption of openness. Stated differently, meetings of public bodies must be preceded by notice given in accordance with §104 of the Open Meetings Law and conducted open to the public, except to the extent that an executive session may be held pursuant to §105(1). Paragraphs (a) through (h) of that provision specify and limit the grounds for entry into executive session. As I understand the duties of the Task Force, it is unlikely that any of those grounds would be pertinent or applicable as a basis for excluding the public from its meetings.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Patrick Cremo

STATE OF NEW YORK
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May 6, 2009

Ms. Irene Zuck
[redacted]

The staff of the Committee on 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. Zuck:

We are in receipt of your correspondence in which you request an investigation regarding certain proceedings in the Town of Greenburgh, including an amendment to a local law. While our office has neither the resources nor the authority to conduct an investigation, we offer the following comments with respect to the Town's responsibility to notify the public of meetings and hearings.

A meeting, as you may know, is different from a hearing. A meeting is generally a gathering of a quorum of a public body, such as a town board, for the purpose of discussion, deliberation, and potentially taking action within the scope of its powers and duties. Meetings, and notice of them, are governed by the Open Meetings Law. A hearing, on the other hand, 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 a newspaper. Although this office has little experience with the adoption of local laws, requirements for hearings held in conjunction with the proposal and adoption of local laws are likely governed by provisions of the NYS Municipal Home Rule Law or perhaps NYS Town Law. Based on the information that you provided, you may wish to consult with a private attorney regarding the proper procedure for adopting a local law.

We regret that we could not be of greater assistance. You may contact us if you have questions with respect to application of the Freedom of Information or Open Meetings Laws.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-17637
OML-AO-4759

Committee Members

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May 7, 2009

Hon. Samuel Fruscione
Council Member
City of Niagara Falls
P.O. Box 69
Niagara Falls, NY 14302-0069

The staff of the Committee 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 Council Member Fruscione:

I have received your letter concerning the status of the Niagara Tourism & Convention Corporation (NTCC) under open government laws, i.e., the Freedom of Information and Open Meetings Laws. The same issue was recently raised, and in an effort to respond properly, I learned that the NTCC is a not-for-profit corporation that receives funding through contracts with Niagara County and the Cities of Niagara Falls and Lockport. I was also informed that its board of directors consists of 17 members, 14 of whom are associated with private businesses and organizations, and 3 of whom represent the municipalities that contract with NTCC.

Assuming that 14 of the 17 members of the NTCC are not designated by government agencies, I do not believe it would be subject to either the Freedom of Information or the Open Meetings Law.

The former is applicable to agencies, and §86(3) defines the term "agency" to mean:

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

Based on the provision quoted above, the Freedom of Information Law pertains to governmental entities. A not-for-profit corporation that is not within the essential control of government would not, in my opinion, constitute an "agency"subject to that statute.

Similarly, the Open Meetings Law applies to public bodies, and §102(2) of that law defines "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 in the case of the Freedom of Information Law, the Open Meetings Law is applicable to entities that conduct public business and perform a governmental function. The receipt of government funding or the existence of a contractual relationship with one or more governmental entities would not, in my view, transform a private or not-for-profit corporation into a governmental entity constituting an "agency" or a "public body."

On the other hand, if a majority of the members of the NTCC are appointed by governmental entities, those entities would exercise essential control over the corporation, and in that instance, due to that degree of control, I believe that it would be required to comply with both open government statutes. Again, however, that does not appear to be so.

Notwithstanding the foregoing, there may be rights of access to records pertaining to the NTCC. The Freedom of Information Law applies to all government agency records, and §86(4) defines "record" to mean:

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

Due to the breadth of definition, records concerning NTCC maintained by the County, the City of Niagara Falls or the City of Lockport, or any other agency, would fall within the coverage of the Freedom of Information Law. Therefore, for example, when records are prepared or received by any of the three government representatives serving on the NTCC Board of Directors, in their capacities as government representatives, any such records fall within the coverage of the Freedom of Information Law and may be requested pursuant to that law from any of the agencies in possession of the records.

When records are maintained by or for a government agency, 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Niagara Convention & Tourism Corporation

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17646
OML-AO-4760

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May 8, 2009

Mr. Charles Parker
[redacted]

The staff of the Committee on 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. Parker:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law and the Open Meetings Law to certain proceedings of the Duanesburg Town Board, including the adoption of "rules of privilege to the floor" governing public participation at meetings. You questioned the Board's authority to selectively answer questions, and requested that we issue a written opinion in keeping with your earlier conversation with Bob Freeman of this office. 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 Town Board, does not want to answer questions or permit the public to speak or otherwise participate at its meetings, we do not believe that it would be obliged to do so. On the other hand, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, we believe that it should do so based upon reasonable rules that treat members of the public equally.

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

There are federal court decisions indicating that if commentary is permitted within a certain subject area, negative commentary in the same area cannot be prohibited. It has been held by the United States Supreme Court that a school board meeting in which the public may speak is a "limited" public forum, and that limited public fora involve "public property which the State has opened for use by the public as a place for expressive activity" [Perry Education Association v. Perry Local Educators' Association, 460 US 37, 103. S.Ct. 954 (1939); also see Baca v. Moreno Valley

Unified School District, 936 F. Supp. 719 (1996)]. In Baca, a federal court invalidated a bylaw that "allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter (District employees' conduct or performance)" (id., 730). That prohibition "engenders discussion artificially geared toward praising (and maintaining) the status quo, thereby foreclosing meaningful public dialogue and ultimately, dynamic political change" [Leventhal v. Vista Unified School District, 973 F.Supp. 951, 960 (1997)]. In a decision rendered by the United States District Court, Eastern District of New York (1997 WL588876 E.D.N.Y.), Schuloff, v. Murphy, it was stated that:

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

In the context of the specific issues that you raised, we believe that a court would determine that the Town Board may limit the amount of time allotted to person who wishes to speak at a meeting, so long as the limitation is reasonable. Five minutes per person, in our opinion, would likely be found to be reasonable. Similarly, the other rules adopted by the Board, including "Be respectful; address the entire town board, individual members are not to be singled out, [and]; speak of issues related to town business, there will be no tolerance for personal attacks on board members" appear to be reasonable also.

Further, we note that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while agency officials may choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of both the Open Meetings Law and the Freedom of Information Law.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4761

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May 22, 2009

E-Mail

TO: Hon. Ann Garris, Town Clerk, Town of Carmel

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. Garris:

I have received your letter concerning Town of Carmel Town Board references to an "Informational Hearing" and an "Informational Meeting" conducted "during a Work Session." The notice of the informational hearing indicated an intent to establish an "individualized residential alternative" at a particular location in the Town, but you added that "At that Town Board Work Session, without notice given, they also held an "informational meeting" regarding an improvement at a different location. The public was given the opportunity to speak at both sessions. "Following the 'Informational Hearing' and subsequent 'Informational Meeting', a Special Meeting was held, at which time a resolution was adopted" with respect to the residential alternative.

You have asked whether, as Town Clerk, you "should record the discussions held at the 'Informational Hearing' and 'Informational meeting' along with the minutes prepared for the Special Meeting." In my view, although you may choose to do so, there is no obligation to do so. In this regard, I offer the following comments.

First, from my perspective, a meeting may be different from a hearing. A meeting is generally a gathering of quorum of a public body, such as 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 of the Open Meetings Law specifies that notice of a meeting need not be a legal notice, but rather 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, I know of no statutory requirement that the "discussions held" at the informational hearing and informational meeting as you described them must be recorded or that they be included in minutes. I note, however, that it may be in the interest of the Town to prepare a record indicating the nature of comments during a meeting or hearing, or perhaps the number of individuals who spoke

for or against a proposed action, etc. In some instances, hearings and meetings are tape or video recorded in order to preserve a verbatim account of discussions or commentary. Nevertheless, again, I am unaware of any statutory obligation to do so.

In a related vein, the Open Meetings Law contains what might be characterized as minimum requirements concerning the content of minutes. Subdivision (1) of §106 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."

In consideration of the provision quoted above, at a minimum, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of the members. They may include additional information or detail, such as the nature of a discussion, but there is no requirement that minutes include more than a record or summary of the items referenced in §106(1).

Lastly, there appears to be confusion concerning the use of certain of the phrases to which you referred. In an effort to offer clarification, I point out the courts have construed the term "meeting" to include any gathering of a quorum of a public body for the purpose of conducting public business, irrespective of the characterization of a gathering or the absence of an intent to take action [see Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, affirmed 45 NY2d 947 (1978)]. The cited decision dealt directly with work sessions held solely for the purpose of discussion and specified that so-called "work sessions" and similar gatherings constitute "meetings" subject to the Open Meetings Law. In short, there is no distinction between a "work session" and a "meeting."

I point out, too, that §62(2) of the Town Law pertains 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." There is no requirement in that provision that notice of a special meeting include the subject or subjects to be considered.

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

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4762

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May 27, 2009

E-Mail

TO: Ms. Sandra Mallah, Superintendent of Schools

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

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

Dear Ms. Mallah:

We are in receipt of your request for an advisory opinion clarifying a previous opinion issued to Mr. Goetschius concerning the status of a "retreat" held to discuss "the development of a process of setting goals for the school district." Based on our telephone conversation and the additional information that you submitted, and in an effort to provide guidance with respect to these issues, we offer the following comments.

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

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body will convene for the purpose of conducting public business, such a gathering would, in our opinion, constitute a meeting subject to the requirements of the Open Meetings Law.

The decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings 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 our 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 the 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, we 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 public business collectively as a body, the activities occurring during that event would not in our view constitute a meeting of a public body subject to the Open Meetings Law.

In this instance, you indicated that the retreat was held:

> "for board development in the process of setting goals .... A consultant was hired, who provided a presentation in the development of a School District vision, mission and goals. The training focused on the distinction between a vision and mission and the process to address the development of these statements. At no time were a vision, a mission or board goals established. This was training that would help guide the School Board in approaching these tasks."

Based on this information, in our opinion, if the discussion was limited to the process by which a board would set goals, or the difference between vision and mission statements, it is likely that it was not a discussion of public business, and, therefore, not a "meeting" subject to the Open Meetings Law.

In sum, pursuant to case law referenced above, when a quorum of a school board gathers to receive training and/or education, and when the purpose of the gathering is limited to general training and education concerning the process by which goals are adopted, in our opinion, such gathering would not constitute a "meeting" subject to the Open Meetings Law. Conversely, when the discussion pertains to the specific goals of the board, or when the discussion focuses on the language of a vision or mission statement, in our opinion, the board would be discussing public business, such a gathering would constitute a "meeting" subject to the Open Meetings Law.

Thank you for the opportunity to clarify our opinion. On behalf of the Committee on Open Government, we hope that this is helpful to you.

CSJ:jm

cc: John Goetschius

FOIL-AO-17658
OML-AO-4763

From: Mercer, Janet (DOS)
Sent: Thursday, May 28, 2009 9:00 AM
To: 'Thomas Mellon'
Subject: RE: Town Ethics Committees

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."

An ethics board or committee is a creation of law, and it clearly conducts public business and performs a governmental function for a public corporation, a town. That being so, I believe that it has the same obligations as a governing body, such as a town board, regarding openness and the provision of notice of meetings, for example, as a town board, as well as the same authority to conduct executive sessions when it is appropriate to do so. Section 105(1) of the Open Meetings Law specifies and limits the grounds for entry for entry into executive session.

Relevant to the duties of a board of ethics is §105(1)(f) of the Law, which permits a public body to enter into an executive session to discuss:

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

If the issue before a board of ethics involves a particular person in conjunction with one or more of the subjects listed in §105(1)(f), I believe that an executive session could appropriately be held. For instance, if the issue deals with the "financial history" of a particular person or perhaps matters leading to the discipline of a particular person, §105(1)(f) could in my opinion be cited for the purpose of entering into an executive session.

For purposes of general guidance, I note that both the Open Meetings Law and its companion statute, the Freedom of Information Law, are permissive. Under the former, a public body, such as a town board or the ethics board, may conduct executive sessions in accordance with §105(1) of the Open Meetings Law, but it is not required to do so. Similarly, the Freedom of Information Law provides that an agency, such as a town, may withhold records in circumstances specified in that statute, but it is not required to do. Whether it is wise, ethical or in the public interest to discuss matters in public that may be considered in executive session or to disclose records that may be withheld under the Freedom of Information Law is, in my view, largely irrelevant to the authority to do so.

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I hope that I have been of assistance.

Janet Mercer
Committee on Open Government
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OML-AO-4764

From: Mercer, Janet (DOS)
Sent: Thursday, May 28, 2009 8:50 AM
To: 'Theresa Grafflin'
Subject: RE: Albany Democratic Committee

I have received your email in which you raised questions concerning a meeting held by the Albany Democratic Committee to endorse a first ward council member. You indicated that notice was not given to another council member.

In this regard, the Committee on Open Government offers advice and guidance concerning access to government information and meetings. The statute that generally requires that meetings be held in public is the Open Meetings Law. That statute pertains to meetings of public bodies, and section 102(2) defines the phrase "public body" to include:

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

As such, the Open Meetings Law pertains to meetings of governmental bodies, such as a county legislature, a city council, a town board, or the State Senate and Assembly. It is emphasized, however, that section 108(2)(a) of the Open Meetings Law exempts from its coverage "deliberations of political committees, conferences and caucuses." Further, section 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, political party meetings would not be covered by the Open Meetings Law.

I note that some "caucuses" must be held open to the public pursuant to the Election Law. Specifically, section 1-104(28) of the Election Law states that:

"The term caucus shall mean an open meeting held in a political subdivision to nominate the candidates of a political party for public office to be elected in such subdivision at which all the enrolled voters of such party residing in such subdivision are eligible to vote."

To obtain additional information regarding political party committee meetings, the only source of which I am aware that might offer guidance would be the State Board of Elections.

I hope that I have been of assistance.

Janet Mercer
Committee on Open Government
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17666
OML-AO-4765

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June 5, 2009

Mr. Thomas Maslanka
[redacted]

The staff of the Committee on 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. Maslanka:

We are in receipt of your request for an advisory opinion regarding whether the Board of Directors of the Westmere Fire Department is subject to the Open Meetings Law, and whether minutes of meetings of the Board are required to be made available to the public pursuant to the Freedom of Information Law. In this regard, we offer the following comments.

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

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

By reviewing the components in the definition of "public body", we believe that each is present with respect to the board of a volunteer fire company and a department. The boards of volunteer fire companies and departments are clearly entities consisting of two or more members. To the extent that they may be incorporated, we believe that they are required to conduct business by means of a quorum under the Not-for-Profit Corporation Law. Further, based on a decision rendered by the Court of Appeals, the state's highest court, fire companies and departments conduct public business and perform a governmental function. Such a function is carried out for public corporations, which are defined to include municipalities, such as towns and villages. Since each of the elements in the definition of "public body" pertains to the boards of fire companies and departments, we believe that the boards of such are "public bodies" subject to the Open Meetings Law.

Until 1980, the status of volunteer fire departments was unclear. Those departments 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 departments, the Court of Appeals found that a volunteer fire department 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 department performs a governmental function and that its records are subject to rights of access granted by the Freedom of Information Law.

Based on the decision rendered in Westchester Rockland, we believe that the board of a fire department falls within the definition of "public body" and would be required to comply with the Open Meetings Law.

Second, the Open Meetings Law gives the public the right to attend meetings of public bodies, listen to the debates, and watch the decision making process in action. Notice of the time and place of all meetings must be posted in a designated location and given to the media prior to every meeting (§104) and was recently amended to require that notice be posted on an agency's website when it has the ability to do so (Laws 2009, Chapter 26). Except when there is a legal basis for entry into executive session, every meeting must be open to the public (§105). Paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be discussed during an executive session. And, the law requires that minutes shall be taken at all open meetings, consisting of "a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon" (§106).

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

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

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

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

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for

> performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

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

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

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:

> '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'

"These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.

"It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).

"This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

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

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the law. Accordingly, minutes of meetings of the Board of Directors are required to be made available to the public upon request, as there is no basis in the law on which to deny access.

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: Board of Directors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4766

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June 10, 2009

Mr. Donald D. Fittipaldi
[redacted]

The staff of the Committee on 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. Fittipaldi:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain proceedings of the Camillus Town Board. The documentation that you submitted indicates that the Board held a special meeting for the purpose of conducting six public hearings, and addressing other items on an agenda. The meeting was called to order at 6 p.m., the six hearings were conducted, and the meeting was adjourned at 6:23p.m. At 6:55 p.m., the Board "returned to regular session", passed a resolution to request sales tax revenue from the County, and adjourned the meeting. The accuracy of the minutes is not at issue, the town attorney has indicated his opinion that the gathering between 6:23 and 6:55, while not closed to the public, should have been preceded by notice, and that there are no minutes from that period due to the lack of action taken.

While it may be that the motion to adjourn should have been a motion to recess and then later, to reconvene, as suggested by the town attorney, to the extent that the Open Meetings Law may have applied during that interim period and to the gathering at 6:55, we offer the following comments.

The Open Meetings Law is clearly intended to open the deliberative process to the public and provide the right to know how public bodies reach their decisions. As stated in §100 of the law, its Legislative Declaration:

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

> The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

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

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

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

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

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

Further, it was held that "a planned informal conference" or a "briefing session" held by a quorum of a public body would constitute a "meeting" subject to the requirements of the Open Meetings Law [see Goodson Todman v. Kingston, 153 Ad 2d 103, 105 (1990)].

Based upon the terms of the Open Meetings Law and its judicial interpretation, if a majority of Board members gathers to conduct public business, any such gathering would, in our opinion, constitute a "meeting" subject to the Open Meetings Law. On the other hand, when less than a quorum is present, or when the discussion does not pertain to public business, the Open Meetings Law would not apply. Further, as noted by the town attorney, when there is an intent to conduct a meeting, the gathering must be preceded by notice given pursuant to §104 of the Open Meetings Law, convened open to the public and conducted in public as required by the Open Meetings Law.

As you know, the Open Meetings Law is applicable to meetings of public bodies, such as the Camillus Town Board, and §102(2) of the Open Meetings Law defines the phrase "public body" to include:

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

Based upon the direction given by the courts, if a majority of the Town Board remained after 6:23 p.m. to discuss public business, collectively as a body and in their capacities as Board members, any such gathering, in our opinion, would constitute a "meeting" subject to the Open Meetings Law. Again, if less than a quorum was present, or if public business was not discussed, the Open Meetings Law would not have applied.

Finally, you indicated that after being made aware of the law and its application, the Board took corrective measures and rescinded the action taken at the 6:55 meeting. In our opinion, that action served as an appropriate remedy regarding the situation.

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: Hon. Martha Dickson-McMahon
Dirk J. Oudemool, Esq.
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4767

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June 10, 2009

Mr. Thomas Maslanka
[redacted]

The staff of the Committee on 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. Maslanka

We are in receipt of your request for an advisory opinion regarding the legal authority "to carry a digital voice recorder, concealed on my person in an unobtrusive manner", at public meetings of the Board of Directors of the Westmere Fire Department. In addition to the comments and legal analysis provided in an opinion to you on this same date, we offer the following.

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

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

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

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

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

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

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

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

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

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

With respect to a requirement that the recording be obvious, we note that the Court in Mitchell referred to "the unsupervised recording of public comment" (id.). In our view, the term "unsupervised" indicates that no permission or advance notice is required in order to record a meeting. We recommend that the recorder not be concealed, as a courtesy. However, it is our view that there is no prohibition concerning concealment. Again, so long as a recording device is used in an unobtrusive manner, based on the case law referenced above, it our opinion that a public body cannot prohibit its use by means of policy or rule.

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: Board of Directors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4768

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June 15, 2009

Mr. William C. Westley
Chairman of the Board
Clarence Senior Citizens, Inc.
4600 Thompson Road
Clarence, NY 14031

The staff of the Committee on 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. Westley:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain committees of the Board of Directors of Clarence Senior Citizens, Inc. Previously, we issued an opinion advising that the Board of Directors is a public body subject to the Open Meetings Law (OML-AO-3483). The issue here is whether committees appointed by the Board, most of which include persons other than Board members, are public bodies that fall within coverage of the law. In response, we offer the following comments.

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

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

Based on the foregoing, a public body is, in our view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body. In order to constitute a meeting subject to the Open Meetings Law, a majority of the total membership of a public body, a quorum, must be present for the purpose of conducting public business. We note, too, that the definition refers to committees, subcommittees and similar bodies of a public body.

Judicial decisions indicate generally that advisory bodies having no authority to take binding action and which typically include persons other than members of a governing body fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. Therefore, an advisory body would not in our opinion be subject to the Open Meetings Law, even if a member of a governing body or the staff of an agency participates.

On the other hand, when the core of a committee consists solely of members of a public body, such as the Board of Directors, we believe that the Open Meetings Law is applicable.

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

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

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body", resulting in the definition indicated above. 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 solely of members of the Board of Directors, would fall within the requirements of the Open Meetings Law when such an entity discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, 437 NYS 2d 466, (4th Dept. 1981), *appeal dismissed* 55 NY 2d 995, 449 NYS 2d 201 (1982)].

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

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

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

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

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

Does the applicability of the Open Meetings Law change if a committee consists of three members of a governing body, and in addition, a fourth or fifth person, not a member of the governing body, is designated to serve on the committee? What if a committee of the Board consisted solely of Board members, plus the Executive Director as an *ex officio* member? What if additions of that nature were made to evade the applicability and intent of the Open Meetings Law? From our perspective, when the core membership of an entity consists of members of a governing body, the kinds of additions or actions described in those questions would not change the essential character of the entity. However, if a committee consists primarily of persons other than Board members, judicial precedent indicates that an entity of that nature is not a public body and, therefore, is not required to give effect to the Open Meetings Law.

