OML AO 5027

E-MAIL

From: Freeman, Robert (DOS)
Sent: Tuesday, January 04, 2011 9:46 AM
Subject: coverage of the Open Meetings Law
Attachments: o3858.wpd

First and foremost, I wish you and yours a wonderful new year and look forward to working with you in 2011.

Second, with respect to the issue, the entity in question does not appear to be subject to the Open Meetings Law. That statute is applicable to public bodies, and a "public body" is entity consisting of two or more members that carries out a governmental function, collectively, as a body. It has been held, however, that advisory bodies that do not consist solely of members of a governing body (i.e., a committee of a legislative body consisting of two or more of its own members) or that do not carry out a function required by law do not perform a "governmental function" and, therefore, do not constitute public bodies.

As I understand the situation, the Carmans River Study Group consists of representatives from a variety of organizations, both governmental and private. Its membership does not include a majority of any particular public body, and its functions are purely advisory. If that is accurate, judicial decisions indicate that it is not a public body and is not required to give effect to the Open Meetings Law. Certainly it may choose to hold open meetings, but again, it would apparently not be required by law to do so.

Attached is an opinion that deals with the issue in greater detail.

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

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

OML-AO-5028

E-MAIL

From: Freeman, Robert (DOS)
Sent: Monday, January 03, 2011 9:45 AM

We have received your inquiry and hope that you will accept our apologies for the delay in response. You have raised a series of questions relating to the Putnam Valley Planning Board and the Open Meetings Law.

First, in brief, that statute applies to meetings of public bodies, and the term “meeting” has been construed to mean a gathering of a quorum of a public body, such as a planning board, for the purpose of conducting public business. Therefore, if, for example, a board consists of five members, a gathering that includes two members and various employees of the Town would not be subject to the Open Meetings Law. Only when a third member joins the two, and the three begin to conduct public business, collectively, as a body, would the Open Meetings Law apply. Similarly, if notice is given indicating that a meeting will be begin at 5:30, but no quorum is present, the Open Meetings Law would not yet apply, for there would be no quorum.

Second, there is nothing in the Open Meetings Law pertaining specifically to an agenda or the means by which it may be developed. Again, however, if a majority of a board, a quorum, gathers to develop, review or alter an agenda, such a gathering would constitute a “meeting” subject to the Open Meetings Law.

Third, judicial decisions indicate that any person may audio or video record an open meeting of a public body held in accordance with the Open Meetings Law, so long as the use of the recording device is neither obtrusive nor disruptive.

I hope that the foregoing is of value and that I have been of assistance.

OML AO 5029

E-MAIL

From: Freeman, Robert (DOS)
Sent: Wednesday, January 05, 2011 4:52 PM
Subject: Open Meetings Law

I have received your correspondence concerning the absence of notice of a town board meeting indicating that the meeting would be held to interview applicants for a certain position.

In this regard, section 104 of the Open Meetings Law pertains to notice of meetings, and the only required information in the notice involves the time and place of a meeting. A public body, such as a town board, may choose to include an agenda or a description of the subject or subjects to be discussed as part of the notice, but it is not obliged to do so to comply with law. In short, so long as the notice included the time and place of a meeting, the board would have complied with the Open Meetings Law.

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

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January 6, 2011

OML-AO-5030

William P. Stris
[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. Stris:

We are in receipt of your request for an advisory opinion regarding application of the Freedom of Information Law to certain records of a school district, and application of the Open Meetings Law to certain gatherings. Specifically, you questioned how recent changes to the Education Law would affect access to annual professional performance reviews of classroom teachers and building principals, which are now mandated by law to "differentiate teacher and principal effectiveness using the following quality rating categories: highly effective, effective, developing and ineffective, with explicit minimum and maximum scoring ranges for each category, as prescribed in the regulations of the commissioner." (Education Law §3012-c[2][a]). You asked whether these ratings would be available to the public, whether statistical data regarding the evaluations would be required to be made available, and whether there are any parts of the ratings that would be excluded from public access. Further, you inquired about a school board's responsibilities with respect to meetings during which certain members attend via teleconferencing.

First, with respect to the Freedom of Information Law issues, we note that our opinion regarding access to certain portions of employee evaluations has not changed. As you may know, 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, it is likely that portions of the records must be disclosed, while others might properly be withheld.

Relevant is §87(2)(b), which permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear based upon judicial decisions that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, with regard to records pertaining to public employees, the courts have found in a variety of contexts that records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838

(1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

The other ground for denial of significance is §87(2)(g), which authorizes an agency to deny access to records that:

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

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

Performance reviews would constitute "inter-agency or intra-agency materials". In consideration of that provision and §87(2)(b), we believe that statistical or factual information contained within those records would be available, except to the extent that disclosure would constitute an unwarranted invasion of personal privacy. Privacy considerations might arise in relation to intimate or personal details pertaining to the subjects of the ratings, and also with respect to others, i.e., staff members, students, parents, etc.

Assuming that a rating is final, whether it is “highly effective, effective, developing or ineffective,” we believe that the rating with the name of the teacher, must be disclosed, for it would constitute a final agency determination available under §87(2)(g)(iii). Moreover, a final rating concerning a public employee's performance is relevant to that person's official duties, and, therefore would not in our view result in an unwarranted invasion of personal privacy if disclosed.

You also asked about statistical information based on ratings given to staff at a particular school. If such information exists, in our opinion it would be required to be disclosed, pursuant to subparagraph (i) of §87(2)(g).

Turning now to your questions regarding application of the Open Meetings Law, we note that there are no provisions of law that permit a school board to meet and vote via teleconference. In the event that you intended to inquire about meetings conducted via videoconference, we offer the following comments:

By way of background, the Open Meetings Law pertains to public bodies, and §102(2) defines the phrase “public body” to mean:

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

As amended in 2000, §102(1) of the Open Meetings Law defines the term “meeting” to mean “the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body.” Based upon an ordinary dictionary definition of “convene”, that term means:

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

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

The amendments to the Open Meetings Law in our view clearly indicate that there are only two ways in which 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 example that you used as the basis for your questions included a situation in which only one or perhaps two members of a five member board were present in the school board’s typical meeting room. The other members were hypothetically attending via remote locations, including a cruise ship, another state, and a hospital. Assuming that the requirements for notice have been met, while three of the five members technically may be accomplished via videoconferencing, the Open Meetings Law is clearly intended to open the deliberative process to the public and provide the right to observe 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."

Accordingly, in our opinion, if the five members are able to see and hear each other via videoconference, and members of the public are able to see and hear each of the members, the requirements of the Law have been met.

Finally, I am pleased that you found the workshop instructive. Enclosed is a copy of my power point presentation.

We hope that we have been of assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CJS:sb
Enclosure

OML AO 5031

E-MAIL

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, January 04, 2011 2:43 PM
Subject: RE: FW: Open Meetings Law - telephone voting

This will confirm that without a quorum present, and without a majority of the members of the City Council voting, in my opinion no meeting was held pursuant to the Open Meetings Law. This will confirm that any action purportedly taken at such a gathering is a nullity.

Please see the advisory opinion at the following link:
http://www.dos.state.ny.us/coog/otext/o4306.htm

Camille

Camille S. Jobin-Davis, Esq.
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Executive Director

Robert J. Freeman

January 10, 2011

OML-AO-5032

E-Mail

TO: Lorna Pundt

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. Pundt:

We are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to a gathering of the Cape Vincent Town Planning Board. We have reviewed your questions, a blog entry regarding the meeting, and a related video posted at the site that you mentioned (jeffersonleaningleft.blogspot) and offer the following comments in an effort to provide guidance with respect to the issues raised.

First, 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. With the exception of public hearings required by statute at which the public is permitted to speak, if a public body, such as a planning 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.

Second, although public bodies have the right to adopt rules to govern their own proceedings (see e.g., Town Law §63), the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to allow commentary from citizens who were in support of a proposal yet prohibit commentary from those in opposition to the proposal, such a rule, in our view, would be unreasonable.

We note that there are federal court decisions indicating that if commentary is permitted within a certain subject area, negative commentary in the same area cannot be prohibited. It has been held by the United States Supreme Court that a school board meeting in which the public may speak is a “limited” public forum, and that limited public fora involve “public property which the State has opened for use by the public as a place for expressive activity” [Perry Education Association v. Perry Local Educators’ Association, 460 US 37, 103. S.Ct.

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

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

At the meeting that you described, the public, both those in support and opposition to the proposal, were behaving in a disruptive manner. It is not clear from your description, the blog or the video whether the public was invited to speak. Nevertheless, it appears that the business of the Board was temporarily adjourned at least once due to public protests, and that at one point during the meeting, while the public continued a discussion, the Board, seated around a table, voted on the controversial issue.

You asked whether the Chair could adjourn and reconvene without a "second." There is nothing in the Open Meetings Law that governs whether a "second" is required for a motion. While there may be bylaws or rules of procedure of the Planning Board that govern, we note the practical effect of loud voices in a meeting room might force Board members to suspend discussion and resume as they are able. Similarly, there is nothing in the Open Meetings Law, or any other law that we are aware of, that would prohibit a board from continuing to conduct business despite loud voices.

The video appears to depict the Board members, seated around a table and voting, while the public continued to focus its attention and discussion in another part of the room. Although the video depicts a small portion of the meeting, the Board members were clearly seated around a table, and clearly involved in a discussion. There were some people standing next to the table and others across the room, few if any of whom were listening to the proceedings at the table.

Based on the information that you have provided, in our opinion, the Board merely continued to conduct business while the public focused its attention elsewhere. We know of no provision of law that would require the suspension of business if the public is unable to hear a vote due to its own loud voices, or if the public's attention became diverted by protests. Accordingly, it is our opinion that if the public was unable to hear the business of the Board due to the public's activity in the room, it would not affect the validity of a vote that was properly taken and recorded in the minutes.

Should you have more information or additional questions, please submit such information in writing, and we will revise our opinion if necessary.

cc: Cape Vincent Planning Board

STATE OF NEW YORK
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Executive Director

Robert J. Freeman

January 10, 2011

OML-AO-5033

Mary Jo Tamburlin
Clerk, Niagara County Legislature
Niagara County Courthouse
175 Hawley Street
Lockport, NY 14094-2740

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. Tamburlin:

I have received your letter and apologize for the delay in response. We have lost our support staff, and it has become increasingly difficult to respond promptly to requests for written advisory opinions. It is noted that thousands of advisory opinions are posted on our website, and often inquiries can be answered quickly and easily through review of opinions.

You have asked "who is permitted to attend executive sessions."

In this regard, §105(2) of the Open Meetings Law provides that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." Therefore, the only people who have the right to attend executive sessions are the members of the public body, *i.e.*, the County Legislature, 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, a county department head, 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 body at an executive session, I believe that the Board could resolve the matter by adopting or rejecting a motion by a member to permit or reject the attendance by a non-member at an executive session.

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:sb

OML AO 5034

E-MAIL

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, January 12, 2011 4:59 PM
Subject: RE: Special Meeting called by FCSD Board of Ed.

Thank you for your message.

In response to your concerns regarding notice of special meetings, please note that section 104 of the Open Meetings Law states that:

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

In sum, 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.

With respect to the agenda, there is no requirement in the Law regarding the

preparation of agendas. See online OML advisory opinions under "A" for "Agenda" at the following link:
http://www.dos.state.ny.us/coog/oml_listing/oindex.html

If you would like to request a written advisory opinion with respect to your situation, please advise.

