STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-17957
OML-AO-4848

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January 11, 2010

Mr. Edward F. Curran
President
Retired Police Association of the
State of New York, Inc.
1 Old Country Road, Suite 265
Carle Place, NY 11514-1884

The staff of the Committee on 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. Curran:

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

You referred to the Governor's Task Force on Public Employee Retirement Health Care Benefits ("the Task Force"), which was created through the issuance of Executive Order #15, and questioned whether the public may be barred from attending its meetings or gaining access to minutes of those meetings or other, related records.

Having reviewed the Executive Order, and based on statutory guidance and judicial precedent, I do not believe that meetings of the Task Force must be open to the public. However, its records are, in my view, subject to rights of access conferred by the Freedom of Information Law. In this regard, I offer the following comments.

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

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

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

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

It is noted that the last decision cited above dealt with an advisory commission created by executive order. As I understand Executive Order #15, the functions of the Task Force are advisory in nature. If that is so, based on the decisions cited above, it does not constitute a public body, it is not subject to the Open Meetings Law and, therefore, the public does not have the right to attend its meetings.

Second, the scope of the Freedom of Information Law is more expansive than the Open Meetings Law, for it pertains to all government agency records. It is clear in my view, that the Executive Chamber is an "agency" as that term is defined in §86(3) of the Freedom of Information Law. More importantly, that statute defines the term "record" in §86(4) to include:

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

The written materials produced or acquired by the Task Force are, in my opinion, "records", irrespective of whether they are maintained on paper or electronically, for they are "kept", "held" and "produced" for an agency, the Executive Chamber.

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 (k) of the Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: David Weinstein, First Assistant Counsel to the Governor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4818/9

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January 13, 2010

Ms. Cathleen Geist
[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. Geist:

We are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to the Orchard Park Board of Fire Commissioners. While we acknowledge your appreciation for the positive effect that the Board's actions have had on service your area, we agree with your contention that most if not all of the decisions made concerning the creation of the Emergency Medical Service Division of the Orchard Park Fire District should have been made in public. In this regard, we offer the following comments.

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

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

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

With regard to the proceedings that you described, including the relatively small amount of time spent discussing issues regarding the creation and start up of the separate EMS District, and the relatively few decisions that were made at meetings held open to the public, we emphasize that every

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

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

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

In keeping with the requirement that executive session discussions be limited to the topics set forth in §105(1), it has been held judicially that:

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

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

Accordingly, in our opinion, discussions regarding whether to create a separate district, and whether to make a particular purchase, for example, should be held in public. Discussions regarding whom to hire, on the other hand, "matters leading to the...employment...of a particular person", may

be held in executive session (§105[1][f]), along with discussions regarding the purchase of real property, "but only when a public discussion would substantially affect the value thereof" (§105[1][h]).

With respect to documentation of the Board's actions, §106(1) of the Open Meetings Law pertains to minutes of open meetings and requires that :

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

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

Further, subdivision (2) of §107 was recently amended (Chapter 397, Laws of 2008) to include and now states that:

> "In any proceeding brought pursuant to this section, costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party. If a court determines that a vote was taken in material violation of this article, or that substantial deliberations relating thereto occurred in private prior to such vote, the court shall awards costs and reasonable attorney's fees to the successful petitioner, unless there was a reasonable basis for a public body to believe that a closed session could properly have been held."

The intent of the amendment is not to encourage litigation. On the contrary, it is designed to enhance compliance and to encourage members of public bodies and those who serve them to be more knowledgeable regarding their duty to abide by the Open Meetings Law. Accordingly, a copy of this opinion will be sent to the members of the Board.

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Board of Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4850

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January 14, 2010

Ms. Evelyn Konrad
Attorney at Law
200 East 84th Street
New York, NY 10028

The staff of the Committee on 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. Konrad:

We are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to gatherings of the Zoning Board of Appeals of the Village of Southampton. To the extent you raise issues regarding conflicts of interest, the necessity for "alternates" when conflicts arise, and the granting of variances that clash with a subdivision's common plan and scheme, we recommend that you consult with others. In an effort to provide guidance with respect to the issues that you raised that are governed by the Open Meetings Law, we offer the following comments.

First, you requested that comments you made at a public meeting be included in the minutes of that meeting. In this regard, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law provides that:

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

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

Based on the foregoing, minutes need not consist of a verbatim account of everything that was said; similarly, there is no requirement that minutes refer to every topic discussed or identify those who may have spoken. 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.

In similar situations, such as those in which members of public bodies have met with resistance when attempting to include their comments in the minutes, it has been advised that a motion be made to include their statements in the minutes. If such a motion is approved, the inclusion of a statement is guaranteed. We recognize that you are not a member of the Board. Nevertheless, we believe that you may ask any member to introduce a similar motion in an effort to ensure that your statement becomes part of the minutes.

Next, you indicated that decisions are made during closed "work sessions". In this regard, based on the judicial interpretation of the Open Meetings Law, there is no legal distinction between a "meeting" and "work session."

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

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

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

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

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

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

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

Finally, while a public body may enter into executive session for any one of the enumerated purposes in §105(1) of the Open Meetings Law, if action is taken during an executive session, it must be memorialized in the minutes, as per §106 cited earlier.

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Richard DePetris

STATE OF NEW YORK
DEPARTMENT OF STATE
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OML-AO-4851

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January 19, 2010

Ms. Maria R. Peterson
[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. Peterson:

I have received your letter in which you wrote that a vacancy recently occurred on the Board of Education of the Highland Central School District. The Board President read aloud two letters from candidates during an open meeting, but then, according to your letter, "announced that the Board would be convening into an Executive Session to discuss the candidates and would come back out into public session to vote on the appointment."

You have requested an advisory opinion concerning the propriety of the executive session. In this regard, I offer the following comments.

As you are aware, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted in public except to the extent that an executive session may appropriately be held. Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session.

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

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

Under the language quoted above, it would appear that a discussion focusing on the individual candidates could validly be considered in an executive session, for it would involve a matter leading

to the appointment of a particular person. Nevertheless, in the only decision of which I am aware that dealt directly with the propriety of holding an executive to discuss filling a vacancy in an elective office, the court found that there was no basis for entry into executive session. In determining that an executive session could not properly have been held, the court stated that:

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Julie Shaw

FOIL-AO-4851-A

From: Freeman, Robert (DOS)
Sent: Wednesday, January 20, 2010 8:34 AM
To: John Watson, NYS Crime Victims Board
Cc: Tina M. Stanford; Ginny Miller
Subject: RE: For your consideration

Good morning - -

First, the Board in my view clearly constitutes a "public body" subject to the Open Meetings Law. Second, it is assumed that §633 of the Executive Law requiring that records and proceedings of the Board regarding claims be confidential would remain in effect. If that is so, the proceedings of the Board concerning particular claims would be exempt from the coverage of the Open Meetings Law. Section 108 of that statute pertains to "exemptions", and if an exemption applies, the Open Meetings Law does not; it is as though the Open Meetings Law does not exist. Subdivision (3) of §108 pertains to matters made confidential by federal or state law. Based on §633, the Board's proceedings regarding particular claims would be confidential by law and, therefore, exempt from the requirements of the Open Meetings Law.

If the only business of the Board involves proceedings regarding claims, there would be no requirement to give notice; again, the Open Meetings Law simply would not apply. If, however, other business would be conducted, i.e., discussions of policy, procedure, development of a report regarding its functions, etc., those items would not involve confidential matters, and the requirements of the Open Meetings Law would be applicable.

I hope that the foregoing will be of value. If I have misinterpreted or made mistaken assumptions, please let me know. If you would like to discuss the issue, please feel free to call.

Best to all,
Bob

Robert J. Freeman
Executive Director
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OML-AO-4852

From: Mercer, Janet (DOS)
Sent: Monday, January 25, 2010 3:31 PM
To: 'Jeffrey M Reynolds'
Subject: RE: Applicability of Open Meetings law to non-profit public library system

Dear Mr. Reynolds:

I have received your letter in which you asked if a not-for-profit public library system is subject to the New York State Open Meetings Laws.

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

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

Based on the foregoing, as a general matter, the Open Meetings Law pertains to governmental bodies.

In addition, that statute, which is codified as Article 7 of the Public Officers Law, is applicable to boards of trustees of public libraries pursuant to §260-a of the Education Law, which states that:

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

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

I hope that I have been of assistance.

Janet Mercer
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FOIL-AO- 17971
OML-AO- 4853

From: Mercer, Janet (DOS)
Sent: Monday, January 25, 2010 3:34 PM
To: 'Phyllis Masciandaro'
Subject: RE: condo association and sunshine laws

Dear Ms. Masciandaro:

I have received your letter in which you asked whether a "condo association is subject to the rules of the NYS sunshine laws."

In this regard, I offer the following comments.

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

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

A condominium association is not a governmental agency and, therefore, would not be subject to the Freedom of Information Law.

In a related vein, the New York State Open Meetings Law applies to public bodies, and §102(2) of that statute defines the phrase "public body" to mean:

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

Based on the foregoing, the Open Meetings Law is applicable to governmental entities; it does not apply to private or non-governmental organizations, such as a condominium association. I note that a public corporation is typically a unit of local government (i.e., a county, town, village, school district, etc.) or a public authority.

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

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OML-AO-4854

From: Mercer, Janet (DOS)
Sent: Monday, January 25, 2010 3:32 PM
To: 'Joseph Ruvolo'
Subject: RE: Attendance at Executive Sessions

Dear Mr. Ruvolo:

I have received your letter in which you asked who may attend executive sessions.

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

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

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

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

I hope that I have been of assistance.

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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4855

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January 26, 2010

Ms. Elizabeth Passer
[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. Passer:

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 Mexico Central School Board. Specifically, you reported that you witnessed three of the seven members meeting in closed session prior to the start of a Board meeting scheduled for "executive session only" at 7 PM on November 12, 2009. A note on the door indicated "BOE in Executive Session – Jim come on in".

A copy of correspondence addressed to you and received by this office from the Superintendent, dated November 13, 2009, indicates that the meeting was called to order at 6:55 pm. "After the Pledge of Allegiance there was a motion to enter executive session. That motion was approved. The Board moved back into regular session at 7:40 p.m. and immediately adjourned having taken no formal actions."

From our perspective, a gathering of less than a quorum of the members of the School Board prior to a scheduled meeting does not constitute a "meeting" that should have been held in accordance with the Open Meetings Law. Once a fourth member joined the gathering, and the discussion regarding the business of the school district began, of course, the Open Meetings Law would apply. In this regard, and in an effort to provide guidance with respect to these issues, we offer the following comments.

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

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

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

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

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

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

Based upon the terms of the Open Meetings Law and its judicial interpretation, if a majority of the Board gathers to conduct public business, any such gathering would, in our opinion, constitute a "meeting" subject to the Open Meetings Law. Further, when there is an intent to conduct a meeting, the gathering must be preceded by notice given pursuant to §104 of the Open Meetings Law, convened open to the public and conducted in public as required by the Open Meetings Law.

When less than a majority of the board is present, the gathering does not constitute a "meeting", and the public would have no right to attend.

It is emphasized that a public body cannot conduct an executive session prior to a meeting. Every meeting must be convened as an open meeting, for §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may

be excluded. That being so, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

Based on the Superintendent's statement, it appears that the Board opened its meeting in public and motioned to enter into executive session in compliance with law. In our opinion, the Board should have waited until 7 PM to open the public meeting in order to permit the public the opportunity to observe the motion to enter executive session. The presence of three of the seven members of the board in a room prior to the opening of the meeting, in our opinion, does not constitute evidence of a "meeting" due to the presence of less than a majority of the members. Again, had a fourth member joined the gathering, and had the discussion focused on the business of the school district prior to the start of the public meeting, on the other hand, our opinion would likely be different.

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Nelson Bauersfeld
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4856

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January 26, 2010

Ms. Pat Ehrich
Coalition for Sustainable Schools
[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. Ehrich:

This is the second of two advisory opinions written in response to your request regarding application of the Open Meetings Law to certain gatherings of committees of the New Roots Board of Trustees. Specifically, you inquired about the applicability of the law to standing committees of the Board and the Board's obligation to prepare and post minutes of its meetings. We offer the following in an effort to provide guidance with respect to the School's obligations under the Open Meetings Law.

First, §2854(1)(e) of the Education Law specifies that charter schools are subject to the Open Meetings Law.

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

Third, however, when a committee consists solely of members of a public body, or when the core of a committee consists of members of a public body, such as a school board, 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 were enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body". "Public body" is now defined in §102(2) to include:

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

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

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

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)].

Does the applicability of the Open Meetings Law change if a committee consists of two members of a governing body, and in addition, a third or fourth person, not a member of the governing body, is designated to serve on the committee? What if each committee of the Board consisted solely of its own members, plus the Superintendent as an ex officio member? And 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. The core members, typically having been designated by means of a resolution approved by the Board, presumably may be removed only by action taken by the Board. Their status on the committee is likely permanent, unless and until the Board as a whole takes action to remove them or until they no longer serve on the Board.

Based on the foregoing, it is our opinion that standing committees of the Board consisting of two Board members and one ex officio employee member constitute public bodies required to comply with the Open Meetings Law. A committee consisting of one board member and two ex officio employees, having advisory authority only, in our opinion, is not likely to constitute a public body.

When a committee is subject to the Open Meetings Law, we believe that it has the same obligations regarding notice, openness, and the taking of minutes, for example, as well as the same authority to conduct executive sessions, as a governing body [see Glens Falls Newspapers, Inc. v.

Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993)].

With respect to your question concerning the timeliness of the preparation of minutes, the Open Meetings Law includes direction concerning the minimum contents of minutes and the time within which they must be prepared. Specifically, §106 states that:

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

Based upon the foregoing, it is clear that minutes must be prepared and made available within two weeks.

We note, too, that there is nothing in the Open Meetings Law or any other statute of which we are aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

With respect to your questions regarding the posting of notice of meetings, §104 of the Open Meetings Law pertains to notice of meetings of public bodies, such as a board of trustees, and states that:

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

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

The term "designated" in our opinion involves a requirement that a public body, by resolution or through the adoption of policy or a directive, must select one or more specific locations where notice of meetings will consistently and regularly be posted. 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. In addition to posting, §104 requires that notice be given to the news media prior to every meeting.

Section 104 was recently amended (Laws of 2009, Ch 26) to include the following provision:

> "5. When a public body has the ability to do so, notice of the time and place of a meeting given in accordance with subdivisions one or two of this section, shall also be conspicuously posted on the public body's internet website."

Based on your indication that the School recently began posting notice of Board meetings on its website. It is our opinion that the School also has the ability to post notice of the time and place of committee meetings on its website and is therefore required to do so under §104(5).

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Sabrina Johnston, FOIL Officer, Business Manager

OML-AO-4857

From: Freeman, Robert (DOS)
Sent: Monday, February 01, 2010 4:42 PM
To: Ms. Barbara Barrie
Subject: Committee on Open Government, Open Meetings Law

Dear Ms. Barrie:

There is nothing in the Open Meetings Law that requires either the preparation or posting of agendas prior to meetings. The notice requirements imposed by that law are found in section of 104 and are attached.

http://www.dos.state.ny.us/coog/openmeetlaw.html#s104

OML-AO-4858

From: Freeman, Robert (DOS)
Sent: Tuesday, February 02, 2010 8:11 AM
To: Florence Alpert

Dear Ms. Alpert:

I have received your note. In short, if the Board intends to convene at 6 p.m., for example, it is required to provide notice indicating that time. If notice is given indicating that a meeting will begin at 6:30, in my view, the meeting should not begin at that time. For your information, the provision concerning notice of meetings is found in section 104 of the Open Meetings Law, which can be found on our website by clicking on to "Laws and Regulations."

Also, although some public bodies read their minutes aloud, there is no obligation to do so. Further, while most public bodies approve their minutes, again, there is no requirement in law that they must do so.

I hope that I have been of assistance.

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FOIL-AO-17886
OML-AO-4857

From: Freeman, Robert (DOS)
Sent: Tuesday, February 02, 2010 8:27 AM
To: Suzanne Perry-Potts

Dear Ms. Perry-Potts:

Based on your description of the entity in question and judicial precedent, it is not a public body required to give effect to the Open Meetings Law. As you may be aware, when an entity is subject to that law, section 106 requires that minutes be prepared and made available within two weeks of the meetings to which they pertain. However, if an entity is not subject to that statute, there is no obligation to prepare minutes. Notwithstanding the foregoing, as soon as documentation exists, whether characterized as minutes or otherwise, it would constitute a "record" that falls within the coverage of the Freedom of Information Law. An agency must respond to a request for any such record in accordance with the time limitations for response prescribed in §89(3)(a) of that law.

I hope that I have been of assistance.

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OML-AO-4860

From: Freeman, Robert (DOS)
Sent: Monday, February 01, 2010 5:11 PM
To: Ms. Nowell

Dear Ms. Nowell:

I have received your inquiry, and first, this is confirm that there is nothing in the Open Meetings Law or any other law of which I am aware that requires that minutes of meetings must be approved. Most boards do so, even though there is no requirement that they must. Second, I believe that a member who was not present at a meeting may vote to approve minutes of that meeting. Very simply, there is no law that addresses the issue, and, therefore, there is no prohibition.

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OML-AO-4861

From: Freeman, Robert (DOS)
Sent: Tuesday, February 02, 2010 2:36 PM
To: Mr. Julie Badlato

Dear Ms. Badlato:

I have received your inquiry concerning the absence of an item on the agenda of a meeting of a board of education. In this regard, there is nothing in the Open Meetings Law or any other law of which I am aware that requires the preparation of an agenda. That being so, a public body, such as a board of education, may choose to develop and abide by an agenda, but there is no obligation to do either. In my view, the only instance in which there may be a requirement to develop or give effect to an agenda would involve the situation in which an entity has adopted its own rules dealing with the preparation and/or function of an agenda.

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

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OML-AO-4862

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, February 04, 2010 1:20 PM
To: Hon. Frank Milano
Subject: Open Meetings Law - intent to circumvent
Attachments: tri-village.doc

Frank,

As promised, links to two advisory opinions and a copy of Tri-Village, attached.

http://www.dos.state.ny.us/coog/otext/o4250.htm (see paragraph towards end that begins "Lastly...")

http://www.dos.state.ny.us/coog/otext/o3732.htm (where a majority of the board took action via telephone)

Further, please note our explanation of recent amendments to the Open Meetings Law, available on our website, and as follows:

An amendment to §107(1) of the Open Meetings Law 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.

The intent of the amendment is not to encourage litigation. On the contrary, it is intended to enhance compliance and to encourage members of public bodies and those who serve them to be more knowledgeable regarding their duty to abide by the Open Meetings Law.

Please let me know if you have further questions.

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OML-AO-4863

From: Freeman, Robert (DOS)
Sent: Friday, February 05, 2010 3:36 PM
To: Peter Forman, Port Washington Office of Emergency Management
Subject: RE: PWOEM

Dear Commissioner Forman:

I have received your communication concerning the status of the PWOEM under the Open Meetings Law.

As we discussed, there is nothing in the enabling statutes found in Article 5-G of the General Municipal that would lead me to advise that the entity in question constitutes a public body subject to the Open Meetings Law. Rather, in consideration of the membership of the PWOEM, and particularly because that entity does not have the authority to take final and binding action on behalf of the municipalities represented in an intermunicipal agreement, it does not appear that it is a public body or, therefore, that it is required to give effect to Open Meetings Law.

I hope that I have been of assistance.

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.P

OML-AO- 4866

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, February 09, 2010 4:47 PM
To: Maguire, Sean (DOS)
Subject: RE: OML and Village Dissolution Study Committees

Sean,

As indicated on your voice mail – I agree, a village dissolution study commission created pursuant to section 19-1901 of the Village Law would likely be a public body subject to the Open Meetings Law, based on relevant case law interpreting the definition of a "public body". If you would like a more formal legal analysis, please let me know by return email and I will get your request in our stack.

Thanks.

Camille

OML-AO-4865

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, February 10, 2010 10:05 AM
To: Ralph Wilson, Superintendent, Genesee Valley Central School District
Subject: RE: Open Meetings Law - shared decisionmaking

Section 104 of the Open Meetings Law requires notice to the media, posted in the designated location and posted on the website – all three.

Camille

OML-AO-1866

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, February 10, 2010 9:54 AM
To: Ralph Wilson, Superintendent, Genesee Valley Central School District
Cc: Mercer, Janet (DOS)
Subject: RE: Open Meetings Law - shared decisionmaking
Attachments: ed law 2590-h(15).doc

Ralph:

Unrelated to your question, I was reading Section 2590-h of the Education Law yesterday, and came across the provisions related to school based management teams. After discussing it with the executive director, we've decided that we're unsure whether the "team" is a "public body" as defined by the Open Meetings Law. Because the statute requires notice of all meetings to be given in keeping with the Open Meetings Law [section 2590-h(15)(b-1)(iii)], however, it is our opinion that it is implicit that team meetings must be held open to the public.

I hope that this is helpful. If you have further questions, please let me know.

Attached is a copy of Education Law Section 2590-h(15).

Camille

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OML-AO-4807

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, February 10, 2010 11:47 AM
To: Maguire, Sean (DOS)
Subject: RE: OML and Village Dissolution Study Committees

Sean,

You raise some interesting questions. I noticed that the Village Law was due to be repealed, and although I am unable to locate a copy of GML 17-A at the moment (can you send me one?) based on your characterization, that there is nothing in GML 17-A that provides for a dissolution study committee, my answer is, well, that it depends in part on what a study committee looks like, and whether it is given any authority.

If a study committee were created prior to the repeal of Village Law 19-1901, I believe it would remain a public body subject to OML until it no longer existed. A committee created after March 21, 2010, on the other hand, would not be a public body subject to the OML unless there were something about its membership or authority that would place it in that category. For example, if the committee were made up solely of members of other public bodies, or if the committee had the authority to bind a municipality or spend public money (chances are slim), in my opinion, based on applicable case law, it would be a public body subject to OML. If you're interested, there are many related advisory opinions on our site, under "C" for "Committees and Subcommittees" and under "A" for "Advisory Body".

I hope that this helps –

Camille

OML-AO-4868

From: Freeman, Robert (DOS)
Sent: Thursday, February 18, 2010 11:47 AM
To: Peter DiCostanzo, Clarence Town Councilman
Subject: RE: Labor negotiations

Dear Mr. DiCostanzo:

I have received your letter and assume that you are referring to negotiations between the Town and a public employee union. If that is so, any gathering of a majority of the Town Board to conduct public business would constitute a "meeting" subject to the Open Meetings Law that must be preceded by notice and convened open to the public. However, §105(1)(e) permits the Board to enter into executive session to discuss or engage in collective bargaining negotiations involving a public employee union.

If the employees are not members of a union, and the discussion or negotiation involves treatment of employees as a group (rather than consideration of performance of a particular employee), I do not believe that there would be a basis for entry into executive session, and that in that circumstance, if a majority of the Board is present, the meeting would be required to be conducted in public.

I hope that I have been of assistance.

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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4869

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February 22, 2010

Ms. Michelle Reeves
[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. Reeves:

I have received your letter, as well as copies of correspondence between yourself and the Uniondale Fire District. In brief, you have met a series of obstructions and delays in relation to your request for minutes of meetings held in June and July by the District's Fire Council, and for minutes of meetings of the Board of Commissioners held in July and August. Based on a review of the materials, I offer the following comments.

First, §106 of the Open Meetings Law specifies that minutes of open meetings of public bodies, such as the Board of Commissioners and the Fire Council, must be prepared and made available to the public within two weeks of the meetings to which they pertain. Minutes reflective of action during an executive session must be prepared and made available in accordance with the Freedom of Information Law within one week of the executive session. Specifically, subdivision (3) of §106 states that:

> "Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such 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 clear direction provided in the Open Meetings Law, the kinds of delays that you have encountered are, in my view, inconsistent with law.

Second, responses to your request indicate that the minutes would be available "within 20 days." In addition to the direction provided in the Open Meetings Law, the legislative declaration

appearing at the beginning of the Freedom of Information Law, §84, states that government agencies must make records available "wherever and whenever feasible." In my opinion, when records, such as minutes of meetings, are clearly accessible to the public, and can be readily located, there is no justifiable reason for delaying disclosure. From my perspective, a delay in disclosure of minutes of meetings held within the past year for a period of as long as twenty days from the receipt of a request or from the date of the acknowledgment of the receipt of a request is inconsistent with the clear intent of the Freedom of Information Law.

Lastly, you indicated that you were informed by the District's Secretary that minutes of meetings would not be emailed to you. In my view, unless those records were prepared in handwritten form or on a typewriter that does not store their content electronically, the records sought must be emailed to you. Stated differently, if the minutes were prepared and are stored on a pc, a personal computer, and the District has the ability to email them to you, a relatively new provision, §89(3)(b), requires that it must do so. That provision states in relevant part that:

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

In an effort to enhance compliance with the Freedom of Information and Open Meetings Laws, copies of this response will be sent to the District.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Commissioners
Marion Billups

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4870

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February 22, 2010

Ms. Elizabeth Passer
[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. Passer:

This is a revision of the advisory opinion issued January 26, 2010, based on additional information presented via correspondence dated January 27, 2009.

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 Mexico Central School District Board of Education. Specifically, you reported that you witnessed three of the seven members meeting in closed room prior to the start of a Board meeting scheduled for "executive session only" at 7 PM on November 12, 2009. A note on the door indicated "BOE in Executive Session – Jim come on in". Board Member Jim Emery arrived at 6:55, entered the meeting, and closed the door behind him. You waited outside until past 7 PM, and the door was not opened.

A copy of correspondence addressed to you and received by this office from the Superintendent, dated November 13, 2009, indicates that the meeting was called to order at 6:55 pm. "After the Pledge of Allegiance there was a motion to enter executive session. That motion was approved. The Board moved back into regular session at 7:40 p.m. and immediately adjourned having taken no formal actions."

From our perspective, a gathering of less than a quorum of the members of the School Board prior to a scheduled meeting does not constitute a "meeting" that would be subject to the Open Meetings Law. Once a fourth member joined the gathering, and the discussion regarding the business of the District began, of course, the Open Meetings Law would apply. In this regard, and in an effort to provide guidance with respect to these issues, we offer the following comments.

First, it is emphasized that the Open Meetings Law has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must

be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

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

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

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

Based upon the terms of the Open Meetings Law and its judicial interpretation, if a majority of the Board gathers to conduct public business, any such gathering would, in our opinion, constitute a "meeting" subject to the Open Meetings Law. Further, when there is an intent to conduct a meeting, the gathering must be preceded by notice given pursuant to §104 of the Open Meetings Law, convened open to the public and conducted in public as required by the Open Meetings Law.

When less than a majority of the board is present, the gathering does not constitute a "meeting", and the public would have no right to attend.

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

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

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

There is conflicting evidence as to whether the Board opened its meeting to the public and motioned to enter into executive session in compliance with the law. As you know, if the facts are as you state them and the Board conducted an executive session as the note on the door indicated, in our opinion, the Board would have failed to have made a motion in a public meeting before entering into executive session as required by the Open Meetings Law. In that event, it would be our opinion that a majority of the members of the Board should have refrained from discussing the business of the Board until the time at which the public was given notice that the meeting would begin, 7 PM. In short, the Board should have opened the meeting in full view of the public in order to permit the public the opportunity to observe the motion to enter executive session.

Because the Open Meetings Law requires that the Board keep minutes of every action taken (§106), minutes of the motion to enter into executive session should indicate the legal basis for the Board's entry into executive session.

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Nelson Bauersfeld
Board of Education

OML-AO-4870A

From: Freeman, Robert (DOS)
Sent: Monday, February 22, 2010 9:16 AM
To: Amy R. Renna, General Counsel, Onondaga Community College
Subject: RE: Open Meetings question

Good morning:

You are correct that there is no obligation to tape records a meeting. It is also noted that an opinion of the State Comptroller has advised that a tape recording of a meeting is not a valid substitute for written minutes, and that §106 of the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Clearly they do not have consist of a verbatim account of all that is expressed; rather, at a minimum, they must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of the members.

Hope this helps.

Bob

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

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OML-AO-871

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February 22, 2010

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:

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

The first involves the propriety of a secret ballot vote conducted during a meeting of the Westmere Fire Department, notwithstanding the provisions of its constitution or by-laws.

In this regard, as a general matter, the Freedom of Information and Open Meetings Laws apply to entities of state and local government. Although volunteer fire departments often are not-for-profit corporations, in 1980, the Court of Appeals, the state's highest court, determined that they are "agencies" [See §86(3)] subject to the Freedom of Information Law [Westchester-Rockland Newspapers v. Kimball, 50 NY2d 575 (1980)]. On the basis of that decision, volunteer fire companies are required to comply with that law, and by extension, with the Open Meetings Law.

Since its enactment in 1974, the Freedom of Information Law has precluded secret ballot voting by members of governmental entities. Section 87(3)(a) of that statute 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, 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)].

I note that there is nothing in either the Freedom of Information or Open Meetings Laws that specifies that a vote must be accomplished by means of a roll call or that a vote be "announced exactly as the same time it is cast." In my view, so long as a record is prepared that indicates the manner in which each member cast his or vote, an entity would be acting in compliance with the open vote requirements imposed by those statutes. I note that the decision cited above referred to "open voting" in the context of both open and executive sessions. Since the Open Meetings Law permits public bodies to vote in proper circumstances during an executive session [see §§105(1) and 106(2) and (3)], it is clear in my view that roll call voting in public is not required. That being so, I believe that the procedure that you proposed would be consistent with law.

While the record of votes by members ordinarily is included in minutes, there is no requirement that it be included in minutes. While such a record must be prepared and made available, the Court of Appeals 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)].

In the second letter, you indicated that the Department received a report from an investigating committee "chaired by the Chief of the fire department and comprised of department line officers." The committee had met earlier to determine whether a Department member failed to comply with the Department's constitution and by-laws. A vote was taken by the committee during its meeting and later presented its findings to the Department, which, according to your letter, relied on the committee's findings and conclusion. You wrote that a stenographer was present during the committee meeting, and you asked whether "the minutes, transcripts and exhibits of the investigating committee...are subject to the Freedom of Information Law..." You added that "Executive Session

was never invoked during either meeting, and the investigating committee meeting was open for other members to attend."

The initial issue in my view involves the status of the investigating committee 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."

From my perspective, it is clear that a governing body constitutes a "public body." Further, when a committee or subcommittee consists of two or members of a governing body, that, too, in my opinion, would constitute a public body required to give effect to the Open Meetings Law. On the basis of your remarks, it appears that the investigating committee is a public body subject to the Open Meetings Law.

Although no executive session might have been held during either the meeting of the investigating committee or the meeting of the Department, it is clear that such a session could have been held. Section 105(1)(f) of the Open Meetings Law permits a public body to enter into executive session to discuss:

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

Both entities appear to have discussed a matter leading to the "discipline, suspension, dismissal or removal" of a member of the Department.

Assuming that the members of investigating committee and/or the Department recognized that their meetings fell within the coverage of the Open Meetings Law and rejected their ability to enter into an executive session, I believe that, by choosing not to do so, records indicating commentary or testimony occurring during those meetings would be accessible under the Freedom of Information Law. In short, the choice not to conduct an executive session would, in my view, result in a waiver of the ability to withhold records reflective of information acquired or expressed during the meetings at issue.

If, however, executive sessions were not held due to an absence of their ability to do so, and if those present during the meetings were persons associated with the Department, rather than members of the public at large, my opinion would be that the records would be subject to rights of access conferred by the Freedom of Information Law, as well as the capacity to withhold records or

portions of records in accordance with the exceptions to rights of access appearing in paragraphs (a) through (k) of that law.

I point out that it has been held that an inadvertent disclosure of records did not create a right of access on the part of the person who inspected records erroneously made available or on the part of the public [see McGraw-Edison v. Williams, 509 NYS2d 285 (1986)]. In conjunction with that holding, if the failure to enter into executive session was inadvertent, perhaps due to lack of familiarity with the Open Meetings Law, or because the only persons present during the meetings at issue had a role in the investigation or decision-making process, it is unlikely in my opinion that a court would require the production of the records at issue in their entirety.

In that event, it is likely that two of the exceptions to rights of access would be pertinent.

Section 87(2)(b) permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." While I believe that records reflective of a determination to discipline, suspend or remove a member, as well as any penalty that might have been imposed, would clearly be public, without knowledge of the details relating to matter, I cannot offer advice concerning whether or the extent to which information relating to the matter might be intimate or highly personal and, therefore, potentially deniable.

The other exception, §87(2)(g) concerning "inter-agency and intra-agency materials" permits an agency to withhold internal communications consisting of advice, opinion, recommendations and the like. Specifically, the cited provision authorizes an agency to withhold records that:

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

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

Typically, a committee of a public body is authorized to offer recommendations to the governing body, the latter of which is empowered to render a final determination. Those recommendations may be withheld. However, if the decision-making body specifies that it has

adopted the recommendations of a person or body as its determination, the recommendations become the final determination, which, again, is, in my view, public.

I hope that I have been of assistance

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Westmere Fire District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OMC-AO-4871A

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February 22, 2010

Ms. Michelle Reeves
[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. Reeves:

I have received your letter, as well as copies of correspondence between yourself and the Uniondale Fire District. In brief, you have met a series of obstructions and delays in relation to your request for minutes of meetings held in June and July by the District's Fire Council, and for minutes of meetings of the Board of Commissioners held in July and August. Based on a review of the materials, I offer the following comments.