With respect to your question concerning the lack of a by-law requiring a quorum to conduct a meeting, as indicated earlier, the definition of the phrase "public body" refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision states that:

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

Based on the foregoing, again, a valid meeting may occur only when a majority of the total membership of a public body, such as a committee or subcommittee, 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.

Finally, with respect to subcommittees of committees, we would apply the same legal analysis regarding membership and authority offered above regarding committees and subcommittees, regardless of whether appointments to a committee or subcommittee were made or confirmed by the Board of Directors or the committee chairs.

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

FOIL-AO-17675
OML-AO-4769

From: Freeman, Robert (DOS)
Sent: Thursday, June 18, 2009 9:24 AM
To: C.B.Smith
Subject: RE: question
Attachments: o3944.wpd

Good morning - -

In response to your question concerning the status of a town's "comprehensive plan committee" under the Open Meetings Law, there are two possible answers, and I have attached an opinion dealing with that issue. In short, it has been held that advisory bodies that do not consist solely of a members of a governing body are not, in most instances, subject to the Open Meetings Law. However, the Town Law, §272-a deals with comprehensive planning and includes reference to the creation of a "special board." Because the special board is a statutory body with certain statutory functions, I believe that such a board constitutes a "public body" required to comply with the Open Meetings Law.

If the entity in question is a special board, it can take action and carry out its duties only at meetings properly held, those actions must be approved by majority vote of the total membership, and minutes must be prepared indicating the nature of action and taken and the vote of the members. In addition, FOIL requires that a voting record indicate the manner in which each member cast his or her vote.

Irrespective of the foregoing, I believe that any records prepared or obtained by the entity would fall within the coverage of FOIL. As you may recall, FOIL includes all agency records within its coverage and defines the term "record" expansively to mean any information, in any physical form whatsoever, kept, held, filed, produced, or reproduced by, with or for an agency. A town is an agency, and all records prepared or obtained by the entity would, therefore, constitute town records subject to rights conferred by the FOIL, irrespective of their location or the status of the entity under the Open Meetings Law.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
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FOIL-AO-4770

From: Freeman, Robert (DOS)
Sent: Thursday, June 18, 2009 3:58 PM
To: C.B.Smith
Subject: RE: question

The Open Meetings Law contains minimum requirements concerning the contents of minutes. At a minimum, they must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of the members. If none of those events occurs, there is no legal obligation to prepare minutes.

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

FOIL-AO-4771

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June 25, 2009

Mr. George Potanovic, Jr.
SPACE
P.O. Box 100
Stony Point, NY 10980

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

Dear Mr. Potanovic:

I have received your letter and hope that you will accept my apologies for the delay in response. You referred to a statement made during a meeting of the Stony Point Town Board indicating that the Board planned "to meet with its newly retained economic consultant....to discuss the development of town-owned property during what they termed a 'field trip.'" Assuming that a quorum of the Town Board participates in such a "field trip", you questioned whether such a gathering falls within the requirements of the Open Meetings Law.

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

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

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

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

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

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

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

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

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

Based on the direction given by the courts in the decisions cited above, if a site visit or field trip is conducted for the purpose of observation, and if discussions relating to those observations occur following such an event in accordance with the Open Meetings Law, I believe that a public body would be acting in a manner consistent with law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4772

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(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/index.html

June 25, 2009

Mr. Peter Pfabe
[redacted]

The staff of the Committee on 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. Pfabe:

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

You described a series of events involving the Town Board of the Town of Pleasant Valley and wrote that the Board "entered into executive session — in violation of the Open Meetings Law — to discuss whether they would approve funds for the Ethics Board to hire an attorney." You also referred to " a note that now adorns Town Board meeting agendas that states: 'Board members reserve the right to go into executive session at any time.'"

In this regard, I offer the following comments.

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

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

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

Second, with respect to the executive session to which you specifically referred, it appears that only one of the grounds for entry into executive session would have been pertinent. However, based on its clear terms, I do not believe that the Board could properly have entered into executive session. Section 105(1)(f) was enacted and now states that a public body may enter into an executive session to discuss:

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

In my opinion, a discussion of *whether* to approve funding for the hiring of an attorney would not have constituted a proper subject for consideration in executive session, for it would not have focused on a "particular" person or corporation in conjunction with one or more of the qualifiers appearing in §105(1)(f). If, after determining to approve funding, a discussion focuses on hiring a particular person or firm, I believe that an executive session may properly be held.

Lastly, pursuant to §107 of the Open Meetings Law, if a lawsuit is initiated and a court finds that action was taken in private that should have been taken in public, the court, may, in its discretion and upon good cause shown, invalidate the action taken in violation of the Open Meetings Law. Additionally, a court has the discretionary authority to award attorney's fees to the successful party.

In an effort to enhance knowledge 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

FOIL-AO-4773

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June 26, 2009

Mr. Michael Hicks
[redacted]

The staff of the Committee on 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. Hicks:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response. You have sought advice and assistance concerning your efforts in obtaining information from the Village of Franklinville. You have focused on what you consider to be the inadequacy of the Village's budget, as well as minutes of meetings of the Board of Trustees.

In this regard, first, you referred to our conversations, as well as a conversation that allegedly occurred between the Mayor and me. Please note that this office, which has a staff of three, receives approximately 7,000 telephone calls annually. I must admit that I do not recall the specifics of conversations between us, and that I do not recall having spoken with the Mayor. That is not to suggest that he and I might not have spoken, but rather that I have no recollection of any such conversation.

Second, the statutory duties of the Committee on Open Government involve providing advice and opinions concerning the Freedom of Information and Open Meetings Laws. Although I am familiar with the provisions in the Village Law dealing with the procedure for the adoption and content of a village budget, it is not within the purview of this office to offer specific guidance concerning the adequacy of a budget. In an effort to offer guidance, however, enclosed are copies of §§5-506 and 5-508 of the Village Law, which prescribe the procedure for adopting and the content of a village tentative and final budget. In an effort to enhance understanding of those statutes, copies will be sent to the Mayor.

Third, with respect to minutes of meetings, because the Board of Trustees constitutes a "public body" required to comply with the Open Meetings Law [see Open Meetings Law, §102(2)], it is required to prepare minutes in accordance with that statute. Section 106 pertains to minutes of meetings and directs that:

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

Based on the foregoing, minutes of open meetings must consist, at a minimum, of a record or summary of motions, proposals, resolutions, action taken, and the vote of the members. Further, minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain. When a public body has properly entered into an executive session, which would be rare in relation to consideration or preparation of a budget [see the grounds for entry into executive session, paragraphs (a) through (h), §105(1)], it may vote during the executive session, unless the vote is to appropriate public moneys. If action is taken during an executive session, minutes must be prepared and made available in accordance with the Freedom of Information Law within one week and must consist of a record or summary of the action taken, the date and vote of the members.

In effort to enhance understanding of and compliance with law, copies of this response will be sent to Village officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Trustees
Hon. Robert Breton, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 4774

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July 1, 2009

E-Mail

TO: Hon. Ann Christmas, Town Clerk, Town of Pompey

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. Christmas:

I have received your letter and the materials relating to it. You indicated that you, as Town Clerk, prepare minutes of Town Board meetings, and that you include "all resolutions, motions, etc. and a summary of what is discussed." Nevertheless, one member of the Board frequently attempts to add items, and consequently, the Board is "spending approximately 30 minutes each month deciding to approve the minutes."

You have requested suggestions that might clarify or improve the situation. In this regard, I offer the following comments.

As I view the matter, four provisions of law are relevant. First, §106 of the Open Meetings Law deals with minutes and under that statute, it is clear that minutes need not consist of an expansive account of what is said. Rather, at a minimum, minutes must consist of a record or "summary", rather than a verbatim rendition, of motions, proposals, resolutions, action taken and the vote of each member. Second, subdivision (1) of §30 of the Town Law states in relevant part that the town clerk "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting". Third, subdivision (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 only consist of a record or "summary" of the kinds of information described in §106 to meet legal requirements. If you, as clerk, want to include more information than is required by law, I believe that you may do so, so long as the content is accurate, fair and balanced.

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

It is emphasized that although as a matter of practice, policy or tradition, many public bodies approve minutes of their meetings, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. In another opinion of the State Comptroller, it was found that there is no statutory requirement that a town board approve minutes of a meeting, but that it was "advisable" that a motion to approve minutes be made after the members have had an opportunity to review the minutes (1954 Ops.St.Compt. File #6609). While it may be "advisable" if not proper for a board to review minutes, due to the clear authority conferred upon town clerks under §30 of the Town Law, I do not believe that a town board can require that minutes be approved prior to disclosure.

In short, it is my view that you, in your position as clerk, have the responsibility and the authority to prepare minutes and to ensure their accuracy. While the Board and/or the Supervisor may have other areas of authority, based on the statutes cited earlier, I believe that the primary responsibility for the preparation and content of minutes rests with the town clerk.

Lastly, in instances in which there is a desire to ensure that an expansive record of commentary and deliberations occurring during a meeting is created, either an audio or video recording can be prepared. If there is a question concerning the accuracy of minutes or a need for detail not ordinarily included in typical minutes of a meeting, a recording 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 recordings are required to be maintained for a period of four months. At the expiration of the retention period, a recording could be preserved, or if it is no longer of value, it could be erased and reused.

I hope that I have been of assistance.

RJF:jm

FOIL-AO-17700
OML-AO-4775

From: Freeman, Robert (DOS)
Sent: Thursday, July 02, 2009 2:12 PM
To: Rosalind Lind, Medina School Board Member
Subject: RE: School Board Hypothetical

In my opinion, first, an action or decision to hire a law firm to investigate charges against an employee can only be taken by means of a vote by a board of education. Second, any such action must be memorialized in minutes. Although the minutes would not have to identify the employee, I believe that it must identify the law firm. Third, a record must be prepared to comply with §87(3)(a) of the Freedom of Information Law that indicates the manner in which each board member voted. And fourth, although §3020-a of the Education Law requires that a vote to initiate charges against a tenured person must occur during an executive session, a vote to hire a law firm, based on judicial interpretations of the Education Law, must be taken in public.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
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FOIL-AO-17701
OML-AO-4776

From: Freeman, Robert (DOS)
Sent: Thursday, July 02, 2009 3:29 PM
To: Rose M. Blackwell, Records Access Officer, City of Corning
Subject: Committee on Open Government, Email: Food for Thought

Rose:

Below is a link to an article that appears on our website, "Email: Food for Thought", which is accessible under "Publications." I believe that a review of the article will provide the guidance that you need.

In brief, those portions of the communications, all of which are "intra-agency materials" [see FOIL, §87(2)(g)] that consist of advice, opinions, recommendations, ideas and the like may be withheld. Having skimmed the documentation, the majority of the content may, in my view, be withheld. Other portions consisting of statistical or factual information, including narrative expressions of fact, are accessible. I note that even though portions of the documentation MAY be withheld, there is no obligation to do so. FOIL is permissive, stating that an agency may choose to deny access to records or portions of records, but it is generally not required to do so.

With respect to the application of the Open Meetings Law, as suggested in the article, if a majority of a public body is involved in instant messaging or a chat room and they discuss public business, I believe that a "virtual" meeting would be the result and that it would constitute a failure to comply with the Open Meetings Law. If, on the other hand, the members open their email messages at different times (i.e., one member opens an email message now because he/she is at the keyboard, another opens it at home tonight at 8, a third is out of town and won't open it until tomorrow), there is no instantaneous communication among a majority of the members. In that situation, I do not believe that the Open Meetings Law would be implicated.

I hope that I have been of assistance.

http://www.dos.state.ny.us/coog/foodemail.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4777

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July 15, 2009

Mr. Dan Eiklor
[redacted]

The staff of the Committee on 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. Eiklor:

Your letter addressed to the Department of State has been forwarded to the Committee on Open Government. The Committee, a unit within the Department, is authorized to provide advice and opinions relating to New York's Freedom of Information and Open Meetings Laws.

You referred to a newspaper article in which a passage involved a question raised by a taxpayer as follows:

> "'I'm wondering what can be discussed. And if finances can't be discussed, what really is the point of being here?'
>
> "Superintendent Michael McMahon responded that, 'The purpose of the open session is for the public to watch the board go about the business of the board, and in fact the public statements are very much channelled [sic] so as to protect employees, protect students, protect people's rights.'
>
> "We're able to hear your concerns in certain areas,' explained McMahon, 'but (the school board) is not able to answer questions or interact.'"

From my perspective, there is only one situation that would prohibit public discussion by the Board or its employees and, therefore, in consideration of its breadth, the Superintendent's statement is inaccurate. In this regard, I offer the following comments.

First, it is emphasized that the Open Meetings Law provides the public with the right to attend, listen to and observe the deliberations and decision-making process of public bodies, such as boards of education. However, that statute is silent with respect to the public's right to speak or otherwise participate during meetings. Because that is so, a public body may choose to prohibit public comment during its meetings. Nevertheless, many authorize limited public participation, and it has been recommended that in choosing do so, they should adopt reasonable rules that treat members of the public equally.

Second, and in a related vein, when a public body permits the public to speak or ask questions, the members of that body are not obliged to respond or to provide answers to their questions. Except in rare circumstances, however, they may choose do so. In short, I believe that the Superintendent's statement that Board members are "not able to answer questions or interact" is overly broad and without legal basis.

With respect to the "rare circumstance" in which there may be a prohibition regarding public discussion, by way of background, while the Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), there is no requirement that an executive session be held even though a public body has 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 and prohibit disclosure or public discussion, I believe that a statute must forbid 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 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, boards of education, councils or similar bodies, there is no statute that *forbids* disclosure or requires confidentiality. The only instances in which information 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.

For the reasons expressed in the preceding commentary, although there is no requirement that a board of education answer questions or interact with those present during a board meeting, unless there is a statutory prohibition, and there is none of which I am aware other than that involving information identifiable to students, there is no law that forbids board members from answering questions or interacting with the public during a meeting.

In an effort to enhance their understanding of the matter, copies of this opinion will be forwarded to District officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Michael McMahon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 4778

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July 16, 2009

Mr. Joseph Robinson
93-B-1093
Sullivan Correctional Facility
P.O. Box 116
Fallsburg, NY 12733

The staff of the Committee on 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. Robinson:

I have received your letter in which you asked whether "parole board hearings constitute 'meetings' within the purview of the Open Meetings Law..."

In this regard, first, based on the provisions of §§259-b and 259-c of the Executive Law, it is clear in my opinion that the Board of Parole constitutes a "public body" required to comply with the Open Meetings Law.

Second, a "meeting" is a gathering of a quorum of public body, a majority of its total membership, for the purpose of conducting public business. Therefore, any gathering of a quorum of the Board for the purpose of conducting public business collectively, as a body, would in my view constitute a "meeting" that falls within the framework of the Open Meetings Law.

Third, a hearing may be not be a meeting. Frequently hearings are conducted by fewer than a majority of the members of a public body or by a hearing officer. In those situations in which there is no quorum present, the Open Meetings Law would not apply.

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

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

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

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

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

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

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

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

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

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

In consideration of the foregoing, even if a majority of the Board gathers to conduct public business, when its function consists of a "quasi-judicial" proceeding, the Open Meetings Law would not apply.

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- 4779

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July 20, 2009

Ms. Jennifer Fremgen
Aiello & Cannick
69-06 Grand Avenue
Maspeth, NY 11378

The staff of the Committee on 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. Fremgen:

As you know, we are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to the public participation portion of meetings of the Mount Vernon Board of Education. Please accept our apologies for the delay in responding to your request.

You indicated that the Board allows public comments during its regular meetings, limited to three minutes per participant, and that one Board member, who feels that his concerns are not addressed by the Board or placed on the Board agenda, participates during the public comment period. Apparently public comment is allowed at the beginning of the meetings, and this Board member "does not answer present to the roll call and remains in the audience until the conclusion of his public comments." You have sought our views of the matter, and in an effort to be of assistance, we offer the following.

There is no case law of which we are aware that deals directly with this issue. While the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100), the law is silent with respect to public participation. When a public body does permit the public to speak, it is our understanding that it may do so based upon reasonable rules that treat members of the public equally.

Although public bodies have the right to adopt rules to govern their own proceedings (see e.g., Education Law, §1709), the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell

v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in our view, would be unreasonable.

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 situation you raised, we believe that a court would determine that the Board's decision to allow each participant three minutes to address the Board, for example, would be reasonable. Similarly, it is our view that boards can limit public comments to matters involving Board business or the operation of the school district, or matters that are on the agenda.

Related to your question, from our perspective, the Board as a whole is responsible for adopting reasonable rules to govern public participation at a meeting. The Chair of the Board, for example, in our opinion, would not have the authority to unilaterally determine whether the subject matter of a proposed comment involves Board business. The Chair is but one member of the Board, and we believe that the Board, if necessary, could determine by means of a majority vote of its total membership if there is a question or disagreement regarding whether a subject relates to Board business. In that circumstance, we believe that the Board should determine whether the subject may be raised during the public comment portion of the meeting, rather than the Chair reaching a determination alone.

Similarly, when necessary, a decision to place an item on the agenda may also require Board approval, rather than a unilateral decision by a Board member. In the context of the preceding example, it appears that the Board as a whole might properly determine whether to place an item on the agenda.

In the situation that you described, the Board member is present at a meeting of the Board, and despite his choice to sit apart from the Board during the beginning of the meeting, the Board is clearly conducting a meeting. The comments that the Board member makes, just as clearly pertain to Board business. Accordingly, it is our opinion that because the Board member is present at a Board meeting for the purpose of discussing Board business, he should be counted as present for the purpose of determining the presence of a quorum and all other Board business. If his absence or presence at a meeting were to be the difference between having a quorum present or not, in our opinion, he should be counted as present when he sits with the audience.

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- 4780

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July 27, 2009

E-Mail

TO: Ms. Paula Piekos

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

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

Dear Ms. Piekos:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain proceedings of the White Plains Planning Board. Specifically, you indicated that the Board moved into executive session on two occasions, for "litigation" purposes, and that when questioned, the Board did not provide "docket numbers or any proof of litigation having been filed." In this regard, 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. Section 105(1) states in relevant part that:

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

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

Second, it has been held judicially that :

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

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

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 at the meeting. In this case, to the extent that the Board may have discussed strategy regarding proposed litigation, we believe it would have had the authority to hold such discussion in executive session. On the other hand, insofar as the discussion was limited to decision that may

"lead to litigation", with no consideration of litigation strategy, as in Weatherwax, above, such discussion would not be permitted in executive session. In any event, it is our opinion that a motion to hold a discussion regarding strategy with respect to potential litigation should be identified as such; an indication of "litigation" without more would be insufficient.

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

CSJ:jm

cc: Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4781

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July 27, 2009

Ms. Carolyn F. Costello
Superintendent of Schools
Central Square Central School District
642 S. Main Street
Central Square, NY 13036

The staff of the Committee on 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. Costello:

I have received your letter concerning an allegation by a member of the Central Square School District Board of Education "that both the Reorganizational meeting and the regular Board meeting are illegal because we did not wait until 7:00 to begin the Re-org meeting." You indicated that:

> "After opening the Re-org meeting @ 6:06 and administering the Oath to our new Board members the Board made a motion and passed a resolution @ 6:12 to continue with the Re-org agenda and move the executive session to the conclusion of the re-org meeting. Board member arrived @ 6:14.
>
> "When that agenda was completed @ 6:48 the Board closed the reorg. meeting, opened the regularly scheduled meeting and made a motion to move into executive session for the purpose of interviewing a Board candidate for the High School Principal position.
>
> "After executive session we returned to our regular meeting and completed our agenda. As you can see from the following email his issue is that we did not stick to the advertised time for the re-org. meeting."

In this regard, I offer the following comments.

First, there is no distinction in terms of the application of the Open Meetings Law to a reorganizational meeting and a "regular" meeting. In short, any gathering of a majority of a public body, such as a board of education, for the purpose of conducting public business constitutes a "meeting" subject to that statute, irrespective of its characterization or the absence of an intent to take action [see definition of "meeting", §102(1); also Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)].

Second, pursuant to §104 of the Open Meetings Law, every meeting must be preceded by notice of the time and place. Therefore, if the Board intends to convene at 6 p.m., it is required to so indicate in its notice given prior to the meeting.

Third, there is no reference in the Open Meetings Law to an agenda. Certainly a public body may prepare an agenda, but unless it has established a rule or policy that the agenda must be followed, there is no obligation to abide by an agenda.

Next, and perhaps most importantly in the context of the situation described, 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 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.

Lastly, even when a public body has failed in some manner to comply with the Open Meetings Law, that failure does not create an automatic invalidation of action taken. Rather, the action taken by a public body remains valid unless and until a court renders a decision to the contrary (see Open Meetings Law, §107).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4782

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July 28, 2009

Mr. Jerome F. Donovan
Chairman
Town of New Hartford Planning Board
111 New Hartford Street
New Hartford, NY 13413

The staff of the Committee on 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. Donovan:

I have received your letter in which you requested an advisory opinion pertaining to the application of the Open Meetings Law in your capacity as Chairman of the Town of New Hartford Planning Board.