Thank you and I hope that this is helpful.

Camille S. Jobin-Davis, Esq.
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OML AO 5035

E-MAIL

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, January 12, 2011 4:53 PM
Subject: RE: Minutes to BOE meeting

Thank you for your message.

In response, please note that there is no requirement in the Open Meetings Law that minutes be posted online. While they are required to be made available to the public in accordance with the Freedom of Information Law within two weeks of the date of a meeting, there is no legal requirement that they be made available online. Perhaps there is a BOE regulation or by law that would require posting on the internet?

I hope that this is helpful.

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OML AO 5036

E-MAIL

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, January 13, 2011 10:55 AM
Subject: RE: Open Meetings Law & Draft Policy regarding how alarms are counted

Based on your description of the discussion contained in the email below, in my opinion there would be no basis for entry into executive session. As you know, a public body has the authority to enter into executive session only for the purposes set forth in §105(1) of the Open Meetings Law. Based on case law interpreting the “litigation exception” which you referenced (§105[1][d]), a belief that a discussion or a decision could ultimately lead to litigation, without more, is an insufficient reason for entry into executive session. Specifically, it has been held that:

"The purpose of paragraph d is 'to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. of Town of Yorktown, 83 AD2d 612, 613, 441 NYS2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply by expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD2d 840, 841 (1983)].

Based on the decisions cited above, all of which were rendered by the Appellate Division, Second Department, which includes Westchester County, only to the extent that a discussion involves litigation strategy would an executive session be properly held under §105(1)(d).

With respect to the so-called “personnel” exception, §105(1)(f) of the Open Meetings Law is limited and precise, and does not apply when the discussion concerns policy issues rather than individual people and how well they carry out their duties. Please note the legal analysis in the opinion at the following link:

http://www.dos.state.ny.us/coog/otext/o4246.htm

I hope that this is helpful.

Camille

Camille S. Jobin-Davis, Esq.
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January 18, 2011

OML-AO-5037

Mr. Timothy Chittenden
[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. Chittenden:

We are in receipt of your letter in which you requested an advisory opinion concerning the application of the Open Meetings Law to actions taken by the City Council of the City of Rye. You specifically asked whether it "is legal for the Rye City Council to go into Executive Session to discuss Attorney/Client matters. "

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

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

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

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

Section 108(3) exempts matters made confidential by federal or state law. It has been advised that members of a public body may meet in private to seek legal advice from their attorney, and that when they do so, their communications fall within the scope of the attorney-client privilege. Because the communications are confidential, a gathering of that nature would be exempt from the coverage of the Open Meetings Law pursuant to §108(3).

It appears that the reference to an executive session by the Council may technically have been inaccurate if, in fact, its intent was to seek legal advice from its attorney.

With respect to your question concerning agendas, there is no reference in the Open Meetings Law to agendas. Consequently, a public body, such as the Council, may choose to prepare or follow an agenda, even though there is no statutory obligation to do so.

Finally, as a general matter, a public body may vote during an executive session properly held, unless the vote is to appropriate public monies [see Open Meetings Law, §105(1)]. In our opinion, if an action represents an allocation or expenditure of funds that have previously been budgeted, the action would not involve an appropriation, and a vote could be taken during a properly held executive session. However, if a determination is made to expend monies that have not been budgeted, i.e., to appropriate new monies, a vote to do so must occur during an open meeting.

We hope that we have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

By: James B. Gross
Legal Intern

RJF: JBG

cc: City Council

OML AO 5038

E-MAIL

From: Freeman, Robert (DOS)
Sent: Thursday, January 27, 2011 8:32 AM
Attachments: f12696.wpd

I offer the following brief remarks in response to your correspondence.

First, as indicated in the attached opinion, towns and other entities of government are required to maintain records in accordance with records retention schedules prepared by the State Archives, which is a unit of the State Education Department. In brief, a retention period typically relates to the significance of certain kinds of records. While minutes of meetings must be kept permanently, the schedule indicates that Recordings of meetings may be disposed of, erased, or reused after four months.

Second, the Open Meetings Law provides minimum requirements concerning the contents of minutes. At a minimum, they must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of the members. They may include additional detail, but there is no obligation to do so.

And third, if a municipal board does not record its meetings and there is a desire or need for a recording, judicial decisions have specified that the public may audio or video record open meetings, so long as the use of recording equipment is neither disruptive nor obtrusive. The thrust of those decisions reflect an amendment to the Open Meetings Law that will become effective on April 1 of this year.

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

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
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OML AO 5039

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Friday, January 21, 2011 1:00 PM
Subject: RE: Fire District - Meeting Minutes

The Open Meetings Law, §106, requires that minutes be prepared and made available within two weeks of a meeting. In my view, they must merely be made available within that time on request. Although an entity may choose to do so, there is no requirement that the minutes be "posted."

I hope that I have been of assistance.

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Executive Director

Robert J. Freeman

January 28, 2011

E-Mail **OML-AO-5040**

TO: Barbara C. Moore

FROM: Camille S. Jobin-Davis, Assistant Director

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. Moore:

We are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to recent gatherings of members of the Town Board of Boston. Specifically, you indicated that it has come to your attention that a quorum of the Town Board has met, on various occasions, with fire companies and the town attorney. No notice of the those gatherings was provided to the public, and one Board member "claims that he was not notified that these meetings were going to be held." In this regard, we offer the following comments.

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

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

Based upon the foregoing, it is clear in our view that a town board constitutes a "public body" subject to the Open Meetings Law.

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

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

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

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

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

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

In the context of the facts that you described, a key question is whether "reasonable notice" was given to all of the members. If a court were to determine that reasonable notice was not given to all of the members, we believe that it would, of necessity, find that these gatherings were not validly held.

Next, separate from the notice requirement involving the members of a public body and §41 of the General Construction Law are those imposed by the Open Meetings Law. Section 104 of that statute provides that:

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

Further, when there is intent to ensure the presence of less than a quorum at any given time in order to evade the Open Meetings Law, there is a judicial decision that infers that such activity would contravene that statute. As stated in Tri-Village Publishers v. St. Johnsville Board of Education:

> "It has been held that, in order for a gathering of members of a public body to constitute a 'meeting' for purposes of the Open Meetings Law, a quorum must be present (Matter of Britt v County of Niagara, 82 AD2d 65, 68-69). In the instant case, there was never a quorum present at any of the private meetings prior to the regular meetings. Thus, none of these constituted a 'meeting' which was required to be conducted in public pursuant to the Open Meetings Law.
>
> "We recognize that a series of less-than-quorum meetings on a particular subject which together involve at least a quorum of the public body could be used by a public body to thwart the purposes of the Open Meetings Law...However, as noted by Special Term, the record in this case contains no evidence to indicate that the members of respondent engaged in any attempt to evade the requirements of the Open Meetings Law" [110 AD2d 932, 933-934 (1985)].

In Tri-Village, the Court found no evidence indicating intent to circumvent the Open Meetings Law when a series of meetings were held, each involving less than a quorum of a board of education. Nevertheless, one might interpret the passage quoted above to mean that, when there is intent to evade the Law by ensuring that less than a quorum is present, such intent would violate the Open Meetings Law. If there was intent to circumvent the Open Meetings Law in the context of the situation of your concern, it is possible that a court would find that the Open Meetings Law had been infringed.

Finally, we note that if there is a quorum of the members of the governing bodies of the fire companies present at meeting, as public bodies, in our opinion they too would be subject to and required to comply with the notice provisions of the Open Meetings Law.

We hope that this is helpful.

cc: Town of Boston
Patchin Fire Company
Boston Fire Company

STATE OF NEW YORK
DEPARTMENT OF STATE
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Executive Director

Robert J. Freeman

January 12, 2011

OML-AO-5041

Warren Gorton
[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. Gorton:

We are in receipt of your request for an advisory opinion regarding application of the Freedom of Information Law to records requested from the White Sulphur Springs Fire District.

Please accept my apology for the delay in responding to your request.

Specifically, you requested a copy of the cover sheet that was utilized to fax a letter to the Sullivan County Probation Department, signed by four Commissioners of the District, and a copy of the minutes of the meeting at which the Commissioners agreed to send such letter. In this regard, we offer the following comments:

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

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

Section 174(7) 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)], we believe that a fire district is required to comply with the Freedom of Information Law.

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

It is our opinion that if the fax cover sheet is retained by or for the District, there would be no basis in the law on which the District could rely to deny access.

We note that the District has indicated that it does not have the cover sheet, and the District's attorney has also indicated that he does not have the cover sheet. 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)(a) 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." It is emphasized that when a certification is requested, an agency "shall" prepare the certification; it is obliged to do so.

If you have not already done so, you may wish to consider requesting a copy of the fax cover sheet from the Sullivan County Probation Department. Because the Probation Department is an agency subject to the Freedom of Information Law, if the cover sheet has been retained, in keeping with our analysis above, we believe there would be no basis in the Law on which the Department could rely to deny access.

With respect to the issue of minutes, we note that the Open Meetings Law pertains to meetings of public bodies, and §102(2) of the Law defines the phrase "public body" to mean:

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

Based on Town Law §174(7) referenced above, since a district corporation is also a public corporation, a board of commissioners of a fire district in our view is clearly a public body subject to the Open Meetings Law. Accordingly, the Board of Commissioners is permitted to take action only during a meeting being held in accordance with the Open Meetings Law.

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, we believe that a meeting, i.e., the "convening" of a public body, involves the physical coming together of at least a majority of the total membership of such a body, or a convening that occurs through videoconferencing.

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

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

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

Based on the foregoing, 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 our opinion that neither a public body nor its members individually may take action or vote by other means.

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)].

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

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

Based on the foregoing, the Open Meetings Law is intended to provide the public with the right to observe the performance of public officials in their deliberations. That intent cannot be realized if members of a public body conduct public business as a body or vote outside of the confines of a properly noticed meeting.

Action taken at a meeting of a public body must be memorialized in minutes. Section 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 Commissioners), upon their preparation and review perhaps years later, to ascertain the nature of action taken by an entity subject to the Open Meetings Law. Most importantly, minutes must be accurate.

Based on your correspondence, it is our understanding that the District has indicated that it does not have minutes from a meeting at which the letter of issue was authorized. When a public body fails to memorialize its actions through minutes, in our opinion, it has failed to comply with a basic requirement of the Open Meetings Law.

Again, should you wish to do so, you could request that the District certify that is has no record of action taken with respect to this matter.

We hope that we have been of assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb

OML-AO-5046

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Thursday, February 03, 2011 9:55 AM
Subject: RE: Executive Session

If the advisory board is a creation of law, I believe that it would be required to give effect to the Open Meetings Law. If it is not, but rather was created, for example, by means of a resolution adopted by a town board, judicial decisions indicate that an entity of that nature is not a "public body" and, therefore, is not subject to that statute.

Assuming that the board is a public body, the Open Meetings Law, section 105(1)(h) permits the board to enter into executive session to discuss the proposed acquisition, sale or lease of real property, but only when publicity would substantially affect the value of the property.

I hope that I have been of assistance.

Robert J. Freeman
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OML-AO-5047

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Thursday, February 03, 2011 9:59 AM
Subject: RE: meeting room door

There is no law that specifies that a door to the room in which a meeting is held must be open. If a door is unlocked and there is some indication that those interested in entering may do so, i.e., by posting a sign on or near the door, I believe that would be appropriate and permissible.