First, §106 of the Open Meetings Law specifies that minutes of open meetings of public bodies, such as the Board of Commissioners and the Fire Council, must be prepared and made available to the public within two weeks of the meetings to which they pertain. Minutes reflective of action during an executive session must be prepared and made available in accordance with the Freedom of Information Law within one week of the executive session. Specifically, subdivision (3) of §106 states that:

> "Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such 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 clear direction provided in the Open Meetings Law, the kinds of delays that you have encountered are, in my view, inconsistent with law.

Second, responses to your request indicate that the minutes would be available "within 20 days." In addition to the direction provided in the Open Meetings Law, the legislative declaration

appearing at the beginning of the Freedom of Information Law, §84, states that government agencies must make records available "wherever and whenever feasible." In my opinion, when records, such as minutes of meetings, are clearly accessible to the public, and can be readily located, there is no justifiable reason for delaying disclosure. From my perspective, a delay in disclosure of minutes of meetings held within the past year for a period of as long as twenty days from the receipt of a request or from the date of the acknowledgment of the receipt of a request is inconsistent with the clear intent of the Freedom of Information Law.

Lastly, you indicated that you were informed by the District's Secretary that minutes of meetings would not be emailed to you. In my view, unless those records were prepared in handwritten form or on a typewriter that does not store their content electronically, the records sought must be emailed to you. Stated differently, if the minutes were prepared and are stored on a pc, a personal computer, and the District has the ability to email them to you, a relatively new provision, §89(3)(b), requires that it must do so. That provision states in relevant part that:

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

In an effort to enhance compliance with the Freedom of Information and Open Meetings Laws, copies of this response will be sent to the District.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Commissioners
Marion Billups

OML-AO-4872

From: Freeman, Robert (DOS)
Sent: Wednesday, February 24, 2010 12:26 PM
To: Hon. Fritz Scherz, Town Board Member, Town of Verona

Dear Mr. Scherz:

I have received your correspondence concerning "the policy on posting an agency prior to a town board meeting." In this regard, there is nothing in the Open Meetings Law or any statute of which I am aware that requires the preparation of an agenda. Many boards do so, but there is no obligation to create an agenda. Similarly, there is no provision that requires that an agenda, if such record has been created, must be followed. A town board may establish policies or rules concerning the preparation of an agenda and its status, but again, there is no requirement that it must do so.

In consideration of the foregoing, there is no statutory direction or requirement involving the posting of an agenda or other town records online. However, it has become common for agencies to post agendas, minutes, budgets and a variety of other documents on their websites.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
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FOIL-AO-4873

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February 24, 2010

E-Mail

TO: Mr. Ken Uy

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. Uy:

I have received your letter in which you questioned the status of a committee created by the Sullivan West Central School District. You wrote that a committee was created to "conduct a comprehensive athletic program review" and that it consists of "six parents, six student-athletes, four coaches, two members of the Board of Education, two top-level administrators and the Athletic director."

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

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

Based on the foregoing, a public body is, in my view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body. The definition refers to committees, subcommittees and similar bodies of a public body, and judicial interpretations indicate that if a committee, for example, consists solely of members of a particular public body, it constitutes a public body [see e.g., Glens Falls Newspapers v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993)]. For instance, in the case of a legislative body consisting of seven members, four would

constitute a quorum, and a gathering of that number or more for the purpose of conducting public business would be a meeting that falls within the scope of the Law. If that entity designates a committee consisting of three of its members, the committee would itself be a public body; its quorum would be two, and a gathering of two or more, in their capacities as members of that committee, would be a meeting subject to the Open Meetings Law.

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

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

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

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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March 4, 2010

Mr. Joseph W. Sallustio, Jr.
[redacted]

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

Dear Mr. Sallustio:

I have received your letter in which you questioned the propriety of a portion of a meeting held in private by the Common Council of the City of Rome for the purpose of discussing "legal issues."

In this regard, I offer the following comments for the purpose of providing clarification.

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 exeeutive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

The other vehicle for excluding the public from a meeting involves "exemptions." Section 108 of the Open Meetings Law contains three exemptions. When an exemption applies, the Open

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

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

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

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Again, §105(1)(d) would not permit a public body to conduct an executive session due to a possibility or fear of litigation.

The other vehicle involves exemptions, and when an exemption applies, the Open Meetings Law does not; it is as though the Open Meetings Law does not exist.

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

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

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

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

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

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

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

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

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Common Council
Diane Martin-Grande, Corporation Counsel
Steve Jones

STATE OF NEW YORK
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March 4, 2010

Andrew S. Fusco, Esq.
[redacted]

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

Dear Mr. Fusco:

I have received your letter, which, although dated July 13, was not received by this office until mid-December. Please accept my apologies for the delay in response.

You have requested an advisory opinion "as to the propriety of transmitting municipal public meetings to people outside of the meeting room via cell phone." In your capacity as the attorney for several municipalities, you wrote that you "have reason to believe that some citizens in meeting rooms are surreptitiously transmitting meetings by cell phone to listeners outside of the meeting rooms." You added that you are familiar with judicial decisions and the opinions rendered by this office involving the lawful use of tape recorders, "whether openly or secretly", and that "in [your] experience, cell phone technology is not nearly as reliable as tape recording." Further, you contend that "cell phone transmissions are often prone to interruptions, voice dropouts, crossed conversations, and inaudibility, for no explainable or predictable reasons." Because that is so, it is your view that a person "who listens to a municipal meeting via a cell phone transmission is apt to get an impression which differs significantly from what was truly said."

From my perspective, based on the direction provided in judicial decisions, a public body cannot prohibit a person in attendance at an open meeting from using his or her cell phone to transmit words expressed during the meeting to persons who are not present, unless the use of the cell phone is in some way disruptive or obtrusive.

As you are likely aware, the Appellate Division in Mitchell v. Board of Education referred to the "unsupervised recording of public comment" [113 AD2d 924, 925 (1985)]. While the use of a cell phone in the manner described does not involve recording of public comment, I believe that the principle upon which that decision was based is applicable in the context of the issue that you presented. Although it was found that a public body, in that case, a board of education, has the authority to adopt rules and procedures to govern its proceedings, those rules must be reasonable.

Further, as suggested earlier, the court determined that a prohibition of the use of a recording device would be reasonable only when so doing would be disruptive or obtrusive. In short, if the use of a cell phone does not adversely affect the ability of a public body to conduct a meeting or the public to observe a meeting, I do not believe that a public body may validly preclude the use of a cell phone.

Equally significant in my view was the Court's analogy to a prohibition of the use of pen and paper due to the possibility of misquotation, which would "arguably [be] violative of the 1st Amendment" (id.). There are innumerable instances in which persons present at meetings prepare notes that may not accurately reflect what is expressed. Similarly, when meetings are recorded and replayed, as the Court recognized, they may be altered or edited, or statements may be replayed out of context, thereby misleading the public. The Court rejected that contention. When a member of the news media records a meeting, he/she does not ordinarily broadcast the entirety of the meeting; on the contrary, brief comments, "sound bites", might be broadcast, and some instances, they, too, may be misleading or, perhaps by choice, eliminate certain statements or points of view from being shared with listeners or viewers.

Another reality involves the possibility that a battery used to power a recording device or cell phone might weaken or lose power completely, thereby diminishing or eliminating the ability to record or transmit in a manner that accurately represents the proceedings. If that possibility served as a valid condition precedent to recording a meeting, and if a public body required that a power source be reliable during the entirety of a meeting, I believe that a court would find such a rule to be unreasonable.

For the reasons expressed above, I do not believe that a public body may preclude persons present at open meetings from using cell phones to transmit what is said at meetings to persons who are not in attendance, unless the use of a phone is disruptive to the proceedings.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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March 5, 2010

Mr. Peter F. Hedglon
[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. Hedglon:

We are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to a meeting of the City of Oneida Common Council in January of 2010. You attached a copy of the agenda from the meeting, and a newspaper article that was apparently printed on the day of the meeting. The agenda stated that there was to be a "pre-meeting discussion" at 6 PM, and that a "regular meeting" would begin at 7 PM. The newspaper article indicated that the meeting would begin at 7 PM. You asked whether there are legal distinctions between pre-meetings and regular meetings, and whether, in our opinion, the "form of notice" was misleading. In this regard, we offer the following comments.

First, based on the judicial interpretation of the Open Meetings Law, there is no legal distinction between a "pre-meeting" and "regular meeting."

By way of background, it is noted that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body, 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)].

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

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

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

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

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in our opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law. Since a pre-meeting 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 your questions concerning proper notice, 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 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.
>
> 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 on the internet, 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. Subsection (3) clarifies that publication of the time and place of a meeting as a legal notice is not required.

Finally, the Open Meetings Law makes no reference to agendas, and there is no law of which we are aware that requires that agendas be prepared or that they must be followed. To the extent that the City may have adopted by laws or rules of procedure that would govern is a matter beyond the jurisdiction of this office. Nevertheless, it is clear from the agenda that you submitted that the City met at 6 PM. While the newspaper article relayed accurate information concerning the "regular" meeting of the City Council, publishing a detailed agenda prior to a meeting is, in this case, more informative than not, and gives the public the ability to ascertain what portion of the meeting will contain discussions of interest. Had the City considered items listed on the agenda for 7 PM prior to 7 PM, or had the City taken action at 6 PM on items other than those listed on the 6 PM agenda, there may have been an issue of a misleading representation; however, those are not the facts alleged here.

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm
cc: Hon. Sue Pulverenti
Common Council

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March 9, 2010

E-Mail

TO: Ms. Robin Segal

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. Segal:

I have received your letter in which you complained that the Town of Woodstock Planning Board "has failed to produce minutes of meetings for any meetings held this year", and that at least four meetings have been conducted since the beginning of the year. You added that the Board "has failed to accept the minutes of meetings sometimes for as long as several months, so there is no way to cite the minutes or rely on them in any way."

In this regard, first, §106 of the Open Meetings Law pertains to minutes of meetings of public bodies, such as planning boards, and states that:

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

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

Subdivision (3) deals specifically with the time within which minutes must be prepared and made available, a period of two weeks with respect to minutes of open meetings, and one week when action is taken during executive sessions.

Second, it is emphasized that there is nothing, however, in the Open Meetings Law or any other statute of which I am aware that requires that minutes be addressed or approved or 'accepted." Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "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.

In sum, although there is no requirement that minutes be approved or accepted, the Open Meetings Law clearly requires that minutes of open meetings be prepared and made available within two weeks of the dates of those meetings.

Lastly, in addition to written minutes, often meetings are recorded by a public body. In those instances, an audio or video recording of an open meeting must be made available for review or copying when sought pursuant to the Freedom of Information Law. Moreover, it has been held in judicial determinations that those in attendance at open meetings may record the meetings, so long as the use of recording devices is neither obtrusive nor disruptive.

In an effort to enhance compliance with and understanding of the Open Meetings Law, copies of this opinion will be sent to Town officials.

I hope that I have been of assistance.

RJF:jm

cc: Town Board
Planning Board

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March 9, 2010

Mr. John H. Drewes
[redacted]

Dear Mr. Drewes:

I have received your letter and have enclosed copies of the Open Meetings Law and "Your Right to Know", which summarizes that law and the Freedom of Information Law.

With respect to your comment, boards of education are "public bodies" subject to and required to comply with the Open Meetings Law, and I note that §105(1) of the Open Meetings Law specifies and limits the subjects that may properly considered during an executive session. Because that is so, a board of education cannot enter into an executive session to discuss the subject of its choice.

This office is authorized by law to provide advice and opinions concerning the Open Meetings Law. If you have a complaint or question relating to either that law or the Freedom of Information Law, please feel free to contact the Committee on Open Government.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

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March 10, 2010

Ms. Karen Fauls-Traynor
Library Director
Sullivan Free Library
101 Falls Boulevard
Chittenango, NY 13037

The staff of the Committee on 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. Fauls-Traynor:

As you are aware, I have received your letter concerning meetings of the Board of Directors of the MidYork Library System and the notice requirements imposed by the Open Meetings Law.

In this regard, §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.
>
> 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."

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

Section 104 imposes a dual and in many cases a triple requirement, for notice must be posted in one or more designated, conspicuous public locations, it must be given to the news media, and when it has the ability to do so, an entity subject to the Open Meetings Law must post notice on its website.

The term "designated" in my opinion involves a requirement that a public body, by resolution or through the adoption of policy or a directive, must select one or more specific locations where notice of meetings will consistently and regularly be posted. If, for instance, a bulletin board located at the entrance of a library has been designated as a location for posting notices of meetings, the public has the ability to know where to ascertain whether and when meetings of a library board will be held.

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

And finally, subdivision (5) imposes a new requirement. In short, many now rely on the internet as a source of up to date information, and that new provision is based on that recognition.

From my 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, I believe that notice of meetings should be given to news media organizations that would be most likely to make contact with those who may be interested in attending. Similarly, for notice to be "conspicuously" posted, I believe that it must be posted at a location or locations where those who may be interested in attending meetings have a reasonable opportunity to see the notice. With respect to notice given online, critical is the timeliness of posting.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Directors

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March 10, 2010

Mr. Thomas J. Madera
[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. Madera:

I have received your letter and the materials relating to it. Please accept my apologies for the delay in response. The issues that you raised relate to minutes of meetings of the Board of Trustees of the Elmont Public Library. From my perspective, the materials indicate a variety of misconceptions.

The key provision relating to those issues is §106 of the Open Meetings Law, which 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." It is also clear that minutes need not be expansive or include reference to comments made by members of the public or even Board members. Rather, at a minimum, they must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of the members.

One of your objections involves a statement by the President of the Board that the entirety of an advisory opinion that I prepared would be included in minutes of a meeting, but only an excerpt of that opinion was included. In my view, if the President or the Board has indicated publicly that a certain document would be included or incorporated in the minutes, the minutes should include that document. However, once again, there is no obligation to include such a document or documents in the minutes.

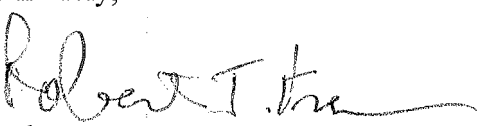
Reference is also made to the belief that "minutes are not official until they are approved by the Board." Here I point out that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have 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.

Next, although many government bodies post their minutes, as well as other records, on their websites, there is no general requirement that they must do so.

Lastly, you wrote that the Board and staff "dismissed" my opinion, contending that "they are not bound by it." That is true. Although the opinion included several references to judicial decisions, it is advisory in nature. It is our hope that advisory opinions rendered by this office are educational and persuasive, and that they encourage compliance with law. Nevertheless, they are not binding.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Trustees

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March 10, 2010

E-Mail

TO: Mr. Gregory A. Horth, Co-Chair, Town of Hartwick Planning Board

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. Horth:

We are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to the organizational meeting of the Town of Hartwick on January 4, 2010. You expressed concern that the meeting was not properly noticed and might have been held in violation of the Open Meetings Law. Specifically, you indicated that the meeting was not held at a "normal listed meeting time", posted on the Town's web site, or advertised in the Town's paper of record, and that the Town's newspaper of record was not notified of the meeting time and place. The only notice of the meeting was posted on the front door of Town Hall, yet you wrote that notices are typically posted in the Town's post office. In this regard, we offer the following comments.

Section 104 of the Open Meetings Law pertains to notice and states that:

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

Recently, 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: first, that notice must be posted in one or more conspicuous, public locations; second, that notice must be given to the news media; and third, that notice must be conspicuously posted on the public body's website, when the ability to do so exists. 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 be posted on a consistent and regular basis. 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 will be held. Similarly, every public body with the ability to do so must now 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. 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 organizational meetings should be given to news media organizations that were selected at the previous organizational meeting. Similarly, for notice to be "conspicuously" posted at a designated location, we believe that it should be posted at a location or locations previously selected, 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. Until or unless the designated location or the "newspaper of record" are changed through Board action, in our opinion, their designation would remain in effect.

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

CSJ:jm
cc: Town Board

OML-AO-4882

From: Freeman, Robert (DOS)
Sent: Thursday, March 11, 2010 8:24 AM
To: Christine Shaw, Town Clerk, Tow of West Monroe
Subject: RE: your opinion

Good morning - -

In short, whenever a majority of the Board gathers to conduct public business, collectively, as a body, the gathering is a "meeting" required to be held in compliance with the Open Meetings Law. In the context of your question, if a majority intends to be present at 6:30, I believe that they would be convening a meeting and that notice must be given indicating that the meeting will begin at that time.

I hope that this will be of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
One Commerce Plaza
Suite 650
99 Washington Avenue
Albany, NY 12231
Phone: (518)474-2518
Fax: (518)474-1927
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4883

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March 11, 2010

E-Mail

TO: Mr. Edmund J. Wiatr, Jr.

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. Wiatr:

We are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to a gathering of members of a town board and a town planning board. You indicated that the planning board, three town board members and the town attorney entered into executive session. In this regard, we offer the following comments.

Pertinent is §105(2) of the Open Meetings Law, which provides that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." Therefore, a public body may authorize others to attend an executive session. While the Open Meetings Law does not describe the criteria that should be used to determine which persons other than members of a public body might properly attend an executive session, we believe that every law, including the Open Meetings Law, should be carried out in a manner that gives reasonable effect to its intent. Typically, those persons other than members of public bodies who are authorized to attend are the clerk, the public body's attorney, the superintendent in the case of a board of education, or a person who has some special knowledge, expertise or performs a function that relates to the subject of the executive session. In the situation that you described, it would likely be reasonable and appropriate for town officials who carry out duties that relate to each other to conduct a joint executive session, so long as there is a valid basis for entry into such session.

Attached are related advisory opinions regarding agendas and notice requirements.

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

CSJ:jm

FOIL-AO-4884

From: Freeman, Robert (DOS)
Sent: Monday, March 15, 2010 3:43 PM
To: Mr. Terry Buford, Director, Irondequoit Public Library
Subject: Executive session

Dear Mr. Buford:

I have received your letter and this is to advise that, in my view, it is clear that an executive session may be held to conduct an "interview with a potential consultant", similar to that of a "job interview." Section 105(1)(f) of the Open Meetings Law specifies that an executive session may be held to discuss the "employment" history of a "particular person or corporation", as well as "matters leading to the appointment [or] employment...of a particular person or corporation." In short, the language of the cited provision is not restricted to issues that relate to employees.

I hope that I have been of assistance.

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

OML-AO-4885

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March 18, 2010

E-Mail

TO: Messrs. Nicholas A. Mauro and Roy Paul

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 Messrs. Mauro and Paul:

We are in receipt of your request for an advisory opinion "on the rights of school board members to address the school board as residents of the district." Specifically, you are members of the Middletown Board of Education, and you wish to participate in the public comment session of Board meetings. 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 a 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., 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, such a rule, in our view, would be unreasonable.

In the context of a meeting of a public body, we believe that a court would determine that a public body may limit the amount of time allotted to a person who wishes to speak, for example, so long as the limitation is reasonable. Imposing a rule that only residents may speak, on the other hand, in our opinion would be 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 or hearings held by school boards and other public bodies. Prohibiting those people from speaking, even though they may bear 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 may validly prohibit a non-resident from speaking at a public forum based upon residency.

Similar logic could be applied to the request from a school board member to speak as a member of the public; however, there is no law or case law that we know of that applies in this situation.

Perhaps more importantly, from our perspective, while a president presides during school board meetings, it is the board that has the authority to determine whether a particular matter should be included on an agenda, for example, or whether school board members should be given an opportunity, during the course of a meeting, to discuss business that is not on the agenda. This issue, in our opinion, is distinct from allowing public participation.

In keeping with what we believe to be reasonable in light of the case law mentioned above, we recommend that the Board consider adopting a rule that all comments, those that are made by the public, as well as those that are made by school board members, be limited to items that are on the agenda, and that agenda items be determined by the board.

Finally, we note that school board members and members of the public may express opinions outside the confines of a school board meeting.

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

CSJ:jm

cc: Jay Worona
John Donoghue
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-18052
OML-AO-11886

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March 24, 2010

Mr. Eric Bashford
[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. Bashford:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to certain situations and the Freedom of Information Law to records generated during those situations. Please accept our apologies for the delay in responding to your request.

More specifically, you inquired as to the propriety of members of a public body sending and receiving electronic communications during a public meeting, public officials engaging in private communications during meetings, and whether any records of such communications would be required to be disclosed. We offer the following comments in an effort to provide guidance.

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

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

Based upon the foregoing, it is clear in our view that public bodies must conduct meetings in a manner that guarantees the public the ability to "be fully aware of" and "listen to" the deliberative process. Further, we believe that every statute, including the Open Meetings Law, must be implemented in a manner that gives effect to its intent. In this instance, the Board must in our view situate itself and conduct its meetings in a manner in which those in attendance can observe and hear the proceedings. This would include refraining from whispering or passing notes between or among members. With perhaps minor exceptions involving the receipt of personal or emergency communications, this would also include refraining from transmitting and receiving electronic messages and phone calls. If it were necessary to receive or send an electronic communication during the course of the meeting or to communicate by telephone, and if the communication is related to public business, we would recommend full disclosure to those present at the meeting. Conducting communications regarding public business privately, during a public meeting, in our opinion would be unreasonable and fail to comply with a basic requirement and intent of the Open Meetings Law.

Second, there is no law that we are aware of that would prohibit a public official or employee from receiving or transmitting information through use of a personal electronic account, including email, instant messaging or texting, for example. While a publicly assigned account may have automatic logging and archiving capabilities, again, we know of no provision of law that would prohibit use of a private account. For an analysis of additional issues with respect to electronic communications and the Open Meetings Law, we have enclosed a copy of Advisory Opinion No. 3787.

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

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

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

In a decision rendered by the Court of Appeals, the state's highest court, it was found that materials received by a corporation providing services for a branch of the State University pursuant to a contract were kept on behalf of the University and constituted agency "records" falling within the coverage of the Freedom of Information Law. It is emphasized that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL

definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

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

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

The point made in the final sentence of the passage quoted above may be especially relevant, for there may be "considerable crossover" in the activities of school board officials. In our view, when those persons communicate with one another in writing in their capacities as school officials or with others, any such communications constitute agency records that fall within the framework of the Freedom of Information Law, even though they may be kept at locations other than school district offices.

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

Insofar as records exist, 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 (k) of the Law.

Further, the Freedom of Information Law pertains to existing records, and we emphasize that government agencies and their employees cannot destroy records at will. The "Local Government Records Law", Article 57-A of the Arts and Cultural Affairs Law, deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

With respect to the retention and disposal of records, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...
>
> 2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..."

In view of the foregoing, records cannot be destroyed without the consent of the Commissioner of Education, and school district officials cannot destroy or dispose of records until the minimum period for the retention of the records has been reached. The provisions relating to the retention and disposal of records are carried out by a unit of the State Education Department, the State Archives.

In light of a municipality's responsibility to retain records for certain periods, perhaps it would be wise to adopt a policy applicable to those instances in which public officials and employees utilize home or personal accounts to conduct public business, to require that copies of such communications be forwarded to the municipality's records management officer on a regular basis. In cases where personal accounts are utilized for public business, perhaps periodic transmissions would alleviate both the public's concern that records were hidden and the clerk's responsibility to request copies for retention purposes, as outlined above.

Finally, in response to your comment regarding the use of a recording device during an executive session, we enclose a copy of a previously issued Advisory Opinion No. 2807 that addressed those issues in great detail.

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

Encs.

OML-AO-4887

From: Freeman, Robert (DOS)
Sent: Tuesday, March 30, 2010 5:13 PM
To: Hon. John Wortman, Councilman, City of Port Jervis
Subject: Political caucuses
Attachments: O2749.wpd

Dear Councilman Wortman:

I have received your letter, and unless the Council has established some sort of provision to the contrary, the eight members of the Council who are of the same political party may, based on the language of §108(2) of the Open Meetings Law, conduct a political caucus outside the coverage of the Open Meetings Law. If the ninth member, who is registered to a different political party, joins a group of councilmembers and they consist of a majority (at least 5 of 9) for the purpose of discussing public business, that gathering would, in my view, constitute a "meeting" that falls within the coverage of the Open Meetings Law.

Attached is an opinion that deals with the matter more expansively.

I hope that I have been of assistance.

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

FOIL-AO-4888

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April 7, 2010

Ms. Jane A. Prior
[redacted]

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

Dear Ms. Prior:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to a gathering of three of the five Hartsville Town Councilmembers. Specifically, and among other items of information, you indicated that two Councilmembers, registered Democrats, met in caucus with the Supervisor, a registered Republican. Immediately following the "caucus", a resolution to decrease the salary of the Highway Superintendent was passed by the three who attended, and you allege that discussion of the resolution was held during the caucus.

In consideration of the issue, Councilperson Parini wrote that at the time of the caucus the Supervisor was a registered Republican who "ran on the Democratic Party ballot" with an endorsement from herself and the other Democratic Councilperson. She further indicated that she had attended a conference held by the Association of Towns, at which time she had received advice that it would be "no problem" to invite a registered Republican into a Democratic caucus because he had run on the Democratic ballot.

In this regard, by way of background, 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 found that any gathering of a majority of a public body for the purpose of conducting public business is a "meeting" that must be conducted open to the public, whether or not there is an intent to have action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)].

The decision rendered by the Court of Appeals was precipitated by contentions ma public bodies that so-called "work sessions" and similar gatherings, such as "agenda se held for the purpose of discussion, but without intent to take action, fell outside the sc Open Meetings Law. In discussing the issue, the Appellate Division, whose deterr 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 town council is present to discuss town business, such a gathering, in our opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law, unless the meeting or a portion thereof is exempt from the Law.

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

Section 108(2)(b), exempting political caucuses, states that:

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

> such political committees, conferences and caucuses invite staff or guests to participate in their deliberations..."

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

Consistent with the decision in Warren v Giambra, 12 Misc3d 650, 813 NYS2d 892 (Erie Cty, 2006), it is our view that if the Democratic members who serve on the Council gather to discuss public business with a Republican member, because there would be members of two political parties present, the gathering cannot be characterized as a political caucus that is exempt from the Open Meetings Law. On the contrary, if there was a quorum of the Town Council present, and the discussion pertained to public business, that kind of gathering in our opinion would constitute a "meeting" subject to the Open Meetings Law.

Consistent with the statutory language, a political caucus by definition is restricted to members or adherents of a single political party. Webster's New Collegiate Dictionary defines caucus as:

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

In Warren, supra, the court held that, "Given the presence of the County Executive [a Republican], the private assembly of the Democratic majority of the County Legislature was not an exempt political caucus." Accordingly, if the gathering described in your letter and the article were attended by council members from two political parties, we do not believe that one of those members could be characterized as a "guest" or that such gathering could be described as a political caucus exempt from the Open Meetings Law.

In a variety of decisions, the courts have determined that provisions authorizing the exclusion of the public from meetings of public bodies should be construed narrowly. Notable in the context of the situation described is Buffalo News v. Buffalo Common Council [585 NYS2d 275 (1992), which involved the interpretation of the exemption regarding political caucuses, the court concentrated on the expressed legislative intent appearing in §100 of the Open Meetings Law, stating that: "In view of the overall importance of Article 7, any exemption must be narrowly construed so that it will not render Section 100 meaningless" (id., 278).

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

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

Lastly, with respect to the ballot issue, we contacted the State Board of Elections and were directed to Election Law §6-102(4), which permits one political party to vote to allow a member of another political party to run on the same ballot. This provision does not require a candidate to change political party affiliation for election purposes, and further, we know of no law that would convert a person's party registration, temporarily or otherwise, upon receiving such permission or obtaining public office in this manner. Accordingly, it remains our opinion that a gathering of members of two or more political parties to discuss public business, constituting a majority of the members of a public body such as the town board, would constitute a "meeting" subject to the Open Meetings Law.

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Hon. Madeline E. Parini
Hon. Zena Andrus
Lori Mithen, Association of Towns

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-'1889

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April 9, 2010

Ms. Jean Baron
United Taxpayers of Northport-East Northport
[redacted]

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

Dear Ms. Baron:

We are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to gatherings of the Northport-East Northport School District Board of Education. Among other issues, you questioned the Board's procedure for entry into executive sessions and the propriety of topics discussed in executive session. In addition, you attached a copy of a notice of a Special Meeting of the Board, as follows:

> "It is anticipated that the Board will act upon a resolution to convene an Executive Session to discuss matters leading to the appointment of particular persons. (This executive session is closed to the public). Wednesday, January 13, 2010 at 6:45."

In response to our notification, general counsel to the Board wrote to express his response on behalf of the Board, a copy of which is attached.

In an effort to provide guidance with respect to these issues, we offer the following comments, and to be as efficient as possible, recommend review of previously issued advisory opinions for more in-depth treatment of certain issues.

First, and with regard to the procedure for entry into executive session, we agree that a public body cannot conduct an executive session prior to a public meeting. Every meeting must be convened as an open meeting, for §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. That being so, it is clear that an executive session is not separate and distinct from an open meeting, but rather

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

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

Based on the foregoing, 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 our view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved.

In the example that you provided, above, the School District implemented an alternative method of achieving the desired result that complies with the letter of the law. Rather than scheduling an executive session, the Board, in a notice of a special meeting for January 13, and in agendas for the Board meetings outlined below, referred to a motion to enter into executive session to discuss a certain subject. We interpret the Board's notice to mean that there is intent to enter into an executive session as a considerate way of alerting the public that an executive session is likely

to be held (rather than scheduled), and implicitly, that there may be no overriding reason for arriving at the very beginning of a meeting. See OML-AO-3339.

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

Upon review of minutes from four Board meetings held in September and October of 2009, we note that at each meeting the Board convened at 6:30 p.m. and unanimously agreed to enter into executive session to discuss one of the following four issues: 1) matters pertaining to custodial negotiations; 2) matters pertaining to contract negotiations; 3) matters pertaining to an individual student; and 4) matters pertaining to an individual employee and individual students. In our opinion, based on this documentation, the Board properly opened the meeting and entered into executive session to hold discussions that were likely appropriate for closed or executive session. See OML-AO-3863 (issues pertaining to students) OML-AO-2748 (employment history of a particular person), and OML-AO-4346 (collective bargaining negotiations). With respect to questions regarding the Board's authority to discuss "matters of finances and audit findings" in executive session, we recommend review of OML-AO-4257.

With respect to your questions concerning agendas, there is no reference in the Open Meetings Law to agendas. Consequently, a public body, such as the Board, may choose to prepare or follow an agenda, and may have adopted by laws or policies regarding same, but there is no statutory obligation to do so.

With respect to your questions concerning the Board's obligations to include comments in the minutes, please note that the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law provides that:

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

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

Accordingly, 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.

In situations in which members of public bodies have met with resistance when attempting to include their comments in the minutes, it has been advised that a motion could be made to include their statements in the minutes. If such a motion is approved, the inclusion of a statement is guaranteed. We recognize that you are not a member of the Board. Nevertheless, we believe that you may ask any member to introduce a similar motion in an effort to ensure that your statement becomes part of the minutes.

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

Additionally, it has long been held that those in attendance at open meetings may tape or video record the meetings, so long as the use of a recording device is not obtrusive or disruptive [see e.g., Mitchell v. Board of Education of the Garden City Union Free School District, supra, People v. Ystueta, 99 Misc.2d 1105, 418 NYS2d 508 (Suffolk Cty., 1979), Peloquin v. Arsenault, 162 Misc.2d 306, 616 NYS2d 716 (Franklin Cty, 1994), Csorny v. Shoreham-Wading River Central School District, 305 AD2d 83, 759 NYS2d 513 (2nd Dept., 2003)]. For an in-depth advisory opinion

regarding the recording of public meetings, see OML-AO-3155, attached. We note that legislation that would codify this case law was recently passed by both the Senate and Assembly, and is currently awaiting action by Governor Paterson (A.10093/S.3195).

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

Encs.

cc: Beth M. Nystrom, District Clerk
John H. Gross

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4890

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April 13, 2010

Mr. Richard W. Morris
[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. Morris:

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

You wrote that you have been videotaping meetings of the Mamakating Town Board for several years. The room in which the meetings are held are equipped with microphones, but the Board has "consistently refused to use them despite residents asking for their use because we can not hear them very well." Additionally, the Board recently adopted a resolution requiring that cameras be located in the back of the room, some "54'-56' away from the members making it impossible to pick up their conversations with a standard video camcorder." You have sought an opinion concerning whether "the size of the room has a bearing on the placement of video/audio equipment."

In this regard, I offer the following comments.

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

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

Based upon the foregoing, it is clear in my view that public bodies must conduct meetings in a manner that guarantees the public the ability to "be fully aware of" and "listen to" the deliberative process.

In consideration of complaints that Board members cannot be heard, assuming that microphones are operational, to comply with the expression of legislative intent referenced above, I believe that the microphones should be used when it is difficult or impossible for those present to hear the Board's proceedings.

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

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

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

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

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the *widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process.* While this court has had the advantage of hindsight, it

> would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority"(id., 509-510; emphasis mine).