You focused on Section 118.41.3 of the Town Code Concerning a "Business Park District." The cited provision concerning "staff review of site plans for infrastructure and building in a business park" states that "staff review shall include the Superintendent of Highways, the Codes Enforcement Officer, the Town Planner and/Engineer and the Planning Board Chairperson or their designee", that staff, as described in the preceding clause, "shall review proposed projects" and "shall have final approval authority concerning proposed projects by new or existing park occupants." It also states that "[a]ll development proposals...shall be subject to design review and approval by staff", that staff "shall meet at the convenience of the members as often as necessary" and "shall have the authority to approve, approve with modifications or disapprove any plans and specifications submitted to the Town of New Hartford for the business park..." In addition, staff has the authority to require a performance bond and "determine if additional site review is required..."

In this regard, I believe that the term "staff" typically refers to employees who offer support, expertise, advice and assistance to others who function as decision makers. However, as I understand the meaning of "staff" as it is used in the provision of the Town Code to which you referred, "staff" consists of the four individuals identified in the Code, those four function collectively, as a body, and they have decision making authority. If that is so, I believe that the staff in this context constitutes a public body required to comply with the Open Meetings Law.

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

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

From my perspective, each of the conditions necessary to conclude that the "staff" constitutes a public body can be met. There are four members who conduct public business collectively and take action as a group. By so doing and carrying out their powers and duties, staff performs a governmental function for a public corporation, the Town of New Hartford. While there may be no specific reference to a quorum requirement in the Code, a separate statute, §41 of the General Construction Law, requires that "Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly as a board or similar body", they may carry out their duties only through the presence of a quorum and action taken by majority of the vote the total membership of such entity.

Assuming the accuracy of the foregoing and that the staff constitutes a public body required to comply with the Open Meetings Law, every meeting of the staff must be preceded by notice of the time and place. Specifically, 104 of that statute provides that:

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

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

can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

Additionally, §106 of the Open Meetings Law concerns minutes of meetings and requires that they consist of a record or summary of motions, proposals, resolutions, action taken and the vote of the members. Further, that provision requires that minutes of open meetings be prepared and made available within two weeks of the meetings to which they pertain.

You also raised a "related concern" and questioned whether "plans and related documents used in the Business Park staff review [are] subject to FOIL." It is clear, in my opinion, that they are, for the Freedom of Information Law pertains to all government agency records, and §86(4) defines the term "record" to include:

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

In consideration of the breadth of the definition and, therefore, the scope of the Freedom of Information Law, plans and related documentary material acquired or prepared by staff constitute "records" that fall within the coverage of that statute.

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.

Plans and related materials submitted to staff by applicants are likely accessible, for none of the grounds for denial of access would be pertinent in most instances.

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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July 30, 2009

Mr. David Radovanovic
[redacted]

The staff of the Committee on 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:

We are in receipt of your request for an advisory opinion concerning certain actions and records of the Mayor of the Village of Saugerties with respect to the Village Historic Review Board. To the extent that your questions may be governed by the General Municipal Law, federal regulations governing entities participating in the Certified Local Government Program, and perhaps most importantly, local legislation adopted by the Village in conjunction with the creation of the Historic Review Board, we direct your questions to Natasha Phillip, Senior Attorney, Office of General Counsel, Department of State (518-474-6740). To the extent that the Committee on Open Government has advisory jurisdiction over the issues that you raised, we offer the following comments.

First, because the Village Board constitutes a "public body" required to comply with the Open Meetings Law [see Open Meetings Law, §102(2)], it is required to prepare minutes in accordance with that statute. Section 106 pertains to minutes of meetings and directs that:

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

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

Based upon the foregoing, it is clear that minutes must be prepared and made available within two weeks. We note that while there is nothing in the Open Meetings Law or any other statute of which we are aware that requires that minutes be approved, 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.

Second, in a related vein, §87(3)(a) of the Freedom of Information Law requires that:

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

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

You indicated that "it was pointed out that" if the Village Board were to approve appointments to the Historic Review Board, "'orphan minutes' would be created that could never be approved". There is nothing in the Open Meetings Law or any other law that defines or references "orphan minutes." Again, there is no requirement that minutes of meetings be approved.

With respect to access to a document that the Mayor has created, "a list of grievances against the board on his personal computer", we note that 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, documentation need not be in the physical possession of the Village to constitute an agency record; so long as it is produced, kept or filed for an agency, the law specifies and the courts have held that it constitutes an "agency record", even if it is maintained apart from an agency's premises [see e.g., Encore College Bookstores, Inc. V. Auxiliary Service Corporation of the State University, 87 NY2d 410 (1995)]. The document that you described, in our opinion clearly constitutes a "record" that falls within the framework of the Freedom of Information Law.

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

One of the exceptions to rights of access, 87(2)(g), pertains to internal governmental communications, but due to its structure, it may require disclosure. Specifically, that provision states that an agency may withhold records that:

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

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.

In a decision rendered by the Court of Appeals in which the Court dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i), it was determined that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132

> [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182)" [Gould et al. v. New York City Police Department, 87 NY2d 267, 276-277 (1996)].

It is also noted that it was held by the Appellate Division more than twenty-five years ago that statistical or factual information contained within audit work papers are accessible [see Polansky v. Regan, 81 AD2d 102 (1981)].

A "list of grievances" could contain factual information that must be disclosed, as well as subjective opinions, including allegations pertaining to conduct.

The other exception of significance is §87(2)(b), which authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." In addition, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers and employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those persons are required to be more accountable than others. With regard to records relating to them, the courts have found that, as a general rule, records that are relevant to their 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 their duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

In the context of the situation that you presented, in my opinion, it is clear that the identities of those with whom the Mayor takes issue are public officers, having been appointed by the Mayor to the Historic Review Board. The extent and the nature of the "grievances", on the other hand, is not clear. Consequently, unequivocal advice concerning rights of access cannot be offered.

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

OML-AO-4984

From: Freeman, Robert (DOS)
Sent: Monday, August 03, 2009 4:46 PM
To: Ms. Teresa Hurley, Newark Central School District

Dear Ms. Hurley:

I have received your inquiry, and if the discussion involves consideration of the superintendent's performance, I believe that an executive session could properly be held under §105(1)(f) of the Open Meetings Law. That provision permits a public body, such as a board of education, to enter into executive session to discuss "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation". In my view, discussion or evaluation of one's performance would involve the "employment history of a particular person" that could validly occur during an executive session.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
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OML-AO-4785

From: Freeman, Robert (DOS)
Sent: Monday, August 10, 2009 7:55 AM
To: Ms. Teresa Hurley, Newark Central School District
Subject: Executive Session

I cannot offer an unequivocal response without additional information. Again, if the discussion involved performance and the amount of an increase the superintendent should receive based on merit, I believe that an executive session would be proper. However, if the discussion involved the salaries of other superintendents in similarly sized districts for comparison purposes, the focus would not be on a "particular person", and I do not believe that an executive session would be warranted in that kind of situation.

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

FOIL-AO- 4786

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August 10, 2009

Ms. Carol Gillen
[redacted]

The staff of the Committee on 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. Gillen:

I have received your letter and the material attached to it, all of which relates to the Enlarged City School District of Middletown and its Board of Education. As you may be aware, the advisory jurisdiction of the Committee on Open Government is limited to matters relating primarily to the Freedom of Information and Open Meetings Laws. In consideration of the issues raised in your letter and the materials, the ensuing comments will focus largely on the Open Meetings Law.

First, since you included an advisory opinion relating to the matter, this is to reiterate our view that every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. That being so, it has been advised and held judicially that when it is known in a advance of meeting that more people are interested in attending than can be accommodated in the usual site of meetings of a public body, such as a board of education, and when an alternative site that would accommodate those interested in attending is available, it would be unreasonable not to conduct a meeting at the alternative location.

Second, Robert's Rules is not law, and there are elements of Robert's Rules that may be inconsistent with the law of New York. Pursuant to §1709 of the Education Law, a board of education is authorized to adopt rules and procedures that govern its own proceedings, and it has been held in various contexts that any such rules or procedures must be reasonable.

Third, although many public bodies often prepare agendas, there is no reference in the Open Meetings Law to agendas. Therefore, while a public body may choose to prepare or abide by an agenda, there is no legal obligation to do so.

Next, the materials indicate that you asked that a letter that you prepared be included in the minutes of a meeting. While a public body may choose to do so, a member of the public cannot

require that a document or his/her comments be included in minutes. Section 106 of the Open Meetings Law prescribes what may be characterized as minimum requirements concerning the content of minutes. Subdivision (1) states that:

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

Based on the foregoing, minutes may include reference to comments, statements or the entirety of documents, but there is no requirement that they must. If a member of a public body introduces a motion to include certain information within minutes, and the motion is approved by a majority of the total membership of that body, I believe that the information must be included. Absent such approval, again, I know of no obligation to include a statement or letter, for example, within minutes.

Lastly, you referred to a "retreat" to be held by the Board. As you are likely aware, the Open Meetings Law applies 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". 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.

If, for example, a retreat involves consideration of long term goals, policy and the like, I believe that it would constitute a "meeting" falling within the requirements of the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17752
OML-AO-4787

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August 12, 2009

Mr. Laszlo Polyak
[redacted]

The staff of the Committee on 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. Polyak:

I have received your letter in which you raised a variety of questions, as well as the materials attached to it. As you are likely aware, the advisory jurisdiction of this office relates to the Freedom of Information and Open Meetings Laws. To the extent that your questions involve those statutes, I offer the following comments.

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

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

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

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

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

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

In sum, any gathering of a quorum of a public body, such as a village board of trustees, for the purpose of conducting public business constitutes a "meeting" that falls within the coverage of the Open Meetings Law.

Next, the Freedom of Information Law does not distinguish among applicants for records, and it has been held that an agency may charge its established fee for copies of records, even though an applicant may be indigent [Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

With respect to minutes of meetings, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Section 106 pertains to minutes, and subdivision (1) states that "Minutes shall be taken at all meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted on and the vote thereon." If none of those activities occurs at a meeting, technically, there need not be minutes. Further, it is clear that minutes need not consist of a verbatim account of discussion occurring during a meeting or that reference be made in the minutes to comments made during a meeting. Whenever a final vote is taken, §87(3)(a) of the Freedom of Information Law requires that a record be maintained indicating the manner in which each member cast his or her vote.

Like the Freedom of Information Law, the Open Meetings Law does not distinguish among those who seek to attend meetings. Section 103(a) states that meetings must be held open to the public, and the law does not limit the right to attend to residents or citizens. I note that the Open Meetings Law is silent with respect to public participation or the right to speak at meetings. That being so, a public body is not required to permit the public to speak at meetings. However, many public bodies permit limited public participation, and it has been suggested in those instances that public bodies adopt reasonable rules that treat the public equally, again, whether those who wish to speak are residents or non-residents.

Although there is no statute that deals with ability to audio or video record open meetings, judicial decisions indicate that any person may do so, so long as the use of a recording device is neither obtrusive nor disruptive [see Mitchell v. Board of Education, 113 AD2d 924 (1985) regarding audio recording and Csorny v. Shoreham-Wading River Central School District, 305 AD2d 83(2003) regarding video recording].

Lastly, with respect to the quoted statement attributed to me, I do not understand its meaning and do not recall the context in which such a statement might have been made.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 4788

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August 12, 2009

Mr. Mark R. Geoghegan
[redacted]

The staff of the Committee on 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. Geoghegan:

We are in receipt of your request for an advisory opinion concerning public participation at a certain public hearing conducted by the Town of Orangeville. You indicated that you and your wife were prohibited from reading your written statement into the record, despite your understanding that the Americans with Disabilities Act permits you to authorize her to read on your behalf. Based on the information that you provided, we are unable to determine the grounds given for the Board's refusal to allow the reading of your statement into the record. Nevertheless, in an effort to provide guidance with respect to the issues that you raised, we offer the following comments.

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

While we know of no judicial decisions concerning the ability of those to speak at either meetings or hearings, we believe that the principles pertinent to that issue would be the same. In short, we believe that an entity such as the Town Board has the authority to adopt rules or procedures to govern its own proceedings (Town Law §63). Those rules or procedures, however,

must in our opinion be reasonable. It would be unreasonable, for example, to authorize those with one point of view to speak for ten minutes or perhaps without limitation, while permitting those with a different view to speak for three minutes or not at all.

If it is contended that a hearing was not conducted reasonably, the potential remedies, if they can be characterized as such, would involve offering complaints to those who conducted the hearing or the initiation of a judicial proceeding with Article 78 of the Civil Practice Law and Rules. In an Article 78 proceeding, a petitioner (a member of the public) must demonstrate that a public officer or governmental entity acted unreasonably, or that such person or entity failed to give effect to a legal requirement. If, for instance, a provision of law requires that a public hearing be held and that members of the public be given an opportunity to be heard, and if that opportunity is not reasonably granted, a court could find that a public officer or governmental entity failed to comply with law. In that event, we believe that court could issue an order designed to guarantee compliance with law and/or reasonableness.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4789

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August 14, 2009

Ms. Janice Stevenson
[redacted]

The staff of the Committee on 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. Stevenson:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain proceedings of the Board of the Port Jervis City School District. Specifically, you were informed that you were banned from speaking at public Board meetings because you are no longer a resident of the District. In this regard, and in an effort to clarify the statements that you attribute to me, 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 School Board, does not want to answer questions or permit the public to speak or otherwise participate at its meetings, we do not believe that it would be obliged to do so. On the other hand, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, we believe that it should do so based upon reasonable rules that treat members of the public equally.

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

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

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

In the context of the specific issues that you raised, we believe that a court would determine that 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 Board could limit comments to matters involving District business.

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

If it is contended that the public comment portion of a meeting was not conducted reasonably, the potential remedies, if they can be characterized as such, would involve offering

complaints to those who conducted the meeting or the initiation of a judicial proceeding under Article 78 of the Civil Practice Law and Rules. In an Article 78 proceeding, a petitioner (a member of the public) must demonstrate that a public officer or governmental entity acted unreasonably, or that such person or entity failed to give effect to a legal requirement. If, for instance, a provision of law requires that a public hearing be held and that members of the public be given an opportunity to be heard, and if that opportunity is not reasonably granted, a court could find that a public officer or governmental entity failed to comply with law. In that event, we believe that court could issue an order designed to guarantee compliance with law and/or reasonableness.

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: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4790

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August 19, 2009

Mr. Joseph P. Novek
[redacted]

The staff of the Committee on 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. Novek:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain proceedings of the Manlius Town Board. You indicated that you were reading a written statement at a Town Board meeting when you were interrupted by the Supervisor, who prohibited you from continuing and asked the Chief of Police to remove you from the meeting. The Mayor then read a statement that was counter to your position. In the materials that you submitted in conjunction with your request, you reference your right to free speech and requested information regarding your right to prosecute those who prevented you from speaking. In this regard, we offer the following comments.

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

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

Second, while the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and

decisions that go into the making of public policy" (see Open Meetings Law, §100), the law is silent with respect to public participation. Consequently, by means of example, if a public body, such as the Town Board, does not want to answer questions or permit the public to speak or otherwise participate at its meetings, we do not believe that it would be obliged to do so. On the other hand, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, we believe that it should do so based upon reasonable rules that treat members of the public equally.

Although public bodies have the right to adopt rules to govern their own proceedings (see e.g., Town Law §63), 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.

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

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

In 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 Town Board could limit comments to matters involving Town business.

From our perspective, the Supervisor of the Town presides over Town Board meetings. It is questionable, however, whether he may validly determine unilaterally whether the subject matter of comment proposed by a person desiring to speak involves Town business. He is but one member of the Board, and we believe that the Board, if necessary, should determine by means of a majority vote of its total membership (see General Construction Law, §41) if there is a question or disagreement regarding whether a subject relates to Town business. We believe that the Board in that circumstance should determine whether the subject may be raised, rather than the Supervisor reaching a determination alone.

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: Supervisor
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4791

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August 19, 2009

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 Freedom of Information Law to various requests for records of the Town of Evans, and the application of the Open Meetings Law to certain proceedings of the Evans Town Board. Should you wish to submit future correspondence via email, please note our general email address is: dos.dl.InetOpenGov@dos.state.ny.us.

In an effort to address the issues that you raised as efficiently as possible, rather than setting forth your individual questions, we offer the following comments.

We are pleased to learn that the Town provided requested tax data in a digital format that was acceptable to you, as required by law. With respect to the length of time that transpired and the request which has not yet been responded to, we note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3)(a) 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.

In direct response to your question regarding "any new remedies under the revised Freedom of Information Law", we note that while the Article 78 proceeding is still the statutory enforcement mechanism, the law was amended in 2006, broadening the authority of the courts to award attorney's fees when government agencies fail to comply with the 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.

With respect to your questions regarding the application of the Open Meetings Law, including work sessions, the Town's responsibility to hold meetings in rooms that cannot accommodate all attendees, agendas and minutes, we offer the following comments.

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

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

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

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

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

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

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

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

From our perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In our opinion, if it is known in advance of a meeting that a larger crowd is likely to attend than the usual meeting location will accommodate, and if a larger facility is available, it would be reasonable and consistent with the intent of the law to hold the meeting in the larger facility. Conversely, assuming the same facts, we believe that it would be unreasonable to hold a meeting in a room that would not accommodate those interested in attending, especially when a larger room, in which the Board typically holds its meetings, for example, is available.

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

It is also noted that §103(b) of the Open Meetings Law states that:

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

Based upon the foregoing, there is no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, we believe that it imposes a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the Board has the capacity to hold its meetings

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

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 work sessions, technically, we do not believe that minutes must be prepared. On the other hand, if motions are made or actions taken, those activities must be memorialized in minutes.

As far as we are able to determine, the Town Clerk's responsibilities with respect to the taking of minutes is contained within Town Law. 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". Subdivision (11) of §30 of the Town Law provides that the clerk "shall have such additional powers and perform such additional duties as are or hereafter may be conferred or imposed upon him by law, and such further duties as the town board may determine, not inconsistent with law". In our opinion, inherent in these provisions is an intent that they be carried out reasonably, fairly, with consistency, and that minutes be accurate.

If minutes or notes are prepared when there is no requirement to do so, any such documents would fall within the coverage of the Freedom of Information Law. It is noted that §86(4) of the statute defines the term "record" broadly to mean:

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

Based upon the foregoing any notes or minutes that are prepared would constitute "records" subject to rights conferred by the Freedom of Information Law. Similarly, audio and visual recordings, agendas, and resolutions, to the extent that they are created and maintained by the agency, are also "records" subject to the Freedom of Information Law.

This is not to suggest that all such records would be available. 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). Therefore, the specific contents of the records would determine the extent to which records are required to be made available.

By means of example, portions of a W-2 form pertaining to a public employee indicating that persons's name and gross wages would be required to be disclosed pursuant to the Freedom of Information Law; however, social security numbers and home addresses could be withheld pursuant to §89(2)(b) as disclosure would result in an unwarranted invasion of personal privacy. Advisory opinions regarding access to such records are available on our website under "W-2 Forms" (**http://www.dos.state.ny.us/coog/foil_listing/fw.html**).

Next, while there is no provision of law that requires the preparation of an agenda or an audio or visual recording of a meeting, to the extent that an agenda or a recording exists, in our opinion, there would be no legal basis on which an agency could rely on to deny access. Audio recordings of open meetings are required to be kept for four months, based on the records retention schedule promulgated by New York State Archives.

With respect to your question regarding the disclosure of a proposed resolution at the time of the meeting at which the resolution is discussed, we note that while a board may choose to furnish information or records during a meeting, it may require that a request be made in writing, in accordance with its rules and regulations adopted under the Freedom of Information Law. Further, and although tangential to your specific question, we note that the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100); however, 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.

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 several years the Committee has recommended legislation on the subject.

With respect to your question regarding access to copies of minutes in a particular format, a new §87(5) requires an agency to "provide records on the medium requested...if the agency can reasonably make such copy." This requirement clarifies and confirms judicial decisions rendered over the course of years, those requiring that agencies make records available economically on computer tapes or disks, rather than photocopying [see Szikszay v. Buelow, 436 NYS2d 558 (1981)], or by transferring data onto computer tapes or disks, instead of printing out as much as a million pages on paper at a cost of thousands of dollars [see Brownstone Publishers, Inc. v. New York City Department of Buildings, 560 NYS2d 642 (1990)]. It also specifies that records provided in a computer format shall not be encrypted. In short, if the agency has the ability to provide the record in the format that you have requested, in our opinion, it must do so.

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: Hon. Carol A. Meissner, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4792

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August 19, 2009

Mr. Charles P. Militello
[redacted]

The staff of the Committee on 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. Militello

I have received your letter in which you raised questions concerning certain practices of the Town of Evans.

You referred to an advisory opinion rendered by this office, OML-AO-4506, in which it was advised that there is no legal distinction between a "work session" and a meeting of a public body, such as a town board. Additionally, that opinion focused on the content of minutes. The questions that you raised pertain to "agenda meetings" held by the Town Board. Based on a review of the opinion that you cited and the judicial precedent described in that opinion, an "agenda meeting" is clearly subject to the requirements imposed by the Open Meetings Law.

You asked whether the agenda meetings should be held in the "regular meeting room." From my perspective, since agenda meetings fall within the requirements of the Open Meetings Law, they must be preceded by notice of the time and place. Assuming that notice of the agenda meetings is given to the public and the news media, and posted on the Town's website as required by §104 of the Open Meetings Law, there be no necessity to move the agenda meeting to a different location. However, if more individuals seek to attend the agenda meetings than the usual room for those meetings would accommodate, and if a different room would accommodate those persons, I believe that the Board would be required to move the meeting to that alternative location (see Crain v. Reynolds, Supreme Court, New York County, August 12, 1998).