If there are further questions, please feel free to contact me.

I hope that I have been of assistance.

Robert J. Freeman
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OML-AO-O5048

E-MAIL

From: Jobin-Davis, Camille (DOS)
Sent: Monday, February 07, 2011 8:45 AM
Subject: Open Meetings Law - notice

As promised, the following is a description of the requirements of the Open Meetings Law with respect to notice of meetings:

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 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.

The following is a link to the text of the Open Meetings Law:
http://www.dos.state.ny.us/coog/openmeetlaw.html

Feel free to forward this email to the town clerk if you think it would be helpful.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
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FOIL-AO-18401
OML-AO-05049

E-MAIL

From: Jobin-Davis, Camille (DOS)
Sent: Friday, February 11, 2011 3:46 PM

Subject: RE: Freeom of Information Law - former police chief

You are welcome, and in answer to your first question about the executive session, typically there is no basis to enter into executive session to discuss the response to a FOIL appeal. In this case, if it becomes necessary to discuss the contents of the former police officer's (chief's?) records, they may enter into executive session to discuss "the employment history of a particular person" (OML section 105(1)(f)). (Am I remembering your situation correctly - they denied access to a former police chief's personnel file?)

In response to your second question, if the public body is the FOIL appeals officer, responsible for determining appeals, then yes, their response to your appeal would require a vote. If the FOIL appeals officer is the Mayor, and he is merely seeking input from the public body(?) then they would not be required to vote.

Hope it helps!

Camille

OML-AO-5050

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Monday, February 14, 2011 9:42 AM
Subject: RE: NYS OML
Attachments: o3195.wpd

Assuming that the committees to which you referred do not consist solely of members of a SUNY governing body, i.e., a college council or board of trustees, and that their functions are wholly advisory, I do not believe that they would be subject to the Open Meetings Law. If, however, they consist of members of the governing body, have the authority to make final determinations, or perform a necessary function in the decision making process, i.e., if the decision maker cannot act until having received the recommendation of a committee, they would, in my view, fall within the requirements of the Open Meetings Law.

Attached is an opinion that may be useful to you. If there are further questions, please feel free to contact me.

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Executive Director

Robert J. Freeman

February 15, 2011

E-Mail **OML-AO-5051**

TO: Supervisor Peg Harrison

FROM: Robert J. Freeman, Executive Director

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

Dear Supervisor Harrison:

I have received your letter and hope that you will accept my apologies for the delay in response. As you may know, we receive hundreds of written inquiries annually, and we have had no support staff since September. Consequently, it has become increasingly difficult to respond in a timely fashion.

The issues that you raised relate to the obligation to prepare minutes of “work sessions” and whether any such minutes must be approved

In this regard, based on the judicial interpretation of the Open Meetings Law, there is no legal distinction between a “meeting” and “work session.”

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

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

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

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

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

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

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

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

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:sb

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February 18, 2011

E-Mail **OML-AO-5053**

TO: Robert LoScalzo

FROM: Camille S. Jobin-Davis, Assistant Director

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

Dear Mr. LoScalzo:

We are in receipt of your request for an advisory opinion concerning the ability of the public to "unobtrusively record audio and video" of a public hearing held pursuant to Eminent Domain Procedure Law ("EDPL"), Article 2.

In this regard, we note that there is a distinction between a "meeting" and a "public hearing". The former involves a gathering of a majority of a public body for the purpose of conducting public business collectively, as a body. As such, meetings are ordinarily held for the purpose of discussion, deliberation, taking action and the like. A "public hearing" typically is held to enable members of the public express their views on a particular subject, such as a proposed budget, a local law or a matter involving land use.

In April of this year an amendment to the Open Meetings Law requiring public bodies to permit the photographing, broadcasting, webcasting or otherwise recording and transmitting of meetings by audio or video means will become effective. The amendment codifies case law enabling public bodies to adopt reasonable rules concerning their proceedings, and permitting the use of related equipment unless so doing is disruptive or obtrusive.

There have been several judicial decisions concerning the use of recording devices at open meetings. In our view, the decisions consistently apply certain principles. One is that a public body has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

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

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

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

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

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

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

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

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

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

While we know of no judicial decisions concerning the ability of those to speak at either meetings or public hearings, we believe that the principles pertinent to that issue would be the same. We note that §203 of the EDPL requires that "… any person in attendance shall be given a reasonable opportunity to present an oral or written statement and to submit other documents concerning the proposed public project." In short, we believe that an entity has the authority to adopt rules or procedures to govern its own proceedings. Those rules or procedures, however, must in our opinion be reasonable. In our view, it would be unreasonable, for example, to authorize those with one point of view to speak for ten minutes or perhaps without limitation, while permitting those with a different view to speak for three minutes or not at all.

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

We hope that this is helpful.

OML-AO-5054

From: Freeman, Robert (DOS)
Sent: Friday, February 18, 2011 8:32 AM
Subject: RE: Question

Good morning, and congratulations on your election!

As you have described the matter, there might be basis for discussing the matter in executive session. However, the Legislature would have the option to discuss the matter in public, even if an executive session could properly be 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." Based on that provision, depending on function of the elected official who is the subject of the discussion, it is possible that the Legislature would have the authority to conduct an executive session to discuss the employment history of a particular person, or perhaps a matter leading to the discipline or dismissal of a particular person. If the elected official is a member of the Legislature, and not an employee, the likelihood of conducting a proper executive session is limited due to the specific language of §105(1)(f).

Notwithstanding the foregoing, the Open Meetings Law is permissive. It states that a public body "may" conduct an executive session to discuss certain issues, but there is no obligation to do so. Because that is so, although the Legislature might have the ability to discuss the performance or conduct of a particular person during an executive session, it could choose to engage in a public discussion of the matter.

I hope that I have been of assistance and, once again, offer congratulations.

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February 23, 2011

Paul R. Black [redacted]

OML-AO-5055

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. Black:

We are in receipt of your request for advice regarding various issues, primarily with respect to minutes, and application of both the Freedom of Information and Open Meetings Laws. In response to our notice, the Town of Lockport submitted additional information for our consideration, a copy of which is attached.

In an effort to provide guidance with respect to the various issues raised, we offer the following comments:

First, as you may know, public hearings may be different from public meetings. A "meeting" is generally a gathering of quorum of a public body for the purpose of discussion, deliberation, and potentially taking action within the scope of its powers and duties. A " 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 by law prior to the taking of certain actions, such as adopting a budget or a local law, for example. There is at least one instance that we know of for which a Town is required to provide a document to the public prior to a statutorily required hearing (Town Law §§106[4] and 108 regarding preliminary budgets). While there may be a statutory requirement to conduct a public hearing prior to the issuance of a bond, we know of no such requirement that a Town hold a hearing prior to the approval of a contract.

Second, with respect to public meetings and any requirements for making records available prior to or contemporaneously with such meetings, we note that in its 2010 Annual Report the Committee on Open Government made recommendations regarding this issue. You may review such recommendations online at the following link: http://www.dos.state.ny.us/coog/pdfs/2010AnnualReport.pdf

Third, with respect to your frustration that there are no minutes documenting a "board discussion/comment regarding" a particular contractual issue, §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, nor must they include descriptions of discussions or comments regarding particular issues. Rather, at a minimum, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member. To the extent that minutes contain more than what is required by Law, we believe that inherent in the statute is the intent that above all, minutes should be accurate.

Finally, 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 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; 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)].

We hope that this is helpful.

Sincerely,

Robert J. Freeman
Executive Director

RJF:sb
Enc: December 6, 2010 correspondence

OML-AO-5056

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Friday, February 25, 2011 12:42 PM
Subject: RE: meetings with lunches

When a majority of a public body subject to the Open Meetings Law gathers to conduct public business, the gathering constitutes a "meeting" that must be preceded by notice and conducted open to the public in accordance with that law. It has been suggested that holding a meeting falling within the coverage of the Open Meetings Law in a restaurant or other facility in which there is an expectation that those present may feel that they must make a purchase is unreasonable and inappropriate.

It is noted that when a gathering is social in nature and does not involve conducting public business collectively, as a body, the Open Meetings Law would not apply.

I hope that I have been of assistance.

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OML-AO-5057

E-MAIL

From: Freeman, Robert (DOS)
Sent: Monday, February 28, 2011 9:45 AM
Subject: RE: Request for Advisory Opinion--OML

In my view, the only exception that might have applied, §105(1)(f), concerns issues that relate to a "particular person", whether that person is an employee, an elected official, or a member of the public. It permits a board to conduct an executive session to discuss "the medical, financial, credit or employment history of a particular person or Corporation, or matters leading to the appointment, employment, romotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation."

Since the issue relates to an elected official, it would appear that the only means of properly asserting the provision quoted above would have involved "a matter leading to…the removal of a particular person…." It seems doubtful that would have been so, and if that aspect of §105(1)(f) did not apply, I do not believe that there would have been a basis for entry into executive session.

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OML-AO-5058
FOIL-AO-18417

VIA E-MAIL

From: Freeman, Robert (DOS)
Sent: Friday, March 04, 2011 10:26 AM
To: dos.sm.DAR.InetInfo
Subject: RE: Attachments to agendas and official minutes

First, agencies have the authority to adopt procedures. However, they must be consistent with the regulations promulgated by the Committee on Open Government regarding the implementation of the Freedom of Information Law. The regulations are available on our website. Second, there is no law that specifies that there must be an agenda or that an entity must abide by an agenda if one is prepared.

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-----Original Message-----

OML-AO-5059

VIA E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Friday, March 04, 2011 4:02 PM
Subject: RE: voting and quorum

To approve a motion or take action, there must be an affirmative vote of a majority of the total membership. In a body consisting of 100 members, there must 51 affirmative votes to carry a motion or take action, irrespective of the number of members present.

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OML-AO-5060

VIA E-MAIL

From: Freeman, Robert (DOS)
Sent: Friday, March 04, 2011 4:32 PM
Subject: RE: Re:

As indicated earlier, there is no particular form that must be used. Further, the law does not require that minutes be approved. On the contrary, §106 of the Open Meetings Law requires that minutes be prepared and made available within two weeks of a meeting. If they have not been approved, they may be marked “unapproved” or “preliminary”, for example, and disclosed with that kind of notation. Finally, although minutes are often posted on a website, there is no requirement that they must.

I note that I will be speaking on open government laws at a public forum on March 23 at 7 p.m. at the Saratoga Springs Public Library.

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OML-AO-061

E-MAIL

From: Freeman, Robert (DOS)
Sent: Wednesday, March 09, 2011 1:58 PM
Cc: Ettinger, Joel (DOT)
Subject: RE: will nymtc members again be insulated before/after 3.10.11 annual meeting?

If a gathering is social, I do not believe that the Open Meetings Law would apply. On the other hand, when a majority of a public body gathers to conduct public business, collectively, as a body, it has been held that the gathering constitutes a “meeting” that falls within the scope of that statute.

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FOIL-AO-5062

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Friday, March 11, 2011 10:10 AM
Subject: RE: Open Meetings Law

Although the Open Meetings Law does not specify when meetings of public bodies may be held, it has been advised in numerous contexts that every law, including that statute, should be implemented in a manner that gives reasonable effect to its intent.