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

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

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

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

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

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

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

> "On August 26, 1986 the Executive Director of the Committee on Open Government opined (OML-AO-1317, p.3) with respect to *video* recording as follows:
>
> > 'If the equipment is large, if special *lighting* is needed, and if it is obtrusive and distracting, I believe that a rule prohibiting its use under those circumstances would be reasonable. However, if advances in technology permit video equipment to be used without special lighting, in a stationary location and in an unobtrusive manner, it is questionable in my view whether a prohibition under those circumstances would be reasonable.'
>
> On April 1, 1994, Mr. Freeman further opined (OML-AO-2324) that a county legislature's resolution limiting hand held camcorders to the spectator area in the rear of the legislative chamber was not per se unreasonable but rather, as challenged, it depended for its legitimacy on whether or not the camcorders could actually record the proceedings from that location.
>
> Blanket prohibition of audio recording is not permissible, and it is likely that the appellate courts would find that also to be the case with blanket prohibitions of video recording. However, what might be reasonable in one physical setting - a village board restricting camcording to the rear area of *its* meeting room - might not be in another - the larger chambers of a county legislature (OML-AO-1317, supra). It might well be reasonable in a village or other space-restricted setting to restrict the number of camcorders to one, as the court system may with its pooling requirement for video coverage of trials (22 NYCRR Parts 22 and 131). Such a requirement might be viewed as unreasonable in a large county legislative chamber or where a local board of education is conducting a meeting in a school auditorium.

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

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

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

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

From my perspective, a rule that permits the use of cameras only at a distance in which sound cannot be heard or recorded would be found by a court to be unreasonable, if a location nearer to the Board would permit sound to be heard or recorded, and if the placement of a camera in that location would be neither disruptive nor obtrusive.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

OML-AO- 4891

From: Freeman, Robert (DOS)
Sent: Tuesday, April 13, 2010 3:49 PM
To: Mr. Norm Parry, Director, New Woodstock Free Library

Dear Mr. Parry:

I have received your inquiry, and this is to confirm that the Open Meetings Law contains no provision that requires public libraries to have an email address to enable patrons to contact the library. I note, however, that a recent amendment to the Open Meetings Law states as follows: "When a public body has the ability to do so, notice of the time and place of a meeting....shall also be conspicuously posted on the public body's internet website."

I hope that I have been of assistance.

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

OML-AO-4892

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April 14, 2010

E-Mail

TO: Mr. Fred Thering

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. Thering:

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

You wrote that you applied to serve on the Town of Hartwick Board of Assessment Review, and that the Town Board conducted and selected an applicant other than yourself during an executive session. You added that "job descriptions for new town positions were also discussed out of the public eye" and questioned whether the creation of new positions should have been discussed and approved during an executive session.

Based on the language of the Open Meetings Law, the Town Board, in my opinion, had the authority to discuss the applicants and select an applicant to serve on the Board of Assessment Review during an executive session. However, I believe that its discussion relating to the creation of new positions should have occurred in public. In this regard, I offer the following comments.

First, by way of background, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, 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.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise, for it states that a public body may enter into an executive session to discuss:

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department, the creation or elimination of positions, or 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 strengths and weaknesses of specific candidates who applied to serve on the Board of Assessment Review, I believe that an executive session may properly be held.

In the situations you described, one issue would have involved a matter leading to the appointment of a particular person, which could properly have occurred in executive session. The other, consideration of creating new positions, would not focus on any particular person and, therefore, would not have qualified for discussion in executive session.

Lastly, §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."

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.

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

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4893

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April 15, 2010

Mr. Robert J. Harvey
[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. Harvey and Town of Enfield residents:

I have received your letter addressed to several officials, including myself. As you may be aware, the Committee on Open Government, a unit of the Department of State, is authorized to provide advice and opinions pertaining to the Freedom of Information and Open Meetings Laws. Insofar as the issues raised in the letter relate to those statutes, I offer the following remarks.

First, reference was made to "budget workshop" that "was turned into a Special Town Board meeting..." In this regard, assuming that a majority of the Board participated in the budget workshop, that event constituted a "meeting" subject to the requirements of the Open Meetings Law. In short, it was determined more than thirty years ago that a "meeting" involves a gathering of a quorum (a majority of the total membership) of a public body, such as a town board, for the purpose of conducting public business, even if there is no intent to take action, and irrespective of the manner in which the gathering is characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947(1978)]. Based on that decision, for purposes of the Open Meetings Law, there is no distinction between a workshop, a work session, a formal meeting, or a special meeting. There is generally no distinction in a board's ability to take action during those kinds of meetings.

I note that the phrase "special meeting" appears in §62(2) of the Town Law and refers, in essence, to unscheduled meetings. That provision 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." Based on the information that you provided, it appears that the workshop was a meeting, and that it was not "turned into" a special meeting.

Second, you wrote that "Town Board meetings (and more specifically, the public attendees) are being videotaped..." and that you "do not believe that videotaping the audience is legal." You also expressed the belief that the tapes "should be on file at the Town Hall..." Interestingly, the Governor approved legislation yesterday that confirms the findings in judicial decisions rendered during the past thirty years, that anyone may either audio or video record an open meeting, so long as the use of the recording equipment is neither disruptive nor obtrusive. The legislation will become effective on April 1, 2011. In an Appellate Division decision rendered in 2003, the court rejected a rule prohibiting the recording of a meeting when any person present requested that the use of the recording device be discontinued (Csorny v. Shoreham-Wading River Central School District, 305 AD2d 83). It has also been held that an open meeting is a public forum in which those present have no "privacy interest" [Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD2d 924 (1985)]. In short, unless the use of a recording or broadcasting device is disruptive, doing so, based on judicial decisions, is "legal."

If a government agency, i.e., a town, maintains recordings of its open meetings, the recordings constitute "records" that are subject to the Freedom of Information Law. Further, it was determined more than thirty years ago that a recording of an open meetings is accessible to the public (Zaleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, Dec. 27, 1978). Based on the records retention schedule promulgated pursuant to Article 57-A of the Arts and Cultural Affairs Law, a municipality must keep a recording of an open meeting for at least four months. At the expiration of that period, the tape may be discarded or erased and reused.

Lastly, you wrote that "Town Supervisor records are not being kept at the Town Hall as required by law." Although there may be such a law, I am unfamiliar with it. I point out, however, that the Freedom of Information Law is applicable to all records "kept, held, filed, produced or reproduced by, with, or for an agency" [§86(4)]. Because that is so, Town records fall within the coverage of that law, regardless of where they may be kept or filed. In addition, pursuant to §30(1) of the Town Law, a town clerk is the legal custodian of all town records, again, irrespective of where they may be kept.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

OML-AO-4894

From: Freeman, Robert (DOS)
Sent: Monday, April 19, 2010 3:34 PM
To: Christine Shaw, Town Clerk, Town of West Monroe
Subject: RE: legal notice

Yes, it's correct. Based on §62(2) of the Town Law, the notice requirement involves the time and place of a special meeting. It says nothing about the subject or purpose of the meeting. Similarly, the Open Meetings Law merely requires that notice indicate the time and place of a meeting. The notice may include reference to the subject or subjects to be considered, but there is no obligation to do so.

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

OML-AO-1895

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April 20, 2010

Ms. Jean Baron
United Taxpayers of Northport-East Northport
[redacted]

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

Dear Ms. Baron:

In follow up to our telephone conversation on Monday, April 12, and in response to your email submission from April 13, 2010, we offer the following clarification regarding requirements for notifying the public of the start of a meeting of a public body, such as the Northport-East Northport School District Board of Education.

First, staff of the Committee on Open Government, including the Executive Director, Robert Freeman, and myself, are authorized to prepare advisory opinions regarding application of the Open Meetings Law, but only a court can determine whether there has been a "violation" of the Law. Accordingly, we offer our opinions in an effort to provide assistance and guidance to achieve greater compliance with the Law.

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

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

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

Almost one year ago, 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 school district's offices has been designated as a location for posting notices of meetings, the public has the ability to know where to ascertain whether and when meetings of a school board will be held. Similarly, every public body with the ability to do so must post notice of the time and place of every meeting online.

Our review of the "Calendar of Board Meetings 2008-2009 and 2009-2010" does not include reference to the times of the meetings indicated on the schedule. Minutes from the July 6, 2009 Annual Organizational Meeting indicate that the Board adopted a schedule of meetings for 2009-2010 at its May 11, 2009 meeting, and our review of minutes from the May 11, 2009 meeting indicate that a schedule was adopted, but no start time is noted. Similarly, minutes from the 2008 organizational meeting indicate that a schedule of meetings was adopted at the May 12, 2008 meeting. However, our review of the minutes from the May 2008 meeting reveals no indication of the start time for such meetings nor the adoption of a calendar of meetings.

Accordingly, based on the above, it is our opinion that the Board has failed to provide notice of the time of its regular meetings in keeping with the requirements of §104 of the Open Meetings Law. In order to comply with the various provisions of the Open Meetings Law, the Board should (1) designate one or more physical locations at which it will post notice of the time and place of its meetings, (2) timely post notice of its meetings at such designated location, (3) send notice of the time and place of its meetings to the news media, and (4) conspicuously post notice of the time and place of its meetings on the Board's website. It is customary to designate the physical location for posting notice at the annual meeting; however, it can be accomplished at any meeting.

In the context of your inquiry, if a series of meetings have been scheduled in advance to be held at particular times, the posting of a notice of a schedule of those meetings in a conspicuous public location and transmittal of that notice once to the news media would in our view satisfy §104 of the Open Meetings Law regarding those meetings. The only instances in which additional notice would be required would involve unscheduled meetings that are not referenced in the notice.

Therefore, if, for instance, the Board of Education establishes at its organizational meeting that formal meetings will be held on the first and third Monday of every month at 6:30 p.m. at the High School, and if notice containing that information is posted on a bulletin board and on the website continuously and transmitted once to the local news media, we believe that the Board would satisfy the notice requirements imposed by the Open Meetings Law. Again, the only additional notice would involve unscheduled meetings. We point out, too, that although notice of meetings must be given to the news media, there is no requirement that the news media print or publicize that a meeting will be held.

With respect to your specific question regarding meetings on January 28 and March 2, 2010, we note that the Board was required to provide notice of those meetings as outlined in §104 of the Open Meetings Law.

Email notification of upcoming meetings to a list of email addresses, in our opinion, is one way for a public body to provide notification of its meetings to the public; however, it does not fulfill any of the "notice" requirements contained in §104, nor is it required by the Open Meetings Law.

With respect to your questions regarding executive sessions, to the extent that the Board enters into executive session after convening its public meeting, we believe such actions are in keeping with the requirements of the Open Meetings Law, as outlined in our opinion of April 9, 2010.

With regard to your questions concerning notice of executive sessions, please note that there are no separate statutory requirements for notice of executive sessions. Notice provisions outlined in §104, above, pertain to public meetings, and all executive sessions must be held during the course of a meeting, as outlined in our previous opinion.

Finally, with respect to your specific question regarding whether the 72 hour "notice" requirement is considered to be calculated in terms of business days or calendar days, we believe that notice must be posted in a conspicuous designated physical location 72 actual hours before the

meeting. Again, 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. If, for instance, a bulletin board located at the entrance of a school district's high school or administrative offices has been designated as a location for posting notices of meetings, but access to the bulletin board is prohibited over the weekend, in our opinion, posting notice of a Monday night meeting on the bulletin board on the previous Friday night would not meet the 72 hour requirement. Further, it is our opinion that posting an agenda with a start time for a Board meeting online one or two days prior to the Board meeting, or posting an agenda online on the day of the Board meeting is insufficient for purposes of meeting either the physical or internet posting requirements in the Law because it is neither conspicuous nor gives 72 hours prior to the meeting.

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Beth M. Nystrom, District Clerk
John H. Gross

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 4896

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April 20, 2010

Ms. Jean Baron
United Taxpayers of Northport-East Northport
[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. Baron:

This is in response to your email submission of April 19, 2010, in which you forwarded a notice of a Special Meeting of the Board of the Northport-East Northport Board of Education meeting for April 19 at 7:30 p.m.

As previously advised, notice of a meeting of a public body such as the Board of Education is required to be made in keeping with §104 of the Open Meetings Law.

If a meeting is scheduled less than a week an advance, notice of the time and place must be given to the news media and posted in the same manner as previously described in §104, "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 and on the internet.

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.

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Beth M. Nystrom, District Clerk
John H. Gross

OML-AO-1897

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, April 21, 2010 1:55 PM
To: Schillaci, Theresa (CPI)

Hi Terry,

Sure, the reason you can't find it is that although it may be common practice, it doesn't exist in statute.

The provision requiring minutes, I think, is the one that may be relevant here. Section 106 says that if action is taken in executive session, there must be a record, and that executive session minutes need not include anything that is not required to be released under FOIL. Minutes from executive sessions are required to be prepared more quickly (one week) than minutes from public session (two weeks). For practical purposes, I think, clerks tend to prepare one set of minutes, and may not get invited into all of the executive sessions, so boards may vote in public immediately following the executive session for convenience.

Other reasons why you may see public bodies reporting out is that public bodies are prohibited from appropriating money in executive session, and, school boards are prohibited from taking any action in executive session except those actions required by law to be confidential (there are only two: disciplining unionized employees and matters that would identify students). So, for practical purposes lots of boards may come out of executive session and then vote.

Hope this helps –

Camille

OML-AO-1898

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, April 21, 2010 5:02 PM
To: Dexter Baker
Subject: RE: Open Meetings Law - emergency rescue squad

Dexter,

Thank you for your message. If the Open Meetings Law applies, the meetings are required to be held open to the public. In other words, the board must allow the public to witness and observe the decision-making process in action. Public participation is a separate issue.

Unless there is a court order or perhaps equally as significant extenuating circumstances, I don't know of any authority on which a board could rely to deny access to a public meeting. If you were denied access to a public meeting, my suggestion would be to ask on what basis, or what provision of law is the board relying on to exclude you from a meeting.

Camille

Camille S. Jobin-Davis, Esq.
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FOIL-AO-
OML-AO-4899

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, April 22, 2010 2:46 PM
To: Shelly Ramos, Deputy Village Clerk, Village of Montebello
Cc: Mercer, Janet (DOS)
Subject: RE: Taping Village Board meetings

Shelly,

There is no statutory obligation to inform the Board, and as far as I know, case law says there is no obligation to inform the public body that you will be recording them. See the following: http://www.dos.state.ny.us/coog/otext/o3155.htm Whether it's a wise idea, is, of course, up to you.

Please note that as Deputy Clerk, if you tape record a meeting, the recording becomes a record of the Village, subject to the FOIL and applicable retention guidelines (four month retention period). See the following: http://www.dos.state.ny.us/coog/ftext/f11760.htm. Many clerks tape record every single meeting, in order to assist with the preparation of the minutes, as outlined in the opinion.

Please let me know if you have further questions.

Camille

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FOIL-AO-4190

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April 22, 2010

Mr. Richard Mitzner
[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. Mitzner:

I have received your letter and hope that you will accept my apologies for the delay in response. The issue focuses on the preparation of and access to minutes of meetings Village of Chestnut Ridge Zoning Board of Appeals.

In this regard, §106 of the Open Meetings Law pertains to minutes of meetings of public bodies, including zoning boards of appeals, and directs as follows:

> "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.

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

If minutes are not prepared in accordance with §106 within two weeks as required by law, the Board would have failed to carry out a duty mandated by law.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Zoning Board of Appeals

OML-AO-4901

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, April 29, 2010 2:07 PM
To: Keating, Deirdre (DCJS)
Cc: Mercer, Janet (DOS)
Subject: RE: Open meeting law question

Hi Deirdre,

The short answer is that 9 NYCRR 6027.9(e) requires that "the council shall submit its recommendation", which in my opinion means that it shall act as a public body, and make a recommendation to the Commissioner.

This means, that while the Council's quasi-judicial deliberations could be held outside the requirements of the Open Meetings Law (exempt under section 108[1]), the act of voting on the recommendation, or determining what the Council's recommendation will be, would be required to be held at a public meeting subject to OML. (See http://www.dos.state.ny.us/coog/otext/o3994.htm specifically, the paragraph that begins "In the situation that you described..." and other opinions under "Quasi-judicial" http://www.dos.state.ny.us/coog/oml_listing/oq.html)

The long answer involves Executive Law.

If the "council" in the reg is the Municipal Police Training Council, Executive Law §839 says that the MPTC is made up of 8 members, and that it can "establish its own requirements as to quorum and its own procedures with respect to the conduct of its meetings and other affairs" (§839[5]). If the council mentioned in the reg is really the Security Guard Training Council, which is made up of 17 members, it too has the authority to establish its own requirements as to quorum and meeting procedures.

So, if either of the above councils have established their own voting procedures that differ from the requirements of the OML, there is a question of whether those procedures rise to the level of statutory authority to bypass the requirements of the Open Meetings Law. I am unable to find any such procedures on line, and perhaps you would know better whether they exist. If we have to address this question, please let me know.

Camille S. Jobin-Davis, Esq.
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OML-AO-4901-A

From: Freeman, Robert (DOS)
Sent: Tuesday, April 27, 2010 11:28 AM
To: Hon. Legursky, Village Board of Trustees

Dear Trustee Legursky:

I have received your inquiry concerning the existence of a law "banning cameras in a village board meeting." In short, there is no such law. Further, judicial decisions indicate that anyone may audio or video record an open meeting of a public body, so long as the use of the recording equipment is neither disruptive nor obtrusive. I note, too, that legislation codifying those decisions was recently approved that will specify that open meetings may be broadcast or recorded, again, as long there is no disruption. The legislation will become effective on April 1 of next year.

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

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FOIL-AO - 17096
OML-AO - 4902

From: Freeman, Robert (DOS)
Sent: Monday, May 10, 2010 11:09 AM
To: Kelly Voll, The Citizen
Cc: Mary Kay Worth, Superintendent, Southern Cayuga Central School District
Subject: RE: open meeting law research

Hi Kelly - -

As suggested to you in our conversation, there appears to be confusion regarding the application of the Open Meetings Law, or absence thereof, and rights of access to records conferred by the Freedom of Information Law.

In this instance, I would agree with the Superintendent's conclusion that the entity in question does not constitute a public body and that, therefore, its meetings fall beyond the requirements of the Open Meetings Law. However, as she also appeared to have suggested, records relating to that entity are subject to rights of access conferred by the Freedom of Information Law. If there is a record, for example, indicating the date, time and location of a meeting of that entity, such a record would, in my view, be accessible under the Freedom of Information Law, even though it relates to a meeting that need not be conducted open to the public. Certainly there is no law that would prohibit her from verbally indicating the information that you requested.

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

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STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1903

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May 13, 2010

E-Mail

TO: Ms. Paula Piekos

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. Piekos:

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

In short, based on your letter, it appears that you believe that you and your attorney were misled by the City of White Plains Planning Board, which discussed a matter involving issues relating to a bridge that apparently is partially on your property and partially on property owned by the City. The difficulty was that the Board discussed the matter, even though there was no reference to it on the agenda.

In this regard, although you might have been misled, please be advised that the Open Meetings Law is silent in relation to the preparation or use of an agenda. Certainly a public body, such as the Planning Board, may prepare an agenda; it is not required, however, to do so. Similarly, when a public body has prepared an agenda, it may, but is not required to follow it. Further, there is nothing in the Open Meetings Law that precludes a public body from discussing an issue that is not referenced on an agenda.

I am not certain that there are other issues that relate to or bear upon compliance with the Open Meetings Law. If there are such issues, please feel free to bring them to our attention.

I hope that the foregoing serves to offer clarification.

RJF:jm

cc: Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4904

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May 14, 2010

Mr. Roy Mallette
[redacted]

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

Dear Mr. Mallette:

I have received your letter and hope that you will accept my apologies for the delay in response. You have questioned "the legality of the pre-agenda meetings" held in the Town of Cicero and whether minutes are taken at those meetings.

In this regard, assuming that the gatherings to which you referred involve a quorum of the Town Board, it appears that they are subject to the requirements of the Open Meetings Law.

By way of background, 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.

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

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

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

OML-AO-4905

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, May 18, 2010 11:00 AM
To: Mayor Arrington, Village of Owego
Subject: Open Meetings Law - special meetings

Mayor Arrington:

In response to your question regarding whether a village board must limit discussions during special meetings to those articulated on an agenda or a notice of the meeting, please note that Section 104 of the Open Meetings Law requires notice of the time and place of every meeting, but does not mention or require a public body to indicate the subjects to be discussed in the notice. Accordingly, the Open Meetings Law does not impose the limitations that you mentioned.

While the authority of my office to interpret the law does not extend to the Village or General Municipal Laws, my review of those laws reveals no specific mention of special meetings or limited topics for meetings in general.

The only other source for this type of requirement that I can think of, is perhaps a local law or ordinance adopted by the Village of Owego, and I recommend, if you haven't already done so, that you review them for these purposes.

I hope that you find this helpful. Thank you for your interest in these issues.

Camille

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OML-AO-4906

From: Freeman, Robert (DOS)
Sent: Wednesday, May 19, 2010 8:53 AM
To: Hon. John Wortmann, Councilman, City of Port Jervis
Subject: RE: Meeting legality
Attachments: o4228.wpd

Dear Councilman Wortman:

I have received your letter concerning the status of an "informational meeting" called by the Mayor of the City of Port Jervis that was not open to the public.

As I understand the matter, the gathering was a "meeting" that should have been preceded by notice and conducted open to the public. In short, it has been held that a gathering of a quorum of a public body, such as a city council, for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, irrespective of its characterization or the absence of an intent to take action. Attached is an opinion dealing with a somewhat analogous situation in greater detail.

You indicated that, "being uncomfortable", you left the meeting. In similar situations, it has been suggested that members of public bodies express their views concerning the status of a gathering, and that they remain in attendance. By exiting, they lose their capacity to know what is said or discussed; by remaining at the meeting, they can better ascertain whether there was compliance with law and/or perhaps inform the public of the nature of a discussion.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
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99 Washington Avenue
Albany, NY 12231
Phone: (518)474-2518
Fax: (518)474-1927
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-18117
OML-AO-4907

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May 19, 2010

Mr. Chad Garrow
Ms. Roseann Garrow
[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. and Ms. Garrow:

I have received your correspondence and hope that you will accept my apologies for the delay in response. Due to complaints concerning the use of wind power, you indicated that the Supervisor of the Town of Clinton would "not be opening the floor for people to speak..." You also complained concerning the Town's charge for postage when copies of records sought under the Freedom of Information Law are mailed to you.

In this regard, I offer the following comments.

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

Second, as you may be aware, when records are accessible under the Freedom of Information Law, they are available for inspection and copying. An agency is not permitted to charge for the inspection of records, and consequently, you may view records without the assessment of a fee in a town office. When photocopies are requested, an agency may charge up to 25 cents per photocopy not in excess of nine by fourteen inches. That law is silent concerning the ability of an agency to charge for postage, but it has been held that an agency may choose to do so (Blanche v. Cherney, Supreme Court, Washington County, March 13, 1992).

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
Hon. Deborah McComb

OML-AO-1908

From: Freeman, Robert (DOS)
Sent: Friday, May 21, 2010 3:38 PM
To: Adam Whitney, Lowville Journal and Republican
Subject: RE: Question about the law about minutes and meetings -
Attachments: O2906.wpd

Dear Mr. Whitney:

In short, there is no law that requires that minutes be approved. Based on the direction given in the Open Meetings Law, minutes must be prepared and made available within two weeks of the meetings to which they pertain, irrespective of whether they have been approved. Attached is an opinion that deals with the issue in greater detail.

I hope that I have been of assistance.

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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-18123
OML-AO-4909

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May 25, 2010

E-mail

TO: Ms. Julie Ielfield

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

Dear Ms. Ielfield:

We have received your letter dated February 11 in which you requested an advisory opinion concerning the Open Meetings Law and Freedom of Information Laws.

According to your letter, two meetings held by your town board were conducted in a manner inconsistent with the Open Meetings Law and information discussed at one of the meetings is being withheld. Based on the facts presented, the Supervisor expressed the need for an executive session during the first meeting, requiring the public to leave. During the second, the Supervisor appears to have indicated the necessity to discuss correspondence from an attorney as the catalyst for entry into executive session but no motion was made to do so.

To address the first issue at hand, in our opinion the procedures utilized by the local municipality to enter into an "executive session," based on the facts presented in your email, are incompatible with the Opening Meetings Law.

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

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

Accordingly, 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.

From the facts presented in your letter, at both the January 11 and February 8 meetings, no motion was made to enter into executive session and no explanation was given for the necessity to do so. Without articulating a motion or the required legal basis for entry into executive session, we believe the board acted in contravention of the Open Meetings Law.

Second, your letter raises the issue of whether pending legislation constitutes a valid basis for a public body to enter into an executive session.

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. This suggests that there is intent 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. Since "legal matters" or possible litigation could be the subject or result of nearly any topic discussed by a public body, an executive session could not in our view be held to discuss an issue merely because there is a possibility of litigation, or because it involves a legal matter.

In regard to minutes of an executive session, §106 of the Open Meetings Law pertains to minutes, and subdivision (2) of that provision deals with minutes of executive sessions and states that:

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

In addition, subdivision (3) of §106 provides that:

> "Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such 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, when a public body takes action during an executive session, minutes indicating the nature of the action taken, the date, and the vote of each member must be prepared within one week and made available to the extent required by the Freedom of Information Law. It is noted, however, that if a public body merely discusses an issue or issues during an executive session but takes no action, there is no requirement that minutes of the executive session be prepared.

Next, is noted that there is nothing in the Freedom of Information Law or the Open Meetings Law that requires that government officers or employees respond to questions, supply information in response to questions or offer explanations for their governmental activities. As

indicated in §89(3) of the Freedom of Information Laws an agency, such as a town, must respond to a "written request for a record reasonably described." Further regulations promulgated by the 21 NYCRR §1401.5(a), state that, "An agency may require that a request be made in writing or may make records available upon oral request" Also, although the Open Meetings Law provides the public with the right to attend meetings of government bodies, it does not give the public the right to speak or require that questions be answered during meetings held in accordance with that law. Lastly, should you request records documenting payments made to the town's legal counsel, we believe the information regarding the attorney's fees is required to be released. 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) of the law.

With specific respect to records reflecting payments to attorneys, we point out that, while the communications between an attorney and client are often privileged, it has been established in case law that records of the monies paid and received by an attorney or a law firm for services rendered to a client are not privileged [see e.g., People v. Cook, 372 NYS2d 10 (1975)]. If, however, portions of time sheets, bills or related records contain information that is confidential under the attorney-client privilege, those portions could in our view be withheld under §87(2)(a) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute" (see Civil Practice Law and Rules, §4503). Therefore, while some identifying details or descriptions of services rendered found in the records sought might justifiably be withheld, numbers indicating the amounts expended and other details to be discussed further are in our view accessible under the Freedom of Information Law.

We hope that we have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: James B. Gross
Legal Intern

RJF:JBG:jm

OML-AO-4910

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, May 26, 2010 10:22 AM
To: Mara Farrell
Subject: RE: Thanks regarding Town Hall Meeting Fishkill, NY

Dear Mara,

Thank you for following up on our telephone conversation. To clarify, if the Town Board is required to take action on an issue or a question, or stated another way, if the Town Board's determination is necessary to moving forward on a particular issue, because it is permitted to take action only at a public meeting subject to the Open Meetings Law, it would have to take any such action at a public meeting. The requirements for holding a public meeting include notice to the public and the media of the time and place of the meeting, allowing the public to witness and observe the decision-making process in action, and minutes. See the Open Meetings Law: http://www.dos.state.ny.us/coog/openmeetlaw.html

And, when a quorum of a town board is gathered together to discuss the business of the town, such a gathering would be a meeting, subject to the Open Meetings Law. You can learn more about the definition of meetings from advisory opinions on our website under "M" for "Meetings."
(http://www.dos.state.ny.us/coog/oml_listing/om.html)

Camille S. Jobin-Davis, Esq.
Assistant Director
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OML-AO-4911

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, May 27, 2010 10:42 AM
To: Ms. Joan Sullivan
Subject: Open Meetings Law - continue exec session

Joan,

As promised, I followed up and am not aware of any authority with respect to statutes other than the OML, or case law arising from other laws that apply to local governments that would prohibit a public body from continuing an executive session or a public meeting at a later date; however after additional consideration, I am sure that a public body should be strongly advised to close the executive session, close the public meeting, and reconvene at a second meeting. For a public body to do otherwise, in my opinion, would impair the ability of the public to discern whether the public body was in executive session appropriately at the second meeting. This would be in contravention of the intent of the OML.

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OML-AO-4912

From: Freeman, Robert (DOS)
Sent: Friday, May 28, 2010 3:19 PM
To: Michael D. Morgan

Dear Mr. Morgan:

I have received your letter in which you referred to my confirmation of your understanding that "SUNY (a corporation) cannot rely upon section 105(1)(f) to discuss its own financial history qua corporation." You requested any written opinions that might focus on that issue.

In this regard, although the advice to which you referred has been expressed on several occasions, having searched our opinions, I do not believe that any written opinion has directly addressed the issue.

I note that counties, cities, towns, villages, school districts, fire districts, public authorities and the like are public corporations. If the boards that serve those entities could rely on section 105(1)(f) as a means of conducting executive sessions, virtually all discussions concerning the development of their budgets, the potential purchase of goods and services and numerous other issues could be considered in executive session. Nevertheless, it is clear, in my view, that issues of that nature must in most instances be discussed in public to comply with the Open Meetings Law, particularly when they involve matters of policy, such as the need to create or eliminate positions or programs. Those discussions often involve what might be characterized as an entity's "financial history." Nevertheless, it has never been found that they may validly be considered during executive sessions.

In short, I believe that your understanding of the application of section 105(1)(f) as it pertains to a discussion by the SUNY Board of Trustees of its own financial history, that section 105(01)(f) could not properly be asserted, is correct.

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-4913

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May 28, 2010

Mr. William J. Estes
General Counsel
NYS Thruway Authority/Canal Corporation
200 Southern Boulevard
Albany, NY 12209

The staff of the Committee on 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. Estes:

I have received your letter in which you asked that I confirm the opinion offered during our recent conversation.

You indicated that often a committee consisting of members of the Thruway Authority meets on the same day prior to a meeting of the full Board of the Authority. That being so, you asked whether notice pertaining to both meetings can be given "by stating the commencement time of the committee meeting and stating that the board meeting will immediately commence after the committee meeting ends (but not give a specific time as when the board meeting will begin)." You added during our conversation that committee meetings run for various amounts of time, usually not in excess of an hour, and that it is impossible, therefore, to know in advance exactly when the Board will begin its meeting.

From my perspective, every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. Clearly, through the requirements involving notice of meetings found in §104 of that statute, there is an intent to enable the public to know when and where meetings of public bodies will occur. In the circumstance that you describe, both the committee and the Board constitute public bodies, and so long as the notice given pursuant to §104 specifies the commencement time and place of the committee meeting and, in addition, states that the Board meeting will commence immediately following the committee meeting, I believe that the intent of the Open Meetings Law would be realized and that notice of that nature would be proper and valid. If, historically, committee meetings last for no more than an hour, it is recommended that the notice indicate that committee meetings typically continue for approximately an hour or less.

I hope that I have been of assistance. If you would like to discuss the matter further, 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-4914

Committee Members

Tedra L. Cobb
Lorraine A. Cortés-Vázquez
John C. Egan
Robert L. Megna
Garry Pierre-Pierre
Clifford Richner
David A. Schulz
Robert T. Simmelkjaer II

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May 28, 2010

Mr. Joseph W. Sallustio, Jr.
[redacted]

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

Dear Mr. Sallustio:

We are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to gatherings of the Rome Common Council, particularly with respect to the requirements for providing notice of public meetings.

First, §104 of the Open Meetings Law pertains to notice and states that:

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

In May of 2009, 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 city hall has been designated as a location for posting notices of meetings, the public has the ability to know where to ascertain whether and when meetings of a school board will be held. Similarly, every public body with the ability to do so should post notice of the time and place of every meeting online.

On behalf of the Committee on Open Government, we hope that this helps clarify the requirements of the Open Meetings Law.

Sincerely,

Camille S. Jobin-Davis

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Hon. Louise S. Glasso

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT OML-AO 4915

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June 2, 2010

Ms. Florence Alpert
[redacted]

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

Dear Ms. Alpert:

We are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to a gathering of the Board of Trustees of the Village of Candor. You inquired as to the propriety of the Board's behavior with respect to a meeting on December 1, 2009, particularly with respect to the amount of business conducted within the first two minutes of the meeting. You further indicated your opinion that the minutes were incorrect with respect to comments made later in the meeting.

First, 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 the intent of the Open Meetings Law, we believe that meetings should begin at or immediately after the time that is set forth in the notice of the meeting. Starting a meeting prior to the time set forth in the notice, in our opinion, is equivalent to holding a meeting for which no notice has been provided.

Second, our review of minutes from the December 1, 2009 meeting indicates that the meeting was called to order, after the Board recited the Pledge of Allegiance, at 6:30 pm. The board then approved minutes from the previous meeting, and reviewed a copy of a letter to a Mr. David O'Konsky, as follows:

> "Dissolution Petition – A copy of a letter sent to David O'Konsky was reviewed which stated that the Clerk had reviewed the submitted petition to dissolve the Village of Candor and determined that it was invalid."

The minutes then indicate that you arrived at the meeting at 6:32.

You characterize the minutes as indicating that the Board invalidated a dissolution petition prior to you entering the meeting; however, our review of the minutes lead us to believe that such action was not taken at the December 1, 2009 meeting.