Your second question involves whether "there [is] any provision in the open meetings law that would require one meeting so that the public can observe the process", as opposed to an agenda meeting and a regular board meeting. Again, as suggested in OML-AO 4506, there is no legal distinction between the agenda meeting and the regular board meeting; both must be conducted open to the public, except to the extent that an executive session may properly be convened. That being

so, the public has the right to attend both kinds of meetings and "observe the process." In my view, because both are "meetings" subject to the Open Meetings Law, the distinction between the two is artificial, and because they are apparently held on the same day, there may be no reason for treating them separately.

The remaining question is whether the Town Clerk must be present at agenda meetings. As suggested in the earlier opinion, the Open Meetings Law contains minimum requirements concerning the contents of minutes. At a minimum, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of the members (see Open Meetings Law, §106). If it is clear that none of those events will occur, in a technical sense, there is no obligation to prepare minutes, and in that circumstance, the Town Clerk, in my opinion, would not have to be present. On the other hand, if there is a possibility that any of those events will occur at an agenda meeting, I believe that the Clerk must be present for the purpose of preparing minutes.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Carol Meissner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4793

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August 19, 2009

Ms. Linda L. Underwood
[redacted]

The staff of the Committee 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. Underwood:

I have received your correspondence and hope that you will accept my apologies for the delay in response, as well as my congratulations on your election to the Schodack Central School District Board of Education. I also received a copy of a response by Ms. Paula Noll concerning your requests made under the Freedom of Information Law. Based on that response, it appeared that issues relating to your requests had been resolved. Nevertheless, in a second letter, you suggested that not to be so and raised a series of issues and questions.

In this regard, I offer the following comments.

First, it is my understanding that you were informed that certain records that you requested do not exist and that your request for a certification asserting that to be so has not been honored. Section 89(3)(a) of the Freedom of Information Law includes language dealing with that kind of situation, indicating that when an agency states that a record sought does not exist, "if so requested", the agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

Second, you suggested that there may be a "secret file" pertaining to you and that its contents were used as a basis for eliminating a position that you held. Here I point out that the Freedom of Information Law pertains to all agency records, for it 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."

Based on the foregoing, information in any physical form that is kept by or for an agency would constitute a "record" that falls within the requirements of the Freedom of Information Law. In my view, there can be no record or file whose existence can be secret. Should such a file exist, it would be subject to rights of access in the same manner as all other agency records.

Next, you asked whether a discussion concerning the elimination of a position "for budgetary reasons" could validly have been discussed during an executive session. As you may be aware, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

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

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

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

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns.

However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department, the creation or elimination of positions, or matters relating to the budget, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". For example, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In short, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981).

On the other hand, insofar as a discussion involves the performance of a particular person, as in the case of consideration of the deficiencies of a particular employee, I believe that an executive session may properly be held.

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

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

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

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

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

Lastly, you asked whether it was "illegal" for the former Board president to disclose what you characterized as "confidential information" to her husband. In my opinion, the term "confidential" is overused and pertains only to those instances in which a statute, an act of Congress or the State Legislature, prohibits disclosure. An example of that kind of situation would involve the disclosure of information that is personally identifiable to a student, in which case federal law, the Family Educational Rights and Privacy Act, would prohibit disclosure to the public, absent consent by a parent of the student. In most instances, however, while records or portions of records *may* be withheld under the Freedom of Information Law, there is no requirement that they *must* be withheld. In those cases, I do not believe that the records or information can be characterized as "confidential." While elements of personnel records, for example, may be withheld, there is no obligation to do so.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Education
Douglas B. Hamlin

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August 19, 2009

Mr. Bob Harrison
[redacted]

The staff of the Committee on 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. Harrison:

I have received your letter and the materials attached to it, and I hope that you will accept my apologies for the delay in response. According to your letter, the Village of Scarsdale Planning Board conducts "closed deliberative sessions to discuss all items on their agenda" and bases its ability to close its meetings on an opinion that I prepared in 1984.

In this regard, I offer the following comments.

First, the Open Meetings Law includes two vehicles under which a public body, such as a planning board, has the authority to exclude the public from its meetings. One is the executive session, and as you may be aware, an executive session is defined in §102(1) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. Section 105(1) prescribes a procedure that must be accomplished in public before an executive session may be held, and paragraphs (a) through (h) of that provision specify and limit the grounds for entry into executive session. In my experience, the opportunities for a planning board to validly conduct executive sessions are somewhat rare. The other vehicle concerns "exemptions" found in §108 of the Open Meetings Law. If an exemption applies, the Open Meetings Law does not; it is as though that law does not exist.

Second, it appears that two of the exemptions are relevant to the matters presented in the material.

Subdivision (1) of §108 exempts judicial and quasi-judicial proceedings from the coverage of the Open Meetings Law. As suggested in the opinion prepared in 1984, it is likely rare that a planning board may rely upon the exemption regarding quasi-judicial proceedings as a means of excluding the public from its deliberations. Some of its functions, such as those involving the modification of a local law, are, in my view legislative in nature, rather than judicial. Further, among

the conditions precedent to a finding that a function is quasi-judicial involves the authority to take final and binding action. Many of the actions of planning boards require approval by a governing body, such as a village or town board, or serve as intermediate steps in a process. In those situations, I do not believe that a planning board would be carrying out a quasi-judicial function.

Also of likely significance is §108(3), which exempts from the Open Meetings Law:

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

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

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

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

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

Insofar as the board seeks legal advice from its attorney and the attorney renders legal advice, I believe that the attorney-client privilege would validly have been asserted and that communications made within the scope of the privilege would be outside the coverage of the Open Meetings Law. However, when a board stops seeking legal advice and the attorney stops offering such advice, I believe that the attorney-client privilege is no longer operable and that the ensuing discussions or deliberations are subject to the Open Meetings Law.

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- 4795

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August 20, 2009

E-Mail

TO: Mr. Eric Andreson

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. Anderson:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain proceedings of the Beekmantown Zoning Board of Appeals. Specifically, the Board held a public hearing on May 15, 2009, at which public comments were heard regarding a request for an extension of a conditional use permit. At the hearing, the Board agreed to refrain from making a decision on that issue until the next meeting. On May 20, 2009, the Board read a 4 ½ page prepared statement, and without discussion, agreed unanimously to grant the extension. Because no deliberations concerning the matter occurred at either the meeting of May 15 or May 20, you asked for our opinion relative to compliance with the Open Meetings Law, and in this regard, we offer the following comments.

The Open Meetings Law is clearly intended to open the deliberative process to the public and provide the right to know how public bodies reach their decisions. As stated in §100 of the Law, its Legislative Declaration:

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

It is emphasized that the Open Meetings Law has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)].

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

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD2d 409, 415).

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

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

Further, it has been held that "a planned informal conference" or a "briefing session" held by a quorum of a public body would constitute a "meeting" subject to the requirements of the Open Meetings Law [see Goodson Todman v. Kingston, 153 AD2d 103, 105 (1990)].

Based upon the terms of the Open Meetings Law and its judicial interpretation, if a majority of board members gathers to conduct public business, any such gathering would, in our opinion, constitute a "meeting" subject to the Open Meetings Law. On the other hand, when less than a quorum is present, the Open Meetings Law would not apply. Further, when there is an intent to conduct a meeting, the gathering must be preceded by notice given pursuant to §104 of the Open

Meetings Law, convened open to the public and conducted in public as required by the Open Meetings Law.

As you may know, the Open Meetings Law was recently amended to include a provision that requires a court to award attorney's fees under certain circumstances. Section 107(2), intended to improve compliance and to ensure that public business is discussed in public as required by that law, 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 mandatory award of attorney's fees would apply when secrecy is an issue, unlike the court's discretionary authority to award attorney's fees under different circumstances.

Without more information, it is difficult to ascertain whether the Board met in private prior to a meeting, or whether the Board may have merely shared information, i.e., by means of distribution a memorandum or draft, prior to a meeting without reaching a decision on a particular issue. It is suggested that you might review Advisory Opinion No. 3787 for an in depth discussion regarding the use of email or telephone communications to share information, attached. The lack of discussion at the meeting at which the Board approved a detailed decision could suggest that the Board acted inappropriately; however, due to the lack of detail or case law regarding this recent amendment, we are unable to advise whether such action alone, would constitute sufficient evidence for a court to make a determination.

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

CSJ:jm

Enc.

cc: Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-17773
OML-AO-4796

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August 21, 2009

Ms. Tracy Carey
[redacted]

Dear Ms. Carey:

I have received your note and the materials attached to it. Please accept my apologies for the delay in response.

The issues that you highlighted involve the accountability of the Hinsdale Youth Football League and its board of directors. That entity is a private corporation that has severed its ties the Town of Hinsdale and its Youth Commission. One of the items that you forwarded is a request made pursuant to the Freedom of Information Law to the president of the League.

In this regard, the Freedom of Information Law is applicable to agencies, and the term "agency" is defined 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 definition, an "agency" is an entity of state or local government. The Freedom of Information Law does not include private entities, such as the Youth Football League, within its coverage.

Similarly, the Open Meetings Law, the companion of the Freedom of Information Law, applies to meetings of public bodies. The phrase "public body" is defined in §102(2) of that law 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."

In a manner analogous to the Freedom of Information Law, the Open Meetings Law applies to governmental bodies and would not apply to meetings of the League or its board of directors.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

OML-AO- 4797

From: Freeman, Robert (DOS)
Sent: Friday, August 21, 2009 10:20 AM
To: Rosalind Lind, Medina Central School District
Subject: RE: Sunshine laws and board retreats

Hi -

There are several opinions on the subject available on our website. Click on to the Open Meetings Law advisory opinion listing, then on to "R", and scroll down to "retreat."

In brief, in our experience, there are essentially two kinds of retreats. One involves a desire on the part of board members to get to know each other better. I do not believe that a gathering of that nature constitutes a "meeting" or, therefore, that the Open Meetings Law would apply. The other involves the situation in which a board intends to gather informally to discuss long term policies, goals, etc. In my view, that kind of gathering clearly would constitute a meeting, perhaps the most important of the year, and it would be subject to the requirements of the Open Meetings Law.

I hope that this will be of assistance to you.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
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OML-AO-4798

From: Mercer, Janet (DOS)
Sent: Monday, August 24, 2009 3:27 PM
To: 'Robert L. Jones'
Subject: RE: Specificity of motions made to enter into executive session.

Dear Mr. Jones:

I have received your email in which you asked if citing "personnel" is sufficient in a motion for entry into executive session.

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

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

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

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

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

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

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

Assuming that the actions taken did not involve consideration of how well or poorly particular public employees were carrying out their duties, I do not believe that there would have been a basis for conducting an executive session.

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

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

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

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

In short, the characterization of an issue as "personnel" 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.

Robert J. Freeman, Executive Director
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OML-AO-4799

From: Mercer, Janet (DOS)
Sent: Monday, August 24, 2009 3:11 PM
To: Mike Willis, Town of Dansville
Subject: RE: Executive Sessions

Dear Mr. Willis:

I have received your email in which you asked whether minutes of executive sessions must be prepared.

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 nature of the action, the date and the vote must generally be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared.

I hope that I have been of assistance.

RJF:jm

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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 4800

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August 24, 2009

E-Mail

TO: Mr. Robert S. Tarleton

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

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

Dear Mr. Tarleton:

Thank you for your thoughtful and well reasoned letter describing certain gatherings of the Port Washington Water District Commission and requesting an advisory opinion regarding application of the Open Meetings Law thereto. As you indicated, the Water Commission met with certain officials from the Village of Flower Hill to discuss and negotiate the terms of a lease for a well. In this regard, 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. Section 105(1) states in relevant part that:

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

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

Second, it has been held judicially that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305).
>
> "Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807)" Gordon v. Village of Monticello, 207 AD2d 55, 58 (1994).

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 do so must be sufficiently detailed to enable the public to ascertain whether there is a proper basis for entry into the closed session. Based on the facts that you provided, in our opinion, there would be no basis for the Water Commission to enter into executive session to renegotiate the terms of an existing lease agreement with the Village.

The provision of law that you mention, the so-called litigation exception, §105(1)(d), permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". 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 AD2d 612, 613, 441 NYS2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" Weatherwax v. Town of Stony Point, 97 AD2d 840, 841 (1983).

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. As you noted, if a public body were permitted to rely on this exception to close any meeting involving an issue that might result in litigation, it would essentially permit closed meetings "since litigation by someone is always possible."

Finally, the Commission's argument to close a meeting because your presence "would have reasonably led to an increase in any rental demanded" would not, in our view, constitute a legal basis for entry into executive session, and is not supported by the law.

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

CSJ:jm

cc: Water District Commission
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4801

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August 25, 2009

Mr. Jeremy Smith
[redacted]

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

Dear Mr. Smith:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain proceedings of the Germantown Town Board. Your questions concern the authority and ability of Board members to amend minutes, and the formalities associated therewith. In this regard, we offer the following comments.

We believe that four provisions of law are pertinent to the matter. First, §106 of the Open Meetings Law deals with minutes and under that statute, it is clear that minutes need not consist of a verbatim account of what is said. Rather, at a minimum, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member.

Second, subdivision (1) of §30 of the Town Law states in relevant part that the town clerk "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting". As such, except in unusual circumstances, the town clerk has the sole responsibility to prepare the minutes.

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

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

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, we believe that they would be appropriate and meet legal requirements. Most importantly, we 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 our view, be inconsistent with law.

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

Additionally, we do not believe that a member of the board may unilaterally alter or direct that minutes be altered. That person is one among five members; in our 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.

The timing of the distribution of minutes to the entire board, in our opinion, would be a policy issue for the board to resolve. Clearly, the Open Meetings Law requires that minutes be prepared and available within two weeks of the date of the meeting; however, there is no statutory requirement regarding dissemination of minutes to the board. Similarly, while the Open Meetings

Law requires that every action be recorded in the minutes, there is no requirement that each decision be made with the formality suggested by Roberts Rules of Procedure.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4802

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August 25, 2009

Ms. Stella Albano
[redacted]

The staff of the Committee on 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. Albano:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain gatherings of Community Board 12 in Brooklyn and the New York City Board of Standards and Appeals. Specifically, you questioned what requirements there are for providing notices of meetings and hearings of such boards to the public. In this regard, we offer the following comments.

First, we note that there is a distinction between a "meeting" and a "hearing". The former involves a gathering of a majority of a public body for the purpose of conducting public business collectively, as a body. As such, meetings are ordinarily held for the purpose of discussion, deliberation, taking action and the like. A "hearing" typically is held to enable members of the public express their views on a particular subject, i.e., application for a variance, a change in zoning, etc. Hearings are usually 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.

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

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

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

Earlier this year, the Legislature added subdivision (5), set forth as follows:

> "5. When a public body has the ability to do so, notice of the time and place of a meeting given in accordance with subdivision one or two of this section, shall also be conspicuously posted on the public body's internet website."

Section 104 now imposes a three-fold requirement, one, that notice must be posted in one or more conspicuous, public locations; two, that notice must be given to the news media; and three, that notice must be conspicuously posted on the body's website, when there is an ability to do so. The requirement that notice of a meeting be "posted" in one or more "designated" locations, in our opinion, mandates that a public body, by resolution or through the adoption of policy or a directive, 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 building in which a community board meets 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. Similarly, every public body with the ability to do so should post notice of the time and place of every meeting online.

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. *The Jewish Press*, in our opinion, although a publication of widespread circulation, might not meet this description.

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, and made accessible on a municipal website through an obvious link.

We point out that a public body is only required 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.

Although the notice requirements relating to meetings are prescribed in §104 of the Open Meetings Law, we are unaware of any single statute that contains general requirements concerning notices of hearings. Similarly, there are no general provisions of which we are aware that deal with other requirements for hearings. Different statutes impose different requirements with respect to hearings. For example, while zoning boards of appeals are required to hold hearings, procedural requirements for those hearings are separately imposed under Village Law (§7-712-a) and Town Law (§267-a). General Municipal Law requires hearings on planning issues under certain circumstances in multiple statutes, as does County Law, and each one of those statutes is unique. In short, the procedural and notice requirements for any particular hearing would be governed by provisions separate and apart from the Open Meetings Law.

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: Meenakshi Srinivasan, Chair, NYC Board of Standards and Appeals
Marty Markowitz, Brooklyn Borough President

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 4803

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August 27, 2009

Albert P. Roberts, Esq.
Vergilis, Stenger, Roberts, Davis
& Diamond, LLP
1136 Route 9
Wappingers Falls, NY 12590

The staff of the Committee on 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. Roberts:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain proceedings of the Board of the Town of Wappinger. Apparently, the Supervisor, during a spirited discussion in a public meeting, stood up, "adjourned the meeting", and exited the meeting room. At that point, the clerk stopped taking minutes and stopped video recording the meeting. The Board continued to meet, entered into and returned from executive session, and took action, none of which was recorded in the minutes. This will confirm that we agree with your advice to the Board that as a body, it can direct that the minutes be corrected to reflect action taken after the Supervisor "adjourned" the meeting. In this regard, we offer the following comments.

First, the Open Meetings Law pertains to meetings of public bodies, such as town boards, and §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". It is emphasized that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized (see Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 [1978]).

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body convene for the purpose of conducting public business, such a gathering would, in our opinion, constitute a meeting subject to the requirements of the Open Meetings Law.

Therefore, if a quorum of the Town Board was present after the Supervisor left, in our opinion, the gathering continued to constitute a "meeting" subject to the Open Meetings Law. The Supervisor's behavior would have no effect, in our opinion, on the application of the Open Meetings Law, and minutes of all actions taking during the later portion of the meeting must be recorded.

We further concur with your opinion that OML Advisory Opinions Nos. 2616 and 3849 are applicable to the instant issue with respect to the creation and amendment of minutes. Most importantly, in our opinion, the minutes must be accurate.

On behalf of the Committee on Open Government, we hope that this is helpful. Thank you for your attention to these matters.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Town Board
Hon. Chris Masterson, Town Clerk

OML-AO - 4804

From: Freeman, Robert (DOS)
Sent: Thursday, August 27, 2009 4:38 PM
To: Joseph Mattie, NYS Education Department
Subject: RE: a3169/s2754 - does this new legislation apply to publiclibraries?

Based on §260-a of the Education Law, public and association libraries are required to comply with the Open Meetings Law. Because that is so, I believe that the boards of trustees of those entities must post notice of their meetings on their websites, if they maintain websites.

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

FOML-AO-4805

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September 1, 2009

Albert P. Roberts, Esq.
Vergilis, Stenger, Roberts, Davis
& Diamond, LLP
1136 Route 9
Wappingers Falls, NY 12590

Dear Mr. Roberts:

This is in follow up to our August 27th advisory opinion to you regarding a particular meeting of the Wappinger Town Board. As referenced in your correspondence, we are now in receipt of State Comptroller Opinion No. 83-54 and would like to take this opportunity to clarify our opinion with respect to the "approval" of minutes by a town board.

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 our opinion that minutes of open meetings must be prepared and made available "within two weeks of the date of such meeting."

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

Viewing the issue from a different vantage point, the Freedom of Information Law makes no distinction between drafts as opposed to "final" documents. FOIL pertains to all agency records, and §86(4) defines the term "record" to mean:

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

Due to the breadth of the language quoted above, once a document exists, it constitutes a "record" subject to rights of access, even if the record is characterized as "draft" or is unapproved. Further, as a general matter, minutes consist of a factual rendition of what transpired at an open meeting. On that basis, we believe that they are accessible (see Freedom of Information Law, section 87[2][g][I]). Further, minutes often reflect final agency determinations, which are available under section 87(2)(g)(iii), irrespective of whether minutes are "approved". Additionally, in the case of an open meeting, during which the public may be present and, in fact, may tape record the meeting (see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD2d 924 [1985]), there would appear to be no valid basis for withholding minutes, whether or not they have been approved.

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: Hon. Chris Masterson, Town Clerk
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4806

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September 1, 2009

E-Mail

TO: Ms. Stacey Curry

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. Curry:

I have received your letter concerning an "unannounced" meeting of the Board of Education of the Panama Central School District.

In this regard, §104 of the Open Meetings Law includes requirements pertaining to notice of meetings and states that:

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

> 5. When a public body has the ability to do so, notice of the time and place of a meeting given in accordance with subdivision one or two of this section, shall also be conspicuously posted on the public body's internet website."

Based on the foregoing, although notice must be "given" to the news media, there is no obligation that the news media organization in receipt of the notice must publish the notice or publicize a meeting. Often notice of meetings is given to the news media, but, for whatever reason, the notice is not published, and in that situation, I do not believe that a public body can be faulted. However, as you pointed out, a provision recently added to the Open Meetings Law requires that a public body post notice of meetings on its website when it has the capacity to do so.

With respect to the enforcement of the Open Meetings Law, §107(1) states that an aggrieved person may seek to do so and that a court has the authority, in its discretion, to nullify action taken by a public body in private that should have been taken in public. I note, however, that the same provision also states that an unintentional failure to fully comply with the notice requirements shall not alone constitute a basis for invalidating action.

Lastly, although the functions of this office relative to the Open Meetings Law are advisory, it is our hope that its opinions are educational and persuasive, and that they encourage compliance with and understanding of that statute. With those goals in mind, a copy of this response will be sent to the Board of Education.

I hope that I have been of assistance.