In my view, the intent of the Open Meetings Law involves the reasonable ability of members of the public, those interested in attending meetings of public bodies, to do so. From my perspective, in consideration of a variety of factors, conducting a meeting at 8:30 on a Sunday morning would be unreasonable, for many who might be interested in attending may not have a reasonable opportunity or capacity to do so. This is not to suggest that meetings cannot be held on weekends or holidays, for a meeting might validly be held during the afternoon, at a more convenient time. Rather, absent an emergency or special circumstance, it is suggested that it would be unreasonable to schedule a meeting early on a Sunday morning.

Please feel free to share this opinion with the Board of Trustees.

I hope that I have been of assistance.

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OML-AO-5063

E-MAIL

From: Jobin-Davis, Camille (DOS)
Sent: Friday, March 11, 2011 4:39 PM
Subject: Minutes - legal documents

Mary Lou,

In response to your question – Are minutes legal documents? – I have to say that there isn't any language in FOIL that specifically says they are "legal documents", but based on my experience in the private sector, they are considered "best evidence" of what occurred during the course of a meeting, they are required to be created by the OML and the FOIL, and they are required to be maintained through application of the Arts & Cultural Affairs Law and regulations promulgated by NYS Archives.

Unlike a video or tape recording of a meeting, which may be used as an aid in compiling minutes, minutes are the "official record" of a meeting according to an opinion rendered by the State Comptroller. (1978 Op. St. Compt. File 280). Accordingly, I believe it is accurate to state that they are the "official" record of what transpired at the meeting.

I hope that is helpful.

Camille

Camille S. Jobin-Davis, Esq.
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OML-AO-5064

E-MAIL

From: Freeman, Robert (DOS)
Sent: Wednesday, March 16, 2011 9:05 AM
Subject: RE: Question on Committee meeting

Good morning - -

A committee consisting of two or more members of a governing body constitutes a public subject to the Open Meetings Law in all respects. That being so, it has the same obligations as the governing body in terms notice and openness, as well as the same ability to enter into executive sessions when appropriate to do so.

With respect to your specific question, as you are aware, in order to enter into executive session, a motion must be made and carried by a majority of vote of the total membership of the committee. If, for example, a committee has three members, its quorum would be two, and carrying any motion, including a motion to enter into executive session, would require a vote in which at least two members of that committee vote in the affirmative. No action is required by the governing body concerning an executive session properly held by a committee of that body.

I hope that I have been of assistance.

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OML-AO-5065

E-MAIL

From: Freeman, Robert (DOS)
Sent: Wednesday, March 16, 2011 9:46 AM
Subject: RE: Clarification on Notices
Attachments: o3858.wpd

Good morning - -

First, if I understand the nature of the committees that you described correctly, they are not “public bodies” and, therefore, are not required to comply with the Open Meetings Law. In short, there are numerous judicial decisions indicating that citizens advisory bodies and similar entities that do not have the authority to take final and binding action are not subject to the Open Meetings Law. Attached is an opinion dealing the issue in greater detail.

Second, this is not to suggest that the kinds of committees in question cannot hold open meetings. On the contrary, many do so in order to gain input and experience from the public, and certainly they may hold their meetings open to the public and/or directed to do so by the Town Board.

Third, a meeting of the Town Board would involve a gathering of a quorum for the purpose of conducting public business, collectively, as a body. If a majority of the Board gathers, in their capacities as Board members, to confer with a committee, I believe that the event would be a Town Board meeting fully subject to the Open Meetings Law. However, if Board members attend as part of a larger audience and do not function as a body, the Open Meetings Law would not apply.

I hope that I have been of assistance.

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OML-AO-5066

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Wednesday, March 16, 2011 3:34 PM
Subject: RE: school board budget meetings

Dear Ms. Crandall:

Any gathering of a majority of the total membership of a public body, i.e., a board of education, a town board, a city council, etc., for the purpose of conducting public business, constitutes a "meeting" that falls within the coverage of the Open Meetings Law. That is so, even if there is no intent to take action, and irrespective of the characterization of the gathering. If, on the other hand, a gathering involves less than a majority of a public body, the Open Meetings Law would not apply.

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

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March 17, 2011

OML-AO-5067

William Matthew Groh
[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. Groh:

This is in response to your correspondence of December 23, 2010, in which you expressed your frustration with our November 8, 2010 opinion to you. We regret that you are not satisfied with the guidance that we provided.

In our previous correspondence, we explained that when an agency fails to respond to a request for records, or fails to respond in full to a request for records, the applicant has the authority to appeal to the FOIL appeals officer, and if s/he is still not satisfied, to bring legal action to request that a court compel disclosure. This office cannot require an agency to produce records on an applicant's behalf. The advice that we offered was in an effort to support your ability to appeal any alleged denial of access.

We also note that an agency is not required to create records in response to a request, and that there is no obligation to document conversation held at a public meeting. As we explained, the Open Meetings Law requires only that the minutes include a record or summary of any and all action taken and the vote thereon. There is no requirement that discussions be memorialized in the minutes.

In response to your request that this office "obtain" the requested information or "compel the town to act appropriately", we note that the Freedom of Information Law and the Open Meetings Law authorize this office to provide legal advice and opinions to those who contact us regarding application of the law. We have neither the authority nor the resources to require an

agency to produce records, and, as is the case here, it is our opinion that the agency is not required to prepare minutes that include the information that you seek.

We regret that we cannot be of further assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb

OML-AO-5069

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Monday, March 21, 2011 11:19 AM
Subject: RE: Posting of open meeting minutes

There is no requirement as yet that minutes of meetings be posted on a website. However, the Open Meetings Law, §106, requires that minutes be prepared and made available on request within two weeks of the meetings to which they pertain.

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OML-AO-5070

E-MAIL

From: Freeman, Robert (DOS)
Sent: Monday, March 21, 2011 9:18 AM
Subject: RE: Follow up question.

It has been advised that if an public body establishes a schedule of meetings, for a calendar year, for example, that one notice indicating the time and place given in accordance with section 104 of the Open Meetings Law would constitute compliance, unless there is an unscheduled meeting. In that instance, and additional notice would have to be given.

However, to effectuate the notice requirements, three elements are necessary to comply. First, notice must be given to the news media. That can be accomplished by emailing, faxing, or mailing notice to one or more news media outlets that would be likely to make contact with those interested in attending. Second, notice must be posted in one or more designated public locations continuously. The posting in my opinion must be in a physical location, i.e., a bulletin board outside of city hall. And third, when a public body has a website, notice must be posted online.

I do not believe that notice posted on a website, without more, would reflect compliance with law. Again, with respect to notice to the news media, an affirmative step must be taken to transmit notice of meetings in some manner.

I hope that I have been of assistance.

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OML-AO-5071

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Monday, March 21, 2011 10:30 AM
Subject: RE: Public Comment Period

First, there is no obligation to list or identify persons who attend an open meeting of a public body.

And second, there is no obligation to include comments offered by those who speak in minutes of a meeting. Section 106 of the Open Meetings Law contains minimum requirements concerning the contents of minutes. At a minimum, they must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of the members. They may include additional detail, but there is no requirement that they must.

I hope that I have been of assistance.

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OML-AO-5075

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Tuesday, March 29, 2011 8:42 AM
Subject: RE: Foil Meeting minutes

The Open Meetings Law, section 106, requires that minutes of open meetings be prepared and made available to the public on request within two weeks. There is nothing in the law that requires that minutes be approved. Consequently, draft minutes should be available as soon as they exist.

If it is the practice or policy to approve minutes and that does not occur within two weeks, it has been advised that minutes may be stamped or marked as "draft" or "preliminary", for example, when they are disclosed. By so doing, the public has the ability to learn generally of the actions taken, and the recipients are concurrently informed that the minutes are subject to change.

I hope that I have been of assistance.

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OML-AO-5047

E-MAIL

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, February 03, 2011 2:03 PM
Subject: RE: Love Canal sewer contamination

In response, my advice is that the report is a “record” of the NFWB and is therefore subject to disclosure under FOIL, at least in part, epending on its contents.

Please note the following opinion regarding “records”: http://www.dos.state.ny.us/coog/ftext/f17403.html (especially the paragraph beginning “First…”)

And the following opinion regarding access to consultant reports: http://www.dos.state.ny.us/coog/ftext/13401.htm (further analysis may be found in our online FOIL advisory opinions under “C” for “Consultant Report”

I hope that you find these helpful,

Camille

Camille S. Jobin-Davis, Esq.
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OML-AO-5077

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Thursday, March 31, 2011 12:25 PM
Subject: RE: Seymour Library, Brockport, NY

You are correct in your conclusion that minutes of meetings must be prepared and made available on request within two weeks of the meetings to which they pertain. However, there is no requirement as yet that minutes of meetings be posted on a website. An entity may choose to do so, and many do, but there is no obligation to do so.

Lastly, as you are aware, the Open Meetings Law specifies and limits the subjects that may properly be considered during an executive session. I would agree that discussion of a complaint regarding the Open Meetings Law would not likely fall within any of the grounds for entry into executive session.

I hope that I have been of assistance.

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March 24, 2011

E-Mail **OML-AO-5078**

TO: Kathleen E. Foley

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. Foley:

This is in response to your request for a written opinion regarding application of the Open Meetings Law to certain actions of a trustee during the course of a meeting of the Cold Spring Village Board. Specifically, you indicated that while the public was prohibited from speaking at the meeting, one of the trustees was "whispering with three members of the public seated near him in the front row. We also witnessed him being prompted to read a text message composed by one of those individuals during the meeting, then him reading it and reacting to it." You were informed that there was no Village policy regarding the use of "PDAs" during public session, and when you suggested that the policy should be that PDAs should be turned off, "the offending trustee responded that he must have his PDA available to him at all times in case of emergency communications."

In this regard, 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, all members of the Board must in our view situate themselves and conduct themselves in a manner in which those in attendance can observe and hear the proceedings. To do otherwise would in our opinion be unreasonable and fail to comply with a basic requirement of the Open Meetings Law.

We hope that this is helpful.

CSJ:sb
cc: Mayor Gallagher, Village of Cold Spring

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OML-AO-5079 April 4, 2011

Paul J. Eldridge
Putnam County Executive
40 Gleneida Avenue
Carmel, NY 10512

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 County Executive Eldridge:

As you are aware, I have received correspondence in which your predecessor sought an advisory opinion concerning the application of the Open Meetings Law. I raised questions soon after originally receiving the materials in late August, 2010 but received no response. It was assumed that the preparation of an opinion was unnecessary until hearing from you recently.

By way of brief background, the materials refer to "a meeting held by the Town Supervisors in Putnam County, and several members of the Putnam County MS4 Coordination Committee", as well as "invited guests from various towns in the County and one of [y]our County Legislators." The question is whether "such a meeting [may] appropriately be closed to the public and non-invited guests including government officials."

In this regard, the Open Meetings Law is applicable to meetings of public bodies. A "meeting", according to §102(1) of that statute, is a gathering of a quorum, a majority of the total membership of a public body, for the purpose of conducting public business collectively, as a body. Section 102(2) defines the phrase "public body" to mean:

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

A “public corporation” includes a county, city, town, village or school district.

In consideration of the foregoing, the issue is whether the gathering at issue involved a quorum of a public body that gathered for the purpose of conducting public business. It is emphasized that a gathering of two or more elected or appointed government officials does not trigger the application of the Open Meetings Law. Again, to constitute a meeting of a public body, a quorum of a public body must convene for the purpose of conducting public business.