Consider the notations elsewhere in the minutes of the meeting on December 1, 2009. On four occasions, there are notations regarding motions made by Trustee Consalvi and seconded by Trustee Brown. Coupled with them, on all four occasions, the minutes indicate "A vote was taken and Trustees Consalvi and Brown, as well as Mayor Sparling, voted aye. The motion was approved and carried." On all four occasions, the Board is recorded as taking action with respect to a particular board responsibility, including approval of the minutes, forming a dissolution study committee, opening a savings account, and authorizing the Deputy Clerk to establish bank accounts. In our opinion, the notation regarding the letter sent to Mr. O'Konsky does not indicate either that a motion was made or that a vote was taken. The notation simply indicates that a letter was reviewed.

Accordingly, in our view, it is reasonable to believe that the board approved minutes and reviewed a letter within the first two minutes of a meeting.

Lastly, you indicate that there is a notation in the minutes that reflects a comment that was not made at the meeting. Section 106 of the Open Meetings Law deals directly with minutes of meetings and states that:

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

Based on the foregoing, it is clear that minutes need not consist of a verbatim account of what is said. Rather, at a minimum, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member. In our opinion, inherent in the Open Meetings Law is an intent that the provisions of this law be carried out reasonably and fairly, and that minutes be accurate.

On behalf of the Committee on Open Government, we hope that this helps to clarify your understanding of the Open Meetings Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 4196

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June 2, 2010

Mr. Karl D. Kruger
[redacted]

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

Dear Mr. Kruger:

We have received your letter in which you requested an advisory opinion concerning the Open Meetings Law.

According to your letter, when you served as a county legislator on the Allegany County Board of Legislators, the republican members who represented fifteen of the sixteen seats would hold political caucuses before an open meeting was to occur. During these sessions, deliberations would take place pertaining to public business to be considered in public following the political caucus.

The Open Meetings Law is applicable to meetings of public bodies, and the phrase public body is defined to mean:

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

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

Nevertheless, the kind of gathering that you described would appear to be exempt from the Open Meetings Law. Even if a majority of certain legislative bodies, such as county legislatures, city councils or town boards are present at a political caucus, it is unlikely that the Open Meetings Law is applicable.

By way of background, § 108 of the Open Meetings Law includes three exemptions. If an exemption applies, the Open Meetings Law does not; it is as though the Open Meetings Law does not exist.

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

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

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

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

We hope that we have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: James B. Gross
Legal Intern

RJF:JBG:jm

cc: County Board of Legislators

OML-AO-4917

From: Freeman, Robert (DOS)
Sent: Friday, June 04, 2010 11:31 AM
To: Mr. Karin, City of Rochester

Dear Mr. Karin:

In my opinion, if there is excessive noise outside of a room in which a meeting of a public body is being held, the door to the room may be closed. However, if the door is closed, it is advised that a sign should be posted on or near the door indicating that a meeting is being held and that the public may enter.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
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99 Washington Avenue
Albany, NY 12231
Phone: (518)474-2518
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4918

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June 7, 2010

Mr. Andrew DeWolf
[redacted]

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

Dear Mr. DeWolf:

We have received your letter in which you requested an advisory opinion concerning the propriety of an executive session held by the Lyons Village Board of Trustees, notice of meetings, and certain documents that were not disclosed by the Board pursuant to the Freedom of Information Law. In response to our notification of your request for an opinion, the Village Clerk submitted information via correspondence dated March 16, 2010, a copy of which is attached.

First, in your initial communication you referred to work sessions held by the Village Board. The term "work session" is not found in any aspect of the Open Meetings Law or any other statute of which we are aware, and the issue, in short, is whether the gathering in question constituted a "meeting" that fell within the coverage of the Open Meetings Law.

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

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body, such as a village board, 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.

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

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

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

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

Based upon the direction given by the courts, when a majority of a public body gathers to discuss public business, in their capacities as members of the body, any such gathering, in our opinion, would constitute a "meeting" subject to the Open Meetings Law.

It appears that the gatherings to which you referred constituted "meetings" subject to the Open Meetings Law. If that is so, they should have been preceded by notice given to the news media and posted in accordance with §104 of the Open Meetings Law and conducted open to the public, except to the extent that an executive session might properly have been held.

Second, there appears to have been uncertainty with respect to public participation at meetings. While the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (OML §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.

Third, according to your letter, the Board went into executive session at a meeting held on November 19, 2009 to discuss a proposed Inter-Municipal Agreement between the Village of Lyons and Wayne County in regards to the acquisition of the H.G. Hotchkiss building and grounds. Minutes from the meeting indicate the board resolved to "declare" an executive session "to discuss the acquisition of property." The Village Clerk contends that "the ability of the village to acquire title to the property for nothing might have been compromised if discussed in open session." In this regard, as you may be aware, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into an executive session. Further, paragraphs (a) through (h) of §105(1) of the Law specify and limit the subjects that may appropriately be considered in executive session. Based upon a review of the grounds for entry into executive session, from our perspective, it is unlikely that any would properly have been asserted with respect to the discussion that you described.

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

A key question, in our view, involves the extent to which information relating to possible real property transactions has become known to the public. The more that is known, the less likely it is that publicity would have an impact on the value of a parcel or in some way damage the interests of taxpayers. We note that the language of §105(1)(h) does not refer to negotiations per se or the impact of publicity upon negotiations relating to a parcel; rather its proper assertion is limited to situations in which publicity would have a substantial effect on the value of the property. It has been advised, for example, that when a municipality is seeking to purchase a parcel and the public is unaware of the location or locations under consideration, it is possible if

not likely that premature disclosure or publicity would indeed substantially affect the value of the property. In that kind of situation, publicity might result in speculation or offers from others, thereby precluding the municipality from reaching an optimal price on behalf of the taxpayers. However, when details concerning a potential real property transaction, such as the location and potential uses of the property, are known to the public, publicity would have a lesser effect or impact on the value of the parcel. Again, the more that is known to the public, the less likely it is that publicity would affect the value of a parcel. In situations, insofar as publicity would "substantially" affect the value of those parcels, an executive session may properly be held. However, in other situations in which publicity would have little or no impact upon the value of real property, we do not believe that there would be a basis for conducting an executive session.

In short, it is reiterated that executive sessions may properly be held in our opinion only to the extent that publicity "would substantially affect the value" of one or more parcels of real property. In consideration of the facts presented, it does not appear that a claim could justifiably be made or proven that publicity could have an effect, let alone a "substantial" effect, on the value of the property that is the subject of the discussion. If that is so, we do not believe that §105(1)(h), or any other ground for entry for executive session, could be asserted as a means of closing a meeting of the Board.

Turning to your inquiry regarding notice of the 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."

In May of 2009, 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 village 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 village 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.

In regards to the issue of the special meeting called with short notice, as noted earlier, § 104 of the Open Meetings Law deals with notice of meetings that must be given to the news media and to the public. 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. Again, when a public body maintains a website, notice should also be posted online.

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 our perspective, unless there is a true emergency or need that would justify convening a meeting within a brief time, meetings should be held with adequate notice to the public.

Finally, in response to your question regarding remedies, 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".

We note that amendments to § 107(1) will become effective on June 13, 2010. When referring to a judicial proceeding, that provision will state that:

> "if a court determines that a public body failed to comply with this article, the court shall have the power, in its discretion, upon good cause shown, to declare the action taken in relation to such violation void, in whole or in part, without prejudice to reconsideration in compliance with this article. If the court determines that a public body has violated this article, the court may require the members of the public body to participate in a training session concerning the obligations imposed by this article conducted by the staff of the committee on open government."

We hope that we have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Kyle Christiansen
Legal Intern

RJF:KC:jm
Enc.
cc: Village Board of Trustees

OML-AO-4919

From: Camille S. Jobin-Davis, Assistant Director
Sent: Tuesday, June 08, 2010 3:44 PM
To: Schillaci, Theresa (CPI)
Subject: RE: Closing a Public Meeting.

I think that I unintentionally implied that you had to vote to close a meeting. Let me see if this makes any more sense --

Losing the quorum means the meeting has closed, period. If member(s) leave, they've voted with their feet. There would be no need to record a motion or vote on the record, the meeting would be over because it wouldn't exist by definition. ("Meeting" under OML and Court of Appeals requires quorum – see the following excerpt from our advisory opinions: The definition of "meeting" has been broadly interpreted by the courts, and in a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].)

Once one of the members has exited, and the quorum no longer exists, the rest of the members present wouldn't be able to vote on anything, even to "suspend" until a later time/date. Again, no need to vote to close, the meeting is over.

Minutes from a meeting that ended because a quorum no longer existed, could merely indicate that the meeting ended at 8:15. If the member left because she had to take a phone call or something quick, and returned shortly thereafter, I think that as long as she informed those present that she intended to return shortly, the record would just reflect that the meeting was "suspended" from 9 to 9:15 due to the temporary absence of member Camille.

Votes taken during a meeting at which a quorum is present are not invalidated because a member leaves after a vote is taken. Action taken at a "meeting" is action taken -- regardless of how the meeting ends.

Let me know if any of this helps ---

OML-AO - 1920

From: Freeman, Robert (DOS)
Sent: Tuesday, June 08, 2010 4:04 PM
To: Ms. Julie Denton, Mid York Library System
Subject: Library committee meetings.
Attachments: o3026.wpd

Dear Ms. Denton:

Attached is an opinion that deals expansively with the issue that you raised. In brief, if a board of trustees constitutes a "public body" that would be subject to the Open Meetings Law, even in the absence of the requirements imposed by §260-a of the Education Law, I believe that committees consisting of two or more members of such a board are also public bodies that fall within the scope of the OML. If, on the other hand, a library board of trustees is not a governmental entity, but rather a not-for-profit corporation, it would not constitute a public body, and but for the enactment of §260-a, would not be subject to the OML. That being so, the committees of that kind of library board, other than such a board in New York City (again, based on the language of §260-a), are not, in my view, subject to the OML.

I hope that this and the attached opinion offer the clarification that you are seeking and that I have been of assistance.

And yes, issues involving the Mid York Library System appear to have diminished. I would conjecture that many are happy about that.

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-4921

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June 8, 2010

Ms. Kiera L. Cohen
[redacted]

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

Dear Ms. Cohen:

We have received your letter of March 16 in which you requested an advisory opinion concerning the propriety of informational sessions held by the City of Long Beach Civil Service Commission.

Specifically, you raised the following questions:

> "1. Are these so-called 'informational sessions' considered to be meetings under the Open Meetings Law?
>
> 2. If they are considered to be meetings, is it required that minutes are taken and made available to the public?
>
> 3. Are there any penalties for not strictly adhering to the Open Meetings Law?"

In this regard, first, in considering whether informational sessions held by the Commission are considered meetings under the Open Meetings Law (OML), it is noted that the word "formal" was considered in first key judicial decision involving the scope of the Open Meetings Law.

Section 102(1) of the OML defines the term "meeting" to mean, the "formal convening" of a public body, such as a civil service commission, for the purpose of conducting public business.

In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an

intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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 OML. However, if there is no intent that a majority of public body will gather for purpose of conducting public business, collectively, as a body, but rather for the purpose of gaining

education, training, or to develop or improve "team building and communication skills", we do not believe that the OML would be applicable.

In short, if a session is to be held solely for the purposes of training and educating board members, and if the members 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 OML.

We point out that in one of the letters you attached, the Secretary to the Civil Service Commission pointed out that "the meetings were scheduled as informational sessions, to discuss Civil Service procedures and to educate" the two new Commissioners. As such, if the Board did not discuss the business of the board, but only received training regarding established procedures, we believe the OML would not apply. In the event that public business was discussed, of course, the OML would apply.

Second, in regard to your question concerning minutes of meetings, if these "informational sessions" do not constitute meetings subject to OML, minutes are not required to be prepared. However, if the sessions were, in fact, subject to the OML, please consider §106 of the OML 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."

It is clear, for example, that minutes need not consist of a verbatim of account of all that is stated a meeting. It is also clear that minutes must be prepared and made available to the public "within two weeks of the date of such meeting." If the Commission takes action during these meetings, minutes would be required to be prepared and provided to the public upon request.

Lastly, in response to your question regarding remedies, 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, without prejudice to reconsideration in compliance with this article. If the court determines that a public body has violated this article, the court may require the members of the public body to participate in a training session concerning the obligations imposed by this article conducted by the staff of the committee on open government."

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".

We hope that we have been of assistance. Should any further questions arise, please feel free to contact us.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: Kyle Christiansen
Legal Intern

RJF:KC:jm

cc: City of Long Beach Civil Service Commission

OML-AO-4922

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, June 10, 2010 10:58 AM
To: Ms. Frances Genovese
Subject: Open Meetings Law - notice of emergency meeting

Frances,

As promised.

The following is a provision of Town Law. Please note reference to special meetings in the second paragraph.

§ 62. Meetings of town board. 1. The town board of every town shall meet on or before the twentieth day of January in each year for the purpose of making the annual accounting by town officers and employees as required by section one hundred twenty-three of this chapter. The requirement for the annual accounting shall not apply to a town having a town comptroller, nor to a town which, prior to the twentieth day of January, shall have engaged the services of a certified public accountant or public accountant to make an annual audit to be completed within sixty days after the close of the town's fiscal year.
2. The town board of every town of the first class shall hold at least one meeting in each month. 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. All meetings of the town board shall be held within the town at such place as the town board shall determine by resolution, except that where provision is made by law for joint meetings of two or more town boards such joint meetings may be held in any of the towns to be represented thereat.

Further, the following is a link to an advisory opinion from our office regarding the necessity for holding meetings on an emergency basis:

http://www.dos.state.ny.us/coog/otext/3383.htm

Please note that the Open Meetings Law applies to all public bodies, including school boards and town boards alike. Additional advisory opinions regarding this issue can be found on our website, under "E" for "Emergency Meetings" on the Open Meetings Law index of advisory opinions (http://www.dos.state.ny.us/coog/oml_listing/oindex.html).

Finally, the notice requirements in the Open Meetings Law have recently been amended. The following is a description of the recent amendments and the current notice requirements:

First, §104 of the Open Meetings Law pertains to notice and states that:

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

legal notice.
4. If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations."

In May of 2009, 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 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.

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

Camille S. Jobin-Davis, Esq.
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4923

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June 10, 2010

E-Mail

TO: Ms. Linda Taurassi, Smithtown Library

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. Taurassi:

As you are aware, I have received your correspondence relating to a matter involving compliance with the Open Meetings Law by the Smithtown Library Board of Trustees. Please accept my apologies for the delay in response.

By way of background, at its January meeting the Board voted to change the date of its regular February meeting. Following that meeting, the President of the Board realized that he had a conflict and asked the Library Director "to poll the board to see about a different date." All but one Trustee could attend on the newly established date, and that Trustee contended that the Board "must keep the date they voted on at their January meeting..." After a number of email exchanges, a new date on which all members could attend was established, and notice of the meeting was given, apparently in compliance with the Open Meetings Law.

Six of seven Trustees attended the rescheduled meeting; the absent Trustee, the member who did not want to change the original date of the meeting, indicated that he was too ill to attend. At the March meeting, the absent member expressed the view that the February meeting "was improper" and that all actions taken at that meeting were invalid and needed to be "revoted."

The question is whether a "special meeting" must be held "just to vote on the date of a regular meeting." In my view, there is no such requirement.

First, it is common practice for public bodies to schedule meetings through communication and methods carried out outside of meetings themselves. The Committee on Open Government is a public body, and often the only manner in which it can be ascertained whether a quorum of the

Committee can attend an upcoming meeting involves contacting members via email, or formerly phone, to learn of the dates on which members would have the ability to attend. Without that capacity, the Committee and numerous other public bodies would be unable ever to schedule meetings with the certainty or even the likelihood that a quorum can be present.

Second, a "meeting", according to the Open Meetings Law, section 102(1), is a gathering of a quorum of a public body "for the purpose of conducting public business." In my view, an effort such as that which you described would not have involved an activity that could be characterized as "conducting public business." The communications did not involve or reflect the business or substantive duties of the board, but rather a purely administrative function that is typically carried out by staff.

And third, it appears that notice of the meeting was given pursuant to section 104 of the Open Meetings Law and that the meeting was held open to the public. If that so, I do not believe that there would be a basis for invalidation of action taken at the meeting in question. Further, as a general matter, action taken by a public body remains valid, unless and until a court renders a contrary determination.

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

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 18145
OML-AO - 4924

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June 10, 2010

Ms. Adrienne Juozokas
Legal Assistant to the Chairman
Public Employment Relations Board
80 Wolf Road - 5th Floor
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, unless otherwise indicated.

Dear Ms. Juozokas:

I have received your communication in which you raised issues concerning both the Freedom of Information and Open Meetings Laws that have arisen at the Public Employment Relations Board (PERB).

The first area of inquiry pertains to a request made pursuant to the Freedom of Information Law in which the applicant sought "all tally sheets from elections conducted in six counties." You indicated that the request "did not include petitioner names or case numbers, only the names of employers." To fulfill the request, you wrote that "we would have to use Westlaw first to find all cases where elections were held involving those counties, and find the files corresponding to the cases in order to locate the tally sheets." The question is: "how much effort is required on our part to use Westlaw to find petitioner names or case numbers in order to complete this request in compliance with FOIL."

In this regard, the issue involves whether the request "reasonably describes" the records sought as required by §89(3)(a) of the Freedom of Information Law.

Based on the language of the law and its judicial construction, a request made for a specific document or documents does not necessarily indicate that a person seeking the record has made a valid request that must be honored by an agency. In considering the requirement that records be "reasonable described", the Court of Appeals has indicated that whether or the extent to which a request meets the standard may be dependent on the nature of an agency's filing, indexing or records retrieval mechanisms [see Konigsburg v. Coughlin, 68 NY2d 245 (1986)]. When an agency has the ability to locate and identify records sought with reasonable effort in conjunction with its filing,

indexing and retrieval mechanisms, it was found that a request meets the requirement of reasonably describing the records, irrespective of the volume of the request. By stating, however, that an agency is not required to follow "a path not already trodden" (id., 250) in its attempts to locate records, I believe that the Court determined, in essence, that agency officials are not required to search through the haystack for a needle, even if they know or surmise that the needle may be there.

As I understand your remarks, PERB cannot locate the records sought using its own record-keeping or retrieval mechanisms; rather, to do so, it must employ a search mechanism outside the agency, Westlaw, to initiate the process of locating and retrieving the records sought. If that is so, it is my view that the request does not meet the requirement that an applicant must reasonably describe the records.

I note that the regulations promulgated by the Committee on Open Government require that an agency's records access officer inform an applicant of the means by which records are kept, if necessary, to enable that person request records in a manner that reasonably describes the records [21 NYCRR section 1401.2(b)(2)]. If, for example, the records sought can be found based on PERB's record-keeping or retrieval systems through use of petitioner names or case numbers, as you inferred, the applicant should be so informed.

During our conversation, you indicated that the PERB, when all members have been appointed, consists of three, but that there are currently only two members.

As you are likely aware, the Open Meetings Law is applicable to meetings of public bodies. From my perspective, it is clear that PERB is a public body, and a "meeting" is a gathering of quorum of a public body for the purpose of conducting public business. Therefore, when two members of PERB are conducting public business, the Open Meetings Law would require they conduct a meeting in compliance with that statute, unless an exemption from its coverage applies.

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

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

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

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

Relevant to the matter is the provision to which you alluded, §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 the situation that you described, it is my understanding that following a hearing, PERB renders a determination that is final and binding. If it does so, I believe that its deliberations, such as those conducted by phone that you described, would be quasi-judicial and, therefore, exempt from the requirements of the Open Meetings Law.

It is noted, however, that even when the deliberations of a board of education may be outside the coverage of the Open Meetings Law, its vote and other matters would not be exempt. As stated in Orange County Publications v. City of Newburgh:

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

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4925

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June 10, 2010

E-Mail

TO: Robert Cox, Managing Editor, New Rochelle's Talk of the Sound

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. Cox:

I have received your communication concerning the propriety of an executive session held by the New Rochelle City Council.

According to an article that you included, the City Council conducted an executive session to discuss "a matter of real estate", and you wrote that the City is not purchasing, leasing or selling real property.

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, such as a city council, cannot enter into an executive session to discuss the subject of its choice. From my perspective, the grounds for entry into executive session are based on the need to avoid some sort of harm that would arise by means of public discussion, and that is so with respect to the only ground for entry into executive session that appears to be relevant in relation to the matter 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. And finally, if the issue did not involve the proposed acquisition, sale or lease of real property, §105(1)(h) would not, in my view, serve as a valid basis for conducting an executive session.

I hope that I have been of assistance.

RJF:jm

cc: City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 1926

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June 11, 2010

Mr. Donald G. Hobel
[redacted]

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

Dear Mr. Hobel:

We are in receipt of your letter requesting an advisory opinion regarding recent amendments made to the Niagara County Legislature Rules of Order. Resolution IL-121-09, and corresponding Rules of Order, specifically, Rule 7, submitted with your request, indicate as follows:

> "The Order of Business of each regular session shall be:
>
> ...
>
> 5. Public comments 'Agenda Items' (regular meetings);
>
> ...
>
> 13. Adjournment
>
> 14. Public comments "general Welfare of the County' (regular meetings)."

Public comments during a regular meeting are limited to 3 minutes per person, while public comments after adjournment are not limited. Further, you indicated that any guest of a legislator may speak without condition, but if different member of the public wishes to speak, that person must sign in before the meeting commences.

In this regard, 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.

Within the language of the Open Meetings Law, there is nothing that pertains to the right of those in attendance to speak or otherwise participate. Certainly a member of the public may speak or express opinions about meetings or about the conduct of public business before or after meetings to other persons. However, since neither the Open Meetings Law nor any other statute of which we are aware, provides the public with the right to speak during meetings, we do not believe that a public body is required to permit the public to do so during meetings. Certainly a public body may permit the public to speak, and if it does so, it has been suggested that rules and procedures be developed that regarding the privilege to speak that are reasonable and that treat members of the public equally. From our perspective, a rule that allows certain members of the public to speak while prohibiting others from speaking at all would be unreasonable and subject to invalidation.

The actions taken by the Legislature, in our opinion, appear to be reasonable, for Section 14 of the amended Rules of Order allows the public with a forum, and without any time restraints to discuss issues concerning public matters.

We note that the term "meeting" [see Open Meetings Law §102(1)] has been construed expansively by the courts. In a decision rendered more than thirty years ago, it was held that any gathering of a majority of a public body for the purpose of conducting public business constitutes a "meeting", even if there is no intent to take action, and regardless of its characterization as "informal" or as a "workshop" or "work session" [see Orange County Publications v. Council of the City of Newburgh 60 AD 2d 409, affm'd, 45 NY2d 947 (1978)].

Accordingly if , a majority of the Legislature remains after the official "adjournment" of the meeting and public comment concerning County matters continues, in our opinion, the meeting would not be adjourned, and the proceedings would continue to be subject to the Open Meetings Law.

Finally, with regard to comments made by members of the public during a public meeting, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law provides that:

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

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

Based on the foregoing, minutes need not consist of a verbatim account of everything that was said; on the contrary, so long as the minutes include the kinds of information described in §106, I believe that they would be appropriate and meet legal requirements. Most importantly, I believe that minutes must be accurate. There is no requirement under the Open Meetings Law requiring that comments made by members of the public be included in the minutes of a meeting of a public body.

We hope that we have been of assistance.

Sincerely,

ROBERT J. FREEMAN
Executive Director

BY: James B. Gross
Legal Intern

RJF:JBG:jm

cc: Niagara County Legislature

OML-AO-4927

From: Jobin-Davis, Camille (DOS)
Sent: Monday, June 14, 2010 11:03 AM
To: Frances Genovese
Subject: RE: Open Meetings Law - notice of emergency meeting

Frances,

To clarify, take a look back at my first email. Section 104(2) requires that notice be given "to the extent practicable" when a meeting is scheduled less than one week in advance. Whether there was compliance with the notice requirements would depend on when the town decided to hold the meeting, how quickly they gave notice to the public, and whether they gave notice through the required mechanisms.

Whether there was an actually emergency and a need to hold a meeting quickly is a separate issue. The advisory opinion was provided with respect to that issue.

I hope that this helps.

Camille

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OML-AO-4928

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June 18, 2010

Ms. Pamela Melville
Labor Relations Specialist
NYS United Teachers
201 Stockade Drive
Kingston, NY 12401-3867

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

Dear Ms. Melville:

We have received your letter in which you requested an advisory opinion concerning the Open Meetings Law.

Your letter was prepared in response to an advisory opinion sent to the Saugerties Central School District Board of Education concerning executive sessions held to discuss grievances initiated based on allegations of violations of a collective bargaining agreement. In short, it was advised that a grievance does not involve collective bargaining negotiations or litigation and that the subject of the grievance is the key factor in determining whether a discussion of the matter may be conducted during an executive session pursuant to §105(1)(f) of the Open Meetings Law. You asked that we revisit our opinion based on your interpretation of collective bargaining negotiations and litigation. Further, you requested clarification regarding the Board's ability to discuss cost saving proposals and/or the economic difficulties of the District, and publication of the subject matter for consideration in executive session.

In this regard, first, the Open Meetings Law is permissive. A public body, such as a board of education, is not required to conduct executive sessions. As you know, 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. Therefore, although a public body *may* conduct an executive session in accordance with paragraphs (a) through (h) of § 105 (1), it is not required to do so, and it may do so only when a motion is approved by a majority vote of a board.

Second, as mentioned in our correspondence to the District, "§105 (1)(e) permits a public body to discuss collective negotiations under the Taylor Law in executive session." Our view

remains "that a grievance does not involve collective negotiations, but rather whether the terms of an existing agreement are being carried out in accordance with the agreement. Therefore, [we] do not believe that consideration of a grievance could properly occur in executive session based on § 105 (1)(e)." Similarly, you indicated that "under the parties' collective bargaining agreement a grievance is a claimed violation, misapplication, or misinterpretation of an expressed provision of the agreement." In our view, a claimed violation, misapplication, or misinterpretation of a collective bargaining agreement cannot be equated with collective negotiations themselves. We believe that negotiations occur prior to and lay the groundwork for an agreement. A grievance on the other hand, is initiated after negotiations are concluded and an agreement has been reached.

With respect to your contention that a grievance proceeding can be equated with litigation, Black's Law Dictionary (8th ed. 2004), defines the word litigation to mean:

> "The purpose of carrying on a lawsuit <the attorney advised his client to make a generous settlement offer in order to avoid litigation>, 2. A lawsuit itself <several litigations pending before the court>." Merriam Webster's Online Dictionary defines the verb to litigate as follows: "to carry on a legal contest by judicial process."

Equally important, in construing the exception which you address in your letter concerning litigation as a reason to enter in executive session under § 105 (1)(d), 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)].

In our view, after careful review of the critical terms, "litigation" involves a judicial contest, and we do not believe that the discussion of a grievance with or by a school board occurring prior to any contractually required arbitration involves a judicial contest. Furthermore, we believe that

the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, so as to avoid disclosure of that strategy to its adversary. As such, §105(1)(d) would not in our view be applicable as a basis for entry into executive session.

From our perspective, once again, when a board is discussing a grievance, it is likely that the only ground for entry into executive session that might be pertinent would be §105(1)(f). That provision permits a public body to enter into executive session to discuss:

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

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

It is our opinion, that the grievance described in your letter concerning contractual discrepancies between the two parties is a policy issue due to the fact that it does not affect one employee, but many union members. As such, the grievance at issue could not, in our view, be discussed under §105(1)(f) in an executive session.

Next, §105 (1) requires that a motion be made by a member of the public body before entering into an executive session. Only a member of the public body can do so. However, there is nothing that could preclude a member from being persuaded by members of the public to introduce such a motion regarding a permitted subject area under §105(1).

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

> "The respondent Board prepared an agenda for each of the five designated regularly scheduled meetings in advance of the time that those meetings were to be held. Each agenda listed 'executive session' as an item of business to be undertaken at the meeting. The petitioner claims that this procedure violates the Open Meetings Law because under the provisions of Public Officers Law section

> 100[1] provides that a public body cannot schedule an executive session in advance of the open meeting. Section 100[1] provides that a public body may conduct an executive session only for certain enumerated purposes after a majority vote of the total membership taken at an open meeting has approved a motion to enter into such a session. Based upon this, it is apparent that petitioner is technically correct in asserting that the respondent cannot decide to enter into an executive session or schedule such a session in advance of a proper vote for the same at an open meeting" [Doolittle, Matter of v. Board of Education, Sup. Cty., Chemung Cty., July 21, 1981; note: the Open Meetings Law has been renumbered and §100 is now §105].

The Open Meetings Law requires only that notice of a meeting must indicate only the time and place of a meeting. However, when it is likely that an executive session will be held, notice or an agenda might indicate that a motion to enter into executive session will be made to discuss a certain topic in accordance with one of the grounds for entry into executive session.

Lastly, in general, discussions of costs and saving measures must ordinarily be considered in public. Issues of that nature relate to the manner in which a governmental entity carries out its duties and the means by which public monies are allocated. That being so, a discussion of that nature would not, in our view, fall within any of the grounds for entry into executive session.

We hope we have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:JBG:jm

cc: George Heidcamp, Board of Education
Denyse Ortlieb, Saugerties Teachers Association

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-18152
OML-AO-4929

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June 18, 2010

Mr. Brian Lobel
[redacted]

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

Dear Mr. Lobel:

We have received your letter in which you requested an advisory opinion concerning (1) the propriety of an executive session held by the Town Board of the Town of Mamaroneck, (2) whether certain "board packets" are accessible under the Freedom of Information Law and (3) whether minutes of meetings of the Town's Board of Assessment Review are disclosable.

First, according to your e-mail, the Board went into executive session to discuss the acquisition of real property. As you may be aware, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into an executive session. Further, paragraphs (a) through (h) of §105(1) of the Law specify and limit the subjects that may appropriately be considered in executive session.

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

A key question, in our view, involves the extent to which information relating to possible real property transactions has become known to the public. The more that is known, the less

likely it is that publicity would have an impact on the value of a parcel or in some way damage the interests of taxpayers. We note that the language of §105(1)(h) does not refer to negotiations per se or the impact of publicity upon negotiations relating to a parcel; rather its proper assertion is limited to situations in which publicity would have a substantial effect on the value of the property. It has been advised, for example, that when a municipality is seeking to purchase a parcel and the public is unaware of the location or locations under consideration, it is possible if not likely that premature disclosure or publicity would indeed substantially affect the value of the property. In that kind of situation, publicity might result in speculation or offers from others, thereby precluding the municipality from reaching an optimal price on behalf of the taxpayers. However, when details concerning a potential real property transaction, such as the location and potential uses of the property, are known to the public, publicity would have a lesser effect or impact on the value of the parcel. Again, the more that is known to the public, the less likely it is that publicity would affect the value of a parcel. In situations, insofar as publicity would "substantially" affect the value of those parcels, an executive session may properly be held. However, in other situations in which publicity would have little or no impact upon the value of real property, we do not believe that there would be a basis for conducting an executive session.

In short, it is reiterated that executive sessions may properly be held in our opinion only to the extent that publicity "would substantially affect the value" of one or more parcels of real property. In consideration of the facts presented, it does not appear that a claim could justifiably be made or proven that publicity could have an effect, let alone a "substantial" effect, on the value of the property that is the subject of the discussion. If that is so, we do not believe that §105(1)(h), or any other ground for entry for executive session, could be asserted as a means of closing a meeting of the Board.

Turning now to the second issue, whether certain "board packets" are accessible under the Freedom of Information Law, you mentioned that these packets are "distributed to the Board members for their meetings," but are not disclosed to the public. It is unclear what is in these board packets. Although the Town has not indicated the basis for its denial of access, it appears that some aspects of the packets must be disclosed in response to a request made under the Freedom of Information Law, while others may be withheld. As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (k) of the Law. From our perspective, the contents of the records in question serve as the factors relevant to an analysis of the extent to which the records may be withheld or must be disclosed. In my view, several of the grounds for denial may be relevant to such an analysis.

Records forwarded to members of the Board would constitute intra-agency materials that fall within the coverage of §87(2)(g) of the Freedom of Information Law. That provision states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. It is emphasized that the Court of Appeals, the State's highest court has specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" [Xerox Corp. v. Town of Webster, 65 NY 2d 131, 133 (1985)].

Therefore, as indicated earlier, intra-agency materials may be accessible or deniable in whole or in part, depending upon their specific contents.

Also relevant may be §87(2)(b), which enables an agency to withhold records or portions thereof which if disclosed would result in an unwarranted invasion of privacy. That provision might be applied with respect to a variety of matters relating to hiring, evaluation or discipline of teachers or other staff, for example.

Section 87(2)(c) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations". Items within an agenda packet might in some instances fall within that exception.

In short, while a blanket denial of an agenda packet may be inconsistent with the Freedom of Information Law, there would likely be one or more grounds for denial that could appropriately be cited withhold portions of those records.

We point out that although records or perhaps portions of records may be withheld, there is no requirement that they must be withheld. The Court of Appeals, the state's highest court, has confirmed that the exceptions to rights of access are permissive, rather than mandatory, stating that:

> "while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Consequently, even if it is determined that a record may be withheld under §87(2)(g), for example, an agency would have the authority to disclose the record.