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 1, 2009

Ms. Peggy Hatton
[redacted]

The staff of the Committee on 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. Hatton:

I have received your letter concerning resistance by officials of the East Ramapo Central School District concerning the ability to videotape meetings of the Board of Education. You wrote that the Superintendent and a Board member "do not like" being videotaped, and they contend that you cannot videotape a child that speaks at a meeting without permission given by the child's parents.

Based on judicial decisions, any member of the public may record an open meeting of a public body, such as a board of education, so long as the use of the recording device is neither disruptive nor obtrusive. In this regard, I offer the following comments.

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

Until 1978, there had been but one judicial determination regarding the use of the 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.).

With regard to comments by children, their presence at an open meeting and speaking itself in my view connote parental consent. The gathering is in the nature of a public forum, and like a school sporting event, such as a football or basketball game during which any number of people photograph or video record portions of the game, parental consent is not given. Rather, consent to be seen or heard, because of the nature of the event, is effectively given on one's own initiative.

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

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

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

> "On August 26, 1986 the Executive Director of the Committee on Open Government opined (OML-AO-1317, p.3) with respect to *video* recording as follows:
>
> > 'If the equipment is large, if special *lighting* is needed, and if it is obtrusive and distracting, I believe that a rule prohibiting its use under those circumstances would be reasonable. However, if advances in technology permit video equipment to be used without special lighting, in a stationary location and in an unobtrusive manner, it is

> questionable in my view whether a prohibition under those circumstances would be reasonable.'

On April 1, 1994, Mr. Freeman further opined (OML-AO-2324) that a county legislature's resolution limiting hand held camcorders to the spectator area in the rear of the legislative chamber was not per se unreasonable but rather, as challenged, it depended for its legitimacy on whether or not the camcorders could actually record the proceedings from that location.

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

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

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

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

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

From my perspective, since the basis for the denial of the use of video recording devices in Peloquin, "distaste for appearing on public access television", is analogous to the basis of the

resistance in East Ramapo, the prohibition as you described it would be found by a court to be equally unreasonable and void. The same conclusion was reached more recently in Csorny v. Shoreham-Wading River Central School District [759 NYS 2d 513, 305 AD2d 83 (2003)].

In an effort to enhance their knowledge of the issue, a copy of this opinion will be sent to the Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4808

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September 9, 2009

Ms. Jenny Novosel
[redacted]

The staff of the Committee on 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. Novosel:

This is in response to the additional materials that you submitted in conjunction with your request for an advisory opinion, as indicated in our correspondence to you. You submitted minutes from various meetings of the Board of the Hamilton County Industrial Development Agency, characterized as "Supervisors' Chambers". We offer the following comments in light of the issues raised in the additional materials that you submitted.

First, we note that the Open Meetings Law pertains to meetings of public bodies, e.g., IDA boards, and that the courts have construed the term "meeting" [§102(1)] expansively. In a landmark decision rendered in 1978, the state's highest court, the Court of Appeals, held that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

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

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

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

In view of the foregoing, if members of a public body meet by chance or at a social gathering, for example, we do not believe that the Open Meetings Law would apply, for there would be no intent to conduct public business, collectively, as a body. If by design, however, the members of a public body seek to meet after a public hearing, or before a public meeting, to socialize and to discuss public business, formally or otherwise, we believe that a gathering of a majority would trigger the application of the Open Meetings Law, for such gatherings would, according to judicial interpretations, constitute "meetings" subject to the law.

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. Regardless of the location or the timing of the meeting, since a session held by a majority of a public body is a "meeting", it would have the same responsibilities in relation to openness, notice and the taking of minutes as in the case of a formal meeting.

Next, the Open Meetings Law does not specify where a public body must conduct its meetings; however, the law does provide direction concerning the site of meetings. Section 103(b) of the law states that:

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

Based upon the language quoted above, the Open Meetings Law, in our opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. On the other hand, we believe that the law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the Board has the capacity to hold its meetings in a first floor room that is accessible to handicapped persons rather than a second floor room, we believe that the meetings should be held in the room that is most likely to accommodate the needs of people with handicapping conditions.

Further, 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.

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. 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)].

With respect to issues involving notice of meetings, §104 of the Open Meetings Law pertains to notice and states that:

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

Earlier this year, the Legislature added subdivision (5), set forth as follows:

> "5. When a public body has the ability to do so, notice of the time and place of a meeting given in accordance with subdivision one or two of this section, shall also be conspicuously posted on the public body's internet website."

Section 104 now imposes a three-fold requirement: one, that notice must be posted in one or more conspicuous, public locations; two, that notice must be given to the news media; and three, that notice must be conspicuously posted on the body's website, when there is an ability to do so. The requirement that notice of a meeting be "posted" in one or more "designated" locations, in our opinion, mandates that a public body, by resolution or through the adoption of policy or a directive, 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. And again, every public body with the ability to do so must post notice of the time and place of its meetings online.

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

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

However, the same provision states further that:

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

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

Finally, an amendment to §107(1) of the Open Meetings Law recently approved 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 mandatory award of attorney's fees would apply only when secrecy is the issue. In other instances, those in which the matter involves compliance with other aspects of the Open Meetings Law, such as a failure to fully comply with notice requirements, the sufficiency of a motion for entry into executive session, or the preparation of minutes in a timely manner, the award of attorney's fees by a court would remain, as it has since 1977, discretionary.

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: Industrial Development Agency

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 4809

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September 9, 2009

Ms. Jenny Novosel
[redacted]

The staff of the Committee on 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. Novosel:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain proceedings of the Hamilton County Industrial Development Agency. Specifically, you questioned whether repeated motions to enter into executive session to discuss "the legal and financial aspects of the Mt. Oak project", "the status of the litigation concerning Oak Mt. Ski Center", "foreclosure proceedings" and "the Oak Mt. project and the financials related to the project" were in keeping with the provisions regarding executive sessions. You submitted minutes from nine separate meetings, seven of which include an explanation that "no action was taken" during the executive session. In this regard, 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. Section 105(1) states in relevant part that:

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

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

Second, it has been held judicially that:

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

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

It would appear that the one of the pertinent grounds for entry in executive session would have been §105(1)(d), which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation".

Based on judicial decisions, the scope of the so-called litigation exception is narrow. 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)].

Based on the foregoing, the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, so as not to divulge its strategy to its adversary, who may be present with other members of the public at the meeting. We note too, that the Concerned Citizens decision cited in Weatherwax involved a situation in which a town board involved in litigation met with its adversary in an executive session to discuss a settlement. The court determined that there was no basis for entry into executive session; the ability of the board to conduct a closed session ended when the adversary was permitted to attend. In the context of the matter at issue, if a representative of Oak Mt. was invited to attend the executive session, the Board, in our view, would have lost its authority to conduct a private session.

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, 444 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 Hamilton County IDA." If the IDA 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 IDA and its constituents, 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.

Accordingly, it is our opinion that the IDA should have been more articulate in describing the "litigation" which was the subject of its discussion. If the discussion pertained to foreclosing against the owners of Oak Mt., the motion should have so indicated, and the discussion should have been limited to the IDA's litigation strategy. Additionally, in our opinion, an update on the status of legal proceedings would not necessarily rise to the level of discussion concerning strategy, and, therefore, may not have been an appropriate topic for executive session.

To the extent that it was necessary to discuss the financial history of a particular person or corporation, pursuant to the Open Meetings Law, §105(1)(f), any such discussion should have

been similarly limited to financial information, in our opinion, after which the Board should have returned to public session.

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: Industrial Development Agency

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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September 9, 2009

E-Mail

TO: Hon. Gail Wolanin Young, Town Clerk

FROM: Robert J. Freeman, Executive Director RJF

Dear Ms. Young:

I have received a draft policy concerning "Conduct at Town Board Meetings" that will soon be considered by the New Hartford Town Board. In this regard, pursuant to your request that I review the draft, I offer the following brief comments.

It is noted at the outset that the right to attend meetings of public bodies, such as town boards, is conferred by a statute, the Open Meetings Law. Prior to the enactment of that law, there was no general or constitutional right to attend meetings of those bodies. Similarly, although there is a constitutional right to speak, there is no such right to speak during meetings. Under the Open Meetings Law, it is clear that it provides any member with the right to attend, listen and observe the performance of public officials. The law is silent, however, with respect to the right of the public to speak or otherwise participate during meetings. Because that is so, it has been advised that a public body may choose to permit the public to speak at its meetings, but that it is not required to do so. Most public bodies do authorize limited participation by the public, and in those situations, it is suggested that they do so by adopting reasonable rules that treat members of the public equally.

In view of the foregoing, it is suggested that the second sentence in the first "Whereas" clause ("Some residents.....) be deleted and that "The response to these claims is that" be deleted from the third sentence. It is recommended that the new second sentence state that: "The Town Board has the authority to ensure that everyone has the right to participate....."

Item 1) in the second Whereas clause indicates that "the meeting building will be opened to the public no earlier than 30 minutes and no later than 15 minutes prior to the scheduled start time." In my opinion, those limitations may be overly restrictive. What if the Town Board wants or has a need to meet at 2 p.m., and the "meeting building" has been open to the public continuously since 9 a.m.? In like manner, item 2) states that the Supervisor will begin each meeting at 6 p.m. Again, a restriction of that nature would reduce the Board's flexibility in terms of the time when meetings can be held.

Item 5) in states that there is a limit of "two video cameras per meeting" and that those cameras must be "tripod mounted." In my experience, video cameras are often now small, and they can be mounted or kept still without being placed on a tripod. There is in fact an attachment for cameras the size of a bottle cap that can be placed on a half full bottle of liquid that might be used in lieu of a tripod. Although I believe that the Board could validly prohibit the use of special lighting or movement, based on judicial decisions, I would suggest the first two sentences be replaced with: "Recording devices may be employed during meetings, so long as their use is neither obtrusive nor disruptive."

Item 9) indicates that individuals "will have up to 5 minutes to speak to the Board." In my opinion, 5 minutes may be unnecessarily long, particularly if there are many speakers. More typical is a limitation of 3 minutes per speaker. The same provision states that "The Town Supervisor can end the address short or extend the allowable time." In my view, it is questionable whether that authority may properly exist in one member of the Board. Better, in my opinion, would be: "The Town Board, upon approval of a motion to do so, may, for good cause expressed in the motion, reduce or extend the time during which an individual may speak."

Should that recommendation be adopted in some manner, item 13 should be amended to refer to "A person who disregards the directives of the Board...."

I hope that you find the foregoing to be constructive and that I have been of assistance.

RJF:jm

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September 16, 2009

E-Mail

TO: Mr. George Heidcamp

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. Heidcamp:

I have received your letter in which you raised a question concerning the notice requirements imposed by the Open Meetings Law. Specifically, you referred to the requirement that notice be given at least seventy-hours prior to a meeting scheduled at least a week in advance and asked whether "the notice must be in print for the entire 72 hours or just notice given within 72 hours prior to the meeting."

Assuming that you are referring to the requirement that notice be given to the news media, I point out that subdivision (3) of §104 of the Open Meetings Law specifies that a public body is not required to pay to place a legal notice in a newspaper prior to a meeting. Notice must merely be "given" to the news media; whether a newspaper, for example, chooses to print notice of a meeting is within the discretion of its management. In my view, the State Legislature intended to ensure that the Open Meetings Law would not create financial hardship to public bodies or newspapers, and the provision indicating that notice of a meeting need not be legal notice is intended to ensure that public bodies should not have to pay place a legal notice in a newspaper prior to every meeting. In terms of the news media, in many instances, there may be hundreds of public bodies within the coverage area of a newspaper, and requiring a newspaper to print notices of meetings relating to perhaps dozens of meetings on a particular day would be financially burdensome.

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

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

RJF:jm

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September 16, 2009

E-Mail

TO: Mr. Ted Crane, Webmaster, Town of Danby

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. Crane:

As you are aware, I have received your correspondence in which you raised a variety of questions, most of which relate to the Open Meetings Law.

You asked initially: "Who has standing to ask these questions". It is assumed that you are asking who can contact this office in an attempt to have questions answered concerning open government laws and issues. In this regard, any person may contact this office by phone, email or by letter and seek advice and guidance, either orally or in writing.

Although an effort will be made to respond to each of your questions, they will not necessarily be considered in the order in which they were presented.

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

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

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

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

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

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

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

With respect to minutes, §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 on the foregoing, it is clear in my opinion that minutes need not consist of a verbatim of account of all that is expressed during a meeting. Rather, at a minimum, minutes must consist of a record or summary of motions, proposals, resolutions, action taken, and the vote of the members. They may be more expansive, but they need not include detail in addition that required by the Open Meetings Law. If none of the events that would require the preparation of minutes occur during a meeting, in a technical sense, minutes would not be required to be prepared.

Section 30 of the Town Law specifies 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 proceeding of each meeting." In short, a town clerk is responsible for preparing minutes of town board meetings.

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.

With respect to "changes" in minutes, it has been advised a member of the public or the a town board cannot insist or require that minutes be amended or altered. Should a board member seek to amend minutes of a meeting, I believe that an attempt to do so should be made during an open meeting by means of a motion specifying the proposed alteration. If the motion carries by a majority vote of the board's total membership, the minutes may be amended accordingly, so long as an amendment accurately reflects what occurred.

You asked whether a town board may require that minutes be prepared in a "particular fashion (i.e., computer file format)." In my view, because a town board has the authority pursuant to the Town Law, §§63 and 64, respectively, to adopt reasonable rules to govern its own proceedings and to manage the affairs of the town, it may require that minutes be prepared or stored in a computer file format, so long as it has the equipment and expertise needed to do so.

As indicated earlier, minutes must be prepared and made available to the public within two weeks of the meetings to which they pertain. In most towns, the clerk is designated as "records access officer." In that role, it is the responsibility of the clerk to coordinate the town's response to requests for records, particularly those sought pursuant to the Freedom of Information Law. In any situation in which a request for records is denied, either in writing or by means of a failure to respond within the requisite time, the person denied access has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

If minutes are not prepared in a timely fashion, the clerk should be reminded of his/her duty to do so to comply with law. If that fails, it is suggested that the matter be brought to the attention of the town board. If a clerk continues to fail to prepare and/or disclose minutes within the statutory time, a proceeding to compel the clerk to do so may be initiated under Article 78 of the Civil Practice Law and Rules.

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

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

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

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the *widespread use of hand held cassette recorders which can be operated by individuals*

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

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

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

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

> "[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their

> words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" (id.).

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

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

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

> "On August 26, 1986 the Executive Director of the Committee on Open Government opined (OML-AO-1317, p.3) with respect to *video* recording as follows:
>
> > 'If the equipment is large, if special *lighting* is needed, and if it is obtrusive and distracting, I believe that a rule prohibiting its use under those circumstances would be reasonable. However, if advances in technology permit video equipment to be used without special lighting, in a stationary location and in an unobtrusive manner, it is questionable in my view whether a prohibition under those circumstances would be reasonable.'
>
> On April 1, 1994, Mr. Freeman further opined (OML-AO-2324) that a county legislature's resolution limiting hand held camcorders to the spectator area in the rear of the legislative chamber was not per se unreasonable but rather, as challenged, it depended for its legitimacy on whether or not the camcorders could actually record the proceedings from that location.
>
> Blanket prohibition of audio recording is not permissible, and it is likely that the appellate courts would find that also to be the case with blanket prohibitions of video recording. However, what might be reasonable in one physical setting - a village board restricting camcording to the rear area of *its* meeting room - might not be in another - the larger chambers of a county legislature (OML-AO-1317, supra). It might well be reasonable in a village or other space-restricted setting to restrict the number of camcorders to one, as the court system may with its pooling requirement for video coverage of trials (22 NYCRR Parts 22 and 131). Such a requirement

might be viewed as unreasonable in a large county legislative chamber or where a local board of education is conducting a meeting in a school auditorium.

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

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

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

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

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

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

I hope that I have been of assistance.

RJF:jm

cc: Ric Dietrich, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4813

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September 16, 2009

E-Mail

TO: Mr. Brian Lobel

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. Lobel:

I have received your letter in which you asked that I review minutes of meetings of the Mamaroneck Town Board for the purpose of offering advice concerning the adequacy of its motions for entry into executive sessions.

In this regard, having reviewed the minutes of several meetings, I note that §106 of the Open Meetings Law requires that minutes consist of a "record or summary" of motions; it does not require that minutes contain a verbatim account of a motion. Whether the references to motions to enter into executive session as they appear in the minutes reflect the entirety of the words used in the motions, or merely a summary of the motions, is unknown to me. Nevertheless, in an effort to provide guidance, I offer the following comments.

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

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

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

One of the phrases that appears repeatedly in the minutes is "employment history." The provision concerning the possibility of discussing that subject in executive session is §105(1)(f), which permits a public body to enter into executive session to discuss:

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

Due to the presence of the term "particular" in §105(1)(f), I believe that a discussion of "employment history" may be considered in an executive session only when the subject involves a particular person or persons.

It has been advised that a motion involving §105(1)(f) should be based on its specific language. 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.

Similarly, with respect to "collective bargaining", the only ground for entry into executive session that refers to that topic is §105(1)(e), which permits a public body to conduct an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law." Article 14 of the Civil Service Law is commonly known as the "Taylor Law", which pertains to the relationship between public employers and public employee unions. As such, §105(1)(e) permits a public body to hold executive sessions to discuss collective bargaining negotiations with a public employee union.

In terms of a motion to enter into an executive session held pursuant to §105(1)(e), it has been held that:

> "Concerning 'negotiations', Public Officers Law section 100[1][e] permits a public body to enter into executive session to discuss collective negotiations under Article 14 of the Civil Service Law. As the term 'negotiations' can cover a multitude of areas, we believe that the public body should make it clear that the negotiations to be discussed in executive session involve Article 14 of the Civil Service Law" [Doolittle, supra].

A proper motion might be: "I move to enter into executive session to discuss the collective bargaining negotiations involving the police union."

Lastly, references were made to matters relating to the leasing of real property. The provision of potential relevance, §105(1)(h), permits a public body to conduct an executive session to discuss "the proposed acquisition, sale or lease of real property...but only when publicity would substantially affect the value thereof." In some circumstances, disclosure of the location of a parcel could substantially affect the value of the parcel. For instance, if a municipality wants to purchase a parcel for a new facility and is considering several locations, none of which are known to the public, disclosure of the sites could result in speculation or current owners raising prices, to the detriment of taxpayers. That being so, it has been advised that a motion under §105(1)(h) should indicate that the public discussion of the proposed action would "substantially affect the value" of the property.

I hope that I have been of assistance.

RJF:jm

cc: Town Board
Christina Battalia

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4814

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September 21, 2009

Mr. Italo J. Vacchio
Superintendent
Port Washington Water District
P.O. Box 432
Port Washington, NY 11050

Dear Mr. Vacchio:

I am in receipt of your correspondence in which you expressed disagreement with the opinion offered by Camille Jobin-Davis on August 24.

You indicated that "the discussion concerning the renewal of the lease, should not be public, as it might end up in litigation should the lease not be renewed should the Village give the district a vacate order, which surely would go to litigation."

As you know, a public body has the authority to enter into executive session only for the purposes set forth in §105(1) of the Open Meetings Law. To reiterate, based on case law interpreting the "litigation exception" cited in the August 24 opinion, a belief that a discussion or a decision could ultimately lead to litigation, without more, is an insufficient reason 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 AD2d 612, 613, 441 NYS2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD2d 840, 841 (1983)].

Based on the decisions cited above, all of which were rendered by the Appellate Division, Second Department, which includes Nassau County, only to the extent that a discussion involves litigation strategy would an executive session be properly held under §105(1)(d).

Enclosed is a copy of Mr. Tarleton's request for an advisory opinion dated July 23.

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

Enc.

cc: Robert Tarleton

OML-AO-4815

From: Freeman, Robert (DOS)
Sent: Tuesday, September 22, 2009 5:08 PM
To: Allen Tupper

Dear Mr. Tupper:

I have received your letter in which you complained that a law was recently passed that bans burning brush on your own property, and that you "don't remember voting on this..."

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information and Open Meetings Laws. The only issue, in my view, that might relate to either of those laws involves whether the public body that passed the law, such as a county legislature, a town board or a village board of trustees, discussed the issue in public during a meeting. A "meeting", according to the Open Meetings Law, is a gathering of quorum of a public body (a majority of its total membership) for the purpose of conducting public business. If in fact a public body discussed a proposed local law or ordinance, I believe that it validly could have done so only during one or more meetings open to the public.

As a general matter, the public does not vote on the kind of matter that you described. Rather, voting and the taking of action are carried out by the public's elected representatives, again, the members of the kinds of public bodies mentioned earlier.

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

Robert J. Freeman
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OML-AO-4816

From: Freeman, Robert (DOS)
Sent: Tuesday, September 22, 2009 4:54 PM
To: Al Schultz
Subject: Open Meetings Law

Dear Mr. Schultz:

I have received your letter, and as I understand the facts, you serve on the Town of Clarence seven member Planning Board, and you and the Chair, on occasion, "will sit down with the Planning and Zoning Department and review all the relevant files and information..."

From my perspective, a gathering of that nature is not subject to the Open Meetings Law. In short, the application of that statute is not triggered unless a quorum, a majority of the total membership of a public body, convenes to conduct public business collectively, as a body. If a public body consists of seven, its quorum would be four. A gathering of two members of the Planning Board with Town staff would not constitute a meeting, and the Open Meetings Law would not apply.

I hope that I have been of assistance.