Some county legislative bodies consist of the supervisors of the towns within a county. That is not so in the case of Putnam County; the nine members of the County Legislature are elected by district. Consequently, although every town supervisor is a member of a town board, a gathering of any number of town supervisors representing towns in Putnam County for the purpose of discussing common concerns or issues would not constitute a quorum of any particular public body. Therefore, the presence of the supervisors representing towns in the County did not involve a meeting of a public body that would have implicated the Open Meetings Law.

The Putnam County MS4 Coordination Committee (hereafter “the Committee) is not a creation of law. Rather, based its by-laws, it was created as a means of enabling government agencies in the County “to foster the exchange of information and foster cooperation among the participating communities in addressing issues that are of a mutual concern”, to “promote discussion” in an effort “to propose recommendations and make reports which identify mutually-beneficial solutions to the concerns facing the participating communities”, and to “seek funding sources which may help to accomplish the goals of the Committee and the participating municipalities.” It is my understanding that there is no requirement that municipalities participate on the Committee and that participation is voluntary.

Based on judicial precedent, because the Committee is not a creation of law and has no authority to take action that is binding on the entities of government represented on the Committee, I do not believe that it is a public body or, therefore, required to have complied with the Open Meetings Law.

Judicial decisions indicate generally that advisory bodies, other than those consisting of members of a governing body, that have no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspaper v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. In one of the decisions, Poughkeepsie Newspaper, supra, a task force was designated by then Mayor Koch consisting of representatives of New York City agencies, as well as federal and state agencies and the Westchester County Executive, to review plans and make recommendations concerning the City's long range water supply needs. The Court specified that the Mayor was "free to accept or reject the recommendations" of the Task Force and that "[i]t is

clear that the Task Force, which was created by invitation rather than by statute or executive order, has no power, on its own, to implement any of its recommendations" (id., 67). Referring to the other cases cited above, the Court found that "[t]he unifying principle running through these decisions is that groups or entities that do not, in fact, exercise the power of the sovereign are not performing a governmental function, hence they are not 'public bod[ies] subject to the Open Meetings Law..."(id.).

I note, too, that there is no indication that a quorum of the Committee was present at the gathering in question. Even if the Committee constituted a public body, absent the attendance of a quorum, the Open Meetings Law would not apply.

In sum, based on my understanding of the facts, the presence of town supervisors would not have involved a public body, and the Committee is advisory in nature. If those conclusions are accurate, the gathering at issue would not have been subject to the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:sb

OML-AO-5080

E-MAIL

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, April 07, 2011 5:14 PM
Subject: RE:

Thank you Linda. There is no need for you to provide my office with copies unless you would like me to consider them for purposes of issuing a written opinion. Although I can't remember our specific conversation, based on your email I hope that we talked about section 104, which pertains to notice? If we did, I apologize, the following information will be a repeat, if not, this may help clarify:

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 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.

Camille

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E-MAIL

OML-AO-5081

From: dos.sm.Coog.InetCoog
Sent: Monday, April 11, 2011 8:52 AM
Subject: RE: Agendas for Town Board Meetings

Neither the Open Meetings Law nor any other statute of which I am aware includes direction concerning agendas. If a town board wants to prepare and abide by an agenda, it may choose to do so. However, there is no obligation to prepare or follow an agenda. Similarly, unless the board has adopted a rule to the contrary, it is free to discuss and vote on items that are not referenced on an agenda.

I hope that I have been of assistance.

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OML-AO-5082
E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Monday, April 11, 2011 8:48 AM
Subject: RE: Open meetings law requirement for voting

Section 41 of the General Construction Law has long indicated that a quorum is a majority of the total membership of an entity, notwithstanding absences or vacancies, and that to take action of any sort, i.e., approving a motion, there must be an affirmative vote of a majority of the total membership.

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OML-AO-5083

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Thursday, April 14, 2011 4:49 PM
Subject: RE: School Board of Education Meeting Minutes - Broadalbin Perth (NY) School District

Although the Open Meetings Law, section 106, requires that minutes be prepared and made available on request within two weeks, there is nothing in the law that requires that the minutes be posted on a website. A school district may choose to do so, but it is not required to do so.

Similarly, there is nothing in that statute that requires that minutes be approved. If it is the practice or policy of a board to do so, but it cannot approve them within two weeks of a meeting, it has been suggested that the minutes be prepared and disclosed as required by law within two weeks, and that they may be marked, "draft", "preliminary", or "unofficial", for example. By so doing, the public can ascertain what generally transpired and is concurrently given notice that the minutes are subject to change.

Once in receipt of minutes, unapproved or otherwise, a member of the public may distribute them or post them on their own websites.

I hope that I have been of assistance.

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FOIL-AO-5084
E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Wednesday, April 20, 2011 8:34 AM
Subject: RE: New Broadcast Rules

With regard to the issues that you raised, first, members of the public may record or broadcast open meetings, subject to reasonable rules. It has been advised that anyone may record or broadcast, so long as so doing is not disruptive or obtrusive. Second, a public body, such as a board of education is not required to record or broadcast its meetings. Third, the term "personnel" merely means "people"; it does not deal in any way with employees of a government agency. The phrase "personnel used to photograph, broadcast, webcast, or otherwise record a meeting" refers to those in attendance who do so; it does not refer to staff or employees of an agency.

Please note that on our home page, at the end of the text concerning recent amendments to the Open Meetings Law, there is a link to model rules designed by the Committee on Open Government to serve as a guide to implementation of the new provision.

I hope that I have been of assistance.

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April 25, 2011

OML-AO-5085

Hon. Gina Bradshaw, Trustee
[redacted]

Hon. Dennis K. Leahy, Mayor
Village of Maybrook
111 Schipps Lane
Maybrook, NY 12543

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 Trustee Bradshaw and Mayor Leahy:

As you know, I have received a request for an advisory opinion from Trustee Bradshaw concerning the propriety of a memorandum that has been characterized as a "confidentiality agreement" that officers and employees of the Village of Maybrook are apparently asked to sign. As is our practice and in an effort to be fair, upon receipt of a request for an opinion, this office sends a copy of the request to the entity of government that is the subject of the matter in an effort to obtain comments. In response to our effort to do so, we received a letter prepared on behalf of Mayor Leahy from Richard B. Golden, the Village Attorney.

Mr. Golden suggested "gently so as not offend, that the request by Ms. Bradshaw for an opinion does not appear to fall with any of the areas with which the Committee has jurisdiction to issue an opinion…" There is no offense taken, and in consideration of the language of the Village Code and the memorandum (the confidentiality agreement) and its potential impact on the ability to disclose records or information acquired during closed meetings, I respectfully disagree with that suggestion.

The agreement that officers and employees are asked to sign refers to §27-4(B) of the Village Code, which provides as follows concerning the responsibilities of those persons:

> "Confidential information: He shall not disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interest."

The agreement states:

> "During the course of your employment with the Village, serving as either an official of the Village or an employee of the Village, you may have access to information that is confidential. This information may not be disclosed, except as permitted or required by law, and in accordance with the Village laws and regulations."

A failure to comply with the Village Code of Ethics could, according to §27-8 of the Code, could result in a fine of up to $250, and suspension or removal from office.

From my perspective, the primary issue involves the meaning and scope of the term "confidential." It is emphasized that in most instances, even when records may be withheld under the Freedom of Information Law or when a public body, such as a village board of trustees, may conduct an executive session, there is no obligation to do so. The only instances, in my view, in which members of a public body are prohibited from disclosing information would involve matters that are indeed confidential. When a public body has the discretionary authority to disclose records or to discuss a matter in public or in private, I do not believe that the matter can properly be characterized as "confidential.

Many judicial decisions have focused on access to and the ability to disclose records, and this office has considered the New York Freedom of Information Law, the federal Freedom of Information Act, and the Open Meetings Law in its analyses of what may be "confidential." To be confidential under the Freedom of Information Law, I believe that records must be "specifically exempted from disclosure by state or federal statute" in accordance with §87(2)(a). Similarly, §108(3) of the Open Meetings Law refers to matters made confidential by state or federal law as "exempt" from the provisions of that statute.

Both the state's highest court, the Court of Appeals, and federal courts in construing access statutes have determined that the characterization of records as "confidential" or "exempted from disclosure by statute" must be based on statutory language that specifically confers or requires confidentiality. As stated by the Court of Appeals:

> "Although we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to

> establish and preserve that confidentiality which one resisting disclosure claims as protection" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

In like manner, in construing the equivalent exception to rights of access in the federal Act, it has been found that:

> "Exemption 3 excludes from its coverage only matters that are:
>
> *specifically* exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) **requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue,** or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.
>
> "5 U.S.C. § 552(b)(3) (1982) (emphasis added). Records sought to be withheld under authority of another statute thus escape the release requirements of FOIA if – and only if – that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure. The Supreme Court has equated 'specifically' with 'explicitly.' *Baldridge v. Shapiro*, 455 U.S. 345, 355, 102 S. Ct. 1103, 1109, 71 L.Ed.2d 199 (1982). '[O]nly *explicitly* non-disclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption.' *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C.Cir.1979) (emphasis added). In other words, a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure"[Reporters Committee for Freedom of the Press v. U.S. Department of Justice, 816 F.2d 730, 735 (1987); modified on other grounds,831 F.2d 1184 (1987); reversed on other grounds, 489 U.S. 789 (1989); see also British Airports Authority v. C.A.B., D.C.D.C.1982, 531 F.Supp. 408; Inglesias v. Central Intelligence Agency, D.C.D.C.1981, 525 F.Supp, 547; Hunt v. Commodity Futures Trading Commission, D.C.D.C.1979, 484 F.Supp. 47; Florida Medical Ass'n, Inc. v. Department of Health, Ed. & Welfare, D.C. Fla.1979, 479 F.Supp. 1291].

In short, to be "exempted from disclosure by statute", both state and federal courts have determined that a statute must leave no discretion to an agency: it must withhold such records.

In contrast, when records are not exempted from disclosure by a separate statute, both the Freedom of Information Law and its federal counterpart are permissive. Although an agency *may* withhold records in accordance with the grounds for denial appearing in §87(2), the Court of Appeals held that the agency is not obliged to do so and may choose to disclose, stating that:

> "...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible

> rather than mandatory language, and it is within the agency's discretion to disclose such records...if it so chooses" (Capital Newspapers, supra, 567).

The only situations in which an agency cannot disclose would involve those instances in which a statute other than the Freedom of Information Law prohibits disclosure. The same is so under the federal Act. While a federal agency *may* withhold records in accordance with the grounds for denial, it has discretionary authority to disclose. Stated differently, there is nothing inherently confidential about records that an agency may choose to withhold or disclose; only when an agency has no discretion and must deny access would records be confidential or "specifically exempted from disclosure by statute" in accordance with §87(2)(a).

The same analysis is applicable in the context of the Open Meetings Law. While that statute authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), again, there is no requirement that an executive session be held even though a public body has the right to do so. The introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public or table the matter for discussion in the future.

Since a public body may choose to conduct an executive session or discuss an issue in public, information expressed during an executive session is not "confidential." To be confidential, again, a statute must prohibit disclosure and leave no discretion to an agency or official regarding the ability to disclose.

By means of example, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. As you may be aware, the Family Educational Rights and Privacy Act (20 USC §1232g) generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing, because a statute requires confidentiality.

In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987). In the context of most of the duties of most municipal boards, councils or similar bodies, there is no statute that forbids disclosure or requires confidentiality. Again, the Freedom of Information Law states that an agency may withhold records in certain circumstances; it has discretion to grant or deny access. The only instances in which records may be characterized as "confidential" would, based on judicial interpretations, involve those situations in which a statute prohibits disclosure and leaves no discretion to a person or body.