It is also emphasized that the grounds for withholding records under the Freedom of Information Law and the grounds for entry into executive session are separate and distinct, and that they are not necessarily consistent. In some instances, although a record might be withheld under the Freedom of Information Law, a discussion of that record might be required to be conducted in public under the Open Meetings Law, and vice versa. For instance, if the supervisor transmits a memorandum to the Board suggesting a change in policy, that record could be withheld. It would consist of intra-agency material reflective of an opinion or recommendation. Nevertheless, when the Board discusses the recommendation at a meeting, there would be no basis for conducting an executive session. Consequently, there may be no reason for withholding the record even though the Freedom of Information Law would so permit.

With respect to the meeting minutes of Town's Board of Assessment Review for 2009, a board of assessment review is in our view clearly a "public body" required to comply with the Open Meetings Law [see Open Meetings Law, §102(2)]. While meetings of public bodies generally must be conducted in public unless there is a basis for entry into executive session, following public proceedings conducted by boards of assessment review, we believe that their deliberations could be characterized as "quasi-judicial proceedings" that would be exempt from the Open Meetings Law pursuant to §108(1) of that statute. It is emphasized, however, that even when the deliberations of such a board may be outside the coverage of the Open Meetings Law, its vote and other matters would not be exempt. As stated in Orange County Publications v. City of Newburgh:

> "there is a distinction between that portion of a meeting...wherein the members collectively weigh evidence taken during a public hearing, apply the law and reach a conclusion and that part of its proceedings in which its decision is announced, the vote of its members taken and all of its other regular business is conducted. The latter is clearly non-judicial and must be open to the public,

> while the former is indeed judicial in nature, as it affects the rights and liabilities of individuals" [60 AD 2d 409,418 (1978)].

Therefore, although an assessment board of review may deliberate in private, based upon the decision cited above, the act of voting or taking action must in my view occur during a meeting.

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

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

The minutes are not required to indicate how the Board reached its conclusion; however, we believe that the conclusion itself, i.e., a motion or resolution, must be included in minutes. We 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", we 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.

We hope that we have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:KC:jm

cc: Town Board
Hon. Christina Battalia

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4930

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June 21, 2010

Mr. Richard Griola
[redacted]

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

Dear Mr. Griola:

We have received your letter in which you requested an advisory opinion concerning the Open Meetings Law.

In your request, you wrote that the Town of Cicero had created and appointed members to a "Police Study Committee," "to examine the issue of consolidation, and to make recommendations for a November initiative." You were informed by the Town Supervisor that because of the "controversial nature" of the topic to be discussed, the first meeting of this new committee, would be closed to the public.

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

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

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

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

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

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

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

We believe that the Town Board, the governing body, has the authority to direct that a committee that it has created must give effect to the Open Meetings Law. Section 64 of the Town Law confers general powers upon town boards, and subdivision (23), entitled "General powers", states that a board "Shall have and exercise all the powers conferred upon the town and such additional powers as shall necessarily be implied there from." In our view, since the Board has the power to create the committee, it is implicit that it has the power to require that the

committee function in a certain way, in this instance, in accordance with the Open Meetings Law.

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

We hope we have been of assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:JBG:jm

cc: Town Board
Hon. Judy A. Boyke, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 22, 2010

Ms. Leanne Tory-Murphy
[redacted]

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

Dear Ms. Tory-Murphy:

We have received your e-mail in which you asked that this office to render an opinion regarding the following issues relating to the Children's Learning Center (CLC) at Hunter College:

> "1. Is it possible to use the FOIL to delay access to what I understand to be publicly available meeting minutes?
>
> 2. Is there any legal justification for a records officer reviewing official minutes of a public body for redaction?"

As you are aware, the issues concerning the status of the CLC under the Freedom of Information Law and the Open Meetings Law were addressed in a recent opinion to Mr. Ronald McGuire. In short, it is our view that the CLC is not necessarily subject to either statute. In consideration of that opinion, we offer the following comments.

First, it is necessary to recognize the extensive FOIL request that you made, for it involves the meeting minutes of the CLC's Board for the past 25 years. While this is a valid request, it may nonetheless be time consuming and require substantial research and retrieval on the part of the Center.

In this regard, and to the extent that these records were prepared for the agency, Hunter College, as outlined in Mr. McGuire's opinion, 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 NY2d 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 Law and Rules.

While it is our opinion that minutes would be "records" maintained for Hunter College, it may require substantial time to locate minutes from meetings held 20 or more years ago. To the extent that more recent minutes are kept in a readily accessible location, in our opinion, it would not be unreasonable to request and expect that such records be made available before records that are more difficult to locate.

Second, with respect to your questions concerning the availability of meeting minutes and an agency's authority to redact portions thereof is §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."

Typically, we advise that minutes are records that are clearly available to the public and readily retrievable; however, in this case, it is unclear whether the CLC Board is required to give effect to the Open Meetings Law, and it may be that CLC maintains minutes that include more than the bare minimum contents required by the Open Meetings Law. To that extent, CLC and/or Hunter College may require additional time to review and redact minutes pursuant to paragraphs (a) through (k) of §87(2) of the Freedom of Information Law.

We hope that we have been of assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:KC:jm

Enc.

cc: GailScovell, Counsel, Hunter College
Frederick P. Schaffer, General Counsel, CUNY
Board of Directors, Children's Learning Center

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-1932

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June 22, 2010

Ms. Judith A. Jerome
Library Director
Durham Public Library
76 Main Street
Whitesboro, NY 13492

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

Dear Mrs. Jerome:

We have received your letter in which you inquired about the propriety of an executive session held by the Mid York Library System's Board of Trustees and the Boards vote, immediately thereafter, authorizing an expenditure of up to $10,000.

In this regard, we offer the following comments.

Minutes of the meeting indicate the Board resolved to "declare" an executive session "to discuss [redacted] employment history, which may lead to decisions about her future employment with MYLS." This, in your opinion, was not an accurate description of the motion. You wrote that after two hours, the Board came out of executive session, and a motion was made to "authorize Kelly Rose…to enter into negotiation with a facilitator recommended to the board by personnel at the New York State Library, incurring expenses up to the amount of $10,000." This motion was approved following "a recommendation from Executive Session."

You added that we discussed the matter, and that it was advised, in your words, that "the resolution was so non-specific that it constituted a violation of the Open meetings Law." Please note that, as a matter of policy and practice, because this officer is not a court, we do not characterize situations as "violations" of law.

With respect to the accuracy of the minutes, §106(1) of the Open Meetings Law pertains to minutes of open meetings and requires that:

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

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

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

In our opinion, in consideration of the substance of the authorization "to enter into negotiation with a facilitator", the minutes do not include sufficient information to ascertain the nature of the Board's discussion. At a minimum, we believe that the minutes should clearly have reflected the intent of the Board. We note that it has been held that a "bare bones" resolution referenced in minutes is inadequate to comply with the Open Meetings Law [see Mitzner v. Sobol, 570 NYS 2d 402, 173 AD 2d 1064 (1991)].

While it appears from the minutes that the basis for entry into executive session was appropriate, it also appears that the discussion was not limited to the matter described.

We hope that we have been of assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:KC:jm

STATE OF NEW YORK
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June 22, 2010

Ms. Marilyn D. Berson
Attorney at Law
[redacted]

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

Dear Ms. Berson:

We have received your letter concerning the propriety of meetings conducted by the Board of Trustees of the Village of Painted Post.

Based on your letter, the Board met on April 6 "behind closed doors" to discuss budgetary matters and the abolition of the Police Department. You indicated that no public notice of the meeting was provided. The new Mayor of the Village, Rozwell Crozier, telephoned our office on May 17, 2010. He confirmed that the meeting on April 6, 2010 was held without notice to the public and involved a discussion of the issues regarding the budget raised at the organizational meeting the previous night. He indicated that subsequent meetings have been properly noticed and that he has no knowledge concerning notice of the meetings held prior to the beginning of his term in office.

From our perspective, the Village should have notified the public of the meeting and conducted it in a manner that allowed the public to witness and observe the proceedings. In this regard, we offer the following comments.

First, by way of background, it is emphasized that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY2d 947 (1978)].

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

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

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

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

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in our opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law. In this instance, we believe that the gathering of a quorum of the Village Board on April 6, 2010 was a meeting that should have been preceded by notice and conducted open to the public as required by the Open Meetings Law.

Section 104 of the Open Meetings Law pertains to notice and states that:

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

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

In May of 2009, 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 village hall has been designated as a location for posting notices of meetings, the public has the ability to know where to ascertain whether and when meetings of a school board will be held. 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 enforcement pursuant to Open Meetings Law, §107, courts have long had the authority to invalidate action taken in private in violation of the Open Meetings Law. Before invalidating any action or portion thereof, and only upon good cause shown, a court must find that there was a violation of that law. This enforcement provision was amended, effective June 13, 2010, to permit a court to declare either that the public body violated the Open Meetings Law and/or declare the action taken void. Further, if the court determines that a public body has violated the law, the court has the authority to require the members of the public body to receive training given by the Committee on Open Government.

Finally, in regard to awards of attorney's fees under the Open Meetings Law, §107(1) 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 apply 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 remains discretionary.

We hope that we have been of assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:KC:jm

cc: Village Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4934

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June 23, 2010

E-Mail

TO: Hon. Len Torres, Councilman, City of Long Beach

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 Councilman Torres:

I have received your letter and the *Newsday* article relating to it concerning certain gatherings of the Long Beach City Council. Please accept my apologies for the delay in response.

According to the article, Council President Thomas Sofield, Jr. "characterized the discussions as informal and approved by the City Attorney", indicating that "they were held expressly to provide information to the new council members and no decisions have been made in private." He added that "People show up at City Hall before the meeting and we go to the city manager's office....and if somebody has a question on an agenda item they may say 'I'm concerned about this.'" He said that "No decision is made regarding whether or not it's going to be approved, or denied, or how anybody's going to vote on it."

Based on judicial precedent, when the gatherings at issue include a quorum of the City Council, a majority of its total membership, they constitute "meetings" that fall within the requirements of the Open Meetings Law.

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

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

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

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

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

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law, irrespective of its characterization. Further, as you are likely aware, meetings must be preceded by notice of the time and place given pursuant to §104 of the Open Meetings Law.

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

RJF:jm

cc: City Council
City Attorney
Laura Rivera

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4935

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June 29, 2010

Ms. Amanda Lonsberry
[redacted]

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

Dear Ms. Lonsberry,

We have received your request for an advisory opinion regarding the propriety of an executive session held by the Mount Morris Central School Board of Education. Specifically, you inquired as to "whether the executive session of March 24 constituted an open meetings law violation."

Minutes of the meeting indicate that at 5:35 there was a motion to enter into executive session "to discuss employment history of particular persons leading to employment, demotion, dismissal, or removal of particular persons." At 5:55 there was a motion to come out of executive session, and the minutes then indicate that the Board discussed an updated budget proposal. The minutes thereafter state that "Before Executive Session, the increase on the tax levy was 2.1%" and after the session, that the tax levy was reduced to zero. The Board president stated that "because the board was discussing a possible retirement and the potential of moving employees from one position to another as key elements in formulating the budget, the budget discussion warranted the closed session." In this regard, we offer the following.

First, please note that only a court can determine whether there has been a "violation" of the Open Meetings Law. The Committee on Open Government is authorized to issue advisory opinions concerning application of that law. Although they are not binding, it is our hope that these opinions are educational and persuasive, and that they serve to resolve problems and promote understanding of and compliance with the law.

Second, from our perspective, every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. Based on that principle, we believe that minutes must be sufficiently descriptive to enable the public and others (i.e., future Board members), upon their preparation and upon review perhaps years later, to ascertain the

nature of action taken by a public body, such as the Board of Education. Most importantly, minutes must be accurate.

In our opinion, in consideration of the substance of the session's discussion of the budget, the minutes do not include sufficient information to ascertain the nature of the Board's action. At a minimum, we believe that the minutes should clearly have reflected the intent of the Board. We note that it has been held that a "bare bones" resolution referenced in minutes is inadequate to comply with the Open Meetings Law [see Mitzner v. Sobol, 570 NYS 2d 402, 173 AD 2d 1064 (1991)].

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

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

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

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

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

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

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

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department or perhaps the creation or elimination of positions, we do not believe that §105(1)(f) may be asserted, even though the discussion may relate to "personnel". For example, if a discussion involves staff reductions or layoffs due to budgetary concerns, the issue in our view would involve matters of policy. Similarly, if a discussion of possible layoff relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In none of the instances described would the focus involve a "particular person" and how well or poorly an individual has performed his or her duties. To reiterate, in order to enter into an executive session pursuant to §105(1)(f), we believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to

personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981).

We hope that we have been of assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:KC:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-
OML-AO-4936

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June 29, 2010

Hon. Patricia E. Marini
Town Board Member
Town of Walworth
3600 Lorraine Drive
Walworth, NY 14568

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

Dear Ms. Marini:

We have received your letter of June 2, 2010, in which you requested an opinion concerning the obligation to refer to the Town Clerk and highway Superintendent as present in minutes of meetings of the Walworth Town Board. You also raised questions relating to draft minutes.

In this regard, first, §30(1) 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 records of the proceedings of each meeting..."

Second, the Open Meetings Law contains what might be characterized as minimum requirements concerning the context of minutes, §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 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. Certainly if a clerk wants to include more information than is required by law, he or she may do so. In our view, there is no obligation to identify those who attend meetings, other than Board members in relation to their votes. Whenever the Board takes action, §87(3)(a) of the Freedom of Information Law requires that a record be prepared indicating the manner in which each member cast his or her vote.

Next, the Town Clerk has indicated that she cannot include a "DRAFT" designation on the version of the minutes that she submits to the Board for approval because the minutes would not be "approved as presented." There is no provision of law that deals with that issue.

Moreover, 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 we are 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, we do not believe that a town board can require that minutes be approved prior to disclosure.

Similarly, we do not believe that a board could require that disclosure of minutes be delayed in a manner inconsistent with the Open Meetings Law. In the event that minutes have not been reviewed or 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 be marked "unapproved", "draft" or "preliminary", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

We hope that we have been of assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:KC:jm

cc: Town Board
Hon. Susie C. Jacobs

OML-AO - 4937

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, July 06, 2010 10:17 AM
To: Christine Hayes
Subject: RE: Advisory Opinion

Christine,

You are welcome and I hope that it helps make those entities more transparent.

With respect to access to the meetings, the following are two advisory opinions in which we outline how Fire Companies and District boards are also "public bodies" subject to the Open Meetings Law.

http://www.dos.state.ny.us/coog/otext/o3904.htm

http://www.dos.state.ny.us/coog/otext/o2891.htm

Among other things, the Open Meetings Law requires all public bodies to hold their meetings open to the public. The following is a link to the text of the Open Meetings Law: http://www.dos.state.ny.us/coog/openmeetlaw.html

As you may already know, while they must hold their meetings open to the public, public bodies are not required to allow the public to speak at their meetings. See advisory opinions under "P" for "Public participation". Based on the case law outlined in those opinions, and, as far as I know, unless you are somehow making so much noise or somehow preventing the board from conducting the meeting, there wouldn't be a basis for requiring you to leave the meeting.

I hope that this is helpful.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
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OML-AO-4938

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July 8, 2010

Mr. Anthony Weiner
[redacted]

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

Dear Mr. Weiner:

We have received your letter and attached materials requesting an advisory opinion regarding the requirements of the Open Meetings Law. In brief, you inquired concerning the propriety of certain actions conducted by members of boards in the Village of Mamaroneck. Specifically, you asked:

> (1) [whether it] "is appropriate for individual board members to e-mail the entire commission with questions and/or comments about a pending application"
>
> (2) "May a municipal attorney call an executive session to discuss pending litigation in which the board is not named? Is it appropriate for a Board to be briefed on litigation in which only other boards are named?"
>
> (3) "Is it appropriate for the board to discuss the appointment of a new chairman? Our Chairman has just resigned from the Commission, and one member has sent an e-mail indicating that we will need to go into Executive Session seemingly to discuss the election of the new chair."

With respect to your initial question, we believe that it is appropriate for individual board members to exchange information via email. While the advice offered in OML-AO-3787 remains pertinent, we have attached a copy of OML-AO-4344, a more recent opinion that refers to a decision that, in terms of the applicable principle, expresses our evolving analysis with respect to electronic communications and meetings. We hope that you find it helpful.

With regard to your second inquiry, while it may be an inadvertent reference, we must first clarify that a municipal attorney cannot require that a public body conduct an executive session. Only the members of a public body can determine whether to enter into an executive session, and only by a majority vote of all of the members of the board. While a municipal attorney would likely provide counsel to board members regarding the authority to enter into executive session, the members would be responsible for voting to enter into executive session based on one or more of the grounds to do so set forth in §105(1) of the Open Meetings Law.

The provision in the Open Meetings Law pertaining to litigation, §105(1)(d), permits a public body to enter into executive session to discuss "proposed, pending or current litigation." In those instances when a board determines it necessary to enter into executive session for this purpose, it is likely that the board would invite the municipal attorney to participate in the closed session.

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 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.

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

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity the pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co. , Inc. v. Town Board, Town of Cobleskill, 444 NYS 2d 44, 46 (1981)].

Further, in a decision rendered by the Appellate Division, one of the issues involved the adequacy of a motion to conduct an executive session to discuss what was characterized as "a personnel issue", and it was held that:

> "...the public body must identify the subject matter to be discussed (see, Public Officers Law § 105 [1], and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY2d 807)" [Gordon v. Village of Monticello, 207 AD 2d 55, 58 (1994)].

With regard to the situation that you described, if a public body is not or will not be a party to the litigation, it is unlikely that §105(1)(d) would apply, However, instances have arisen in which a different conclusion has been suggested. For instance, if a planning or zoning board is the subject of litigation, the controversy may be significant to the municipality's governing body, i.e., a village board of trustees or a town board. In that circumstance, the governing body might discuss litigation strategy during a proper executive session, even though it is not named in the litigation.

Finally, with respect to the question involving discussion of the appointment of a new chairman in executive session, in our opinion, discussions regarding the election of officers would not fall within any of the grounds for entry into executive session. The only provision that appears to be relevant to the matter, §105(1)(f), permits a public body to conduct an executive session to discuss:

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

Although the discussion and election of officers involves consideration of particular individuals, it is unlikely that any of the specific subjects included within §105(1)(f) would be applicable regarding the election of an officer. In short, while "matters leading to" certain actions relating to specific persons may be discussed during executive sessions, matters leading to the election of officers is not among them.

We hope that we have been of assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:KC:jm

cc: Charles Mitchell, Ethics Board Chair
Christie Derrico, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-18184
OML-AO-4939

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July 7, 2010

Ms. Maureen A. 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 facts presented in your correspondence.

Dear Ms. Powell:

I have received your note and the materials relating to it. The issues involve a request made under the Freedom of Information Law to the Roosevelt Union Free School District for records concerning a "Use of Facilities" request and documentation relating to it, as well as records of the "BOE enumerated vote" concerning the approval of the Use of Facilities request. Because the meeting during which that request was to be considered was postponed, you surmise that the Board acted to approve the request "via voting by telephone." You noted, too, that although your request for records was made in April, no response was received until June.

Assuming that only the Board of Education could have approved the "Use of Facilities" request, I believe that it could have done so only at a meeting held in accordance with the Open Meetings Law. In this regard, I offer the following comments.

As amended in 2000, §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body." Based upon an ordinary dictionary definition of "convene", that term means:

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

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

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

The definition of the phrase "public body" [Open Meetings Law, §102(2)] refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision, which was also amended to include language concerning videoconferencing, states that:

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

Based on the foregoing, again, voting and a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the

authority to carry out its powers and duties. Consequently, it is my opinion that neither a public body nor its members individually may take action or vote by means of telephone calls or e-mail.

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

> "...there is a question as to whether the series of telephone calls among the individual members constitutes a meeting which would be subject to the Open Meetings Law. A meeting is defined as 'the official convening of a public body for the purpose of conducting public business' (Public Officers Law §102[1]). Although 'not every assembling of the members of a public body was intended to fall within the scope of the Open Meetings Law [such as casual encounters by members], ***informal conferences, agenda sessions and work sessions to invoke the provisions of the statute when a quorum is present and when the topics for discussion and decision are such as would otherwise arise at a regular meeting' (Matter of Goodson Todman Enter. v. City of Kingston Common Council, 153 AD2d 103, 105). Peripheral discussions concerning an item of public business are subject to the provisions of the statute in the same manner was formal votes (see, Matter of Orange County Publs. v. Council of City of Newburgh, 60 AD2d 309, 415 Affd 45 NY2d 947).
>
> "The issue was the Town's policy concerning tax assessment reductions, clearly a matter of public business. There was no physical gathering, but four members of the five member board discussed the issue in a series of telephone calls. As a result, a quorum of members of the Board were 'present' and determined to publish the Dear Resident article. The failure to actually meet in person or have a telephone conference in order to avoid a 'meeting' circumvents the intent of the Open Meetings Law (see e.g., 1998 Advisory Opns Committee on Open Government 2877). This court finds that telephonic conferences among the individual members constituted a meeting in violation of the Open Meetings Law..."

More recently, the Appellate Division nullified action taken by a five person Board, two of whose members could not participate. Two other members met and a third participated by phone. Those three voted, but the Court found that the Open Meetings Law prohibited voting by phone and nullified the action taken [Town of Eastchester v. NYS Board of Real Property Services, 23 AD2d 484 (2005)].

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

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

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

Lastly, with respect to the delay in responding to your request for records, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a

> reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4740

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July 9, 2010

Ms. Heather L. Ellingsworth
[redacted]

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

Dear Ms. Ellingsworth:

We have received your letter in which you inquired about the propriety of an executive session held by the General Brown Central School District Board of Education. Specifically, you mentioned that the "board went into executive session to 'discuss two personnel matters." Those waiting in the hallway for the executive session to end witnessed board members exiting the building and were later informed that the Board had voted during the closed 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.

If the discussions did not involve consideration of how well or poorly particular public employees were carrying out their duties, we do not believe that there would have been a basis for conducting an executive session.

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 my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

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

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

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

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

With respect to the issue of voting during a closed session, 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.

We hope that we have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:KC:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 6194

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July 9, 2010

Mr. Alexander Contini
[redacted]

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

Dear Mr. Contini:

We have received your letter and attached materials concerning proper notice of meetings of the Board of Ethics in the town of Beekman. In this regard, we offer the following comments.

First, §104 of the Open Meetings Law pertains to notice and states that:

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

In May of 2009, 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 designated conspicuous, public locations; two, that notice must be given to the news media; and three, that notice must be 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 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.

For your consideration, we have enclosed a copy of "Board of Ethics: Public Disclosure?" (NYSBA/MLRC Municipal Lawyer, Spring 2008, Vol. 22, No. 2.)

We hope that this has been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:KC:jm

Enc.

cc: David Sears

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4942

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July 12, 2010

Ms. Lovie D. Bourne
[redacted]

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

Dear Ms. Bourne:

We have received your letter concerning the propriety of certain meetings held by the Charlton Fire District Board of Commissioners. Specifically, you questioned whether the Board complied with the Open Meetings Law by engaging in executive sessions without providing reasons and holding meetings without providing notice. In this regard we offer the following comments.

First, §104 of the Open Meetings Law pertains to notice and states that:

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

In May of 2009, 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 fire 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 board of a fire district 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.

Second, with respect to executive sessions held by the Board, 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.

Our office maintains an educational website (http://www.dos.state.ny.us/coog/index.html) through which we make many of our advisory opinions available, as well as a video that can be used for training, and the text of open government laws. By copy of this letter, we are also forwarding pamphlets which we hope will help clarify the requirements of both the Freedom of Information and Open Meetings Laws.

We hope that this has been of assistance.

Sincerely,

Camille. S. Jobin-Davis
Assistant Director

CSJ:KC:jm

Enc.

cc: Board of Commissioners

OML-AO-4943

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, July 15, 2010 3:21 PM
To: Jennifer VanTuyl
Attachments: flynn.pdf

Jennifer,

Based on our conversation, I researched case law interpreting the definition of "public body". I believe the following two cases are most relevant to the situation that you described:

Smith v. CUNY, 92 NY2d 707 (1999) B
Association comprised of administrators, faculty members and students at community college authorized to review proposed budgets, allocate student activity fees and disbursements constitutes "public body" subject to the Open Meetings Law; performs "substantially more than advisory function", rather has "decision-making authority to implement its own initiatives"

Flynn v. Citizen Review Board, Supreme Court, Onondaga Cty., March 11, 1996 --
Citizens Review Board created by local law has subpoena power, but no authority to take final action. In holding that it is covered by Open Meetings Law, court found that "The fact that a public body can only make recommendations or is an advisory board is not, in and of itself, the brightline test that the governmental organization is not a public body...Rather, the inquiry is directed to whether the body has been endowed with some governmental function. The essence of a governmental function is whether the body has the 'right to exercise some part of the power of the sovereign'", i.e., conducting investigations and issuing subpoenas. Court advised that the CRB in the future "consult with" the Committee on Open Government and criticized it for failing to utilize "the free resources provided by the State", wasting time and "incurring needless litigation costs." Held that actions taken in violation of Open Meetings Law invalid.

Flynn, is unreported – I've attached a copy.

Further, and based on the above case law, I agree, when a committee has been granted authority to act on a public body's behalf, the committee is a public body itself. Whether the authority was implicitly or explicitly delegated to the committee, if the committee behaves as if it has such authority, in my opinion, it is subject to the Open Meetings Law. Until or unless the committee's authority to behave on behalf of a public body is clarified, in my opinion if it behaves as if it has such authority, it is subject to the Open Meetings Law. In the alternative, perhaps you will argue, and I think with good reason, that the committee has no authority until or unless such authority is delegated.

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

Camille S. Jobin-Davis, Esq.
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OML-AO - 4944

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, July 15, 2010 4:17 PM
To: Mary Lou Hilow
Subject: RE: Request for Written Opinion

Mary Lou,

You are correct, and although we have not written a formal advisory opinion, many emails containing what I hope is helpful information have been sent to you.

To give you an idea of the scope of a formal advisory opinion regarding the broad allegations that you make in your July 15 email, let me briefly note the following issues that we would need to address solely in response to the first three sentences:

1. Meetings in private.

a. All public bodies have authority to enter into executive session to discuss a person's employment history (job performance) and matters leading to continued employment or promotion pursuant to section 105(1)(f). If the motion was made accurately, these discussions would be appropriate. If the motion was not made, or was made inaccurately, the OML would not have been followed. Without a description of the motion, we could not advise whether the meeting was held outside the parameters of the Open Meetings Law.

b. All public bodies have authority to discuss pending litigation in executive session pursuant to section 105(1)(d).

c. All public bodies have authority to hold meetings exempt from the requirements of the OML when they are discussing matters that are confidential under state law. For example, when members of a public body gather to request and receive legal advice (attorney-client privilege) they may meet in private, without notice to the public, without taking minutes, and without allowing the public to observe. In sum, depending on the content of the discussion, the Board may/may not have held meetings appropriately.

2. Notice of meetings.

a. OML requires that a public body provide only notice of the time and place of its meetings, not the topics or agendas; the subject matter need not be set forth in the notice.

b. OML requires posting of notice of a meeting in a designated location, to the news media, and online (a recent requirement).

3. Enforcement.

a. In order to challenge action taken at a meeting that was held in "violation" of the Open Meetings Law, and only a court can determine whether there has been a "violation"; a person must bring an Article 78 proceeding within 120 days of the meeting at which the action was taken.

b. If action is brought in a timely manner and the court determines that there has been a "violation" of a meeting, the court could, in its discretion and upon good cause shown, invalidate the action taken at that meeting, and award attorney's fees to the prevailing party.

c. An inadvertent failure to notify the public of the meeting, alone, shall not be grounds for invalidating action taken at a meeting.

In my opinion, a formal analysis of the above legal issues would require approximately 20-25 pages of written material. Further, without factual allegations regarding particular motions or meetings, it is not possible to accurately advise whether in our opinion a gathering or a discussion was held in compliance with the Law; the "opinion" would be educational only.

The remainder of your July 15 email contains many more broad allegations regarding the behavior of the School District with respect to the Open Meetings Law and the Freedom of Information Law. We do not have the resources to issue an advisory opinion that addresses so many issues in such a broad fashion. Educational materials published by our office and available online, in my opinion, would be adequate and most useful to you.

Camille

Camille S. Jobin-Davis, Esq.
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OML-AO-4945

From: Freeman, Robert (DOS)
Sent: Monday, July 19, 2010 10:21 AM
To: Ms. Lunetha Lancaster
Subject: 501C3

Dear Ms. Lancaster:

I have received your email in which you questioned the status under the Open Meetings Law of a "501c3 lodging facility that is owned [and] governed by a board of directors."

In this regard, the Open Meetings Law applies to public bodies, and the phrase "public body" is defined in §102(2) of that statute to include governmental entities. The kind of facility that you described, as I understand the matter, is independent of government and, therefore, would not constitute a public body or be required to comply with the Open Meetings Law. It is noted, however, that not-for-profit corporations are required to file a form 990 with the IRS, and that IRS rules require those corporations to disclose the forms to the public.

I hope that I have been of assistance.

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OML-AO-4946

From: Freeman, Robert (DOS)
Sent: Monday, July 19, 2010 11:04 AM
To: Mr. Eric W. Schoen
Attachments: o3215.doc; o3749.wpd

Dear Mr. Schoen:

I have received you inquiry concerning the ability of a member of the public "to videotape the public comment session of a meeting...and broadcast the public comment on public access television."

In this regard, in brief, judicial decisions indicate that anyone may record an open meeting of a public body, so long as the use of the recording device is neither disruptive nor obtrusive. Further, the person who conducts the taping may do with the recording as he/she sees fit.

Attached are advisory opinions dealing with matter, one of which was prepared at the request of a resident of a school district whose board attempted to prohibit videotaping its meetings due to the objections of those who would be taped. It was advised as suggested in the preceding paragraph. The first opinion refers to the Mitchell decision, in which the Appellate Division found that a person who records a meeting may broadcast, edit or replay the tape without restriction. The second opinion attached, also decided by the Appellate Division, cited and supported the opinion that I prepared. That is the Csorny decision.

I hope that I have been of assistance.

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FOIL-AO-18202
OML-AO-4947

From: Freeman, Robert (DOS)
Sent: Monday, July 19, 2010 2:17 PM
To: E.J. McMahon, Empire Center for New York State Policy
Subject: RE: Pension committee

I'll be on the road in two minutes, but...if indeed the actuarial committee is not a statutory body and its functions are purely advisory, case law indicates that it would not be subject to the Open Meetings Law. Note, however, that the coverage of FOIL is much broader, for it deals with all agency records, and the term "record", as you are likely aware, includes any information in any physical form whatsoever, kept, held, filed, produced or reproduced by, with or for an agency. Therefore, although meetings of many entities may not be subject to the Open Meetings Law, records kept, produced or acquired by those entities constitute "records" subject to rights conferred by FOIL.

Hope this helps.

Robert J. Freeman
Executive Director
Committee on Open Government
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FOIL-AO-18203
OML-AO-4948

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, July 20, 2010 2:16 PM
To: Ms. Mary Lou Hilow
Subject: RE: Request for Written Opinion

Mary Lou,

I can't help with understanding when or whether a school district makes issues or allegations public, all I can help with are whether records are required to be made available upon request, or whether a meeting must be held in compliance with the Open Meetings Law. There is no requirement in the law that an agency "publicize" certain issues.

As you may know, when a public body discusses matters regarding pending litigation, the motion must be specific, as outlined in the following advisory opinion: http://www.dos.state.ny.us/coog/otext/o4214.htm.

Whether something is a "matter of public record" depends on (a) whether someone has a made a request for the record pursuant to the FOIL, and (b) whether the agency has the authority to deny access based on any of the exceptions in section 87. If a lawsuit was filed, and the record of that lawsuit is public at the courthouse, the record would be public from the agency also (see http://www.dos.state.ny.us/coog/ftext/f9121.htm "Nevertheless...") , however, there is no law that would require the agency to notify the public, or publicize the filing of the lawsuit.

Camille

Camille S. Jobin-Davis, Esq.
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OML-AO - 4949

From: Camille S. Jobin-Davis, Assistant Director
Sent: Tuesday, July 20, 2010 3:06 PM
To: Mr. Gerry Wiepert

Gerry,

As promised, please note the information in the following advisory opinions:

To discuss pending litigation, an explicit motion must be made in a public meeting to enter into executive session: http://www.dos.state.ny.us/coog/otext/o4214.htm

An attorney-client privileged discussion is exempt from the Open Meetings Law (see http://www.dos.state.ny.us/coog/otext/3478.htm); however, an interview with a potential attorney would not be privileged, or, at the very least, would only be privileged in part.

Interviews could be conducted in executive session, as follows:
http://www.dos.state.ny.us/coog/otext/o2850.htm

And, notice of all public meetings is required as follows:

Section 104 of the Open Meetings Law pertains to notice and states that:
"1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before such meeting.
2. Public notice of the time and place of every other meeting shall be given to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
3. The public notice provided for by this section shall not be construed to require publication as a legal notice.
4. If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations."

In May of 2009, 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 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.