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FOIL-AO-4817

From: Freeman, Robert (DOS)
Sent: Tuesday, September 22, 2009 8:02 AM
To: Clark, Whitney (DOS)
Cc: Mercer, Janet (DOS)
Subject: RE: Appraisal Board

Hi Whitney –

For better or worse, I do not believe that members of public bodies may vote by proxy. That is particularly clear in consideration of amendments to the Open Meetings Law authorizing meetings to be held by videoconference and case law indicating, accordingly, that members cannot vote via use of the telephone.

The opinions that you want are old, and we don't have a scanner, but we can fax them to you. I'll be out this morning, so please email your fax number to Janet Mercer so that she can fax the opinions to you.

Bob

Robert J. Freeman
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FOIL-AO-17816
OML-AO-4818

From: Freeman, Robert (DOS)
Sent: Wednesday, September 23, 2009 10:21 AM
To: Nina Martino
Subject: RE: Another question

Section 87(3)(a) of the Freedom of Information Law has long required that an agency maintain a record indicating the manner in which each member of a body casts his or her vote in any instance in which a vote is taken. Further, it has been held that such a record must be prepared and made available even when action is taken during an executive session [Smithson v. Ilion Housing Authority, 130 AD2d 965 (1987), affirmed 72 NY2d 1034 (1988)]. In short, members of public bodies subject to the Open Meetings Law cannot vote by secret ballot, and a record must be prepared specifying how each member casts a vote.

I hope that I have been of assistance.

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OML-AO - 4819

From: Freeman, Robert (DOS)
Sent: Friday, September 25, 2009 8:53 AM
To: Richard J. Herz
Subject: RE: what constraints on nymtc council members meeting before/after public session?

The meaning of "principals" is not clear. However, based on the language of the Open Meetings Law and judicial precedent, 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, collectively, as a body. Therefore, when a majority of the board of the MTA gathers to conduct public business, the gathering would constitute a meeting subject to the Open Meetings Law. If a gathering is social in nature, it has been held that the Open Meetings Law does not apply. Further, if a group involves executive staff and less than a quorum of a public body, that statute would not apply.

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OML-AO-4820

From: Jobin-Davis, Camille (DOS)
Sent: Friday, September 25, 2009 2:45 PM
To: 'Eric Anderson'
Subject: RE: Statute of Limitations

Hi Eric:

It is my understanding that the statute of limitations is 120 days also.

Section 107(3) of the Open Meetings Law mandates that the statute of limitations with respect to action taken at executive session runs from the date the minutes of the executive session have been made available to the public. Otherwise, and with respect to all other action taken, I believe the statute of limitations runs from the date the action is taken.

Camille

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

OML-AO-4821

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September 25, 2009

E-Mail

TO: R. Leblanc

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./Ms. Leblanc:

I have received your inquiry in which you sought an opinion concerning "the proper procedure for convening an emergency meeting when time is of the essence and financial consequences or public welfare is involved."

In this regard, there is nothing in the Open Meetings Law or any other statute of which I am aware that deals with "emergency" meetings. However, I believe that the provision in the Open Meetings Law concerning notice of meetings may be applied in the case of meetings of that nature.

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.

> 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.
>
> 5. When a public body has the ability to do so, notice of the time and place of a meeting given in accordance with subdivision one or two of this section, shall also be conspicuously posted on the public body's internet website."

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, and posted on a website when a public body has the ability to do so, 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, by posting notice in one or more designated locations, and when the ability to do so exists, posting notice online.

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

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

> "In White v. Battaglia, 79 A.D. 2d 880, 881, 434 N.Y.S.ed 637, lv. to app. den. 53 N.Y.2d 603, 439 N.Y.S.2d 1027, 421 N.E.2d 854, the Court condemned an almost identical method of notice as one at bar:
>
> "Fay Powell, then president of the board, began contacting board members at 4:00 p.m. on June 27 to ask them to attend a meeting at 7:30 that evening at the central office, which was not the usual meeting date or place. The only notice given to the public was one typewritten announcement posted on the central office bulletin board...Special Term could find on this record that appellants violated the...Public Officers Law...in that notice was not given 'to the extent practicable, to the news media' nor was it 'conspicuously posted in one or more designated public locations' at a reasonable time 'prior thereto' (emphasis added)" [524 NYS 2d 643, 645 (1988)].

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

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17829
OML-AO-4822

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September 28, 2009

Mr. Daniel Jenkins
[redacted]

The staff of the Committee on 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. Jenkins:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to a request for records made to the Village of Tupper Lake. Specifically, you requested records pertaining to a mediation agreement proposed by an applicant to the Adirondack Park Agency, including:

> "1. A copy of the resolution passed by a vote of the Village Board members in support of the ACR 'mediation agreement'.
>
> 2. Copies of the confidentiality agreements that were signed by each Village Board member prior to their review of the text of the ACR 'mediation agreement'.
>
> 3. A complete copy of the ACR 'mediation agreement' document.
>
> 4. A list of all records and materials held by the Village relating to the ACR 'mediation agreement'."

The Village provided a copy of the resolution in response to the first request, and denied the remainder of the request on the grounds that the Village is "bound by the Confidentiality Agreement signed by all parties to the adjudicatory hearing process imposed by the Administrative Law Judge O'Connell", "as inter-agency materials which contains advisory or agency recommendations, not including factual or statistical information, and not final in its determination", and based on US v. Glens Falls Newspapers, Inc., 160 F3d 853, NYS Committee on Open Government AO 10530, and Daily News Pub Co. of Memphis, Tenn. v. Office of Court Admin. of State of NY, 718 NYS2d 800.

On appeal, the Village confirmed the denial and further indicated as follows:

> "The Village is required to adhere to the Confidentiality Agreement to which it agreed to be bound, along with the other parties to the mediation, as part of the mediation protocol as administered by the Administrative Law Judge Daniel P. O'Connell."
>
> "This is a confidential settlement negotiation discussed during [a] proceeding over which Judge O'Connell, acting as mediator, presided. For purposes of these mediation proceedings, Judge O'Connell was a member of the judiciary and those confidential settlement negotiations shall be kept confidential, not subject to production under the Freedom of Information Law. Following the conclusion of the mediation, it was reiterated to the parties that those matters discussed and/or documents produced during the mediation shall remain confidential. Not only does Judge O'Connell feel that these discussions must remain confidential, but it was with the understanding that all discussions would be kept confidential, that all of the parties signed the Confidential Agreement at issue."

Last year, in conjunction with an advisory opinion issued to the Adirondack Park Local Government Review Board, we received a copy of a document entitled "Mediation Protocol" from the Adirondack Park Agency (enclosed). As you will see, it is our opinion that to the extent that there are provisions of the Mediation Protocol that conflict with the Freedom of Information Law and the Open Meetings Law, they would be unenforceable.

With respect to the specific issues that you raised regarding access to confidentiality agreements and documents that Village Board members may have received, we offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (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 agreements between Board members and a state agency fall within §87(2)(g). To the extent that such agreements detail factual information, i.e., that they memorialize the terms of an agreement between two agencies, or represent an outcome or culmination of negotiations, they would constitute final agency determinations, and we believe that they must be disclosed pursuant to subparagraphs (i) and (iii) of §87(2)(g) respectively. To the extent that an agreement has been executed between an agency and entities other than "agencies" [see definition of "agency", §86(3)], it would not constitute an inter-agency record, and §87(2)(g) would not serve as a basis for denial of access.

Significantly, it has been held in a 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 NYS2d 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 NY2d 557, 565 (1984)].

In view of the judicial precedent cited above, a promise or agreement regarding confidentiality cannot be sustained when the grounds for denial of access appearing in the Freedom of Information Law cannot justifiably be asserted.

The Village relied on certain judicial decisions and a previous opinion of the Committee in support of its position that the records are not required to be released. We believe that the decisions and opinion can be distinguished from the situation here.

In the federal case on which the Village relies, US v. Glens Falls Newspapers, Inc., (160 F3d 853 [1998]), the court determined that settlement negotiations, including documents exchanged during settlement negotiations between named parties to litigation pending in the district court could be kept confidential subsequent to a trial court "consent order" which was in keeping, the court found, with the court's rules. The Northern District Court of New York's Local Rule 5.7, "Documents to be Provided to the Clerk", states that "All pretrial and settlement conference statements shall be provided to the Clerk but not filed. These documents are not for public view." The court determined that the trial court judge had properly weighed the interests of the litigants when it issued the consent order that required confidentiality of settlement documents in draft form, in a manner consistent with federal court rules.

The court further relied on the discretionary authority of the Town, pursuant to the Open Meetings Law, to discuss pending litigation in executive session [Open Meetings Law, §105(1)(d)], and incorrectly, in our opinion, referred to that authority as support for the contention that records related to such settlement negotiations are confidential by statute. The Open Meetings Law, in our view, does not prohibit a public body from discussing pending litigation in public, but rather permits a public body to do so in private. The ability of the Board to conduct an executive session, as opposed to the obligation to do so, in our opinion, cannot be equated to or serve as a statutory basis for ensuring the confidentiality of records obtained or reviewed during an executive session. There are innumerable instances in which records discussed during executive sessions are accessible under the Freedom of Information Law. In short, the provisions that permit (but do not require) entry into executive session in the Open Meetings Law are not necessarily congruent with the grounds permitting (but not ordinarily requiring) an agency to withhold records pursuant to the Freedom of Information Law. This is not intended to suggest that such disclosures would be wise or in the public interest in every instance, but rather, again, that there is no basis in law for prohibiting a person present during an executive session from speaking about that closed session or from disclosing records obtained, reviewed or considered during that session. To gain a more detailed explanation of our opinion, see Committee on Open Government Open Meetings Law Advisory Opinion 3929a enclosed.

Unlike the situation in US v. Glens Falls Newspaper, there is no pending litigation here. There are no judicial or court rules of which we are aware that make records that are shared with the Village with respect to its voluntary participation in a mediation process confidential, and to date, we have not been informed of a court order that would prohibit the voluntary participants from disclosing records received in conjunction with the mediation process. As we understand that process, it is an element of the adjudicatory hearing procedure over which an administrative law judge presides, and a non-binding method to assist in the resolution of conflicts regarding a permit application; it is not litigation in the sense that, at the end of the process, the parties are bound by a judicial determination.

The New York County case, Daily News Pub Co. of Memphis. Tenn. v. Office of Court Admin. of State of NY, 186 Misc.2d 424, 718 NYS2d 800 (2000), holds that a database of information compiled from court records is not publicly available merely because it is housed at the Office of Court Administration, an agency subject to the Freedom of Information Law. The issue in that case involved access to records of or pertaining to a court, an entity that is not subject to the

Freedom of Information Law. Moreover, it was later unanimously held by the Court of Appeals that records emanating from a court that come into the possession of an agency are agency records subject to the Freedom of Information Law [Newsday v. Empire State Development Corp., 98 NY2d 746 (2002)].

We note that the particular advisory opinion on which the Village relies pertains to student academic records that were admitted as evidence in a judicial proceeding and became part of the court record (Freedom of Information Law Advisory Opinion 10530). The Family Educational Rights and Privacy Act (FERPA) prohibits the disclosure of records identifiable to students, except when the parents of the minor student or a student who has reached the age of 18 has waived confidentiality. In the opinion, we pointed out that FERPA allows disclosure of records that are exempt from disclosure to the general disclosure for limited purpose, i.e., compulsory disclosure of a record in a judicial proceeding. We further indicated that in a situation in which records are made part of a court record, they may be available to the public, not pursuant to the Freedom of Information Law, but rather other statutes requiring the disclosure of court records. Accordingly, it remains our opinion that the Freedom of Information Law governs access to records obtained by the Village.

Finally, and in good faith, we admit that we are confused by the questions of access that have arisen with respect to participation by public bodies in the ACR mediation. To our knowledge, no court is yet involved, and an administrative law judge is not a "member of the judiciary" as characterized by the Village in its response to your request. While the Adirondack Park Agency has the authority to designate a person to preside over public hearings pursuant to Executive Law, Article 27, §800, et seq., §812 of the Executive Law sets forth the statutory authority of such person as follows:

> "5. The agency, or member or designee thereof presiding at the hearing shall have power to administer oaths and issue subpoenas to compel the attendance of witnesses and the production of relevant documents and papers, including witnesses and documents requested by the parties."

There appears to be no statute that provides an administrative law judge with the authority to order mediation proceedings closed, or to make records confidential that are required to be made available pursuant to the Freedom of Information Law.

We note that even the authority of a court to require confidentiality is limited. Section 216.1(a) of the Uniform Rules, NYS Trial Courts in civil actions states that:

> "Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing by court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears

> necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard."

In sum, we know of no court order sealing records and continue to advise that the Freedom of Information Law, not a private agreement, governs rights of access.

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

Encs.

cc: Hon. Michael Desmarais

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4823

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September 29, 2009

E-Mail

TO: Barbara Nowell, Charter School Board Trustee

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. Nowell:

I have received your letter in which you raised several questions concerning a charter school board and the application of the Open Meetings Law. For purposes of clarity, such a board may be referenced in this response as a "public body", for it is treated in that manner by the Education Law, §2854(1)(e).

First, in the case of a board consisting of twelve members, you asked whether a gathering of two members "to talk about issues concerning the school, without making any decisions", would constitute a "meeting" subject to the Open Meetings Law. Based on the definition of "meeting" in §102(1) of that statute, a meeting is a gathering of a quorum of a public body, a majority of its total membership, for the purpose of conducting public business. If a board consists of twelve, a quorum would be seven, and any gathering of less than seven members would fall outside the coverage of the Open Meetings Law. During a gathering of less than quorum, there is no limitation on the ability to discuss issues concerning the school.

In a related vein, §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of a meeting during which the public may be excluded. To conduct an executive session, §105(1) requires that a motion be made to do so during an open meting and carried by a majority vote of a public body's total membership. That being so, a quorum must be present in order to conduct a meeting or an executive session.

Next, the definition of "meeting" coupled with other elements of the Open Meetings Law make clear that a meeting may be held by means of videoconferencing, whereby the members of a public body may conduct public business and the public may attend, listen and observe a meeting

in more than one location. Concurrently, it is clear due to those provisions as well as judicial decisions that a member of a public body cannot be counted for purposes of a quorum or vote through the use of a phone [see e.g., Town of Eastchester v. NYS Board of Real Property Services, 23 AD3d 484 (2005)], for the public, as you suggested, cannot see or observe a member in that circumstance.

Lastly, based on §105(2), only the members of a public body have the right to attend an executive session. However, that body may authorize the attendance of others. Therefore, a person who is the subject of a discussion may be invited to attend an executive session, but he/she has no right to do so.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4824

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September 29, 2009

E-Mail

TO: Mr. Michael Oot

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. Oot:

I have received your "complaint regarding the behavior of the Workers' Compensation Board." You wrote that "[i]t has been widely reported that the WCB has been holding 'secret meetings' with regard to a special project that would result in sweeping changes to the current system."

As you are likely aware, the Open Meetings Law applies to meetings of public bodies. A "public body", according to §102(2) of the Open Meetings Law, is an entity consisting of two or more members that conducts public business and performs a governmental function for state or local government. Section 140 of the Workers' Compensation Law specifies that the Board "shall consist of thirteen members', and numerous provisions of that Chapter indicate that the Board conducts public business and performs a governmental function for the state. Therefore, it is clear in my opinion that the Workers' Compensation Board is a "public body" required to comply with the Open Meetings Law.

Section 102(1) defines the term "meeting" to mean a gathering of a quorum of a public body, a majority of its total membership, for the purpose of conducting public business. When a quorum convenes to conduct public business, it has been held that such a gathering constitutes a "meeting", even if there is no intent to take action, and irrespective of the manner in which the gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)].

In consideration of the foregoing, a gathering of less than a quorum of the Board, six or fewer, would not constitute a meeting, and the Open Meetings Law would not apply. On the other

hand, a gathering of a quorum of the Board to discuss matters of policy, such as "changes to the current system", would, in my opinion, constitute a meeting required to be held in compliance with the Open Meetings Law.

Lastly, exempt from the coverage of the Open Meetings Law is any matter made confidential by federal or state statute [see Open Meetings Law, §108(3)]. Therefore, insofar as a discussion by the Board would identify a claimant, a matter made confidential by §110-C of the Workers' Compensation Law, the Open Meetings Law would not apply.

I hope that I have been of assistance.

RJF:jm

cc: Cheryl Wood, Esq., Workers' Compensation Board
Patrick Cremo, Esq., Workers' Compensation Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17835
OML-AO-4825

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September 30, 2009

E-Mail

TO: David F. Robinson, Herkimer Evening Telegram

FROM: Robert J. Freeman, Executive Director RJF

Dear Mr. Robinson:

As indicated during our conversation, I have received your list of questions concerning public participation in government. Because the functions of this office pertain to the Freedom of Information Law and Open Meetings Laws, I will be happy to address the questions that relate to those statutes. With respect to those falling beyond the expertise of this office it is suggested that you contact an attorney with the Department of State who specializes in municipal law, Ms. Natasha Phillip. She can be reached at (518)474-6740.

Insofar as the questions involve either the Freedom of Information or Open Meetings Laws, I offer the following. Please let me know whether the remarks are along the lines of what you want.

What government meetings are open to the public and what meetings are closed?

The Open Meetings Law applies to meetings of public bodies. A "public body" is an entity consisting of at least two members who are elected or appointed pursuant to law to carry out a governmental function collectively, as a body. Examples of public bodies are county legislatures, city councils, town boards, village boards of trustees, boards of education, etc. Although the courts have found that advisory bodies consisting of members of the public or a combination of government officials and members of the public are not subject to the Open Meetings Law, a committee consisting of two or members of a public body is itself a public body required to comply with the Open Meetings Law.

A "meeting" is a gathering of a quorum, a majority of a public body's total membership, for the purpose of conducting public business, even if there is no intent to take action, and irrespective of the manner in which a gathering may be characterized. Therefore, "official" meetings, as well as less formal gatherings, which are often characterized as "workshops" or "work sessions" are "meetings" falling within the coverage of the Open Meetings Law. A social gathering would not be covered by that law.

When is it appropriate for a meeting to go into executive session?

An executive session is defined to mean a portion of an open meeting during which the public may be excluded. Before an executive session may be held, a motion to do so must be made in public, the motion must describe the topic or topics to be discussed, and the motion must be carried by a majority of the total membership of the public body. Most importantly, the Open Meetings Law is based on a presumption of openness, and a public body cannot conduct an executive session to discuss the subject of its choice. On the contrary, the law specifies and limits the topics that may properly be considered during an executive session. The grounds for holding executive session are related to some sort of harm that would occur through public discussion, often in relation to personal privacy or the ability of a government to carry out its duties in the best interest of the public. The motion to go into executive session should include information sufficient to enable the public to ascertain whether the topic may properly be discussed behind closed doors.

How can resident get a matter on the agenda of a meeting?

There is no particular provision of law dealing with agendas. Most public bodies prepare agendas, but there is no legal obligation to do so. In general, public bodies have the authority to adopt reasonable rules to govern their own proceedings, and many may have rules dealing with the inclusion of items on an agenda or, for example, the ability to speak at meetings. In the absence of a rule or procedure, it is suggested that the resident contact either the clerk or a member of the public body in an attempt to have that body address the issue of concern.

How do residents obtain information from government agencies?

The primary tool for obtaining government information is the Freedom of Information Law, known by many as "FOIL." FOIL applies to all government agency records, whether they are created or maintained on paper or electronically. To request records, contact should be made with an agency's "records access officer." The records access officer has the duty to coordinate the agency's response to requests for records. Most often, the clerk is the records access officer in a local government agency. Note that relatively new provisions of FOIL indicate that when agencies have the ability to do so, they must accept requests made via email. Further, when they have the capacity to do so, they must disclose records by means of email as well.

Like the Open Meetings Law, FOIL is based on a presumption of access. All government agency records are accessible, except those records or portions of records that fall within a series of exceptions to rights of access listed in the law. In general, only when disclosure would "hurt" may an agency deny access. For example, when there would be an "unwarranted invasion of personal privacy", when a government agency could not carry out its functions effectively on behalf of the public, or perhaps when disclosure would cause injury to the competitive position of a commercial enterprise, agencies have the authority to withhold records or portions of records.

In short, both FOIL and the Open Meetings Law are based largely on common sense: in general, everything is open, except in those instances in which disclosure or public discussion would result in some sort of harm.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 10841
OML-AO- 4826

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October 2, 2009

E-Mail

TO: Mr. Ted Crane, Town of Danby

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. Crane:

I have received your communication addressed to Ms. Mercer of this office and apologize for typographical errors found in the response to your earlier correspondence.

You have sought clarification concerning two issues.

First, as I understand the Open Meetings Law, it is possible that meetings might be held during which no event required to be referenced in minutes occurs. In those instances, although it may be appropriate to prepare a record indicating that a meeting was held, in a technical sense, if none of the events described in §106 occurred, I do not believe that there would be an obligation to prepare minutes.

And second, when a town provides the equipment necessary to make records available in a certain form or format, but a clerk does not have the expertise to take advantage of that capability, you asked whether a town board may require the clerk, "if necessary, to accept its assistance for conversion to other formats." That issue, in my view, does not deal with the Freedom of Information Law as much as it involves the authority of a town board as the governing body of the municipality. Because I am not an expert on that subject, I cannot answer. However, I believe that the language of the Freedom of Information Law makes clear that when an agency, in consideration of its equipment, has the ability to make records available in the form or storage medium of an applicant's choice, the agency must do so. As stated in §87(5)(a): "an agency shall provide records on the medium requested by a person, if the agency can reasonably make such copy..." Similarly, in a provision concerning fees for reproducing records and determining the actual cost of doing so, §87(1)(c)(iii) states that an agency may include:

> "the actual cost to the agency of engaging an outside professional service to prepare a copy of a record, but only when an agency's technology equipment is inadequate to prepare a copy..."