The foregoing is not intended to suggest that unilateral disclosure of records that may be withheld under the Freedom of Information Law or of information acquired during a proper executive session is appropriate, wise or ethical. Rather, it is intended to offer an analysis of the meaning of the term "confidential" and to suggest that information that may be withheld, but which is not required by statute to be withheld, is not confidential.

Lastly, I point out that the specific wording of the agreement, whether it is intentional or otherwise, may not be inconsistent with the preceding commentary. It refers to confidential information acquired by Village officers and employees in the course of their duties and states that "This information may not be disclosed, *except as permitted or required by law*." Due to the presence of the term "*permitted*", the agreement might be construed to mean that information that may be withheld is not *required* to be withheld, unless there is a statute that forbids disclosure.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:sb

cc: Richard B. Golden

OML-AO-5086

E-MAIL

From: Freeman, Robert (DOS)
Sent: Tuesday, May 03, 2011 9:28 AM
Subject: RE: FROM KITTY MERRILL IN EAST HAMPTON

Letting Town Board members and the public at large know that vandalism occurred, without additional detail, is, in my view, routine. Considering the matter from a somewhat different perspective, a police blotter entry or equivalent summarizing or referring to an event as vandalism would be accessible under the Freedom of Information Law. However, when the record or discussion involves more detail, and disclosure of the record or public discussion would interfere with a law enforcement investigation, those portions of the record may be withheld, and the equivalent aspect of the discussion could occur during an executive session.

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FOIL-AO-18481
OML-AO-5088

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Wednesday, May 04, 2011 4:00 PM
Subject: RE: Open Meeting Law

Section 106 of the Open Meetings Law requires that minutes be prepared and made available on request within two weeks of the meetings to which they pertain. Although many government bodies post minutes of their meetings on a website, there is no legal obligation to do so. When they choose to do so is within their discretionary authority.

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OML-AO-5089

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Wednesday, May 04, 2011 3:50 PM
Subject: RE: legal meeting question

A "meeting", as that term is defined by the Open Meetings Law, involves a gathering of a quorum (a majority of the total membership) of a public body for the purpose of conducting public business, collectively, as a body. If board upon which the two trustees serve is typical of village boards of trustees, it consists of five members. Two of the five may discuss public business privately, for two would not constitute a quorum. If, however, three members of a five member board gather to conduct/discuss public business as a body the Open Meetings Law would apply.

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

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OML-AO-5090

From: Freeman, Robert (DOS)
Sent: Friday, May 06, 2011 12:32 PM
Subject: RE: Open meetings law Question

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

With respect to the issues that were highlighted, I offer the following comments.

First, it is true that the Committee on Open Government is not empowered to enforce the Open Meetings Law or compel compliance with that statute. As you are aware, however, this office responds to thousands of verbal inquiries and prepares hundreds of advisory legal opinions annually. Although the opinions are not binding, it is our hope that they are educational and persuasive, and that they encourage knowledge of and compliance with law. I note, too, that the courts have frequently cited and relied on our opinions as the basis for their determinations.

Second, I believe that §110 of the Open Meetings Law serves to prevent the outcome that your constituent has suggested.

Subdivision (1) of §110 states that:

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

Stated differently, a local enactment or a regulation promulgated by a state agency cannot diminish or restrict public access in a manner that provides less access than the Open Meetings Law. For example, the Open Meetings Law, §105(1) specifies eight grounds for entry into an executive session. Subdivision (1) essentially nullifies any provision that would add to the grounds for closing meetings. Similarly, §106 requires that minutes of meetings be prepared and made available on request within two weeks of the meetings to which they pertain. Subdivision (1) would invalidate a local enactment, rule or policy stating that minutes will not be available until a month after a meeting or until they are approved.

In contrast, subdivision (2) of §110 states that:

"Any provision of general, special or local law or charter, administrative code, ordinance, or rule or regulation less restrictive with respect to public access than this article shall not be deemed superseded hereby."

Further, subdivision (3) states that:

“Notwithstanding any provision of this article to the contrary, a public body may adopt provisions less restrictive with respect to public access than this article.”

Therefore, a public body by means of a local enactment could require that certain topics be discussed in public, even though §105(1) of the Open Meetings Law would permit an executive session to be held. In like manner, although the Open Meetings Law requires that minutes be prepared and made available within two weeks of meetings, a public body could enact a requirement that minutes be prepared within one week of meetings. Those kinds of provisions would be “less restrictive with respect to public access” than the Open Meetings Law and would remain in effect, notwithstanding related elements of the Open Meetings Law.

I hope that the foregoing serves to clarify understanding of the Open Meetings Law and that I have been of assistance. If you would like to share this opinion, please feel free to do so as you see fit.

Sincerely,
Bob Freeman

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FOIL-AO-5091
E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Monday, May 09, 2011 9:16 AM
Subject: RE: work sessions/executive sessions

The term "work session" is not found in law and is essentially a fiction. As you are likely aware, it was determined by the Court of Appeals years ago in a case involving so-called "work sessions" that any gathering of a quorum of a public body for the purpose of conducting public business, collectively, as a body, constitutes a "meeting" subject to the Open Meetings Law, irrespective of the absence of an intent to take action, and regardless of the means by which the gathering is characterized.

In short, for purposes of compliance with the Open Meetings Law, there is no distinction between a work session and a regular meeting. Both must be preceded by notice, both must be convened and conducted open to the public, except to the extent that a proper executive session is held during the gathering.

If you would like to discuss the matter, please feel free to call.

Best,
Bob

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OML-AO-5092

E-MAIL

From: Jobin-Davis, Camille (DOS)
Sent: Monday, May 09, 2011 3:56 PM
Subject: Open Meetings Law - public participation

Thank you for your email of April 24, 2011. In response, please note our online opinions regarding “Public Participation, Non-Resident” at the following link: http://www.dos.state.ny.us/coog/oml_listing/op.html You may also wish to review opinions offered under “Public Participation.”

This will confirm, in keeping with the analysis offered in those opinions, that it is our opinion that a public body could not restrict persons from speaking at a public meeting based on their employment status with the agency.

Camille

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May 11, 2011

OML-AO-5093
E-Mail

TO: John R. Kelch, 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 facts presented in your correspondence.

Dear Mr. Kelch:

We are in receipt of your requests for an advisory opinion regarding application of the Open Meetings Law to certain gatherings of the Burnt Hills-Ballston Lake School Board. Over the course of the past few months you have raised various issues, the first of which involved a public body's responsibility "to provide amplification so that the public could hear the meeting". In response to this issue, the Superintendent wrote: "Since January we have provided at least one microphone for Board use at all of our meetings (We have ordered a multi-pack unit for future use.) I am curious, however, what your perspective would be on any Board's need to accommodate the various hearing abilities of potential public attendees" (copy attached).

In this regard, 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. According to this provision, ever public body must situate itself and conduct its meetings in a manner in which those in attendance can observe and hear the proceedings. To do otherwise would in our opinion be unreasonable and fail to comply with a basic requirement of the Open Meetings Law.

When a person in attendance at a public meeting has difficulty hearing the deliberations, it may be due to inadequate projection by Board members, the acoustics in a particular room, the hearing ability of the person, or a combination of these factors and more. Based on the intent of the Open Meetings Law, we believe that if the normal volume of the Board members' voices is inadequate for the average attendee, the Board has a responsibility to use appropriate amplification devices. In other words, we believe that every public body has a responsibility to behave in a reasonable manner in light of the abilities and limitations of those in attendance.

The second issue involves documents that are presented to the Board immediately prior to the meeting, and the votes thereon. You wrote, "During the meetings, these matters are often decided by a simple 'motion to adopt the recommendations of [xxxx party]' without any discussion or public disclosure of the substance of the matter. Further, when minutes are finally publicly posted, they frequently include no further detail of the matters adopted nor attachment of the afore-mentioned documents for clarification of such adopted motions."

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

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

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

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 School Board members), 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 School Board. Most importantly, minutes must be accurate.

As you described the matter, the adoption of recommendations that were transmitted to the School Board in our view represents action taken by the School Board that must be adequately memorialized in minutes. Minutes that indicate that a recommendation was adopted, without any information about the content or substance of the recommendation, in our opinion, would be inadequate. 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, 173 AD2d 1064, 570 NYS2d 402 (1991)]. Attaching the recommendation that was adopted or incorporating it into the minutes in this instance, in our opinion, would be appropriate.

In response to this issue, the Superintendent clarified that when minutes are posted online, "the online version of the minutes is provided as a courtesy and does not include all the background documentation, but that documentation is available for him to review in person or to request a copy thereof." In our opinion, although it is not required by Law, it is a logical step for the School Board to post its minutes online. Not only does it save the District administrative time, it permits the public to access such information without delay. Therefore, if the minutes that the District places online are in some way incomplete, or fail to adequately capture sufficient details regarding a particular vote, in our opinion, it would be appropriate for the District to amend its practice and provide adequate documentation. While we would not discourage posting "background materials" in our opinion, most important is the adequacy of the information regarding the action taken.

Finally, although you did not raise the issue in your correspondence, the District noted that it has recently begun providing expanded agendas, with short explanations for each item, to all attendees, and online at least 72 hours before each meeting. The District is now also providing a notebook with supporting documents for review at each meeting.

Although there is no requirement in the Open Meetings Law that a public body prepare an agenda, we note that in previous years the Committee has recommended that records

discussed at meetings should generally be made available prior to or at public meetings, and when possible posted online prior to the meeting. Please see the history of our recommendation in our 2010 Annual Report to the Governor and the State Legislature on page 13 at the following link: http://www.dos.state.ny.us/coog/pdfs/2010AnnualReport.pdf. Also, please note that such proposal was passed by the Assembly on March 14, 2011, and has been delivered to the Senate.

We hope that this is helpful to you.

CSJ:sb

Enc.

cc: John Blowers
Jim Schultz

STATE OF NEW YORK
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May 11, 2011

OML-AO-5094
Jim Brady
[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. Brady:

We are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to certain proceedings of the Olean City Council. Before we set forth relevant circumstances and offer our opinion, we emphasize that this office has statutory authority to offer advice and counsel regarding application of the Freedom of Information Law and the Open Meetings Law. Only a court has the authority to determine whether a "violation" of Law occurred, and if we communicated to you that the City Council "violated" the Open Meetings Law, that was our error. 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.

You request for our opinion includes specific information received from the Council President, as follows:

> "Historically, the incoming Council members have gathered in Rm. 119 prior to the Annual Meeting. This is not considered a regular meeting and is handled in a similar way as our Pre-Council meetings that are held between the Committee of the Whole and Regular Council meeting on the 2nd and 4th Tuesdays of each month, although there have been times when we have skipped this Pre-Council due to time constraints. Since no business takes place, the officials & media have traditionally not participated. There is no agenda, as we briefly do a quick run-

> through of the Regular Council Meeting agenda and answer any questions or concerns from those present." Email 1/1/2011

In her response on January 28, 2011, the Mayor submitted that there was no meeting held prior to the Annual Meeting (copy attached). She explained that it was cancelled by the Council President, who notified only those members who indicated their intention to attend.