OML-AO-4950

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, July 22, 2010 9:55 AM
To: Susan Campriello, The Daily Mail

Susan,

As promised,

Section 104 of the Open Meetings Law pertains to notice and states that:
"1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before such meeting.
2. Public notice of the time and place of every other meeting shall be given to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
3. The public notice provided for by this section shall not be construed to require publication as a legal notice.
4. If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations."

In May of 2009, 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 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.

Camille S. Jobin-Davis, Esq.
Assistant Director
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OML-AO-4951

From: Freeman, Robert (DOS)
Sent: Tuesday, July 27, 2010 10:04 AM
To: Mike Wright, Reporter

Sorry for the late reply.

As for the question, if a board consists of five members at full strength, and three leave a meeting, there is no longer a quorum, no action can be taken, and the Open Meetings Law no longer applies. If less than a quorum conducts a meeting, because the Open Meetings Law is inapplicable, there is no notice requirement, and there would be no obligation to accomplish the procedure for entry into executive session.

If you'd like to discuss the matter, please feel free to call.

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OML-AO - 4952

From: Freeman, Robert (DOS)
Sent: Wednesday, July 28, 2010 8:14 AM
To: Hon. Bob LoColla, Town of Fishkill Board Member
Attachments: O2369.wpd

Based on §108(2) of the Open Meetings Law, political caucuses are exempt from the coverage of that law, irrespective of the subject matter that may be discussed. Therefore, if, for example, four persons on a legislative body are members of a particular political party, and the fifth is of a different party, the four can meet in closed political caucus to discuss any subject, including matters of public business. I note, however, that in a situation in which all of the members of a legislative body are members of the same political party, it has been held that public business must be discussed in public, and that a closed caucus may only be held to consider matters of political party business.

Attached is a lengthy opinion that deals with a variety of issues that may be pertinent, including a focus on the exemption regarding political caucuses.

I hope that I have been of assistance.

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OML-AO-4953

From: Freeman, Robert (DOS)
Sent: Friday, July 30, 2010 11:46 AM
To: Ms. Maureen Hernandez

Dear Ms. Hernandez:

I have received your inquiry, and this is to advise that the Open Meetings Law makes no reference to agendas. Therefore, there is no statutory requirement that a public body, such as a village board of trustees, prepare an agenda relating to its meetings. If, however, a village board or other body has adopted a rule or policy concerning the preparation or use of agendas, it should be expected to abide by any such rule or policy.

I hope that I have been of assistance.

Robert J. Freeman
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OML-AO-4954

From: Freeman, Robert (DOS)
Sent: Friday, July 30, 2010 12:10 PM
To: Ms. Estrella Laws
Subject: correspondence to school board

Dear Ms. Laws:

I have received your letter, and this is to advise that there is no requirement that boards of education or superintendents must "document correspondence, via a letter or email, in their approved Board Minutes." Please note that the Open Meetings Law, section 106, contains what might be characterized as minimum requirements concerning the contents of minutes. Specifically, subdivision (1) of 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."

Based on the foregoing, although a board may choose to include reference to correspondence in minutes of its meetings, there is no obligation to do so.

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

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OML-AO-4955

From: Freeman, Robert (DOS)
Sent: Friday, July 30, 2010 12:24 PM
To: Mr. Louis Vicari
Subject: Open Meetings Law

Dear Mr. Vicari:

I have received your letter in which you raised the following question: "Is a meeting between more than two town board members (a quorum) and representatives of NYS ORPS for the purpose of discussing the town's equalization rate subject to the Open Meetings Law?"

In this regard, in brief, it was held more than thirty years ago that a gathering of majority of the public body, a quorum, for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, even if there is no intent to take action, and irrespective of the manner in which the gathering may be characterized. Therefore, if a quorum of the board gathers, in their capacities as members of the board and functions as a body, I believe that the gathering would fall within the scope of the Open Meetings Law. On the other hand, if representatives of an agency are providing a presentation or training for a group consisting of members of a numerous town boards, and a majority of one or more boards are merely members of an audience and are not functioning collectively, as a body, I do not believe that the Open Meetings Law would apply.

I hope that I have been of assistance.

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OML-AO-4956

From: Freeman, Robert (DOS)
Sent: Friday, July 30, 2010 1:10 PM
To: Ms. Martha Jaynes
Subject: Boards of Education
Attachments: O2403.wpd; O2621.wpd

Dear Ms. Jaynes:

I have received your letter in which you indicated that your local board of education "meets in Executive session where all discussion is held, and during the open meetings, merely votes on issues." You added that executive sessions are scheduled one hour prior to meetings.

In this regard, first, for reasons described in detail in the attached opinion, an executive session cannot validly be scheduled or held prior to an open meeting. Second, a public body, such as a board of education, cannot conduct an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of §105(1) specify and limit the grounds for entry into executive session. Attached is another opinion which focuses on three commonly cited grounds for conducting executive sessions.

It is suggested that you review and copy the Open Meetings Law, which is available on our website under "Laws and Regulations", and bring it to meetings in an effort to attempt to improve compliance. The attached opinions or others available on our website might also be shared with the board. The home page of the website includes a heading entitled "advisory opinions" and connects to two indices to opinions, one involving the Freedom of Information Law, and the other the Open Meetings Law. When questions or issues arise relating to those laws, the opinions may be of substantial value. Alternatively, you may contact this office by phone to discuss those issues.

I hope that I have been of assistance.

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

OML-AO-4957

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August 2, 2010

E-Mail

TO: Hon. John Wortmann, Councilman, City of Port Jervis

FROM: Robert J. Freeman, Executive Director

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

Dear Mr. Wortmann:

We have received your letter in which you requested an advisory opinion concerning the propriety of an executive session held by the Common Council of the City of Port Jervis, on which you serve. The Council indicated that the reason for the executive session was for "an issue of attorney client privilege based upon a request for an opinion on potential or possible litigation and liability."

In this regard, we offer the following comments.

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

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

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

Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

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

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

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

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

that remains to be discussed in public, and the intent of the Open Meetings Law would be thwarted.

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

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

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

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

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

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

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

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

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was

> informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceedings, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399, NYS 2d 539, 540 (1977)].

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

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

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

We hope that the foregoing serves to clarify understanding of the Open Meetings Law and is of assistance.

RJF:KC:jm

cc: Common Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-18209
OML-AO-4958

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August 2, 2010

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 facts presented in your correspondence.

Dear Mr. Schneider:

We have received your letter in which you raised issues concerning both the Open Meetings Law, as well as the Freedom of Information Law.

In this regard, we offer the following comments.

First, §104 of the Open Meetings Law pertains to notice and states that:

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

In May of 2009, 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 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.

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

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

The foregoing prescribes minimum requirements concerning the content of minutes, and it is clear that minutes need not consist of a verbatim of account of all that is stated a meeting. It

is also clear that minutes must be prepared and made available to the public "within two weeks of the date of such meeting." Further, if none of the actions described in subdivision (1) or (2) of §106 occurs, technically, there is no obligation to prepare minutes.

Next, with regard to to the Board of Assessment Review, the Open Meetings Law is applicable to public bodies, and §102(2) defines the phrase "public body" to mean:

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

In consideration of the foregoing, we 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 our view occur during a meeting held open to the public.

In short, because an assessment board of review is a "public body" and an "agency", we believe that it is required to prepare minutes in accordance with §106 of the Open Meetings Law,

however, under certain circumstances, the Board of Assessment Review may deliberate in private.

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

Finally, in regard to your question dealing with security measures at the meetings, if the policy does not distinguish among those who seek to attend, it is our view that a town board may engage in reasonable measures to ensure safety and security.

We hope that we have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:KC:jm

cc: Evans Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4195

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August 13, 2010

Ms. Kathryn Cappella Hankins
[redacted]

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

Dear Ms. Hankins:

We have received your letter in which you requested an advisory opinion involving issues pertaining to the Fleming Town Board. I note that the issues largely concern a public hearing held by the Town Board, and that the advisory jurisdiction of the Committee on Open Government relates to the Open Meetings Law.

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

While there are few judicial decisions concerning the ability of those to speak at either meetings or hearings, I believe that the principles pertinent to that issue would be the same. In short, I believe that an entity has the authority to adopt rules or procedures to govern its own proceedings. Those rules or procedures, however, must in my opinion be reasonable. In my view, it would be unreasonable, for example, to authorize those with one point of view to speak for ten minutes or perhaps without limitation, while permitting those with a different view to

speak for three minutes or not at all. Additionally, those who conduct hearings, to be reasonable, must treat those who speak or wish to do so with respect and courtesy.

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-18223
OML-AO-4960

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August 19, 2010

Richard Castellane, Esq.
[redacted]

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

Dear Mr. Castellane:

I have received your letter and the materials relating to it concerning events relating to the presentation of your grievance before the Town of Lyonsdale Board of Assessment Review.

In brief, following the receipt of notification that the assessment of your real property had been significantly increased, you requested notes prepared by the assessor pertaining to the change in the assessed value. Although he indicated that he would send a copy of the notes, and despite your having submitted a written request for them, you indicated that you have never received the notes, nor have you been given a reason for the failure to disclose. Thereafter, you initiated a challenge to the assessment and appeared before the Board of Assessment Review. "Hovering about" in the meeting room while your complaint was being heard "was a gentleman who never introduced himself." During the hearing, you referred to various documentation and offered to supply original bills relating to construction on your property, but the Board chose not to accept or review those materials. After finishing your presentation, "the Board thanked [you], and [you were] excused – departing from the hall." Despite your offer to provide original documentation, in rejecting your complaint, the reason given was that "the proof of value you presented was inadequate, because the supporting data was insufficient." Further, you learned later that the person "hovering about" is the Assessor, and that after you were excused, the Assessor was questioned by the Board concerning your assessment.

In this regard, you have raised a variety of concerns relating to the situation, some of which involve matters beyond the expertise or jurisdiction of this office. With respect to those materials pertinent to our functions, I offer the following comments.

First, with respect to your request for the Assessor's notes, I point out that the Freedom of Information Law is expansive, for it includes all records of an agency, such as a town, within its coverage. Section 86(4) of that states defines the term "record" to mean:

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

In view of the scope of the provision quoted above, the Assessor's notes would constitute "records" subject to 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 (k) of the Law.

Insofar as the notes consist of facts, numbers, statistics and the like, I believe that they would be accessible pursuant to §87(2)(g)(i), for that provision requires the disclosure of "statistical or factual tabulations or data" contained within internal governmental communications. Moreover, even before the Freedom of Information Law was enacted in 1974, it was held that assessment records, including pencil marked data cards, were accessible [see e.g., Sanchez v. Papontas, 32 AD2d 948 (1969)].

Third, since you indicated that a written request for the notes was submitted, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

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

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

Section 89(4)(b) also 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.

Next, I direct your attention to §525 of the Real Property Tax Law, entitled "Hearing and determination of complaints." That statute details the procedure applicable concerning proceedings before a board of assessment review. Most pertinent in the context of the situation that you described are the final two sentences of subdivision (2)(a), which state that:

> "Minutes of the examination of every person examined upon the hearing of any complaint shall be taken and filed in the office of the city or town clerk. The assessor shall have the right to be heard on any complaint and upon his request his 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*" (emphasis added).

From my perspective, when you completed your remarks before the Board, you should not have been excused by the Board. On the contrary, I believe that you had the right to be present to hear the comments offered by the Assessor and that, in fairness, and in a manner consistent with the direction provided in the statute quoted above, you should have been informed of the right to be present to listen to the Assessor's remarks.

Lastly, I know of no provision that requires that a hearing conducted by an assessment board of review be tape recorded, and no recording was made of the proceeding at issue. For

that reason alone, again, I believe that you should have been informed of your right to be present while the Assessor addressed the Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Board of Assessment Review
Peter Rodgers, Assessor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-18229
OML-AO-4961

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August 23, 2010

Hon. Margaret Harrison, Supervisor
Hon. Kathy Michell, Clerk
Town of Tusten
210 Bridge Street
Narrowsburg, NY 12786

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

Dear Supervisor Harrison and Town Clerk Michell:

I have received correspondence from both of you, and I hope that you will accept my apologies for the delay in response. To be completely honest, the package of materials that you sent were buried on my desk and overlooked.

Please note that the duties of the Committee on Open Government involve providing advice and opinions pertaining to the Open Meetings and Freedom of Information Laws. The materials reflect disagreements between you, and much of their content is unrelated to the statutes within the Committee's statutory advisory jurisdiction. Insofar as they pertain to issues that relate to either of the two statutes, I offer the following general comments.

First, both the Freedom of Information Law and the Open Meetings Law are permissive.

The former states that all records of an agency, such as a town, are accessible to the public, except those records or portions of records that "may" be withheld in accordance with a series of grounds for denying access appearing in §87(2). The term "may" is emphasized, for although instances arise in which an agency has the authority to withhold records or portions of records, the language of the law and a decision rendered by the state's highest court indicate that an agency is not required to do so and may choose to disclose [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)]. From my perspective, the only instances in which an agency must withhold records would involve situations in which a statute, an act of Congress or State Legislature, specifically confers confidentiality or prohibits disclosure. In the context of the correspondence, I do not believe that any such statute would be pertinent or applicable.

Similarly, the Open Meetings Law permits but does not require that executive sessions be held. As you are aware, §105(1) prescribes a procedure that must be accomplished in public before a public body, i.e., a town board, may enter into executive session. In short, a motion to do so must be made, it must indicate the subject or subjects to be discussed, and most importantly, the motion must be carried by a majority vote of the total membership of the body. If the motion fails, a public may discuss an issue in public, even though there may be a proper basis for conducting an executive session. As in the case of the Freedom of Information Law, only when a statute prohibits public discussion would a public body lose its option to engage in a public discussion. In the context of the duties of a town board, there are few instances in which there would be a statutory prohibition.

Second, the Freedom of Information Law pertains to all government agency records and defines the term "record" to include:

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

Due to the breadth of the definition, as soon as information exists in some physical form and is maintained by or for an agency, it is subject to rights of access conferred by the Freedom of Information Law. That being so, there is no exception that deals specifically or directly with records relating to matters that have not been resolved. I am not suggesting that all such records must be disclosed, but rather that the contents of records and the effects of their disclosure are the key factors in determining whether or the extent to which the records must be disclosed, or conversely, may be withheld.

Lastly, the minutes of a Town Board meeting include a passage in which a member of the Board contended that a motion to enter into an executive session "to discuss a personnel matter" is "not a specific enough reason" to justify an executive session. In this regard, although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law in its initial form, permitted a public body to enter into an executive session to discuss:

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

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy. The current provision, however, is limited, for it refers to certain matters as they relate to a "particular" person or corporation.

Even when §105(1)(f) may be validly asserted, it has been advised and held by the courts 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.

The Appellate Division, in discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-18235
OML-AO-4961A

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 27, 2010

E-Mail

TO: Mr. Stephen Tiska

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr Tiska:

We have received your correspondence concerning your efforts in obtaining building inspection reports from the Town of Masonville concerning facilities that are used for public assembly. You added that it is your understanding that records indicating a "self-evaluation" must be prepared in relation to those facilities to comply with the Americans with Disabilities Act. In response to your request for the reports, you were informed that none exist.

In this regard, first, the Freedom of Information Law pertains to existing records. Therefore, if the records of your interest have not been prepared by or for the Town, the Freedom of Information Law would not apply.

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

Lastly, you indicated that Town Board meetings are held in a local church, and that the church is not accessible to persons with disabilities. Here we direct your attention to the Open Meetings Law. Section 103(b) of that statute provides that:

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

Based upon the foregoing, there is no obligation upon a public body such as a town board, to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons.

However, we believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings 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 at a location that is accessible to handicapped persons, such as a local school or firehouse, we believe that the meetings should be held in the location that is most likely to accommodate the needs of those people.

We hope that we have been of assistance.

RJF: JBG: jm

cc: Pamela Walker, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-4962

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September 17, 2010

Edward Harrington
[redacted]

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

Dear Mr. Harrington:

We are in receipt of your request for an advisory opinion regarding the application of the Open Meetings Law concerning actions taken during a public comment session of the Oswego Common Council during its meeting on August 9. During that public session, you criticized the Mayor and were removed from the meeting. You asked for an opinion on whether an elected official or body can have a person removed for providing negative commentary during a public comment session during an opening meeting.

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

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

citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

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 short, if a public body permits positive commentary concerning public officers or employees, we believe that it must permit negative comments as well.

We hope that we have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:JBG

cc: Oswego Common Council
Mayor Batcman, City of Oswego

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 17, 2010

Daniel J. Dustin
[redacted]

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

Dear Mr. Dustin:

We are in receipt of your request for an advisory opinion regarding the application of the Open Meetings Law to the meetings held by the Town of Colonie Landfill Advisory Committee. In your letter, you indicated that two members of the Advisory Committee are elected officials of the Town; the others are town employees and a resident. You have asked for an opinion addressing the status of the Advisory Committee under the Open Meetings Law.

In this regard, judicial decisions indicate generally that ad hoc entities having no power to take final action, other than those consisting wholly of 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)].

As we understand the nature of the Advisory Committee, it does not appear to be subject to the Open Meetings Law.

We hope that we have been of assistance,

Sincerely,

Robert J. Freeman
Executive Director

RJF:JBG

cc: Town of Colonie Town Board

Jobin-Davis, Camille (DOS) OML-AO-4964

From: Jobin-Davis, Camille (DOS)
Sent: Monday, September 27, 2010 10:59 AM
To: [redacted]
Subject: Open Meetings Law - voting

Dear Ms. Gravino:

The following three excerpts from the Open Meetings Law, pertain to the use of video conferencing for meeting purposes:

§102. Definitions. As used in this article:
1. "Meeting" means the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body.

§103. Open meetings and executive sessions.
...
(c) A public body that uses videoconferencing to conduct its meetings shall provide an opportunity to attend, listen and observe at any site at which a member participates.

§104. Public notice.
...
4. If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations.

If "live feed" is similar to video conferencing insofar as it provides simultaneous audio and visual contact with the board, giving the public the ability to witness and observe the board member involved in the decision making process, then I believe it would be permitted pursuant to the videoconferencing provisions of the Open Meetings Law.

I hope that you find this helpful.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
99 Washington Ave, Suite 650
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-Original Message-----

Jobin-Davis, Camille (DOS) OML-AO-4965

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, September 30, 2010 11:39 AM
To: 'donna_giliberto@dps.state.ny.us'
Subject: FW: inquiry

Donna,

I left a message on your machine – and sorry for the delay!

In sum, I think that providing the public an opportunity to comment on a webpage is something entirely separate and unique from public participation at a meeting.... I don't believe that any of the case law regarding "reasonable rules" that a board could impose on public comments (and unreasonable rules requiring them to identify themselves) can be correlated to an agency's invitation to the public for written online comments. Without a board/public body holding a public meeting, that case law, in my opinion, doesn't control.

Are you thinking about anything else?

I hope that this helps.

Camille

Camille S. Jobin-Davis, Esq.
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[redacted]

STATE OF NEW YORK
DEPARTMENT OF STATE
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September 30, 2010

Richard W. Morris
[redacted]

Dear Mr. Morris:

This is in response to your request for advice with respect to gatherings of planning and zoning board members at the Mamakating Town Hall, prior to their regular meetings. Specifically, you indicated that "[p]rior to the evening's meeting the members… with their attorneys and the town planner gather in the planning/building department office in another part of the building before entering the large room. Sometimes the door is open and sometimes it is closed. It is unsubstantiated but people have heard them discussing the evening's agenda."

In response to your request, the attorney for the Town of Mamakating Planning Board submitted correspondence (copy attached) indicating "From time to time the Board members do, under attorney/client privilege, meet to discuss the legal entitlements and ramifications of various applications. Such gathering of Board members is for the purpose of soliciting and receiving legal advice, not for the purpose of conducting public business."

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

The decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings, such as "agenda sessions," held for the purpose of discussion, but without 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 planning board or zoning board of appeals is present to discuss board business, any such gathering, in our opinion, would constitute a "meeting" subject to the Open Meetings Law.

Further, because the "pre-meeting" is a "meeting", it must be preceded by notice of the time and place given to the news media and by means of posting pursuant to §104 of the Open Meetings Law. Therefore, if a pre-meeting is scheduled to begin at 7:45, notice must be given to that effect.

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

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

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

In terms of background, it has long been held that a municipal board may establish a privileged relationship with its attorney [People ex rel. Updyke v. Gilon, 9 NYS 243 (1889); Pennock v. Lane, 231 NYS 2d 897, 898 (1962)]. However, such a relationship is in 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, we believe that the attorney-client privilege may validly be asserted and that communications made within the scope of the privilege would be outside the coverage of the Open Meetings Law. Therefore, even though there may be no basis for conducting an executive session pursuant to §105 of the Open Meetings Law, a private discussion might validly be held based on the proper assertion of the attorney-client privilege pursuant to §108, and legal advice may be requested even though litigation or possible litigation is not an issue. In that case, while the litigation exception for entry into executive session would not apply, there may be a proper assertion of the attorney-client privilege.

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

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb

cc: John Piazza, Chairman, Mamakating Planning Board
Chair, Mamakating Zoning Board of Appeals

Jobin-Davis, Camille (DOS) OML-AO-4967

From: Jobin-Davis, Camille (DOS)
Sent: Monday, October 04, 2010 10:44 AM
To: [redacted]
Subject: Open Meetings Law: Formal Voting During Work Sessions

Dear Mr. Morales,

Forgive me if we've spoken already - your name seemed familiar, but I wasn't sure -

In a nutshell, every gathering of a quorum of a public body to discuss public business is a "meeting" subject to the Open Meetings Law. When a public body is in a "meeting", regardless of what that gathering is called, a "workshop", a "pre-board meeting", an "agenda session", if there is a quorum present, and if they are discussing public business, the gathering is subject to the Open Meetings Law, and the public body may take action.

Although there is no provision of law that prohibits taking action during such a gathering, when a public body indicates to the public, in its notice of the meeting, that it is holding a "workshop", with the intent to communicate that no voting will take place during this gathering, in my opinion, the public body is being disingenuous, and should refrain from voting during the workshop.

The following is a link to a related advisory opinion:
http://www.dos.state.ny.us/coog/otext/o4506.htm

I hope that you find this helpful

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
Fax: 518-474-1927
http://www.dos.state.ny.us/coog/index.html

[redacted]

Jobin-Davis, Camille (DOS) OML-AO-4968

From: Jobin-Davis, Camille (DOS)
Sent: Monday, October 04, 2010 4:22 PM
To: 'Karen Nielsen, Chair Board of Fire Commissioners CSH'
Subject: RE: relocating public board meeting

Dear Ms. Nielsen,

Determining the location for a meeting or changing the location, in my opinion, does not require action by the board. I agree, you would need to post notices as soon as possible so that the public was aware of the change of location - alert the media, and change the notice on the website.

I would also advise posting notice of the change at the location where you originally scheduled the meeting for obvious reasons, and if necessary, starting the meeting a bit later than usual to allow for folks who have to make their way to the new location.

As you may know, the Open Meetings Law was recently amended with respect to the size of the room in which a meeting is held. Please note the following explanation from our website:

"Effective immediately, §103 of the Open Meetings Law requires that public bodies make reasonable efforts to hold meetings in rooms that can "adequately accommodate" members of the public who wish to attend. The intent of the amendment, as expressed in the accompanying legislative memorandum, is for public bodies to hold meetings in rooms that can reasonably accommodate the number of people that can reasonably be expected to attend. For example, if a typical board meeting attracts 20 attendees, and meetings are held in a meeting room which accommodates approximately 30 people, there is adequate room for all to attend, listen and observe. But in the event that there is a contentious issue on the agenda and there are communications of substantial public interest, numerous letters to the editor, phone calls or emails regarding the topic, or perhaps a petition asking officials to take action, the new provision would require the public body to consider the number of people who might attend the meeting and take appropriate action to hold the meeting at a location that would accommodate those interested in attending, such as a school facility, a fire hall or other site.

Changing the location of a meeting may require providing notice of the new location, which would be required to comply with the Open Meetings Law.

(Open Meetings Law §103[d]*, Laws 2010, Chapter 40, effective April 14, 2010.)"

Very sorry for the delayed response.

Camille

[redacted]

Jobin-Davis, Camille (DOS) OML-AO-4969

From: Jobin-Davis, Camille (DOS)
Sent: Monday, October 04, 2010 4:28 PM
To: 'Daniel A. Benoit'
Subject: Open Meetings Law - Executive Session - attendance by parent of child discussed therein

Dear Mr. Benoit:

A school board may discuss issues pertaining to students and their academic records in private session. These issues are confidential pursuant to The Family Educational Rights and Privacy Act (FERPA), such discussions are exempt from the Open Meetings Law, and the school board is prohibited from discussing them in public.

Whether the parent has a right to attend such session, in my opinion, would be a matter for the school board to determine.

Further advisory opinions regarding these types of issues may be found on our online index of Open Meetings Law advisory opinions under "F" for "Family Educational Rights and Privacy Act".

On the other hand, if your comment is more tailored to a comment regarding a policy of the school - please see advisory opinions under "P" for "Public Participation."

I hope that this is helpful.

Camille

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[redacted]

Jobin-Davis, Camille (DOS) OML-AO-4970

From: dos.sm.Coog.InetCoog
Sent: Tuesday, October 12, 2010 10:44 AM
To: F, Douglas Swesty
ject: RE: Do NYS OML provisions apply to advisory committees?

Dear Mr. Swesty,

Whether an advisory committee is a "public body" subject to the Open Meetings Law depends on (in a nutshell) the membership of the Committee and its responsibilities and authority. Generally, if a committee is created by statute, it would have certain mandated responsibilities and is likely a public body, subject to the Open Meetings Law.

For analysis of case law that applies the definition of "public body" to advisory committees, please see the Committee on Open Government's online Open Meetings Law advisory opinions under "A" for "Advisory Bodies", and "C" for "Committees and Subcommittees".

Whether the committee meets in a municipal headquarters building would not be determinative of whether the committee is subject to the requirements of the Open Meetings Law.

I hope that you find this helpful.

Camille

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[redacted]

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-18260
OML-AO-4971

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October 12, 2010

Mr. Robert Reninger
Broadview Civil Association
250 Knollwood Road
White Plains, NY 10607-1823

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

Dear Mr. Reninger:

We are in receipt of your request for an advisory opinion regarding a request made to the Town of Greenburgh for copies of minutes of the Town Board of Assessment Review pursuant to the Freedom of Information Law. We note your objection to the Town's production of records responsive to your request and its characterization of the records produced for inspection as being responsive to your request. In an effort to provide clarification with respect to these issues, we offer the following comments.

First, Section 106 of the Open Meetings Law requires the preparation of minutes and states the following:

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

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

In view of the foregoing, a motion, as well as any other action taken during an open meeting, must be memorialized in minutes.

Second, the Freedom of Information Law has since its enactment included what some have considered an "open vote" requirement. Section 87(3)(a) provides as follows:

> "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, such as the Board of Assessment Review, a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Although records of votes ordinarily will appear in minutes, it has been held by the Court of Appeals that so long as such records are maintained by an agency, there is no requirement that they be included in minutes [Perez v. City University of New York, 5 NY3d 522 (2005].

Our review of the materials attached to your request indicates that the Town provided access to copies of actual petitions, "1,700 documents ... revealing the vote taken by each Bar member on each document." This appears to indicate that each of the votes taken by the Board of Assessment Review was memorialized on the actual petitions.

Lastly, a board of assessment review is in our view clearly a "public body" required to comply with the Open Meetings Law [see Open Meetings Law, §102(2)]. While meetings of public bodies generally must be conducted in public unless there is a basis for entry into executive session, following public proceedings conducted by boards of assessment review, we believe that their deliberations could be characterized as "quasi-judicial proceedings" that would be exempt from the Open Meetings Law pursuant to §108(1) of that statute. It is emphasized, however, that even when the deliberations of such a board may be outside the coverage of the Open Meetings Law, its vote and other matters would not be exempt. As stated in Orange County Publications v. City of Newburgh:

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

Therefore, although an assessment board of review may deliberate in private, based upon the decision cited above, the act of voting or taking action must in our view occur during a meeting.

Moreover, both the Freedom of Information Law and the Open Meetings Law impose record-keeping requirements upon public bodies. As indicated earlier, that statute includes requirements concerning the preparation of minutes. 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 memorialized.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb

cc: Hon. Judith Beville
Edye McCarthy, Town Assessor

Jobin-Davis, Camille (DOS) OML-AO - 4972

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, October 12, 2010 10:24 AM
T·· 'Arthur Singer'
(,ect: RE: Executive sessions

Dear Mr. Singer,

I believe that you will find the following advisory opinion helpful:
http://www.dos.state.ny.us/coog/otext/o2748.htm

Based on the reasoning contained in the above advisory opinion, because there is no requirement in the law that a particular person be identified when a discussion is properly held in executive session pursuant to section 105(1)(f), there is also no corresponding requirement that a particular department be identified, especially when the department consists of a small number of people.

For additional analysis regarding these issues, please note online Open Meetings Law advisory opinions under "E" for "Executive Session".

I hope that you find this helpful.

Camille

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Assistant Director
'·'S Committee on Open Government
. ,artment of State
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http://www.dos.state.ny.us/coog/index.html

[redacted]

Freeman, Robert (DOS) FOIL-AO-4973

From: Freeman, Robert (DOS)
Sent: Wednesday, October 13, 2010 3:14 PM
To: 'Bob LaColla'
Subject: RE: Latest Lock Down Rule
Attachments: image001.jpg; image002.jpg

If the resolution was carried by a 3-2 vote on a board consisting of 5 members, I believe that it would be valid. The only avenue of recourse, in my view, would involve amending the rules. Again, doing so would require an affirmative vote of a majority of the total membership of the Board.

Robert J. Freeman
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[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Freeman, Robert (DOS) OML-AO-4974

From: Freeman, Robert (DOS)
Sent: Wednesday, October 13, 2010 12:03 PM
To: Schillaci, Theresa (CPI)
Subject: RE: Executive Session

If a gathering is held on a day other than the original meeting, we have advised that it's a new meeting that must be preceded by notice and convened open to the public. From there, a motion can be instantly made to enter into executive session. It has also been suggested that if the only subject to be considered at meeting may properly be discussed in executive session, the notice might indicate that a motion to discuss such and such will be made immediately after convening and that no other business will be conducted. By so doing, there is technical compliance with the OML, but a notification that there is no reason to attend.

Hope this helps a little.

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Freeman, Robert (DOS) OML-AO-4975

From: Freeman, Robert (DOS)
Sent: Thursday, October 14, 2010 11:22 AM
To: Jobin-Davis, Camille (DOS); lpasquali@nycap.rr.com
Subject: RE: the Enterprise article

We have advised in numerous contexts that every law should be implemented in a manner that gives reasonable effect to its intent. With respect to notice, it has generally been suggested notice must be given to one or more news media outlets, and that whenever possible, it should be given to the news media organization most likely to make contact with those who would be interested in attending a meeting.

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From: Jobin-Davis, Camille (DOS)
Sent: Thursday, October 14, 2010 11:01 AM
To: lpasquali@nycap.rr.com
Freeman, Robert (DOS)
Subject: FW: the Enterprise article

Meant to copy to Bob!

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, October 14, 2010 10:57 AM
To: 'Linda Pasquali'
Subject: RE: the Enterprise article

Linda,

Although there are a number of advisory opinions on our website regarding "Notice to News Media", none of them directly address whether notice must be given to both papers in the region. Rather, the opinions advise as follows:

"The Open Meetings Law does not specify that notice of a meeting must be given to the official newspaper. In some instances, the official newspaper may be a weekly publication, and notice in some circumstances might be more appropriately given to a daily newspaper or radio station, for example." OML-AO-3165

"In my opinion, every law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to the intent of the law. It would be unreasonable in my view for the Town Board to transmit notice to the Washington Post or a New York City radio or television station, for those outlets would not likely reach residents of the Town, nor would they assign a reporter to attend a meeting of the Board. If notice is posted and given to a newspaper that has a significant circulation in the Town or to a radio station situated in or

near the Town, I believe that the Board would be in compliance with the Open Meetings Law. In short, there is nothing in the Open Meetings Law that would require that notice of meetings be given to a particular newspaper. If a newspaper has a significant circulation in a municipality, it would appear to be reasonable to provide notice to that newspaper." OML-AO-2585

:d on the analysis in the above advisory opinions, and the notice requirements in Section 104 of the Open Meetings Law, I agree that that notice to the official newspaper is sufficient. I'm copying Bob Freeman in on my response in the event that he'd like to clarify.

Hope it helps!

Camille

Camille S. Jobin-Davis, Esq.
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Freeman, Robert (DOS) FOIL-AO-4976

From: dos.sm.Coog.InetCoog
Sent: Thursday, October 14, 2010 8:49 AM
To: 'Thomas Mellon'
Subject: RE: Executive session

A proper executive session may be held at any time during a meeting that has been convened open to the public.

Robert J. Freeman
Executive Director
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[redacted]

Jobin-Davis, Camille (DOS) OML-AO-4977

From: Freeman, Robert (DOS)
Sent: Thursday, October 14, 2010 11:22 AM
To: Jobin-Davis, Camille (DOS); lpasquali@nycap.rr.com
Subject: RE: the Enterprise article

We have advised in numerous contexts that every law should be implemented in a manner that gives reasonable effect to its intent. With respect to notice, it has generally been suggested notice must be given to one or more news media outlets, and that whenever possible, it should be given to the news media organization most likely to make contact with those who would be interested in attending a meeting.