Therefore, when an agency does have the "technology equipment" adequate to reproduce a record, I believe that it must develop the expertise to use the equipment in a manner consistent with the requirements imposed by the Freedom of Information Law.

I hope that I have been of assistance.

RJF:jm

OML-AO- 4827

From: Freeman, Robert (DOS)
Sent: Friday, October 02, 2009 8:25 AM
To: Tracy Frisch
Subject: RE: Open Meetings Law question

Hi Tracy - -

If the group consists of less than a quorum of the Board of Supervisors, the Open Meetings Law would not apply. However, if, for example, the Board designates a committee consisting of two or more of its members, i.e., a budget committee, that entity would itself constitute a public body, and a quorum would be a majority of its total membership. In that situation, with a committee of five, a quorum would be three, and a meeting subject to the Open Meetings Law would occur when three of the five gather, in their capacities as committee members, to discuss committee business.

I hope that this will serve to clarify and that you and yours are happy and well.

Bob

Robert J. Freeman
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OML-AO-4828

From: Jobin-Davis, Camille (DOS)
Sent: Monday, October 05, 2009 4:10 PM
To: Dennis
Subject: Open Meetings Law

Dennis:

In response to your question, I checked the effective date of the amendment to Section 104 of the Open Meetings Law regarding the posting of notice on a public body's website. On May 12, 2009, the Governor signed into law the bill (S.2754/A.3169) adding subsection (5) to require that notice of a meeting be posted on the public body's website (Chapter 26, Laws of 2009). It was effective immediately.

I hope that the information you received at the training was helpful and that you enjoyed your time there. If you have any further information or questions, please let me know.

Camille

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OML-AO- 4829

From: Jobin-Davis, Camille (DOS)
Sent: Monday, October 05, 2009 4:14 PM
To: David Robinson, Herkimer Telegram
Subject: Open Meetings Law questions

David,

As promised, the following are my responses to the two remaining questions. Please let me know if you have further questions.

#1: Are there situations in which committee and board chairpersons can negotiate matters without input from the entire board (i.e., meeting with other department heads or outside agency and business leaders)? When do chairs or mayors have the authority to negotiate without involving entire board at all times. Is there leeway – where?

There is nothing in the Open Meetings Law or related case law that I know of that addresses this issue. In my experience, a public body may delegate the authority to negotiate on its behalf to one of its members by resolution; however, I believe that the authority to bind the agency would always rest with the public body. It appears to be common practice for a chair of a committee or an executive of an agency to meet with department heads or business leaders to attempt to shape agreements, but again, the final agreement would always be subject to approval by the public body.

If a representative of a public body were to meet with department heads or business representatives, because such gatherings would not involve a quorum of the public body, they would not be considered "meetings" subject to the requirements of the Open Meetings Law. Should a public body designate a committee to negotiate on its behalf, and the committee were made up solely of members of the public body, as mentioned in response to the first question, and the committee were to meet with department heads or with business representatives, such gatherings would be "meetings" subject to the Open Meetings Law.

#2: What repercussions are there for governments, regardless of level, that do not follow open meeting laws?

There are two types of enforcement remedies available through an Article 78 proceeding pursuant to the Open Meetings Law. The first pertains to the court's authority to invalidate action taken at a meeting held in violation of the law, as follows:

"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." OML §107(1).

However, the same provision states further that:

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

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

The second is the court's discretionary authority to award costs and reasonable attorneys fees to the successful party.

In 2008, the Legislature amended §107(2) of the Open Meetings Law to include the following:

"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."

This new mandatory award of attorney's fees would apply only when secrecy is the issue. In other instances, those in which the matter involves compliance with other aspects of the Open Meetings Law, such as a failure to fully comply with notice requirements, the sufficiency of a motion for entry into executive session, or the preparation of minutes in a timely manner, the award of attorney's fees by a court would remain discretionary.

Camille

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OML-AO- 4830

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, October 14, 2009 9:33 AM
To: 'Cathy Geist'
Subject: RE: Open Government Law

Cathy,

In response to your questions, I've written a few remarks and provided a few links, in the text of your questions, below. In addition, if you would prefer that we issue an advisory opinion specific to your situation, please let me know. At this point it takes us approximately 2 months to issue an opinion.

After reading and responding to your questions, you may also be interested in advisory opinions regarding the enforcement of the Open Meetings Law, and the recent amendment to the law regarding the court's discretionary authority to award attorneys fees, as follows:
http://www.dos.state.ny.us/coog/otext/o2487.htm
http://www.dos.state.ny.us/coog/attorneyfees.html

"Would a meeting held by a Fire District serving a municipality have to follow these open meetings laws?"

Yes. The monthly meetings are held by the Board of Fire Commissioner's and are open to the public? Yes – the Open Meetings Law requires that "meetings" of public bodies are open for the public to be able to witness and observe the decision making process in action. "Meetings" are defined as anytime a quorum of the public body gathers together to discuss the business of the body.

"Secondly, am I correct in saying that every time you go into executive session at a meeting you not only have to make the motion to go into executive session, but the general reason why you are going into executive session is part of that? The meetings in question went into executive session five months by saying "I make a motion we go into executive session" the motion was seconded and then they invite the people they want(if applicable) in the session with them. They do come out of session to motion any decisions."

Yes. A motion is required for every executive session, and the motion must be explicit, relying on one of the grounds for executive session listed in OML section 105(1) (http://www.dos.state.ny.us/coog/openmeetlaw.html) so that the public can be assured that the body has a legitimate basis for holding a discussion in executive session. See the advisory opinion at the following link:
http://www.dos.state.ny.us/coog/otext/o3774.htm.

"Lastly, and my greatest concern, is that at an August meeting the committee went into executive session after the lawyer stated "still looking at ways to provide better EMS service to the residents of Orchard Park. The General Municipal law prohibits the billing of residents. They pay for the service through the taxes. The way to provide better service is to form a separate not for profit Orchard Park Fire District EMS. There would be a separate tax id and others could join without joining the fire companies". A motion was made and seconded to go to executive session.(no reason

stated according to meeting minutes). They held executive session for 14 minutes, came out and then made a motion to move ahead with the non for profit Emergency Medical Service Division of the Orchard Park Fire District. I strongly feel that the information provided/discussed in this executive session should have been done in front of the public, not in executive session. The decision made after that executive session changed the whole volunteer program to our OP Fire District(three fire companies) as it has been known for over 50yrs. Most of the meetings to develop this new EMS service were done behind closed doors, although the Board would disagree."

Issues of policy must be discussed during the public session, for there would be no basis in the law on which to rely in order to move into executive session. See advisory opinions at the following links: http://www.dos.state.ny.us/coog/otext/o3618.htm
http://www.dos.state.ny.us/coog/otext/o2748.htm
http://www.dos.state.ny.us/coog/otext/o3654.htm

I hope that these are helpful to you. Please let me know if you have further questions.

Camille

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OML-AO-4831

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, October 14, 2009 3:25 PM
To: 'Peggy Hatton'
Subject: RE: FOIL Chicken Slaughterhouse

Peggy,

Very sorry not to get back to you sooner. Right now it takes us about one month to issue an advisory opinion – we would do our best to get it to you as quickly as possible.

But there may be another issue here. In your email you say that proper notice was not mailed to the neighbors… If there is an issue regarding whether proper notice was mailed to neighbors for a public hearing, you may be able to take legal action based on the statute that requires the legal notice be sent, and any local law that requires that notice be sent for public hearings. Public hearings are different than public meetings, and are often required to be held in conjunction with applications before zoning and planning boards. If a statute (a state law) or a local law requires mailed notice of a public hearing, then it is my understanding that any decisions that require the public body to hold a public hearing before making a determination, could be invalidated by a court. For this issue you need to retain a private attorney, and you may be able to speak to one, without cost, if you limit your discussion to that question. You could also contact the planning or zoning board clerk to find out whether notice was sent out in conjunction with the particular hearings --- if necessary, you could make a FOIL request to inspect copies of notices sent to the neighbors.

I hope that this is helpful, and again, I'm sorry for the late reply.

Camille

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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4832

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October 16, 2009

Mr. Stephen M. Rosario
Executive Director
New York State Chemical Alliance
99 Washington Ave., Suite 701
Albany, NY 12210

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

Dear Mr. Rosario:

I have received your letter in which you asked whether the Open Meetings Law applies to meetings of the Interagency Committee on Sustainability and Green Procurement. In this regard, I offer the following brief comments.

Executive Order #4, issued in April of 2008, includes the appointment of 11 leaders of state agencies as ex-officio members of the Interagency Committee and indicates that "a majority of the members of the Committee shall constitute a quorum, and all actions and recommendations of the Committee shall require approval of a majority of the total members of the Committee." The Committee's responsibilities include, annually, the selection of "priority categories" of commodities, services or technology, the preparation of "green procurement lists" and "'green procurement specifications' for use by State agencies and public authorities in the procurement of commodities, services and technology." The Committee is further required to develop procurement specifications for new contracts, establish "specific goals to achieve reasonable reductions in the amount of solid waste generated and paper consumed annually by State agencies and authorities", and "shall also develop and implement strategies to assist State agencies and authorities to achieve such reduction goals."

Based on the provisions of the Executive Order, I believe that the Interagency Committee is required to comply with the Open Meetings Law.

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

Executive Order #4 indicates that the Committee was created by the Governor to conduct public business, collectively as a body and to perform a governmental function, for it must carry out and implement certain functions specified in the Order. Further, the Order states that the Committee must carry out its duties in accordance with a quorum requirement. In sum, I believe that each of the ingredients necessary to find that the Committee constitutes a "public body" is present.

I note that many entities created by executive order have solely advisory functions, and that in those instances, it has been advised that they do not constitute public bodies subject to the Open Meetings Law. In this instance, however, the Committee has the authority to making binding decisions and to create standards with which state agencies must comply. For that reason, I believe that it constitutes a public body 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: Jeffrey Pearlman

FOIL-AO-17873
OML-AO-4833

From: Jobin-Davis, Camille (DOS)
Sent: Friday, October 30, 2009 10:42 AM
To: Ms. C. O'Neill
Subject: Open Meetings Law - agricultural society

Dear Ms. O'Neill:

This is in response to your email question of September 17, 2009 "Are Agricultural Societies (i.e. county fair boards) subject to Open Meetings Law?".

Please be advised that after reviewing Not-for-Profit Corporation Law §1409, and Agriculture and Markets Law §290, it is the opinion of the Committee on Open Government that boards of agricultural societies are not public bodies because they do not perform a "government function" as is required by OML §101(2). Therefore, the OML would not apply to require open meetings of boards of directors of agricultural societies.

We recommend that you consult the bylaws of an organization that is not subject to the Open Meetings Law, in order to ascertain whether there is a self-imposed requirement to hold public meetings. And, we note that when an agricultural society files an annual report to the Commissioner of the Department of Agriculture and Markets, such report would be a "record" subject to a FOIL request made to the Department.

I hope that this is helpful to you. Should you have any further questions, please advise.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
99 Washington Ave, Suite 650
Albany NY 12231
Tel: 518-474-2518
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4834

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November 5, 2009

Mr. Robert Nied
Mr. Don Airey
Schoharie Valley Watch
P.O. Box 193
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, unless otherwise indicated.

Dear Messrs. Nied and Airey:

I have received your letter in which you referred to a special meeting of the Richmondville Town Board held on August 20 "in the parking lot of the Town Barn." You indicated that notice of meeting was not given to the news media or posted either in a conspicuous location or on the Town's website. During the meeting, the Board voted to approve an expenditure "of over $2,000", and in addition, an executive session was held. You have sought my views concerning the Board's actions.

In this regard, I offer the following comments.

First, I point out that the phrase "special meeting" is referenced in §62 of the Town Law. Subdivision (1) of that statute 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 members of the board of the time when and the place where the meeting is to be held." If two days written notice of the meeting was not given by the Supervisor to members of the Board, it would appear that there was a failure to comply with §62 of the Town Law.

Separate are notice requirements imposed by the Open Meetings Law. In brief, pursuant to §104 of that statute, when a meeting is scheduled less than a week in advance, notice of the time and place of the meeting must be given "to the extent practicable", at a reasonable time prior to the meeting, to the news media, by means of posting in one or more designated, conspicuous public locations, and on a public body's website, if such a website exists. It appears that none of those steps were taken.

Second, in an effort to learn more of the matter, I spoke with the Town Clerk, who indicated that she did not receive notice of the meeting, despite a requirement imposed by §30 of the Town Law that a town clerk must be present at town board meetings for the purpose of preparing minutes of a meeting. She added and the minutes of the meeting (prepared by a person other than the clerk) confirm that the meeting was held quickly in order to save money in purchasing a lawnmower. Based on an offer found on the internet, a mower that would meet the Town's specifications could be purchased from a Wisconsin firm for $1,250, but shipping would cost between $1,500 and $2,000. That being so, it was determined that two Town officials could travel to Wisconsin with the hope of spending between $400 and $500 for travel, and purchase the mower and transport it to the Town. The minutes state that "The board agreed that was an excellent deal that they couldn't afford not to proceed with."

From my perspective, even though the Board's plan might have reflected "a good deal", it appears that the meeting was held in contravention of Open Meetings Law, and perhaps §62 of the Town Law. I note that compliance with the Open Meetings Law may be accomplished, even when a meeting must be held quickly. To do so, a member of the news media can be notified of the time and place of a meeting by phone, email or fax; notice can easily be posted in the location or locations designated for posting; and when an agency maintains a website, notice can be readily posted online.

Lastly, I point out that, should a judicial proceeding be commenced concerning compliance with the Open Meetings Law, §107 authorizes a court, upon a showing of "good cause", to invalidate action taken in private that should have been taken in public. However, the same provision states that an "unintentional failure" to fully comply with the notice requirements imposed by §104 "shall not alone" be grounds for invalidating action.

In an effort to enhance knowledge of and compliance with applicable law, copies of this opinion will be sent to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Maggie Smith, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4835

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November 5, 2009

Mr. William Urianek
[redacted]

The staff of the Committee on 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. Urianek:

As you aware, I have received your correspondence. You have asked that I review draft rules of procedure pertaining to the Board of Trustees of the Village of Mineola. Based on a review of that document, I offer the following comments.

Under "Introduction" is a statement that the Board's deliberations will occur in a public forum, "unless deliberations shall be required to be confidential pursuant to the provisions of the Open Meetings Law..." In this regard, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of a public body, such as a village board of trustees, must be conducted in public, unless there is a basis for entry into executive session. Pursuant to §105(1) of the Open Meetings Law, to conduct an executive session, a procedure must be accomplished in public as follows: a motion to enter into executive session must be introduced in public; the motion must indicate the subject or subjects sought to be discussed; and the motion must be carried by a majority of the total membership of the body. If a motion to enter into executive session is not approved, a public body may discuss an issue in public. Similarly, a public body may choose discuss an issue in public, even if there may be a basis for discussion in executive session. In short, the Open Meetings Law does not "require" confidentiality; rather, it permits public bodies to conduct private discussions in accordance with the provisions of §105.

With respect to "Special Meetings", as well as other meetings, §104 of the Open Meetings Law requires that notice of the time and place of meetings be given to the news media, that it be posted in one or more designated, conspicuous public locations, and when a public body has the ability to do so, that notice be posted on its website.

On the subject of "Voting", I point out the Freedom of Information Law has since 1974 required that in any instance in which a vote is taken, a record of votes must be maintained that

indicates the manner in which each member cast his or her vote [see §87(3)(a)]. Further, the effect of an abstention or an absence is essentially equivalent to a negative vote, for action may be taken by a public body only after an affirmative vote of a majority of the body's total membership. In the case of a board consisting of five members, three affirmative votes are needed to approve a motion or take action (see General Construction Law, §41).

With regard to "Minutes", while most public bodies approve minutes of their meetings, there is no provision of law requiring that they must be approved. However, §106 of the Open Meetings Law requires that minutes be prepared and made available within two weeks. Because that is so, in instances in which it is the practice or policy of a public body to approve its minutes, but in which it has not done so within two weeks of a meeting, it has been recommended that, to comply with law, minutes must be prepared and made available within that time, but that they may be marked "draft" or "unapproved", for example. By so doing, the public can generally learn of what occurred at a meeting, but the recipients are effectively notified that the minutes are subject to change.

Lastly, in "Guidelines for Public Comment", reference is made to a "sign-in form" in which those who wish to speak must identify themselves by name and address. Although I know of no judicial decision dealing with a requirement of that nature, I do not believe that a person can be required to identify himself or herself as a condition precedent to speaking at a meeting in the same manner as those who choose to identify themselves.

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

The Open Meetings Law does not distinguish among those who have the right to attend meetings of public bodies; any member of the public, regardless of status, interest or residence, enjoys the right to do so. Because that is so, I do not believe that a public body, by means of its rules of procedure, may discriminate or eliminate a privilege on the basis of his or her identity or location of residence. Most importantly, situations have arisen in which people, such as those who may be victims of batterers or perhaps the parents of children, may have good reason to avoid identifying themselves. Because that is so, I do not believe that the Board can restrict the ability to speak at its meetings to those who identify themselves by name and address.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

OML-AO-4836

From: Freeman, Robert (DOS)
Sent: Thursday, November 05, 2009 1:16 PM
To: Ms. P. Marini, Town of Walworth
Subject: town board minutes

Dear Ms. Marini:

I have received your letter in which you sought "information on whether there is a requirement for a town clerk to put our Town Board minutes in the 'official minute book' that is maintained in her office."

In short, having reviewed §30 of the Town Law, which pertains to the responsibilities and duties of town clerks, there is no reference to an "official minute book", and I know of no requirement that minutes be placed in an official minute book or other designated compilation. I note, however, that the Open Meetings Law, §106, requires that minutes be prepared and made available to the public on request within two weeks of the meetings to which they relate. Although there is no law requiring that minutes be approved, most boards do so as a matter of practice or policy. In situations in which it is the practice or policy to approve minutes, but a board has not met to do so within two weeks, it has been recommended that minutes must be prepared and disclosed as required by §106, and that they be marked "draft" or "preliminary", for example. With a notation of that nature, the public can learn generally of the actions of the board, but the recipients are effectively given notice indicating that the minutes are subject to modification.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
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Albany, NY 12231
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OML-AO-4837

From: Freeman, Robert (DOS)
Sent: Thursday, November 12, 2009 8:55 AM
To: Elizabeth Passer
Subject: RE: adjournment of meeting

Good morning - -

First, although a public body may answer questions during a meeting, it is not required by law to do so. Second, in my opinion, adjournment signifies the end of a meeting. Any reconvening of a majority of a public body would constitute a new meeting that must be preceded by notice given in accordance with §104 of the Open Meetings Law and conducted open to the public.

Please let me know whether I have misinterpreted your remarks.

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

OML-AO-4838

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November 19, 2009

Hon. James M. Sullivan
Mayor
Village of Victory
P.O. Box 305
Victory Mills, NY 12884

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

Dear Mayor Sullivan:

I have received your letter in which you sought an advisory opinion concerning "private citizens videotaping and tape recording municipal meetings, specifically, Village of Victory meetings." Attached to it is a letter from a resident who asked that the meetings "no longer be taped so that [she] and others may speak within [their] comfort zone", and indicated that she feels that recording meetings is "obtrusive and offensive."

While I respect the feelings of the person objecting the use of recording devices at Village meetings, judicial decisions clearly indicate that anyone has the right to record open meetings, so long as the use of recording equipment is neither physically obtrusive nor disruptive.

In this regard, I offer the following comments.

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

Notwithstanding Davidson, however, the Committee advised that the use of tape recorders should not be prohibited in situations in which the devices are unobtrusive, for the presence of such

devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

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

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

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

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

> the judgement annulling the resolution of the respondent board of education" (id. at 925).

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

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

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

More recently, the Appellate Division cited the Mitchell decision in a case involving the use of a video recording device, which "rejected the very arguments advanced by the Board herein, that the recording of meetings inhibits the democratic process" [Csorny v. Shoreham-Wading River Central School District, 305 AD2d 83, 89 (2003)]. The court found that:

> "Like the *Mitchell* Court, we are not persuaded that the videotape recording of Board meetings will truly inhibit the democratic process. While the Board adduced affidavits from three parents who expressed their fears being videotaped at meetings, the Board may not hold the law hostage to the personal fears of a few individuals. The petitioners' camera, mounted on a tripod at the rear of the room is not obtrusive. It is as innocuous as an audiotape recorder to which these same affiants have voice no objection" (id.).

I note, too, that the Court in Csorny referred to advisory opinions prepared by this office and found that although "this Court is not bound to the Committee's opinion.....in this case we recognize the merit of the Committee's opinion and this we are inclined to give it the credit it deserves" (id., 90).

Based on the foregoing, I continue to believe that any person may use an audio or video recorder during an open meeting, so long as such device is not physically obtrusive or disruptive. According to judicial decisions, a person's feelings of discomfort, intimidation, fear or that a recording will constitute an invasion of privacy are irrelevant.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4839

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November 24, 2009

Ms. Bambi Phillips
[redacted]

The staff of the Committee on 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. Philips:

As you aware, I have received your correspondence, and I hope that you will accept my apologies for the delay in response.