In this regard, we note that 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 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 Council members gathers to conduct public business, any such gathering would, in our opinion, constitute a "meeting" subject to the Open Meetings Law. On the other hand, when less than a quorum is present, the Open Meetings Law would not apply. Further, when there is an intent to conduct a meeting, the gathering must be preceded by notice given pursuant to §104 of the Open Meetings Law, convened open to the public and conducted in public as required by the Open Meetings Law.

In this regard, the Open Meetings Law is applicable to meetings of public bodies, such as the Olean City Council, and §102(2) of the Open Meetings Law defines the phrase "public body" to include:

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

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

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, gathered together in the presence of each

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

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

Next, separate from the notice requirement involving the members of a public body and §41 of the General Construction Law, §104 of the Open Meetings Law provides that:

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

With respect to competing interpretations of Roberts Rules of Order, we note that Roberts Rules of Order is not law and is not always clear. While we agree that a public body has the inherent authority to determine the rules of its procedure, it is the responsibility of a mayor or council president, as the case may be, to preside at meetings. Accordingly, we advise that the Council could amend its bylaws if it is necessary to do so.

Finally, a 2008 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. The new provision states that when it is found by a court that a public body voted in private "in material violation" of the law "or that substantial deliberations occurred in private" that should have occurred in public, the court "shall award costs and reasonable attorney's fees" to the person or entity that initiated the lawsuit. The intent of 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.

We hope that you find this helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb
Enc.
cc: Mayor Witte

FOIL-AO-18490
OML-AO-5095

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Monday, May 16, 2011 1:10 PM
Subject: RE: Open Meeting Law

First, although comments offered by the public during an open meeting may be included in minutes of the meeting, there is no requirement that they must be included. The Open Meetings Law, §106, provides minimum requirements concerning the contents of minutes. At a minimum, they must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of the members. They may, but need not, include additional information.

Second, if a government body records its meetings, a recording of an open meeting is, according to the language of the Freedom of Information Law and judicial precedent, accessible to the public. I note, too, that any person present at a meeting may record the proceedings, so long as the use of recording equipment is not disruptive or obtrusive.

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

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OML-AO-5096

May 17, 2011

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 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 a gathering of the City of Rome Civil Service Commission. Specifically, attached to your request was a notice from the Commission announcing that "[a]t a special conference call meeting on January 19, 2011, the Rome Civil Service Commission has approved the lateral transfer" of a named employee. The notice further indicated that "complete paperwork will be formally included in the minutes of the February 8, 2011 Commission Meeting." You wrote that notice of this meeting was not posted or published in the newspaper, and asked whether the Commission had "violated" the Open Meetings Law.

First, please note that only a court can make a determination whether a gathering is "illegal" or whether there has been a "violation" of the Open Meetings Law. While the Committee on Open Government is authorized to issue advisory opinions concerning application of that law, this office has no authority to enforce the law or compel an entity to comply with its statutory provisions. It is our hope that these opinions are educational and persuasive, and that they serve to resolve problems and promote understanding of and compliance with the Law.

Second, based on the language of the Open Meetings Law and judicial precedent, a member of a public body may not vote by phone.

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

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

As amended in 2000, §102(1) of the Open Meetings Law defines the term “meeting” to mean “the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body.” Based upon an ordinary dictionary definition of “convene”, that term means:

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

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

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

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

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

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

Based on the foregoing, again, voting and a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties. Consequently, it is our 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..."

On another occasion 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)].

With respect to issues related to notifying the public of a meeting, we note that there is no requirement that notice of a meeting be published in a newspaper. 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 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.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb
cc: Dawn E. Andrews
Patricia Reidel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

Committee Members

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May 17, 2011

OML-AO-5097
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 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 a discussion held in executive session by the Rome City School Board. Specifically, you indicated that a discussion was held in executive session in which the "superintendent then went around the table asking each member how they would vote" with respect to a proposed resolution to extend a particular employee's contract and accompanying letter. Later, you indicated "[t]here was no motion to go back into the public session and we proceeded to go into the room where the public session was held with no members of the public present and the recording instruments were gone."

In response, attorneys for the District indicated that the administrator's employment history, or "job performance", was the subject of discussion at the aforementioned executive session, in keeping with the provision of Open Meetings Law §105(1)(f). In support of its position that discussion of the possible renewal or extension of an employment contract is appropriate in executive session, the firm relied on language provided by this office in OML-AO-2459, in which it was advised that "insofar as the Board focused on particular administrators and their performance (i.e., whether a particular administrator merited an increase based on performance and, if so, how much), I believe that an executive session could properly have been held." A copy of the District's response is enclosed (March 3, 2011).

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

In our view, if what you indicate is accurate, and each board member was required to indicate how s/he would vote on the resolution, we believe that any such action could properly have been taken only during an open meeting.

This will confirm our opinion, as expressed in our written opinion to you of the same date, that it is permissible to discuss a person's job performance in executive session pursuant to §105(1)(f) of the Open Meetings Law, and that a determination regarding whether a particular person's contract should be renewed or extended, must be made in public. Again, as a practical matter, in our opinion it would be difficult, if not impossible, for a board member to express appreciation for the work of another and satisfaction with the person's job performance without indicating by attitude, if nothing else, whether s/he would approve the renewal or extension of that person's contract. We must always caution, however, as we did in OML-AO-2459, that a school board cannot vote during an executive session, except in rare circumstances in which a statute permits or requires such a vote.

With respect to whether the public and/or the "recording instruments" are present in the room to which the public body returns after an executive session, as you are likely aware, there is

no requirement that a public body record its proceedings. Unless there is an express indication made that the public body will move to enter into executive session and adjourn immediately thereafter, would there be an issue, in our opinion, with a public body returning to public session after an executive session.

Finally, it is not necessary, in our opinion, to take a roll call vote in order to close an executive session; when a quorum of board members leave a room, the meeting, or that portion of the meeting has essentially ended.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb

Enc.
cc: Patricia Reidel
cc: Henry Sobota

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 17, 2011

OML-AO-5098
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 facts presented in your correspondence.

Dear Mr. Sallustio:

We are in receipt of your requests for advisory opinions regarding application of the Open Meetings Law to certain gatherings of the Rome City School Board. Specifically, you raised questions regarding discussions held in executive sessions and proper notice for a special meeting.

With respect to executive sessions, you requested clarification, expressing your concerns that the discussion within the executive sessions may have strayed beyond that which is permissible. In particular, the motion for entrance into executive session was to discuss the employment history of a particular person, and the conversation included "'cheer leading' involving what a good job the person was doing". You indicated that "the real reason for the session was to try to get the board's consensus on approving a new contract for this person, a contract I was not aware was being negotiated by the superintendent, or extending of this person's current contract."

In response, attorneys for the District indicated as follows: "During the executive session, the Superintendent and most Board members expressed the view that the administrator's job performance had been competent, efficient and faithful, and that the agreement should therefore be renewed." The firm relied on the language provided by this office in OML-AO-2459, in which it was advised that "insofar as the Board focused on particular administrators and their performance (i.e., whether a particular administrator merited an increase based on performance and, if so, how much), I believe that an executive session could properly have been held." A copy of the District's response is enclosed (February 7, 2011).

This will confirm our opinion, as expressed in OML-AO-2459 (enclosed), that a discussion in executive session "involving what a good job a person was doing" is appropriate pursuant to the above provision, and that a determination regarding whether a particular person's contract should be renewed or extended, must be be made in public. Building on the analysis provided in the above referenced opinion,

as a practical matter, in our opinion it would be difficult, if not impossible, for a board member to express appreciation for the work of another and satisfaction with the person's job performance without indicating by attitude, if nothing else, whether s/he would approve the renewal or extension of that person's contract. We must always caution, however, as we did in OML-AO-2459, that a school board cannot vote during an executive session, except in rare circumstances in which a statute permits or requires such a vote.

With respect to the timing of notice of a special meeting, you received hand-delivered notice of such meeting "to consider a motion to enter executive session to discuss legal issues with counsel and the employment history of a particular person" two days prior to the meeting. You indicated "the limited legal subject matter noted on the notice does not appear to be informative enough to justify going into executive session" and raised issues regarding the timeliness of the delivery and the posting on the website. The District's attorney, present at the gathering, indicated that the conversation was limited to that which is confidential pursuant to the attorney-client privilege, in reliance on an advisory opinion from this office, OML-AO-4622 (copy enclosed). The attorney also provided further information regarding the special meeting, characterizing it as an emergency meeting and providing further information regarding the timing of the notice sent to the media.

This will confirm our opinion, as expressed in OML-AO-4622, that insofar as a public body seeks legal advice from its attorney and the attorney renders legal advice, we believe that communications made within the scope of the privilege would be exempt from the Open Meetings Law.

Further, we note that the Open Meetings Law requires only notice of the time and place of a meeting. While many public bodies provide information regarding the general topic for the gathering within the notice, and/or publish agendas prior to a meeting, it is not required by Law.

Finally, with respect to notice of special or emergency meetings, we note that meetings scheduled less than one week in advance require notice to be given "as soon as practicable". Please note the information contained in the enclosure entitled "Notice."

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb

Enc.
cc: Henry Sobota
Patricia Reidel

OML-AO-5099

From: Jobin-Davis, Camille (DOS)
Sent: Friday, May 20, 2011 4:42 PM
Subject: RE: Open Meetings Law - mandatory use of executive session to review appointments
Attachments: 1604_001.pdf

This is in response to your April 4, 2011 email (copy attached) and pursuant to our telephone conversation.

With respect to any kind of requirement that a public body consider an issue in executive session or in public session, I emphasize that the Open Meetings Law gives a public body the discretionary authority to enter into executive session for limited purposes. And, 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.

Accordingly, when there is a resolution or by-law adopted requiring that certain discussions take place in public session which the public body may have the authority to discuss in executive session, or requires the public body to discuss certain issues in executive session, I would caution that such requirements would not override the discretionary authority granted to all members of a public body to cast his or her vote in favor or against entrance into an executive session.

Related advisory opinions may be found online, through our index of Open Meetings Law opinions, under "E" for "Executive Session" and more specifically with respect to your concerns, under "I" for Interviews, "V" for Vacancy in Elective Office, and "P" for "Personnel".

I hope that you find this helpful.

Camille

Camille S. Jobin-Davis, Esq.
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FOIL-AO-18499
OML-AO-5100

E-MAIL

From: Freeman, Robert (DOS)
Sent: Wednesday, May 25, 2011 10:51 PM
Subject: RE: FOIA & Public Meeting Questions

Thanks for the kind words.

Your assumption regarding the obligation of an agency to be more precise in its acknowledgement of the receipt of a request is correct. An agency would not be complying with law merely by indicating that an applicant will be notified "when the information is ready." Section 89(3)(a) of the Freedom of Information Law requires that an acknowledgement of the receipt of a request include an approximate date, typically not in excess of 20 additional business days, indicating when a request will be granted in whole or in part. The same provision states that the approximate date must be reasonable in consideration of the facts and circumstances. If an agency fails to respond to a request in any manner within five business days of the receipt of the request or fails to provide an approximate date, the applicant may consider the request to have been denied. In any instance in which there is a denial, whether in writing or due to a failure to respond properly, he/she has the right to appeal. An appeal may be made to the head or governing body of the agency or person designated to determine appeals by that person or body.

To obtain a more expansive description of the time limits for responding to requests and appeals, see "Issues of Interest" on our home page. At the bottom is a link to a detailed explanation.