Robert J. Freeman
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Website: www.dos.state.ny.us/coog/index.html

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, October 14, 2010 11:01 AM
To: lpasquali@nycap.rr.com
Cc: Freeman, Robert (DOS)
Subject: FW: the Enterprise article

Meant to copy to Bob!

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, October 14, 2010 10:57 AM
To: 'Linda Pasquali'
Subject: RE: the Enterprise article

Linda,

Although there are a number of advisory opinions on our website regarding "Notice to News Media", none of them directly address whether notice must be given to both papers in the region. Rather, the opinions advise as follows:

"The Open Meetings Law does not specify that notice of a meeting must be given to the official newspaper. In some instances, the official newspaper may be a weekly publication, and notice in some circumstances might be more appropriately given to a daily newspaper or radio station, for example." OML-AO-3165

"In my opinion, every law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to the intent of the law. It would be unreasonable in my view for the Town Board to transmit notice to the Washington Post or a New York City radio or television station, for those outlets would not likely reach residents of the Town, nor would they assign a reporter to attend a meeting of the Board. If notice is limited and given to a newspaper that has a significant circulation in the Town or to a radio station situated in or

near the Town, I believe that the Board would be in compliance with the Open Meetings Law. In short, there is nothing in the Open Meetings Law that would require that notice of meetings be given to a particular newspaper. If a newspaper has a significant circulation in a municipality, it would appear to be reasonable to provide notice to that newspaper." OML-AO-2585

ed on the analysis in the above advisory opinions, and the notice requirements in Section 104 of the Open Meetings Law, I agree that that notice to the official newspaper is sufficient. I'm copying Bob Freeman in on my response in the event that he'd like to clarify.

Hope it helps!

Camille

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[redacted]

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4978

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October 15, 2010

Christopher A. Renke, Esq.
Abrams, Fensterman, Fensterman,
Eisman, Greenberg, Formato & Einiger, LLP
1111 Marcus Avenue, Suite 107
Lake Success, NY 11042

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

Dear Mr. Renke:

We are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to a meeting of the Electrical Licensing Board in the Town of Oyster Bay. Specifically, you were denied access to a meeting of the Board by the Chairman who indicated that the Open Meetings Law did not apply.

Our review of the online Code of the Town of Oyster Bay, updated on April 1, 2010, indicates that the Town Board shall appoint five members to the "Examining Board of Electricians", who are required to meet "at least twice each month and at such other times as, [is] .... necessary for the effective discharge of its duties" (§107-14[A] and [C]). "The Board shall elect a Chairman from its membership who shall retain voting rights identical with that of the remainder of the Board" (§107-14[B]). Section 107-14 further requires as follows:

> D. Examination of applicants for electrician licenses; recommendations. The Board shall examine all applicants for licenses required by this chapter as to qualifications; shall pass judgment on all licensing matters brought to its attention; shall review all applications for the renewal of such licenses; and may make appropriate recommendation to the Commissioner of the Department of Planning and Development or his designee as to the issuance, modification, suspension or revocation of licenses required by this chapter, or renewals thereof, upon which the Board has passed judgment in the course of its official business. The Board may also make recommendation as it deems necessary or proper concerning proposed additions, changes or other amendments to this chapter or the Electrical Code adopted in this chapter. [Amended 5-6-1980]

E. Recordkeeping. The Board shall keep a written record of all its meetings and proceedings and recommendations.

F. Promulgation of rules and regulations. The Board may make such rules and regulations for the conduct of its business as may be necessary and proper.

The Town Code also contains provisions concerning the duties and responsibilities of the Examining Board, including prescribing an application for an examination for a license (§107-22[A]), setting the time for holding examinations for licenses, with at least 15 days notice given to the applicants (§107-23[A]).

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

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

Based on 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.

Accordingly, from our perspective, each of the conditions necessary to conclude that the Examining Board constitutes a public body can be met. It consists of five members who conduct public business collectively, and take action by casting votes. By doing so and carrying out their powers and duties, the Examining Board performs a government function for the Town of Oyster Bay. While we know of no specific reference to a quorum requirement, a separate statute, §41 of the General Construction Law, requires that "Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly as a board or similar body", they may carry out their duties only through the presence of a quorum, a majority of the total membership, and action may be taken my means of an affirmative vote of a majority of the total membership.

Assuming the accuracy of the foregoing and that the Examining Board constitutes a public body required to comply with the Open Meetings Law, every meeting of the Examining Board must be preceded by notice of the time and place.

Specifically, §104 of the Open Meetings Law pertains to notice and states that:

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

2. Public notice of the time and place of every other meeting shall be given to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

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

4. If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations."

In May of 2009, 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. Similarly, every public body with the ability to do so should post notice of the time and place of every meeting online.

Lastly, 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)].

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb
cc: Electrical Licensing Board, Oyster Bay

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4929

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October 15, 2010

Christie L. McEvoy-Derrico, Village Attorney
Village of Mamaroneck
Village Hall
P.O. Box 369
Mamaroneck, NY 10543

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

Dear Ms. McEvoy-Derrico:

Thank you for your correspondence of August 23, 2010. I appreciate your insight and experience with respect to the issues addressed in my recent advisory opinion. Typically we invite a municipality that will be the subject of an advisory opinion to offer a submission for our consideration prior to the release of the advisory opinion. Although I'm not sure why that was not sent in this case, enclosed please find copies of the documents that Mr. Weiner submitted in consideration of his request.

In response to your questions concerning the provisions for entry into executive session to discuss "proposed, pending or current litigation," I note that while case law does not explicitly clarify at what point litigation is "proposed", this office has advised that receipt of a notice of claim, in our opinion, would constitute "proposed" and/or "pending" litigation.

In my opinion, which is based on decisions rendered by the Appellate Division, Second Department, which includes Westchester County, the characterization of a matter as "proposed" or "pending" litigation is not determinative of the ability to conduct an executive session. The critical factor is whether a public body is discussing litigation strategy. To that extent, I believe that an executive session may properly be held.

I do not agree that holding discussions in executive session when issues get contentious or "begin to careen towards litigation" would be appropriate. As set forth in our advisory opinion to Mr. Weiner on July 8, we believe §105(1)(d) and the ensuing case law permits a public body to discuss its litigation strategy behind closed doors rather than issues that might eventually result in litigation. We believe that those decisions convey the courts' narrow interpretation of the intent of the exception, that is, to protect the municipality's ability to defend itself or prosecute an action.

In other words, only to the extent that the Board discusses its litigation strategy would an executive session be properly held. As you may know, if it is necessary for the Board to request and receive legal advice at a particular juncture, a gathering of such nature would be exempt from the Open Meetings Law pursuant to §108(3) based on the assertion of the attorney-client privilege.

I hope that you find this helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

Enc.

CSJ:sb
cc: Anthony Weiner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-18273
OMI-AO-4980

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October 18, 2010

Mr. David Kidera
Director
Authorities Budget Office
PO Box 2076
Albany, NY 12220-0076

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

Dear Mr. Kidera:

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

You referred to a statutory obligation imposed by the Public Authorities Reform Act, §2800, subdivisions (1) and (2) of the Public Authorities Law, requiring authorities to include as part of a public annual report "an evaluation conducted by each authority's board of directors of its performance for the year." However, §2800(1)(a)(15) and (2)(a)(15) concerning state and local authorities respectively specify that "such evaluations shall not be subject to disclosure under article six of the public officers law", which is the Freedom of Information Law. Similarly, §2800 (1)(b) and (2)(b), also concerning state and local authorities respectively, provide that each public authority "shall make accessible to the public, via its official or shared internet web site, documentation pertaining to its mission, current activities, most recent annual financial reports, current year budget and its most recent independent audit report unless such information is covered by subdivision two of section eighty-seven of the public officers law." Section 87(2) of the Public Officers Law states, in brief, that all agency records, including those of public authorities, are accessible to the public, except those records or portions thereof that fall within one or more of the exceptions to rights of access appearing in that provision.

The Authorities Budget Office will be developing policy guidance in relation to the foregoing, and you have sought guidance concerning the following questions.

> "1. Can pubic authorities be required to submit these evaluations to the ABO if such evaluations are not subject to FOIL, given that information received by the ABO as part of an Annual Report is public information?"

Having reviewed the provisions of §6 of the Public Authorities Law entitled "Powers and duties of the authorities budget office" (referenced in your letter as the "ABO"), it is clear in my view that the ABO may do so. Subdivision (2)(a) of that statute specifies that the ABO "shall have the authority to...request and receive from any state or local authority, agency, department or division of the state or political subdivision such assistance, personnel, information, books, records, other documentation and cooperation as may be necessary to perform its duties..." With respect to disclosure of records that the ABO acquires, including reports obtained from state or local authorities, subdivision (c) of §2800 of the Public Authorities Law states in relevant part that the ABO "shall make accessible to the public, via its official or shared internet web site, documentation pertaining to each authority's mission, current activities, most recent annual financial reports, current year budget and its most recent independent audit report *unless such information is covered by subdivision two of section eighty-seven of the public officers law*" (emphasis added). Although the italicized language is not, in my view, artfully expressed, I believe that it is intended to require the ABO to disclose information to the public that it acquires from state and local authorities, except to the extent that an exception to rights of access appearing §87(2) may properly be asserted to withhold the information.

"2. Can a public authority discuss the results of its self-evaluation in executive session?"

The Open Meetings Law contains two vehicles under which a public body, such as the board of an authority, may exclude the public from a meeting.

The first is the executive session. That phrase is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting from which the public may be excluded. Before entering into an executive session, a public body must accomplish a procedure in public: a motion to hold an executive session must be made, the motion must indicate the subject or subjects to be considered, and it must be carried by a majority vote of the body's total membership, notwithstanding absences or vacancies. Further, paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be discussed during an executive session. In short, a public body cannot enter into executive session to discuss the subject of its choice.

The second pertains to "exemptions" that appear in §108 of the Open Meetings Law. If an exemption applies, the Open Meetings Law does not; it is as though that statute does not exist. Subdivision (3) of §108 provides that a discussion of "any matter made confidential by federal or state law" is exempt from the coverage of the Open Meetings Law. Because §2800 of the Public Authorities Law states that "board performance evaluations"...shall not be subject to disclosure" pursuant to the Freedom of Information Law, I believe that a court would determine that a discussion by a board involving an evaluation of its performance would constitute a matter made confidential by state law that, therefore, could be conducted in private.

In a technical sense, such discussions would not be held during in executive sessions, and it is likely that none of the grounds for entry into executive session would apply. They may, however, be conducted in private, outside the coverage of the Open Meetings Law, for they involve matters that are confidential under state law.

"3. If the evaluation is critical of the performance of one or more board members, is any discussion of that individual exempt from open meeting requirements?"

Assuming that the discussion is a part of the board's performance evaluation, I believe that the discussion could occur in private based on the same rationale as that offered immediately above, that it would constitute a matter made confidential by state law. In addition, depending on the nature of the discussion, it is possible that one of the grounds for entry into executive session would be pertinent. Section 105(1)(f) authorizes a public body to enter into executive session to discuss "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." If, for example, a board considers the removal of a particular member from its board, I believe that an executive session could be justified. Again, however, it appears that a discussion of that nature would involve a matter that is exempt from the Open Meetings Law based on §108(3).

"4. Is the public authority entitled to protect the completed evaluation document, but required to hold any discussion of the results in an open meeting?"

Again, because §2800 of the Public Authorities Law specifies that a board performance evaluation "shall not" be accessible under the Freedom of Information Law, it is my belief that a discussion of the evaluation could occur in private in consideration of §108(3).

Notwithstanding the foregoing, I point out that the Open Meetings Law is permissive. Although a public body *may* enter into executive to discuss certain subjects, it is not required to do so. Moreover, if, for instance, a topic is a proper subject for consideration in executive session, but a motion to do so is not carried, a public body may discuss the topic in public. Similarly, while a matter may be exempt from the coverage of the Open Meetings Law and may be discussed in private, there is no obligation to do so.

"5. What are the obligations of the Authorities Budget Office to protect or make public any records or documents it receives pertaining to the board's evaluation of its performance?"

In addition to the particular records and issues analyzed in the preceding records, pertinent in this regard is subdivision (3) of §6 of the Public Authorities Law concerning the powers and duties of the ABO, for it states that "The reports and non-proprietary information received by and prepared by the authorities budget office shall be made available to the public, to the extent practicable, through the internet." As I understand that provision, it requires the ABO to disclose the records at issue, except to the extent that the records contain proprietary information. The term "proprietary" relates §87(2)(d) of the Freedom of Information Law, which authorizes an agency, such as the ABO, to withhold records or portions of records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause

substantial injury to the competitive position of the subject enterprise..." The extent to which §87(2)(d) might properly be asserted would be dependent on the content of records and the effects of disclosure. Additional detail can be offered if you seek amplification of issues relating to that provision.

It is emphasized that a claim that information is "proprietary" without more is likely inadequate. As you may be aware, when records are withheld under the Freedom of Information Law, the person denied access has the right to appeal. If the appeal is denied, he/she may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. Section 89(4)(b) of the Freedom of Information Law specifies that in such a proceeding, the agency has the burden of proving that an exception to rights of access was properly asserted. Further, in a recent decision rendered by the Court of Appeals involving §87(2)(d), it was held that a denial based on speculation was insufficient to justify a denial of access; rather, the agency and/or the commercial entity would be required to demonstrate that disclosure would in fact cause substantial injury to the entity's competitive position [Markowitz v. Serio, [11 NY3d 43 (2008)].

I point out that the use of the term "proprietary" is not entirely clear. As indicated in the language of §87(2)(d), that exception is most frequently applicable in relation to records submitted to government entities by private, commercial entities. Is the term intended to refer to information maintained by authorities that pertain to private commercial entities? Or is it intended to deal with the rare situation in which an authority functions as competitor in a commercial marketplace?

Lastly, like the Open Meetings Law, the Freedom of Information Law is permissive. Although an agency may withhold records in accordance with the exceptions to rights of access appearing in §87(2), it may choose to release records unless a statute forbids disclosure [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)]. Consequently, if, for example, a situation arises in which the ABO believes that certain information should be disclosed in the public interest, it may choose to disclose, even though it has the ability (but not the obligation) to deny access.

I hope that I have been of assistance. I would be pleased to discuss any of the foregoing with you, as well as any issues that might arise involving the Freedom of Information or Open Meetings Laws.

Sincerely,

Robert J. Freeman
Executive Director

RJF:sb

Freeman, Robert (DOS) OMC-AO-4981

From: Freeman, Robert (DOS)
Sent: Friday, October 22, 2010 9:01 AM
To: [redacted]
ject: School Board members attending executive sessions of audit committee

We have received your correspondence concerning a situation in which a quorum of a board of education attends an executive session conducted by an audit committee pursuant to §2116-c of the Education Law. You have asked whether the presence of a quorum of the board would "make null and void the Audit Committee executive session and subject the meeting to the requirements of the Open Meetings Law." You also sought guidance concerning "the requirements for keeping minutes during an executive session of the Audit Committee."

In this regard, we offer the following remarks.

First, it is clear in our view, that an audit committee is a "public body" required to comply with the Open Meetings Law. An audit committee is a creation of law, and it performs a governmental function for a public corporation, a school district. A board of education, as you are aware, also constitutes a public body, and both are required to comply with the Open Meetings Law. In my view, if there is an intent that a quorum of both an audit committee and a board of education meet jointly, both entities would be required to give notice in accordance with §104 of the Open Meetings Law.

Second, because an audit committee is a public body, it has the authority to conduct executive sessions in accordance with §105(1) of the Open Meetings Law, as well as subdivision (7) of §2116-c of the Education Law. That provision focuses solely on an audit committee's authority to conduct executive sessions and specifies that "Any trustee or member of a board of education who is not a member of such audit committee may be allowed to attend an audit committee meeting if authorized by a resolution of the trustees or board of education." Based on that provision, members of boards of education are permitted to attend executive sessions of audit committees.

Third, §105(2) of the Open Meetings Law states that a public body may authorize persons other than members of that body to attend its executive sessions. That being so, in accordance with that and the provisions cited above, members of a board of education may attend an executive session of an audit committee. The presence of board members at an executive session of an audit committee would not in any way render the audit committee's executive session "null and void." The anomaly, in my view, involves the ability of an audit committee to enter into an executive session pursuant to §2116-c(7) of the Education Law to discuss matters that a board of education ordinarily may not consider during an executive session. The question, therefore, involves the proper interpretation of §2116-c(7) in conjunction with the Open Meeting Law.

Because the language of §2116-c(7) specifically authorizes members of a boards of education to attend audit committee executive sessions, and because an executive session is a portion of a meeting during which the general public may be excluded [see Open Meetings Law, §102(3), I would surmise that a court would determine that members of boards of education, irrespective of the number of board members authorized to do so, may attend executive sessions conducted by an audit committee. It appears to be intent of the State Legislature to enable board members who do not serve on audit committees to have the opportunity to be aware of an audit committee's activities, including its discussions in executive session. If that is so, I believe that the limitations concerning the subject matter of executive sessions appearing in §105(1) of the Open Meetings Law are overridden by the authority conferred in §2116-c(7). Again, although both an audit committee and a board of education would be required to provide notice prior to a joint meeting, for both are public bodies, it is my view that members of the board may be authorized to attend an executive session properly held by an audit committee.

stly, with respect to minutes, §106 of the Open Meetings Law provides guidance. In short, if a public body merely engages in a discussion during an executive session but takes no action, there is no obligation to prepare minutes. If,

however, action is taken, minutes indicating the nature of the action taken, the date, and the vote of the members must be prepared and made available to the extent required by the Freedom of Information Law within one week of the executive session.

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

Robert J. Freeman
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OMLAO-4982

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October 25, 2010

William Goblet
[redacted]

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

Dear Mr. Goblet:

We are in receipt of your letter in which you requested an advisory opinion concerning the Open Meetings Law in regard to contract negotiations involving the Town of Wright Town Board and its Highway Department. In previous conversations with you, in addition to your letter, you mentioned that the Board entered into an executive session to discuss collective bargaining negotiations.

In this regard, as a general matter, paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session. Section 105(1)(e) of the Open Meetings Law authorizes a public body to enter into executive session to consider "collective negotiations pursuant to article fourteen of the civil service law." Article 14 is commonly known as the "Taylor Law" and deals with the relationship between public employers and public employee unions, which are characterized in §201(5) of the Civil Service Law as "employee organizations."

If there is no public employee union in the Town, in our view, §105(1)(e) would not have served as a valid basis for entry into executive session. Further, if the discussion involved employees of the Highway Department as a group, and not any particular employee, it is unlikely that there would have been any ground for conducting an executive session.

We hope that we have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF: JBG
cc: Town of Wright Town Board
Town of Wright Highway Department

STATE OF NEW YORK
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October 25, 2010

E-Mail

TO: Mr. Adam Brill

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Brill:

I have received your letter and a report prepared by the City of Yonkers Inspector General, who was directed to "'investigate and render a decision 'regarding 'whether the CRC [Charter Revision Commission] followed correct process for noticing some of their meetings and hearings...."

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

The Open Meetings Law requires that every public body, including the CRC, must provide notice in accordance with §104 of that statute prior to every meeting. However, there are numerous statutes that involve notice of hearings. For example, there are separate statutes concerning hearings held before the adoption of budgets by villages, towns and school districts. Similarly, the Municipal Home Rule Law includes provisions relating to hearings held by a legislative body or chief executive officer. In short, while the Open Meetings Law applies to meetings all public bodies, there are unique and disparate provisions concerning hearings.

Because this office is authorized to offer advisory opinions regarding the Open Meetings Law (see Public Officers Law, §109), and because we have neither the expertise nor the jurisdiction to offer an opinion concerning notice requirements associated with hearings, the following remarks will pertain only to the Open Meetings Law.

Section 104 of that statute provides that:

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

The section of the Inspector General's report entitled "Discussion" includes a series of facts relating to hearings/meetings held on August 16 and August 26. Based on his findings, notice was given to the news media (the *Journal News*), and posted in City buildings and on the City's website prior both gatherings. Consequently, he concluded that both events were "conducted after sufficient public notice." Since it appears that the requirements imposed by §104 of the Open Meetings Law were met, I agree that the CRC appears to have complied with that statute.

I hope that I have been of assistance. If you would like to discuss the matter, please feel free to contact me.

Jobin-Davis, Camille (DOS) OML-AO-4984

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, October 27, 2010 10:04 AM
To: 'Brauchle, Robert'
ject: RE: Article 7 discussion

Dear Robert,

I've read the article that you sent from the OD on September 29th. The following is an excerpt from a recent advisory opinion regarding a very similar set of circumstances:

The provision in the Open Meetings Law 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 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 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 situation that you described, if the school board is not or will not be a party to the litigation, in my opinion it is unlikely that §105(1)(d) would apply. The way that Mr. James Davis characterized the discussion, according to the article, is that the school board will evaluate the ramifications of the agreement to the district's budget and fiscal health. In my opinion, that discussion is not protected pursuant to section 105(1)(d).

On the other hand, if the school board were to hold a discussion with its attorney, during ch the school board were requesting and receiving legal advice regarding the ramifications

of their actions, to the extent that the discussion is protected by the attorney-client privilege, the discussion could be held in private.

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

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
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[redacted]

FOIL-AO-18286
OML-AO-4985

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Wednesday, October 27, 2010 10:49 AM
To: [redacted]
Subject: "Quasi government groups"

Dear Mr. Moore:

I have received your letter concerning the status of athletic associations, such as the NYS Public High School Athletic Association. You asked whether they are under the jurisdiction of the Commissioner of Education and subject to open government laws.

In this regard, I am unaware of the authority of the Commissioner of Education relative to the entities of your interest. However, both the Freedom of Information and Open Meetings Law apply to governmental entities. Although the membership of those entities in question include government officers or employees, I do not believe that they are themselves governmental entities. If that so, they would not be required to comply with the Freedom of Information Law or the Open Meetings Law. I note, however, that correspondence involving those organizations that come into the possession of an agency, such as a school district, would constitute school district records that fall within the coverage of the Freedom of Information Law. Therefore, if, for example, a member of the Public High School Athletic Association receives documentation from the Association at the public school that employs him/her, the documentation may be requested from the school district pursuant to the Freedom of Information Law.

I hope that I have been of assistance.

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OML-4986

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From: Freeman, Robert (DOS)
Sent: Friday, August 13, 2010 8:25 AM
To: Leslie Gross
Subject: RE: Thank you for the workshop today....and need an opinion when you have a few minutes.....please

Dear Leslie - -

It was a pleasure to see you, and your kind words are much appreciated.

With respect to your question, in short, when a majority of the Board gathers to conduct public business, even if there is no intent to take action, and irrespective of the manner in which the gathering is characterized, the gathering constitutes a "meeting" that falls within the coverage of the Open Meetings Law. Any such gathering must be preceded by notice and conducted open to the public, except to the extent that an executive session may properly be convened. There is no "fact-finding exception."

You knew the answer.

I hope that our paths will cross again soon and that you and yours will enjoy the rest of the summer!
Bob

Robert J. Freeman
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OML 4987

Mercer, Janet (DOS)

From: Freeman, Robert (DOS)
Sent: Wednesday, August 18, 2010 10:32 AM
T·· [redacted]
ject: town of Busti meeting
Attachments: o3257.wpd

Dear Mr. and Ms. Terrano:

I have received your correspondence concerning the gathering involving officials of the Town of Busti and the Village of Lakewood. As you may be aware, it has been determined by the courts that any gathering of a majority of a public body, such as a town board or a village board of trustees, for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law.

As I understand the situation to which you referred, a majority of the Village Board intended to gather to discuss public business with Town officials, who were unaware of the Village Board's intention to do so. If that is accurate, I believe that the Village Board would have been required to give notice of its meeting. If Town Board members were unaware of the possibility of a meeting with the Village Board, that Board could not have given notice. However, upon the arrival of the Village Board, because the Town Board had adjourned its meeting, I believe that it should have postponed gathering with the Village Board and scheduled a meeting that could be preceded by notice given by both Boards in order to comply with the Open Meetings Law.

Also, since you referred to business being conducted by email, attached is an opinion that deals with that issue.

I hope that I have been of assistance.

,ert J. Freeman
Executive Director
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OML 4988

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August 27, 2010

Karl Kruger, President
Allegany County Concerned Citizens
For Responsible Government
[redacted]

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

Dear Mr. Kruger:

We have received your letter in which you inquired about the 1985 amendments to Article 7, §108 of the Public Officers Law. The legislation was introduced by the Senate and Assembly Rules Committees, which were chaired in 1985 by Senator Anderson and Assemblyman Fink. The vote in the Senate was 49 in favor, 7 opposed; The vote in the Assembly was 137 in favor, 0 opposed.

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

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

> "for purposes of this section, the deliberations of political committees, conferences and caucuses means a private meeting of members of the senate or assembly of the state of New York, or the legislative body of a county, city, town or village, who are members or adherents of the same political party, without regard to (i) the subject matter under discussion, including discussions of public

> business, (ii) the majority or minority status of such political committees, conferences and caucuses or (iii) whether such political committees, conferences and caucuses invite staff or guests to participate in their deliberations..."

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

We hope that we have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF: KC: jm

OML-4989

STATE OF NEW YORK
DEPARTMENT OF STATE
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August 27, 2010

James P. Dugan
[redacted]

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

Dear Mr. Dugan:

I have received your letter in which you requested advice relating to the implementation of the Open Meetings Law by the Oysterponds Union Free School District Board of Education.

In brief, you referred to a meeting that began at 6:30, even though notice of the meeting indicated that it would begin at 7:00. In a letter relating to the matter received from the Board President, he wrote that:

> "We had previously scheduled an Executive Session to take place right after we started the public meeting at 6:30 and we expected it to last 30 minutes and it all took place exactly as we had planned. We even had the Pledge of Allegiance at 6:30. We did not feel it was right to ask the public to sit around for 30 minutes while we discussed a Personnel Issue that had to do with a Board Motion on the Agenda."

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

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

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

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

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

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, an alternative method of achieving the desired result that would comply with the letter of the law has been suggested in conjunction with similar situations. Rather than scheduling an executive session, the 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, since you complained concerning your inability to hear Board members' discussions, I direct your attention to §100 of the Open Meetings Law, its legislative declaration. That provision states that:

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

commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

Based upon the foregoing, it is clear in my view that public bodies must conduct meetings in a manner that provides the public with the ability to "be fully aware of" and "listen to" the deliberative process. Further, I believe that every statute, including the Open Meetings Law, must be implemented in a manner that gives effect to its intent. In this instance, the Board must in my view situate itself and conduct its meetings in a manner in which those in attendance can observe and have a reasonable capacity to hear the proceedings.

We hope that we have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF: JBG: jm

cc: Walter J. Strohmeyer, Jr., President
Oysterponds Union Free School Board

OML 4990

STATE OF NEW YORK
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August 30, 2010

Joseph W. Sallustio, Jr.
[redacted]

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

Dear Mr. Sallustio:

We have received your letter and the materials attached to it. You indicated that you serve as a member of the Rome City School District Board of Education, and you have sought our views concerning a Board "retreat." According to the email attached to your letter, the Board members were to meet to discuss such matters as the Board/Superintendent roles and responsibilities, Board Committees, handling complaints, problem solving and communication protocols, as well as best practices for board operations.

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 my opinion, constitute a meeting subject to the requirements of the Open Meetings Law.

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

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

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

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

Based upon the direction given by the courts, when a majority of a public body gathers to discuss public business, 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, insofar as 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, to the extent that indeed the retreat involves educating and training the Board, without the discussion of public business, the "retreat" might not constitute as a "meeting" subject to FOIL.

In regard to your question on notice, §104 of the Open Meetings Law pertains to notice and states that:

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

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

In May of 2009, 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 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.

We hope that we have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF: KC

cc: Board of Education, Rome City School District

OML 4991

STATE OF NEW YORK
DEPARTMENT OF STATE
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August 30, 2010

Anthony DiBiase
[redacted]

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

Dear Mr. DiBiase:

We are in receipt of your request for an advisory opinion regarding the conduct of the Rochester Housing Authority Board of Commissioners in relation to the Open Meetings Law. You mentioned that the Board has met without providing notice to the public, entered into multiple executive sessions and has not provided minutes.

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

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

With respect to minutes of meetings, §106 of the Open Meetings Law states:

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

which is not required to be made public by the freedom of information law as added by article six of this chapter.

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

In view of the foregoing, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Notwithstanding your contentions, based on information provided by the Authority's attorney, no action was taken during the executive session to which you referred.

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

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

2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

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

4. If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations."

In May of 2009, 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 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.

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 online, 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, and if possible, on the body's website.

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

We hope that we have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF: JBG

cc: Rochester Housing Authority Board of Commissioners
Ann Riley, Attorney, Rochester Housing Authority

OML 4992

STATE OF NEW YORK
DEPARTMENT OF STATE
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August 30, 2010

E-Mail

TO: Kathy Ceceri

FROM: Robert Freeman RF

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

Dear Ms. Ceceri:

I have received your letter relating to your use of a video camera during meetings of the Village of Victory Board of Trustees. We have also received a letter on the same subject from Mr. Patrick Dewey, a member of the Board.

At issue is a resolution introduced by Trustee Dewey and adopted by the Board that limits the use of video cameras to an area at the rear of the meeting room. You wrote that "Dewey's issue with the video recording seems to [be] the fact that members of the public are seen on these videos when they are posted on YouTube" and that "[t]here doesn't seem to be an issue of the camera being intrusive." Mr. Dewey wrote that his concern "is not the camera itself but the methods Mrs. Ceceri use to obtain her video" and that you have admitted that you want "to record peoples' faces." He added that "[i]t is not uncommon for Mrs. Ceceri to move about the room in order to improve her camera angle", and that you "find this behavior to be distracting and disruptive to the meetings."

In this regard, at present, the Open Meetings Law is silent with respect to the use of recording or broadcasting equipment at meetings of public bodies. However, it has been held in a variety of contexts that public bodies have the ability to adopt reasonable rules concerning their proceedings, and that the use of such equipment cannot be prohibited, unless so doing is disruptive or obtrusive. In a decision of the Appellate Division that focused on the validity of a rule adopted by a board of education authorizing the board president render a decision concerning the use of such devices if a person in attendance "requests that audio recording and/or videotape or other visual recording be interrupted and

/discontinued for a portion of the meeting" [Csorny v. Shoreham-Wading River Central School District, 305 AD2d 83, 85 (2003)]. The board's policy also stated that the act of record "must be unobtrusive in manner and must not interfere with or distract from the deliberative process" (id., 86). The Court cited an opinion that I prepared and rejected the portion of the board's policy authorizing the president of the board to have the use of a recording device interrupted or discontinued following a request to do so by a person in attendance at the meeting. In so holding, the Court referred to earlier decisions involving the same or similar issues and wrote that:

> "In *Mitchell,* it was audiotape recording that was in controversy. This Court affirmed the judgment of the Supreme Court, Nassau County, striking down the Board's prohibitory resolution, under a rationale that is directly applicable to the instant matter.
>
> This Court held 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 of the body" (*id.* at 925). The *Mitchell* Court distinguished *Davidson,* in implicit recognition that the advances in technology from 1963, when *Davidson* was decided, until 1985, when *Mitchell* was decided, rendered *Davidson*'s rationale obsolete.
>
> Furthermore, the *Mitchell* Court rejected the very arguments advanced by the Board herein, that the recording of meetings inhibits the democratic process. The Court stated:
>
> 'Those who attend [public] meetings, and who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. 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 ... wholly specious' (*Mitchell v Board of Educ. of Garden City Union Free School Dist., supra* at 925).
>
> 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 of 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 voiced no objection." (id., at 89).

Significant in my view, particularly in relation to Mr. Dewey's remarks, is that the camera in Csorny was "mounted on a tripod at the rear of the room." When a camera is used in a stationary location, behind or placed apart from those in attendance in a manner that does not impair anyone's ability to view or hear the proceedings, it is unlikely that its use would be disruptive or obtrusive. Consequently, a rule requiring the placement of a camera in that fashion would be reasonable. Concurrently, if a person records or photographs the proceedings during a meeting and "move[s] about

the room" in order "to record peoples' faces", I would agree with Mr. Dewey that activity of nature would be disruptive and could validly be prohibited.

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

cc: Hon. Patrick M. Dewey

OML 4993

STATE OF NEW YORK
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August 30, 2010

E-Mail

TO: Dr. Ellen E. Vachon

FROM: Camille Jobin-Davis CJD

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

Dear Dr. Vachon:

We are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to gatherings and actions of the Maine Town Board.

Specifically, you indicated that at a regular meeting of the Town Board, the Board "unanimously agreed to write to Broome County legislators" on a particular issue. Although you were not present, you indicated that you listened to the tape recording of the regular meeting, and that "the tape does have all members verbally stating a positive response to writing the letter." You were informed by a Board member that later, "[w]ith the suggestion and advice of our Attorney, the decision of the Town Board was over ruled by three members in a private meeting. It was not advertised to the public ...."

With respect to this matter, we received a written description of the events that transpired from the Town Attorney, Cheryl Insinga, who was not present for the discussion at the regular meeting. She wrote that she was informed by Councilman Todd Rose, as follows: "the Town Board had unanimously decided to write and send a letter on the subject matter and that I was asked to draft it. I asked him about this and I did tell him that I thought sending the letter was inappropriate based upon my understanding of the facts. (I believe my thoughts on the matter were well known.) But I did draft a letter (which is attached as 21581)."