According to your letter, on September 3, the Hounsfield Town Supervisor called a special meeting concerning a water tower project to be held on September 4 at 9 a.m. You indicated that you know of two members of the Town Board who received notice of the meeting during the evening of September 3; it is unclear whether other members received notice of the meeting. During the meeting of September 4, the Board set a date for a public hearing to be held on September 17. Upon questioning, the Supervisor indicated that he prepared minutes of the meeting of September 4. As of October 18, however, minutes of that meeting had not been disclosed.

You have raised a variety of questions regarding the foregoing, and in this regard, I offer the following comments.

First, a "meeting", as that term is used in the Open Meetings Law, involves a gathering of a quorum of a public body, such as a town board, for the purpose of conducting public business. To convene quorum, section 41 of the General Construction Law has since 1909 required that reasonable notice of such a gathering must be given to all of the members of the body. If not all of the members of the Board received reasonable notice concerning the meeting of September 4, the gathering in question would not have included a quorum, and the Board, in my view, could not have validly taken action. In that circumstance, upon a legal challenge, I believe that court would determine that any action purportedly taken would be null and void.

Second, aside from the foregoing, two other statutes relate to notice of a meeting. Section

62 of the Town Law deals with notice of special meetings to members of a town board and states in relevant part that "The supervisor of any town may, and upon written request of two members of the board shall within ten days, call a special meeting of the town board by giving at least two days notice in writing to the members of the board of the time when and the place where the meeting is to be held."

Section 104 of the Open Meetings Law deals with notice of meetings that must be given to the news media and to the public by means of posting. Specifically, §104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice.
>
> 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.
>
> 5. When a public body has the ability to do so, notice of the time and place of a meeting given in accordance with subdivision one or two of this section, shall also be conspicuously posted on the public body's internet website."

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, and, when possible, on a website, 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, by posting notice in one or more designated locations, and posting notice online when an entity has that capability.

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

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

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

From my perspective, unless there is a true emergency or need that would justify convening a meeting within a day, members of the public would be effectively precluded from asserting their statutory right to attend a meeting of a public body.

Third, in any instance in which action is taken by a public body, minutes must be prepared in accordance with section 106 of the Open Meetings Law. Further, that provision in subdivision (3) specifies that minutes that minutes must be prepared and made available to the public within two weeks of the meetings to which they pertain. The failure to do so, as suggested in your letter, would be inconsistent with the requirements of the Open Meetings Law.

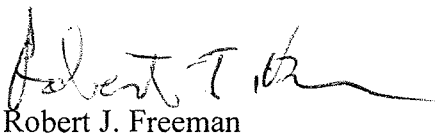
Next, section 30(1) of the Town Law specifies that the town clerk is required to prepare minutes of town board meetings. Subdivision (9) of that statute provides that, in the absence of the town clerk, a deputy town clerk may prepare minutes, and in the absence of that person, an individual other than a member of the town board may do so. Based on that provision, I do not believe that the Supervisor would have been authorized to prepare minutes of the meeting of September 4.

Lastly, assuming that all of the members of the Board received notice of the meeting of September 4, and with respect to the validity of action taken at that meeting, section 107 of the Open Meetings Law provides a court with discretionary authority to nullify action taken in violation of that law. However, the same provision states that an "unintentional" failure to fully comply with the notice requirements imposed by that statute shall not alone constitute grounds for invalidating action.

In an effort to enhance compliance with and knowledge of applicable law, a copy of this opinion will be forwarded to the Town Board.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

OML-AO-4840

From: Freeman, Robert (DOS)
Sent: Tuesday, November 24, 2009 10:24 AM
To: Mr. Pardy

The acknowledgment of the receipt of your request appears to be consistent with the Freedom of Information Law. However, I note that there is no requirement in law concerning the approval of minutes and that the Open Meetings Law requires that minutes be prepared and made available with two weeks. If it is the practice of a board to approve its minutes and that has not yet been accomplished, minutes may be marked as "draft" or "preliminary", for example, and disclosed on request. When that is done, the public can learn generally what transpired, but notice is effectively given that the minutes are subject to change.

I hope that I have been of assistance.

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

FOIL-AO-17912
OML-AO-4841

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December 1, 2009

E-Mail

TO: Ms. Pegeen Mulligan Moore, Town of Kinderhook

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 Ms. Moore:

We are in receipt of your request for an advisory opinion regarding application of the Freedom of Information Law to records requested "for political reasons". Specifically, you related that the Town Board discussed a voucher submitted by an employee in executive session, and has now received a request for a copy of the voucher. In this regard, we offer the following comments.

First, 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 (k). In our opinion, only one of the grounds for denial is pertinent to an analysis of rights of access to vouchers. While that provision might permit that certain aspects of the record in question may be withheld, we believe that the remainder must be disclosed, regardless of the purpose of the request.

Specifically, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and subject to a variety of interpretations, the courts have provided direction through their review of challenges to agencies' denials of access. In brief, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, it has been held that, as a general rule, records that are relevant to the performance of their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva

Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty, NYLJ, October 30, 1980; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

In the context of the record at issue, it is likely that a voucher submitted by a town employee is relevant to the performance of the employee's duties. Consequently, with the exception of personal details, it would be required to be disclosed. Examples of the kinds of personal details that could be deleted prior to disclosure of the remainder of the record would be such items as home address, social security number and personal credit card number.

It is noted, too, that the purpose for which a request is made or the intended uses of a record are irrelevant. It was held decades ago that when a record is accessible under the Freedom of Information Law, it must be made equally available to any person, without regard to status or interest [Burke v. Yudeslon, 51 AD2d 673 (1976)].

Second, in phrasing your questions, you indicated that the Town Board held an executive session to discuss personnel matters. In an effort to clarify the law with respect to this issue, we offer the following additional comments.

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

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

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

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

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

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

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

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

If a discussion held in executive session does not involve consideration of how well or poorly a particular public employee is carrying out his or her duties, we do not believe that there would be a basis for holding the discussion in an executive session. Similarly, a discussion concerning the Town's policy regarding reimbursement, would be required to be held in public.

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

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.

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

CSJ:jm

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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 2, 2009

Hon. Barbara Smith
Council Member 4th Ward
City of Albany Common Council
235 Livingston Avenue
Albany, NY 12210

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

Dear Council Member Smith:

I have received your letter in which you wrote that "[q]uestions have arisen recently about whether Common Council committees are permitted to go into executive session during deliberations concerning appointments to city boards, commissions and task forces." You have sought clarification of the matter.

In this regard, first, the Open Meetings Law is applicable to public bodies, and §102(2) of that statute defines the phrase "public body" to 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 on the foregoing, a governing body, such as the Common Council, clearly is a public body, and in consideration of the last clause in the definition, any committee consisting solely of the members of the Council, in my view, also constitute public bodies required to comply with the Open Meetings Law.

Second, §105(1) of the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before an executive session may be held. That provision states in relevant part that:

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

The ensuing provisions, paragraphs (a) through (h), specify and limit the grounds for entry into executive session.

Pertinent to your inquiry is paragraph (f), which authorizes a public body to conduct an executive session to discuss:

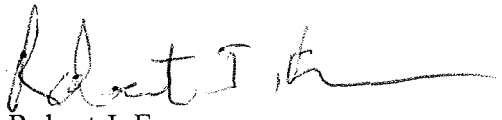
> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

Insofar as the focus of deliberations by the Council or a committee of the Council focus on the appointment of "a particular person" or persons, I believe that an executive session could validly be held.

Lastly, the Open Meetings Law is permissive; although it *may* conduct executive sessions in circumstances authorized in §105(1), there is no obligation to do so. If, for example, a motion to enter into executive session to discuss "a matter leading to the appointment of a particular person" is not carried by a majority vote of the total membership of a public body, that entity may choose to discuss the matter in public.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

OML-AO-4843

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, December 03, 2009 2:05 PM
To: Cissy Hernandez, Town of New Lebanon
Subject: Open Meetings Law - Minutes

Cissy,

As promised, I learned that minutes of the zoning board of appeals are required not only pursuant to the Open Meetings Law, but pursuant to section 267-a of the Town Law, which sets forth in relative part as follows:

§ 267-a. Board of appeals procedure. 1. Meetings, minutes, records. Meetings of such board of appeals shall be open to the public to the extent provided in article seven of the public officers law. Such board of appeals shall keep minutes of its proceedings, showing the vote of each member upon every question, or if absent or failing to vote, indicating such fact, and shall also keep records of its examinations and other official actions.

As indicated, it contains very little guidance with respect to your questions, however, it remains my opinion that your authority/ability to tape record public meetings is secure.

Please let me know if you have further questions.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
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December 10, 2009

E-Mail

TO: Mr. Edmund Wiatr

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. Wiatr:

We are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to a gathering of the members of the Town Board of New Hartford at which a financial arrangement was made with respect to the budget of the New Hartford Town Library. You indicated that there was a meeting of the entire Board sometime in 2006, as reported at a recent meeting, at which time the Board "worked out a deal that the town would provide enough money in the town budget each year to cover the Library operating expenses". It is your understanding that this gathering was not in keeping with the provisions of the Open Meetings Law. In this regard, we offer the following comments.

The Open Meetings Law is clearly intended to open the deliberative process to the public and provide the right to know how public bodies reach their decisions. As stated in §100 of the Law, its Legislative Declaration:

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

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

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

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

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

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

Further, it was held that "a planned informal conference" or a "briefing session" held by a quorum of a public body would constitute a "meeting" subject to the requirements of the Open Meetings Law [see Goodson Todman v. Kingston, 153 Ad 2d 103, 105 (1990)].

Based upon the terms of the Open Meetings Law and its judicial interpretation, if a majority of Board members gathers to conduct public business, any such gathering would, in our opinion, constitute a "meeting" subject to the Open Meetings Law. On the other hand, when less than a quorum is present, the Open Meetings Law would not apply. Further, when there is an intent to conduct a meeting, the gathering must be preceded by notice given pursuant to §104 of the Open

Meetings Law, convened open to the public and conducted in public as required by the Open Meetings Law.

Section 104 of the Open Meetings Law pertains to notice of meetings and requires that every meeting be preceded by notice given to the news media and posted. Although it was recently updated in 2006, §104 required as follows:

> "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.

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

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

However, the same provision states further that:

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

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

Without more information, it is difficult to ascertain whether the Board met in private or whether the meeting was properly noticed and accessible to the public.

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

CSJ:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4845

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December 21, 2009

E-Mail

TO: Mr. Sante E. Moesle, Advisory Audit Committee, Onteora Central School District

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. Moesle:

I have received your letter in which you sought a response concerning "where does it state minutes are to be approved or accepted, since we meet once a month, law 106 item 3 states when minutes need to be available to the public, the committee could not possibly accept or approve the minutes without falling outside of the law..."

In short, there is no provision of law of which I am aware that requires that minutes of meetings of public bodies be approved or accepted.

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."

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

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

RJF:jm

cc: Jay O'Connor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4846

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December 22, 2009

Ms. Cynthia Guzzo
CSEA Local 852
127-5 Smithtown Boulevard
Nesconset, NY 11767

The staff of the Committee 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. Guzzo:

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

You wrote that you are employed by the Smithtown Special Library District and that you sought to attend a meeting of the Library's Buildings & Grounds Committee. The Committee is "comprised of 3 Library Board members and the Library Director", and you were informed that it is not subject to the Open Meetings Law.

Based on a review of the Library's by-laws, the language of the Open Meetings Law, and its judicial interpretation, I believe that the Committee is required to comply with that statute and that the public has the right to attend its meetings. In this regard, I offer the following comments.

First, having reviewed the Library's by-laws, the Library Director is not a member of the Committee. Article V of the by-laws entitled "Committees" states in §1.h. that "The Library Director or his/her designee shall attend all committee meetings and may take part in deliberations but shall have no vote." Section 2.b.i. of Article 5 entitled "Standing Committees" provides as follows: "Composition: Three (3) Board members." Therefore, the committee that is the subject of your inquiry consists of three Board members; the Library Director, although authorized to join in committees' deliberations, is not a member of committees.

Second, when a committee consists solely of members of a public body, such as the Board of Trustees of a library district, 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 Library District, would fall within the requirements of the Open Meetings Law when such an entity discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. A quorum of a public body is a majority of its total membership (see General Construction Law, §41). Therefore, in a body consisting of seven, a quorum would be four. If that body designates a committee of three, a quorum of the committee would be two.

A committee subject to the Open Meetings Law must abide by the same requirements concerning openness, notice, and minutes, as well as the same ability to enter into executive session when appropriate to do so, as the governing body, the Board of Trustees. As you may be aware, meetings of public bodies must be conducted open to the public, except to the extent that there is a

basis for entry into executive session. Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the grounds for entry into executive session.

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-17944
OML-AO-4847

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December 22, 2009

Mr. Kevin M. Young
Young, Sommer, Ward, Ritzenberg
Baker & Moore, LLC
Executive Woods
Five Palisades Drive
Albany, NY 12205

The staff of the Committee on 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. Young:

As you are aware I have received the voluminous materials relating to your request for an advisory opinion sought on behalf of the Delaware County Board of Supervisors concerning the status of the Watershed Agricultural Council for the New York City Watershed, Inc. ("WAC") under the Freedom of Information and Open Meetings Laws.

By way of background, WAC is a not-for-profit corporation created in 1993, and its certificate of incorporation states that its "general purpose...is to control and prevent contamination of the watershed of New York City's drinking water supplies from point and non-point sources of agricultural pollution by promoting best management practices while maintaining the economic vitality of agriculture." It is my understanding that the catalyst for the creation of WAC was a "filtration avoidance determination" ("FAD") issued by the United States Environmental Protection Agency (EPA), enabling New York City ("the City") to avoid the installation of costly filtration systems on its water supply. Among the conditions imposed by the EPA was that the City regulate agriculture in the watershed as a means of controlling pollution. WAC was created to meet that condition through the implementation of "whole farm plans" and the purchase of conservation easements in the watershed. WAC cannot regulate, but the EPA required the City to develop, implement and fund a program to regulate agriculture, and WAC was retained by the City to administer the program and accomplish the City's regulatory functions. According to the materials that you provided, approximately 87% of WAC's funding is from the City Department of Environmental Protection ("DEP"), and in order to receive funding from the City, farmers must sign contracts with WAC subjecting their farms to WAC's control.

In short, WAC exists solely for the purpose of enabling the City to meet federal requirements and serves as its agent to fulfill the City's obligation to comply with the FAD. Further, review of the materials indicates that the functions of WAC are largely under the control of DEP.

For example, the agreement between DEP and WAC states that the Commissioner of DEP or his or her designee is a member of the WAC with voting powers *and an ex-officio membership on all WAC committees.*" Section 1.06 states that:

> "*The Program shall at all times be subject to the review and reasonable direction and approval of the Commissioner. The Commissioner shall have the right to determine the amount, quality, acceptability and fitness of the work being performed by WAC under this Agreement, and her/his approval shall be a condition precedent to the right of WAC to receive any money under this Agreement.*"

It would appear that "any money" includes moneys or funding from any source. Section 5.1 states that:

> "*WAC agrees that a copy of any and all written materials and documents, written or otherwise, that are prepared pursuant to this Agreement shall be forwarded to the Commissioner at her/his request. DEP shall have the right to use all written materials, documents and information that are gathered or prepared pursuant to this Agreement for any purpose deemed appropriate by DEP.*"

Section 5.03 states that "*All vouchers and invoices for payment to be made hereunder, and the books, records and accounts upon which said vouchers or invoices are based are subject to audit by DEP and by the Comptroller of the City of New York....*" Section 7.01 states that WAC may hire consultants, but only "*subject to the Commissioner's written approval...*" Section 7.04 states that "*Prior to the purchase of goods, materials or equipment directly by WAC in an amount in excess of $5000, WAC shall obtain the Commissioner's or her/his designee's written consent.*" Section 7.05 precludes WAC from entering into any subcontracts for the performance of its obligations "*without the prior written approval of DEP.*" Section 1.02 of Exhibit C appended to the agreement concerning "Personnel and Operating Expenses" specifies that the expenditure of program funds for the annual salary of the WAC Chair is "*subject to the approval of the Commissioner, or his/her designee.*" Similarly, the New York City Watershed Memorandum of Agreement, which includes a watershed land acquisition program, states in part that "The WAC, *in consultation with NYCDEP*, will be responsible for property owner contact and outreach for the Watershed Agricultural Program and the identification and implementation of management practices designed to enhance pollution protection."

Significantly, the "Whole Farms Contract" between DEP and WAC prepared in 1998 and later extended states in the fourth "Whereas" clause that:

> "WAC...is a not-for profit corporation *established to carry out the Watershed Agricultural Program, and related programs designed to*

> *protect the New York City water supply while maintaining the economic viability of agricultural and forest enterprises in the New York City watershed region..."*

From my perspective, WAC's records are subject to the Freedom of Information Law either in their entirety, or at the very least, in great measure. In this regard, I offer the following comments.

First, as you may be aware, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

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

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

In the first decision in which it was held that a not-for-profit corporation may indeed be an "agency" required to comply with the Freedom of Information Law, Westchester-Rockland Newspapers v. Kimball [50 NY2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "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].

It is noted that in Westchester-Rockland, the Court rejected the contention that a distinction must be made between a volunteer fire company, also a not-for-profit corporation, "on which a local government relies for the performance of an essential public service...and an organic arm of government" (id., 579). In my view, ensuring a reliable supply of drinkable water to those in the City is also "an essential public service" reflective of the performance of a governmental function.

Another decision rendered by the Court of Appeals involved an entity that, in my view, is analogous in some respects to WAC. Buffalo News v. Buffalo Enterprise Development Corporation [84 NY2d 488 (1994)] involved the status of a not-for-profit corporation, a local development corporation created under §1411 of the Not-for-Profit Corporation Law. In its finding that the entity ("the BEDC") "channels funds into the community and enjoys many attributes of public entities" (id., 492) and holding that the BEDC is an "agency", the Court highlighted and italicized the portion of the definition of that term that refers to any "*governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof.*" In the discussion of the matter, the decision states that:

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

> the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments" (id., 492-493).

In a third decision involving a not-for-profit corporation, the "CDRC", having an "intimate" relationship with an agency, it was found that:

> "...the CRDC was admittedly formed for the purpose of financing the cost of and arranging for the construction and management of the Roseland Waterpark project. The bonds for the project were issued on behalf of the City and the City has pledged $395,000 to finance capital improvements associated with the park...
>
> "Most importantly, the City has a potential interest in the property in that it maintains an option to purchase the property at any time while the bonds are outstanding and will ultimately take a fee title to the property financed by the bonds, including any additions thereto, upon payment of the bonds in full. Further, under the Certificate of Incorporation, title to any real or personal property of the corporation will pass to the City without consideration upon dissolution of the corporation. As in Matter of Buffalo News, supra, the CRDC's intimate relationship with the City and the fact that the CRDC is performing its function in place of the City necessitates a finding that it constitutes an agency of the City of Canandaigua within the meaning of the Public Officers Law and therefore is subject to the requirements of the Freedom of Information Law..." (Canandaigua Messenger, Inc. V. Wharmby, Supreme Court, Ontario County, May 11, 2001).

The Appellate Division unanimously affirmed the findings of the Supreme Court regarding the foregoing [aff'd 739 NYS 2d 509, 292 AD2d 835 (2002)].

Although there are distinctions in the functions of WAC and BEDC and the other entities referenced above that were found to be "agencies", there are, based on the direction offered by the courts, and particularly the Court of Appeals, a variety of similarities, which, in my view, would lead a court to conclude that WAC is an "agency" subject to the Freedom of Information Law. Those similarities are detailed in the materials that you provided, many of which describe the relationship between the City and WAC, and the examples offered earlier herein.

In short, as I understand the matter, WAC would not exist but for its relationship with the City, and based on the terms of its agreements with the City and the functions that it carries out, again, I believe that it constitutes an "agency" obliged to give effect to the Freedom of Information Law.

Second, even if WAC is not an agency, many, if not all, of its records fall within the scope of the Freedom of Information Law. That statute defines the term "record"

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

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

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

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

Insofar as records maintained by WAC are "kept, held, filed, produced or reproduced...*for* an agency", such as the DEP, I believe that they would constitute "agency records" that fall within the scope of the Freedom of Information Law.

In consideration of the nature of the relationship between WAC and DEP, it appears that all of its records, perhaps with few exceptions, are maintained for DEP and, therefore, are subject to rights of access conferred by the Freedom of Information Law.

Lastly, with regard to the status of WAC's governing body, the "council of directors", under the Open Meetings Law, that statute is applicable to meetings of "public bodies", and §102(2) defines the phrase "public body" to mean:

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

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

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

In Smith v. City University of New York, the Court of Appeals held that:

> "in determining whether the entity is a public body, various criteria or benchmarks are material. They include the authority under which the entity is created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies" [92 NYS2d 707, 714 (1998)].

WAC's by-laws indicate that the council of directors consists of from 15 to 19 members. As either a not-for-profit corporation or a governmental entity, I believe that may carry out its functions and take action only by means of a quorum. For reasons discussed earlier, WAC in my opinion conducts public business and carries out a governmental function for a public corporation, the City of New York. Assuming the accuracy of the foregoing, each of the ingredients necessary to conclude that the WAC council of directors constitutes a "public body" subject to the Open Meetings Law can be met.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. James Eisel, Sr., Chairman,
Delaware County Board of Supervisors
WAC Council of Directors
William Harding, Executive Director, Watershed Partnership Protection Council
Natasha Philip