A series of emails shows that based on her conversations with Council member Rose and the Supervisor, the Town Attorney was unsure whether the letter was authorized by the Board. She directed the Clerk, "George [Supervisor] has reached out to Todd [Council member] to try to straighten this out, so please call George before you send out anything on this."

Minutes from the Town Board meeting later approved by the Town Board indicate as follows:

> "Larry talked about the Darling's and getting into the Ag district. He stated that if they get into this district then, that overrides the old home rule. The question is if you go into an Ag district home rules gets last or not[sic]. Two legislators said they are interested in protecting home rule. If the town requests a statement to uphold town rule it will be in our best interest. He would like to have Cheryl write to protect home rule. George [Supervisor] will call Cheryl [Town Attorney] and ask her to write a letter to protect home rule. Town rules override the county and state."

We note that the minutes, which are the official record of the meeting, state that during the course of the regular meeting, motions were made and votes were held on twelve separate occasions. In the text of the minutes, the motions are bold-faced. The paragraph set forth above in its entirety indicates neither a motion nor a vote, and in our opinion, is unclear. In particular, the statement "George [Supervisor] will call Cheryl [Town Attorney] and ask her to write a letter to protect home rule" seems to indicate that the members agreed that the Supervisor would require the Town Attorney to write the letter. However, it is apparent from the emails referenced above that the Supervisor and the Council member were in disagreement, and the Supervisor sought the Town Attorney's advice on the issue. Accordingly, it is not clear whether action was taken at the regular meeting.

If, as you contend, all members verbally stated a positive response to writing the letter, in our opinion, action was taken, and a decision was made by the Board to have the Attorney write a letter for the Supervisor's signature. Any subsequent decision to withhold the letter, we agree, would be required to have been made at a meeting held in accordance with the provisions of the Open Meetings Law. On the other hand, if action was not taken at the meeting, and a decision was made, instead, perhaps for the Supervisor to ask the Town Attorney whether a letter should be sent, then the ensuing discussions with the Town Attorney, in our opinion, would have been appropriate.

The issue involves the clarity of the minutes and whether there is a difference between what transpired at the meeting and what is reported therein.

In this regard, when action is taken by a public body, it must be memorialized in minutes, for §106 of the Open Meetings Law provides that:

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

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

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

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

"The fact that respondents characterize the vote as taken by 'consensus' does not exclude the recording of same as a 'formal vote'. To hold otherwise would invite circumvention of the statute.

"Moreover, respondents' interpretation of what constitutes the 'final determination of such action' is overly restrictive. The reasonable intendment of the statute is that 'final action' refers to the matter voted upon, not final determination of, as in this case, the litigation discussed or finality in terms of exhaustion or remedies" (id. 646).

Therefore, if a public body reaches a "consensus" that is reflective of its final determination of an issue, we believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted [see FOIL, §87(3)(a)].

Further, 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". Finally, §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.

On behalf of the Committee on Open Government, we hope that we have been of assistance.

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

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

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

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

Therefore, if a public body reaches a "consensus" that is reflective of its final determination of an issue, we believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted [see FOIL, §87(3)(a)].

Further, 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". Finally, §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.

On behalf of the Committee on Open Government, we hope that we have been of assistance.

cc: Town Attorney, Town Supervisor

OML 4994

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

September 13, 2010

Hon. William Goblet
Supervisor
Town of Wright
1215 Cotton Hill Road
Berne, New York 12023

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

Dear Supervisor Goblet:

I have received your letter concerning a meeting involving "negotiations between the Town Board and Town of Wright Highway Department and whether the meeting should be open to the public. You wrote that the discussion "did not single out individuals, but was to determine pay and benefits for highway employees in general." You added that the Town does not "have union involvement."

From my perspective, any such discussion must occur in public to comply with the Open Meetings Law. In this regard, I offer the following comments.

It is emphasized at the outset that the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of a public body, such as a town board, must be conducted open to the public, unless there is a basis for entry into executive session. Paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered during executive sessions. Although two of those provisions are relevant to matter, I do not believe that either could justifiably be asserted to enter into executive session.

-Supervisor Goblet-

-September 13, 2010-

First, §105(1)(e) authorizes a public body to conduct an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law." Article 14 is commonly known as the Taylor Law, and it pertains to the relationship between public employers, such as counties, cities, towns and school districts, and public employee unions. Because there is no public employee union in the Town, §105(1)(e) would not apply.

Second, §105(1)(f) permits a public body to enter into executive session to discuss "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." When a discussion involves "employees in general" and does not focus on any "particular person" in relation to one or more of the qualifiers appearing in §105(1)(f), that provision could not be cited to conduct an executive session.

In short, based on the information that you provided, there would be no basis for conducting an executive session to discuss the matter that you described.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Executive Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML 4995

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November 2, 2010

Richard W. Morris
[redacted]

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

Dear Mr. Morris:

This is in response to your request for clarification regarding our advice with respect to gatherings of planning board members at the Mamakating Town Hall, prior to their regular meetings.

In your most recent correspondence you clarified that a majority of the planning board members gather in the planning department office prior to every meeting, for approximately one half of an hour. In your opinion, this is not merely the members "picking up their packets" (the packets are available in the clerk's office), and the discussion likely includes matters that are on the agenda for the upcoming meeting.

You asked whether a gathering of the planning board members, for purposes of discussing issues that are protected by the attorney-client privilege, would require a motion for entry into executive session.

As previously indicated, we emphasize, when a quorum of the planning board gathers to discuss planning board business, they are attending a "meeting" subject to the Open Meetings Law. Whether or not there is an intent to take action, and regardless of how the gathering is characterized, 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. Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978). Accordingly, it is our opinion that if a majority of the members of the planning board gather together to discuss issues that are pending before the planning commission, the gathering would be a "meeting" subject to all of the requirements of the Open Meetings Law.

Further, and with respect to the issue of whether a motion for executive session is required to hold an attorney-client privileged discussion, we 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.

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

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

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

Accordingly, and as previously advised, insofar as the planning board seeks legal advice from its attorney and the attorney renders legal advice, we believe that the attorney-client privilege may validly be asserted and that communications made within the scope of the privilege would be outside the coverage of the Open Meetings Law. And again, the mere presence of an attorney does not signify the existence of an attorney- client relationship; in order to assert the attorney-client privilege, the attorney must in my view be providing services in which the expertise of an attorney is needed and sought.

While it is not our intent to be overly technical, as suggested earlier, the procedural methods of entering into an executive session and asserting the attorney-client privilege differ. In the case of the former, the Open Meetings Law applies. In the case of the latter, because the matter is exempted from the Open

Meetings Law, the procedural steps associated with conducting executive sessions do not apply. It is suggested that when a meeting is closed due to the exemption under consideration, a public body should inform the public that it is seeking the legal advice of its attorney, which is a matter made confidential by law, rather than referring to an executive session.

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb

cc: Chair, Mamakating Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML 4996

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November 4, 2010

E-Mail

TO: Mr. Frank Natalie

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

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

Dear Mr. Natalie:

We have received your request for an advisory opinion concerning application of the Open Meeting Law to the actions taken by the Rotterdam Industrial Development Agency at its meeting on September 30. Specifically, the Agency entered into executive session to discuss issues pertaining to a PILOT agreement with the owner of a local apartment complex known as Long Pond Village. The motion was based on the premise that publicity would adversely affect the value of Long Pond Village, the owners of which are in the process of selling the property to another private entity.

A newspaper article that you submitted in conjunction with your request, dated September 4, 2010, indicated the current assessed value of the property and the terms of the existing PILOT agreement, along with statements attributed to the Chairman of the Metroplex Development Authority. According to a news article, Metroplex "handles administrative issues" for the Agency. Apparently, the PILOT agreement will terminate upon the sale of the property, unless a new agreement is reached with the Agency.

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

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

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

In this regard, as you are aware, the Open Meetings Law is based upon a presumption of openness. Specifically, the Law requires that meetings be conducted open the public, except to the extent that an executive session may be held in accordance with the provisions of paragraphs (a) through (h) of §105(1). The provision on which the Agency relied on to enter into executive session is §105(1)(h). That provision permits a public body to enter into executive session to discuss:

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

Based on the foregoing, 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.

In our opinion, §105(1)(h) is designed to shield discussions regarding a governmental entity's sale or acquisition of real property when disclosure would affect the government's interest in the value of such property. The rationale underlying that provision, in our opinion, does not involve protection of the interests of private parties in the sale of real property, but rather the government's ability to engage in an agreement or transaction optimal to the taxpayers and in their best interest. In short, it is our opinion that this provision does not apply when the government is not the seller or purchase of a parcel.

Accordingly, we do not believe that the provision cited by the Agency, §105(1)(h), would serve as a valid basis for conducting an executive session.

We hope that we have been of assistance.

CSJ: JBG

cc: M. Cornelia Cahill, Counsel to the Rotterdam Industrial Development Agency

OML 4997

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Thursday, November 04, 2010 9:21 AM
To: 'Darrell Davis'
Subject: RE: Peekskill City Council
Attachments: o3749.wpd

Dear Mr. Davis:

The Committee on Open Government is authorized to provide advice and opinions relating to open government laws. It is not empowered nor does it have the resources to conduct "investigations." I point out, however, that judicial decisions indicate that any person may audio or video tape open meetings of a public body, such as a city council, unless the use of a recording device would be disruptive or obtrusive. Consequently, if there are "technical problems" relating to the taping or airing of meetings by the City, you or any other person may record and disseminate the recordings of the public proceedings of the City Council.

Attached is an expansive opinion concerning the ability to record open meetings of public bodies that may be useful to you.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
One Commerce Plaza
Suite 650
Washington Avenue
Albany, NY 12231
Phone: (518)474-2518
Fax: (518)474-1927
Website: www.dos.state.ny.us/coog/index.html

[redacted]

OML 4998

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Thursday, November 04, 2010 8:42 AM
T 'Robert Cullen'
S...ject: RE: question

First, the town board has the authority to adopt rules and procedures to govern its own proceedings; the Supervisor merely presides at meetings and ensures that the rules and procedures are followed. Second, there is no obligation on the part of a municipal board to record its meetings. If it is the town's recording device, the board may choose record the meeting or portions of the meeting. Third, if the recording device is used by a member of the public or cable entity independently and not for or on behalf of the town, judicial decisions indicate that a board cannot prohibit its use, unless the use or presence of the device is disruptive or obtrusive. In one of those decisions, it was determined that a board's "distaste" regarding the use of a video recorder was not a valid basis for precluding its use.

For a more expansive explanation of the principles and precedent relating to your inquiry, go to our website, click on to "Advisory opinions", then the Open Meetings Law advisory opinion listing, then "V", and scroll down to "Video equipment, use of". Several opinions will be available in full text.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
nittee on Open Government
Department of State
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[redacted]

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 1, 2010

Executive Director

Robert J. Freeman

OML-AO-5002

Daniel T. Warren
[redacted]

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

Dear Mr. Warren:

We are in receipt of your letter seeking an advisory opinion concerning the implementation of the Open Meetings Law by the Commissioners of the NYS Insurance Fund. In your letter, you ask whether the Insurance Fund is required to post its minutes online or whether they must be requested pursuant to the Freedom of Information Law (FOIL). Additionally, you asked whether the reasons articulated during a meeting of the commissioners were adequate. Its notice referred to "investment, personnel, real estate, and legal matters."

It is noted that your letter was sent to the State Insurance Fund to obtain its views concerning your remarks, and I have enclosed a copy of the letter sent to this office by Gregory F. Allen, General Attorney.

In this regard, first, as a general matter, the Open Meetings Law includes direction concerning the contents of minutes and the time within which they must be prepared. Specifically, §106 states that:

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

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

Based upon the foregoing, it is clear that minutes must be prepared and made available within two weeks. There is no statutory requirement that minutes be distributed or made available on the internet.

We note too, that there is nothing in the Open Meetings Law or any other statute of which we are aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In our experience, minutes are among the most public and readily accessible records maintained by government agencies. In many instances, they are routinely and informally made available without a written or formal request. Nevertheless, because the FOIL pertains to all records, an agency may require a written request. Further, while many agencies post their minutes on websites, there is no obligation to do so.

Next, 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 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.

Based upon the language of the Open Meetings Law and its judicial interpretation, motions to conduct executive sessions citing the subjects to be considered as "personnel", "legal matters", "real estate" or "investment", without additional detail are inadequate. The use of those kinds of terms alone do not provide members of public bodies or members of the public who attend meetings with enough information to know whether a proposed executive session will indeed be properly held.

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

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

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However,

the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding 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..." (emphasis added).

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

Moreover, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion [see Gordon v. Village of Monticello, 207 AD 2d 55 (1994); Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, Supreme Court, Chemung County, April 1, 1983]. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

There is no ground for entry into executive session that refers to "legal matters." Again, that kind of minimal description of the subject matter to be discussed would be insufficient to comply with the Law. The provision that deals with litigation, §105(1)(d), permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

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

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

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

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

Citing an issue as "real estate" or "investment" would be inadequate. The exception most likely related to those matters is §105(1)(h), which permits a public body to enter into executive session to discuss the proposed acquisition, sale or lease of real property, or the proposed purchase or sale of securities, but "only when publicity would substantially affect the value thereof. " Consequently, not every issue involving a discussion of real property or "investments" would, if discussed in public, "substantially affect the value" of the property. Because that is so, it is our view that motion made in accordance with §105(1)(h) must indicate that publicity would have a substantial effect on the value of real property or an investment.

Lastly, insofar as the Commissioners sought legal advice from their attorney, any such communications would fall with the scope of the attorney-client privilege, and would be exempt from the Open Meetings Law [see §108(3)] and, therefore, could occur in private.

We hope that we have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

Enc.

RJF: JBG

cc: Gregory Allen, New York State Insurance Fund
New York State Insurance Fund

OML 5006
E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Monday, November 22, 2010 3:54 PM
Subject: RE: Cathie Black Waiver Mtgs

There are numerous judicial decisions indicating that an advisory panel in the nature of that to which you referred is not a "public body" and, therefore, falls outside of the requirements of the Open Meetings Law. Even if the panel could be found to be subject to that statute, it would have a basis for conducting a closed or "executive" session in accordance with section 105(1)(f) of that statute. That statute 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."

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

OML 5007

E-MAIL

From: Freeman, Robert (DOS)
Sent: Monday, November 22, 2010 8:41 AM
Subject: RE: question re open meetings law and SED screening panel

Judicial decisions indicate that an advisory body as described in the article does not constitute a “public body” and, therefore, is not subject to the Open Meetings Law. Even if the Open Meetings Law applied, the group could discuss the matter during an executive session under 105(1)(f) of that statute. The cited provision permits a public body to conduct a closed session to discuss “the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal or a particular person or corporation.”

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

OML 5008

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Monday, November 22, 2010 3:48 PM
Subject: RE: Minutes

Section 106 of the Open Meetings Law requires that minutes of open meetings be prepared and made available within two weeks. Although most boards approve minutes, they do so based on policy, tradition, habit, etc.; there is no law that requires that minutes be approved. If minutes are not approved within two weeks, it has been advised that the clerk or whoever prepares the minutes should do so and make them available on request within two weeks, and that the minutes be marked as "unapproved", "draft" or "preliminary", for example. With a notation of that nature, the recipient can know generally of the action taken at a meeting, but is given notice to the effect that the minutes are subject to change.

When records are disclosed to a member of the public, he/she may do with them as he/she sees fit, including posting them on a website.

I hope that I have been of assistance.

OML 5009

E-MAIL

From: Freeman, Robert (DOS)
Sent: Tuesday, November 23, 2010 8:05 AM
Subject: RE: Community Education Council District 2 in New York City
Attachments: o3787.wpd

I have received your letter and believe that the “ruling” by the Department of Education is unduly restrictive and inconsistent with law. In brief, unless a majority of the members of the Community Education Council gather physically, by means of videoconferencing, or via instant messaging or a chat room during which there is instantaneous ommunication among the members, I do not believe that the Open Meetings Law applies. If a member transmits a memorandum or report to other members identified on list, and one member opens the email now, another in three hours, a third tonight, a fourth tomorrow morning, etc., there is no instantaneous communication among the members, and in my view, the Open Meetings Law would not be implicated. Attached is a detailed opinion dealing with the issue that may be useful to you.

If you would like to discuss or consider the matter further, please feel free to contact me.

I hope that I have been of assistance and wish you and yours a happy Thanksgiving.

Bob Freeman

OML 5010

E-MAIL

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, December 16, 2010 4:51 PM
Subject: RE: Open meeting law question

Dear Wendy,

Yes, this will confirm my opinion (based on further research and Executive Law s840) that the Council is subject to the Open Meetings Law. Therefore, any gathering of a quorum of the Council to discuss public business, including hearings and votes, is required to be held in public. Deliberations of the council, because they are quasi-judicial, are exempt from the Open Meetings Law, in my opinion, based on section 108(1), and therefore could be held in private. Please note that technically, the private gathering is not an executive session, it is a meeting exempt from the Law.

I hope that this is helpful.

Camille

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

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Fax: 518-474-1927
http://www.dos.state.ny.us/coog/index.html

OML AO 5012

E-MAIL

From: Freeman, Robert (DOS)
Sent: Monday, December 20, 2010 12:52 PM

Subject: Emailing: A655FINAL1.pdf
Attachments: O2456.wpd; A655FINAL1.pdf

I have received your letter and hope that you will accept my apologies for the delay in response. The issue involves the ability of members of the public and the news media to attend meetings of "School Leadership Teams."

By way of background, those entity's, "SLT"s", are created pursuant to §2590-h(15) of the Education Law, and the provisions concerning their implementation are found in the Chancellor's regulations, a copy of which is attached. Those regulations refer to the regulations promulgated by the State Commissioner of Education that require the designation of what are known as "shared decision making committees". I believe that the SLT's are the successor entities that replaced shared decision making committees when the New York City Board of Education ceased existence and was replaced by a chancellor and a series of statutes that begin at §2590 of the Education Law.

It was consistently advised that a shared decision making committee is a "public body" required to comply with the Open Meetings Law, and attached is an opinion that deals with that issue expansively. Assuming that an SLT is the equivalent to and the successor of a shared decision making committee, I believe that it is a public body subject to the Open Meetings Law. If that is so, pursuant to §103 of the Open Meetings Law, its meetings are open to the general public, including non-parents, non-residents and members of the news media.

I hope that I have been of assistance.

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Executive Director

Robert J. Freeman

December 20, 2010

OML -A0-5015

E-Mail

TO: Tracey Schrader

FROM: Camille S. Jobin-Davis, Assistant Director

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

Dear Ms. Schrader:

We are in receipt of your letter in which you request an advisory opinion concerning gatherings of the members of the Village Board of Saranac Lake and whether those gatherings are in keeping with the Open Meetings Law. In your letter you state that a majority of the Village Board meets Monday nights at a local bar and grill where the members socialize as well as discuss Village business. In your letter you provided a newspaper article which also detailed the events, and contained quotes by members of the Board, for example, “We don’t debate things; we don’t make decisions…we may discuss things.” The Mayor of the Village is quoted in the article in regard to these accusations, “Naturally, sometimes a village topic may come up, but there’s never a vote taken…”.

First, as a general matter, please note that only a court can make a determination whether a gathering is “illegal” or whether there has been a “violation” of the Open Meetings Law. While the Committee on Open Government is authorized to issue advisory opinions concerning application of the Freedom of Information Law, this office has no authority to enforce the law or compel an entity to comply with the statutory provisions. It is our hope that these opinions are educational and persuasive, and that they serve to resolve problems and promote understanding of and compliance with the law.

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 the Village Board members gathers to discuss public business, any such gathering would, in our opinion, constitute a "meeting" subject to the Open Meetings Law. When less than a quorum is present, the Open Meetings Law would not apply. Further, when there is an intent to conduct such 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.

If a gathering is social, and conversation by a majority of the Board drifts into matters of public business, it is our hope that at least one member is sufficiently vigilant and knowledgeable to suggest that discussion of those matters end and that they be continued in public at a meeting held in accordance with the Open Meetings Law.

We hope that we have been of assistance.

CSJ:JBG

cc: Saranac Village Board

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Executive Director

Robert J. Freeman

December 20, 2010

OML-AO-5016

E-Mail

TO: James D. O'Meara

FROM: Robert J. Freeman, Executive Director

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

Dear Mr. O'Meara:

As you know, we have received your request for an opinion concerning a bus driver employed by the Gilboa Central School District who, according to your letter, was charged by the Board of Education with insubordination. You contend that a vote on the matter should have been taken during "public session."

In this regard, to learn more of the matter, we contacted the District, and its attorney, Ms. Wendy K. DeWind, indicated that the Superintendent discussed the matter with Board during an executive session, but that no charges were initiated and no action taken. Because no action was taken by the Board, there would not have been a vote by Board.

I note for the future that judicial decisions rendered over the course of some fifty years indicate that boards of education may discuss certain matters during executive sessions, but that they cannot vote or take action in private, except in two circumstances. One involves the initiation of charges against a tenured person pursuant to section 3020-a of the Education Law; the other would involve the circumstance in which a public vote would make a student's identity easily traceable. In that latter case, public disclosure of a student's identity would represent a failure to comply with the federal Family Educational Rights and Privacy Act, 20 USC 1232g.

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

cc: Wendy K. DeWind

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Executive Director

Robert J. Freeman

December 20, 2010

OML-AO-5017

Ms. Karen Finnessey
Deputy Clerk/Treasurer
Village of Voorheesville
PO Box 367
Voorheesville, NY 12186

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

Dear Ms. Finnessey:

We are in receipt of your letter in which you ask for clarification of our response to an opinion given to a local newspaper concerning notice of a certain meeting. You wrote that the date of a meeting was confirmed four days prior to the meeting and that notice was provided to the public by posting in both the post office and on the front door of the Village Hall, and sent via an email to the official newspaper.

Based on these facts, we offer the following remarks.

Section 104 of the Open Meetings Law pertains to notice and states that:

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

> 4. If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations."
>
> Recently, 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: first, that notice must be posted in one or more conspicuous, public locations; second, that notice must be given to the news media; and third, that notice must be conspicuously posted on the public body's website, when the ability to do so exists. 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 be posted on a consistent and regular basis. If, for instance, a bulletin board located at the entrance of a village 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 will be held. Similarly, every public body with the ability to do so must now 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. 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 should be given to news media organizations that are likely to make contact with those likely interested in attending.

We hope that we have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF: JBG

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Executive Director

Robert J. Freeman

December 20, 2010

OML-AO-5018

Mark Strivings
[redacted]

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

Dear Mr. Strivings:

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

According to your letter, the Board of Education of the Wheatland-Chili Central School District conducted several executive sessions to discuss the future of the current superintendent. Following those discussions, the President of the Board read a statement during an open meeting, expressing its appreciation for the work of the superintendent but indicating the need for a "fresh perspective" and stating that the Board would initiate a search process in an effort to retain a new superintendent. You wrote that the Board "did not vote on that statement" and asked whether it could validly avoid taking a vote. You also asked whether you can "demand that the Board of Education immediately suspend all activity in searching for a new Superintendent until the Board does vote on this matter in an open meeting…"

In this regard, in an effort to learn more of the matter, we contacted the District. In a response from its attorney, Mr. James A. Spitz, Jr., we were informed that no action was taken by the Board with respect to the contract of the current superintendent, whose contract expires in June, 2011. He also forwarded a copy of a letter addressed to you by the President of the Board specifying that "[t]here has been no resolution put forth to extend that contract…"

It has been suggested in other circumstances that the absence of taking direct action or perhaps a failure to act does not itself represent an action, and, therefore, does not require a vote. In this instance, it is unclear whether the Board took action in an affirmative manner to terminate the superintendent, or whether it merely is permitting the existing contract to lapse. If indeed an action was affirmatively taken, we would agree that any such action should occur in public by means of a vote of a majority of

the membership of the Board. In either case, however, we do not believe that you or others may "demand" that the Board "suspend" its efforts in searching for a new superintendent.

We hope that we have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:sb

cc: Kim Snyder
James A. Spitz, Jr.

OML AO 5019

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Tuesday, December 21, 2010 12:54 PM
Subject: RE: Town Board Meeting Minutes

Although an agency may require that a request be made in writing, section 106 of the Open Meetings Law requires that minutes of meetings be prepared and made available within two weeks of the meetings to which they pertain. As noted earlier, they must be made available within that time, irrespective of whether they have been approved.

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Executive Director

Robert J. Freeman

December 21, 2010

OML-AO-5020

Raymond Slingerland, Village Administrator
Village of Mamaroneck
Village Hall
123 Mamaroneck Avenue
Mamaroneck, NY 10543

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

Dear Mr. Slingerland:

I have received your letter in which you sought an advisory opinion concerning the status under the Open Meetings Law of committees established by the Village of Mamaroneck. Certain among them are creations of law and carry out various governmental functions; others were created differently and carry out purely advisory functions. The distinction between the two kinds of entities is, in my opinion, determinative with respect to the application of the Open Meetings Law.

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."

The courts have held that committees and similar bodies consisting of two or members of a governing body are themselves public bodies [see e.g., Glens Falls Newspapers v. Solid Waste and Recycling Committee, 195 AD2d898 (1993)]. For instance, the State Assembly, a public body, has 150 members, and a gathering of a quorum, 76, would constitute a meeting of the Assembly. If a committee of the Assembly, i.e., the local government committee, consists of 15 Assembly members, its quorum would be 8, and a gathering of 8 or more, in their capacities as members of a particular committee, would constitute a meeting subject to the Open Meetings Law.

Other judicial decisions indicate generally that advisory bodies having no power to take final action, except 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)].

The materials relating to your inquiry indicate that three committees, the Beautification, Budget and Mamaroneck Avenue Task Force Committees, "are not codified and perform purely advisory functions". Assuming that those entities do not consist solely of members of a particular body, I do not believe that they would be required to give effect to the Open Meetings Law. This is not intended to suggest that they cannot or should not conduct meetings open to the public preceded by notice, but rather that they are not required to do so.

In the decisions cited above, none of the entities were designated by law to carry out a particular duty and all had purely advisory functions. More analogous to the status of entities referenced that are creations of law 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.

The three other entities, the Tree Committee, the Council on the Arts and the Committee for the Environment, are creations of law, and their missions, functions and membership are set forth in local laws enacted by the Village. Based on a review of those laws, I believe that each of the three entities performs duties reflective of governmental functions. That being so, they are, in my opinion, public bodies subject to the Open Meetings Law.

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 (1999).

In consideration of the direction provided by the state's highest court, again, the entities created by law that carry out specified duties are, in my view, public bodies and, therefore, must give effect to that statute.

As you are aware, every meeting of a public body must be preceded by notice, and § 104 of the Open Meetings Law states that:

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

Approximately one year ago, 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 school district's offices has been designated as a location for posting notices of meetings, the public has the ability to know where to ascertain whether and when meetings of a school board will be held. Similarly, every public body with the ability to do so must post notice of the time and place of every meeting online.

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

Sincerely,

Robert J. Freeman
Executive Director

OML AO 5021

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Thursday, December 23, 2010 12:01 PM
Subject: RE: violation of open meeting laws

If the Board consists of nine members and only four were present, the gathering would not have constituted a "meeting", and the Open Meetings Law would not have applied. More importantly, no action could validly have been taken. The Board has the authority to carry out its duties and take action only by means of an affirmative vote of a majority of its total membership, which would be five in a Board consisting of nine. Any action purportedly taken would be the equivalent of no action taken.

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OML AO 5022

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Thursday, December 23, 2010 4:11 PM
Subject: RE: Secret Ballot by Fire Commissioners

The Freedom of Information Law, §87(3)(a) since 1974 has required that a record be prepared whenever action is taken indicating the manner in which each member has cast his or vote. Further, the courts have found that both the Freedom of Information and Open Meetings Laws prohibit secret ballot voting by members of public bodies, such as boards of fire commissioners.

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Executive Director

Robert J. Freeman

December 24, 2010

OML-AO-5023

Assemblyman John J. McEneny
New York State Assembly
Legislative Office Building, Rm. 648
Albany, NY 12248

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

Dear Assemblyman McEneny:

I have received your letter in which you wrote that "we have a severe overconcentration of charter schools, which are run in secret", and that charter schools' "board meetings are not announced either in terms of time or place." That being so, you expressed the "hope that [I am] able to rule that they must open their meetings and announce the time and place in a timely manner."

In this regard, the Committee on Open Government cannot render "rulings" or compel entities to comply with law. It is authorized, however, to render advisory opinions. While the opinions are not binding, it is our hope that they are educational and persuasive, and that they serve to enhance compliance with open government laws.

As those laws relate to charter schools, §2854(1)(e) of the Education Law states that: "A charter school shall be subject to the provisions of articles six and seven of the public officers law." Articles six and seven are, respectively, the Freedom of Information Law and the Open Meetings Law. Consequently, it is clear that charter schools are required to comply with those statutes, and I believe that those entities must be considered "agencies" subject to the former, and that their boards be considered "public bodies" subject to the latter.

Section 104 of the Open Meetings Law pertains to notice of meetings and requires 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."

Additionally, in 2009, a new subdivision (5) states that:

> "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: first, that notice must be posted in one or more conspicuous, public locations; second, that notice must be given to the news media; and third, 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 school's offices has been designated as a location for posting notices of meetings, the public has the ability to know where to ascertain whether and when meetings of a school board will be held. Similarly, every public body with the ability to do so must post notice of the time and place of every meeting online.

Lastly, as you are aware, the Open Meetings Law is based on a presumption of openness. Meetings held pursuant to that statute must be conducted open to the public, except to the extent that a discussion may be conducted during an executive session. To initiate an executive session, §105(1) directs that a motion to do so must be introduced in public, that the motion must indicate the subject or subjects to be discussed, and that the motion must be carried by a majority vote of the total membership of the body, irrespective of absences or vacancies. Paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered during an executive session. As such, the board of a charter school cannot conduct an executive session to discuss the subject of its choice.

Similarly, the Freedom of Information Law pertains to charter school records and requires that all records be made available, except to the extent that an exception to rights of access appearing in §87(2) may validly be cited to deny access.

I hope that I have been of assistance and that the foregoing will be of value. If you believe that I can offer further assistance or guidance, please do not hesitate to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:sb

OML AO 5024

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Monday, December 27, 2010 10:55 AM

Subject: RE: Letters from Public and Public Record

I have received your inquiry concerning the obligation to honor a request by a member of the public that a letter be "included in the public record." You wrote that the Town Supervisor asked that there be a motion to do so, and that the letter would be "inserted into the record" if there is an affirmative vote granting the request.

I believe that the Supervisor is correct. There is no provision of law that requires that a request by a member of the public, or even that of a member of a town board, to have a statement included in the record be granted. It is noted that §106 of the Open Meetings Law pertains to minutes of meetings. The minutes are, in my view, the official record of the governing body, i.e., the Town Board. Section 106 prescribes what may be characterized as minimum requirements concerning the contents of minutes. At a minimum, the minutes must consist of a record or summary of motions, proposals, resolutions, action and taken, and the vote of the members. While they may include additional detail, there is no requirement that they must. Further, §30 of the Town Law specifies that the Town Clerk is responsible for the preparation of minutes.

With specific regard to the issue, in my view, a request to have items or statements included in the record, in other words, the minutes, can Require that a motion to do so be made. If the motion is approved by a majority of the total membership of the Board, I believe that it must be included in the minutes. If no such motion is made or carried, there is no obligation to do so.

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

Robert J. Freeman
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OML AO 5025

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Monday, December 27, 2010 10:42 AM
Subject: RE: Lewd or Vulgar Gestures by Elected Officials

I have received your letter concerning allegedly vulgar behavior on the part of a member of the Beekmantown Town Board. As you may be aware, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Open Meetings Law.

That law does not deal with or address or the kind of issue that you raised, and I know of no law that focuses on the issue. However, §63 of the Town Law states in part that a town board may adopt rules of procedure, and as a general matter, that provision provides a town board with the authority to adopt reasonable rules to govern its own proceedings. If you believe that it would be worthwhile to do so, you might propose or draft rules dealing with decorum at meetings.

I hope that I have been of assistance.

Robert J. Freeman
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Committee on Open Government
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OML AO 5026

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Tuesday, December 28, 2010 9:42 AM
Subject: RE: Question on quorums and meetings

Hello and happy holidays!

A quorum, based on §41 of the General Construction Law entitled "Quorum and majority", is a majority of the total membership of the Town Board, irrespective of absences or vacancies. Therefore, if the Board consists of 5 members, and there are no vacancies, a quorum would be 3. Further, the same provision states that action may be taken only by means of an affirmative vote of the majority of the total membership. Consequently, to approve a motion or otherwise take action, there must be three affirmative votes.

Since you referred to gatherings as "informal discussions with no action taken", I point out that the term "meeting" has been construed to mean a gathering of a quorum of a public body, such as a town board, for the purpose of conducting public business, even if the purpose of a gathering is to engage in discussion and there is no intent to take action. In the context of the situation that you described, if a majority of the Board gathers with members of the community "for the purpose of discussing specific issues of interest to them", I believe that the gathering would constitute a meeting that falls within the scope of the Open Meetings Law.

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

Robert J. Freeman
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