With respect to notice of meetings, first, it was held years ago that a "meeting" is a gathering of a quorum (a majority) of a public body for the purpose of conducting public business, regardless of the absence of the intent to take action or the means by which the gathering is characterized. Second, section 104 of the Open Meetings Law requires that notice of the time and place of every meeting must be given to the news media, by means of posting in one or more designated, conspicuous public locations, and when an agency has the ability to do so, on its website. If a meeting is scheduled at least a week in advance, notice must be given not less than 72 hours prior to the meeting. If it is scheduled less than a week in advance, notice must be given "to the extent practicable" at a reasonable time prior to the meeting.

The full text of the Open Meetings Law is available on our website by clicking on to "Laws and regulations."

I will be out of the office for approximately a week. However, in my absence, you may contact our Assistant Director, Camille Jobin Davis camille.jobin-davis@dos.state.ny.us or phone (518)474-2518.

I hope that I have been of assistance. Also note that I am tentatively

scheduled to conduct a public forum on the Freedom of Information and Open Meetings Laws in Madison County during the last week of September.

OML-AO-5101

3-MAIL

From: Jobin-Davis, Camille (DOS)
Sent: Friday, May 27, 2011 2:31 PM
Subject: Open Meetings Law - notice

We are in receipt of your correspondence dated May 20, 2011, in which you asked whether “towns can get away with holding important meetings without alerting the media?”.

In response, please note that 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 scertain

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.

I hope that you find this helpful. Should you have further questions, please advise.

Camille

Camille S. Jobin-Davis, Esq.
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OML-AO-5102

From: dos.sm.Coog.InetCoog
Sent: Tuesday, May 31, 2011 3:36 PM
Subject: RE: Job Interviews - open meeting

Interviews between candidates for positions of public employment and a majority of the members of a public body such as a village board or a school board may be conducted in executive session. Please see the analysis
contained in the advisory opinion at the following link:

http://www.dos.state.ny.us/coog/otext/o2850.htm

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OML-AO-5103

E-MAIL

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, May 31, 2011 3:55 PM
Subject: RE: Please can you comment, please see below...
Jean,

In direct response, yes, a public body may discuss current and possible litigation in executive session; however, there are circumstances when it is not permitted to do so. For clarification, I recommend that you please read opinions on our online OML index, under “L” for “Litigation”. In sum, if there is pending litigation the case name must be given, if the board is considering taking legal action against an entity, naming the entity is not necessary, but if the discussion concerns an issue that “might become the topic of a lawsuit”, or if a decision “could result in action taken against the public body” such discussion is not a ermissible topic for executive session. Again, I recommend that you take a look at the advisory opinions – the above analysis is very simplistic.

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OML-AO-5104
FOIL-AO-18504

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Tuesday, May 31, 2011 4:07 PM
Subject: RE: Open Meeting Law

I'm sorry that I'm not being clear -- Once the recording exists, it is a record, subject to FOIL and you can request a copy at any time. Perhaps the two week provision that you are referring to is the one during which minutes must be prepared? If so, there is no such time frame associated with access to a copy of the recording --it would exist as soon as the meeting has concluded.

On the other hand, if you would prefer to listen to it before you pay for a copy to be made, and the agency has the ability to play it for you at the office, then you could request to listen to it at the office.

Hope it helps -

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FOIL-18501
OML-O5106

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Tuesday, May 31, 2011 2:34 PM
Subject: RE: Tape recording Board meetings

If tape recordings are generated by a public body, they are "records" subject to both the Freedom of Information Law and records retention schedules promulgated by NYS Archives. Accordingly, should the agency receive a request for a copy of a recordiNg of a public meeting, it would be required to be disclosed, and the agency could charge the actual costs for reproducing such record. Typically, recordings are made in order to assist the clerk in the preparation of the minutes. Pursuant to the schedules promulgated by NYS Archives, a recording of a public meeting is only required to be kept for a period of 4 months from the date of the meeting, although an agency could keep a recording for as long as it wished.

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OML-AO-5107
VIA E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Thursday, January 13, 2011 9:20 AM
Subject: RE: Public meetings
Attachments: O2696.doc

Because the Open Meetings Law specifies that meetings are open to the general public, it has been advised that all who attend should have an equal opportunity to speak, irrespective of their residence. Attached is an opinion that deals with that issue I detail. Also, that law was recently amended, stating that: "Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in an appropriate facility which can adequately accommodate members of the public who wish to attend such meetings." Therefore, if it is common for there to be more people who seek to attend than the meeting room will accommodate, and if there is an alternate location that would accommodate those interested in attending, efforts must be made to conduct the meeting in that latter location.

I hope that I have been of assistance.

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OML-AO-5108

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Thursday, June 02, 2011 2:34 PM

Subject: RE: town law violation

The Open Meetings Law requires that all actions of a town board be taken in open session, with notice to the public of the time and place of the meeting, minutes, etc. Although members of a public body are permitted to attend meetings and vote by videoconference, they are not permitted to attend or vote by telephone.

Further, in my opinion, when action by a town board is required with respect to authorizing a purchase, such authorization must be granted during the course of a public meeting.

Related advisory opinions may be found online on our Open Meetings Law advisory opinions index (http://www.dos.state.ny.us/coog/oml_listing/oindex.html) under “T” for “Telephone voting.”

I hope that this is helpful.

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OML-AO-5109

E-MAIL

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, June 02, 2011 2:50 PM
Subject: RE: Open Meetings Law

Setting goals, discussing individual evaluations and salaries, in my opinion, are all discussions regarding the business of the board, and would be required to be held during a properly noticed public meeting. There may be a basis to enter into executive session for a portion of that meeting, but nonetheless, a public meeting would be required to be held if a majority of the board were discussing board business.

Retreats may be held, provided that the topics discussed are generic to all boards of supervisors, or all public bodies. Please see online advisory opinions regarding Open Meetings Law issues under “R” for “Retreat”.

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OML-AO-5110

E-MAIL

From: dos.sm.Coog.InetCoog
Sent: Thursday, June 02, 2011 3:02 PM
Subject: RE: Meetings and voting

There was an amendment to section 102 of the Open Meetings Law in 2000 regarding the authority of board members to be present and vote by videoconference, but the statute does not permit voting or being counted for quorum purposes if a member participates by telephone conference.

Please see our online advisory opinions regarding Open Meetings Law under "T" for "Telephone Voting".

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OML-AO-5111

E-MAIL

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, June 07, 2011 10:28 AM
Subject: RE: Question on Open Meetings Law

The OML does not permit voting by email or telephone conference call. Please take a look at the language of section 102 – when a board member cannot be physically present, the statute only allows videoconferencing. In my opinion “electronic means consistent with OML” would mean videoconferencing – simultaneous audio and visual, through which the public can see and hear the board member and the board members can see and hear each other.

I hope that clarifies –

Camille

for quorum and voting purposes of members of public bodies via videoconferencing (not telephone conferencing). We have issued many advisory opinions, located online under "T" for "Telephone voting".

There are also a number of related opinions under "E" for "Email Meeting or Voting".

Can you forward a copy of the bill?

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OML-AO-5113

E0MAIL
From: Jobin-Davis, Camille (DOS)
Sent: Thursday, June 09, 2011 9:41 AM
Subject: Open Meetings Law - public body

Sarah,
Based on the language of section 760-220, I think the Board of Review is a public body subject to all of the requirements of the Open Meetings Law, except, as we discussed earlier, I believe that it has the authority to deliberate in private because it is a quasi-judicial entity (section 108). To clarify, while it likely has the authority to deliberate in private, the Board, like all public bodies, is required to make its decisions, i.e., vote, in public, in keeping with the Open Meetings Law. Taking action by email is not permitted pursuant to the Open Meetings Law.
Paragraph (2) of section 760-220(2) states that "Such board shall consist of not less than three nor more than twenty persons, three of whom shall be designated to hear and report each appeal…". In my opinion, this leaves a lot of room to maneuver – who designates? When?
I also note paragraph (5), in which the Board's decision stands unless the Commissioner reverses or modifies within three days after the filing of the Board's decision. Perhaps this would explain the information you received, about a Board decision being essentially overturned later.?
There is case law, and I can provide legal analysis for my opinions, above – please let me know if that would be helpful.
Camille

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OML-AO-5114

E-MAIL

From: Freeman, Robert (DOS)
Sent: Thursday, June 09, 2011 10:47 AM
Subject: RE: Open meetings

Your letter raises several issues.

First, the Board, in a technical sense, cannot "schedule" an executive session in advance of a meeting. As you know, a motion to enter into executive session must be made during an open meeting, and the motion must be carried by a majority vote of the total membership. Because it cannot be known with certainty that a motion will be approved, it has been advised by this office and held judicially that executive sessions cannot be scheduled in advance.

Second, the only reference to "negotiations" in the Open Meetings Law appears in §105(1)(e), which pertains to collective bargaining negotiations involving a public employee union. However, depending on the nature of the discussion, §105(1)(f), the so-called "personnel" exception (even though that term does not appear anywhere in the eight grounds for entry into executive session), might apply. That provision permits a public body to conduct an executive session to discuss "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation". The issue that you described might involve consideration of the employment history of or a matter leading to the employment of a particular person or corporation, in which case an executive session could properly be held. A motion to discuss negotiations, however, would not be sufficiently descriptive to enable the public to know that there may be a proper basis for conducting an executive session.

It has been suggested on many occasions that in instances in which the propriety of a proposed executive session is questionable, you or someone else

might share a copy of §105(1) of the Open Meetings Law, which lists the eight grounds for entry into executive session, with a public body, and ask which of the grounds might apply.

Third, it was held thirty years ago by the Appellate Division, Second Department, that §105(1)(d), the "litigation" exception for executive session, is intended to enable a public body to discuss its litigation strategy in private, so as not to divulge its strategy to its adversary. One of the decisions involved a situation in which a town board invited its adversary in litigation to discuss the possibility of a settlement. The Court found that once the adversary joins the discussion, the board loses its ability to conduct an executive session [see Concerned Citizens to Review the Jefferson Mall v. Town Board of the Town of Yorktown, 84 AD2d 612, appeal dismissed, 54 NY2d 957 (1981)].

In an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this response is being sent to the Town Attorney.

I hope that I have been of assistance.

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OML-A0-5115

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, June 08, 2011 3:11 PM
To: 'Sarah Crichton'
Subject: Newsday inquiry

Sarah,
It's important to establish how the review board was created and what authority it has – it is the threshold issue upon which I would base my opinion about whether the Open Meetings Law applies -
-
If the Board was created by law, and has authority to act on behalf of the Commissioner, it is likely a public body, subject to Open Meetings Law. If it is required to give advice before the Commissioner takes action, i.e., if the Commissioner must receive the advice before taking action, then there is case law to suggest that it is also, likely, a public body subject to Open Meetings Law. If it was not created by law, and is some sort of ad hoc entity with no real authority, and the Commissioner asks for their advice but retains the authority to make the decision, then it's likely it is not a public body, not subject to Open Meetings Law.There is one unusual judicial decision in which a court held that an advisory body was a public body and was therefore subject to the Open Meetings Law because the advice of the committee was "adopted and carried out without exception". Syracuse United Neighbors v. City of Syracuse, 437 NYS2d 466, 80 AD2d 984, appeal dismissed, 55 NY2d 995 (1982) --My legal research reveals nothing in state or county law regarding the board of review. Case law involving the Board of Review/County Dept of Health Services does not clarify this issue. Because I have so far been unable to determine whether the board of review is a public body, I have to advise that if it is only an advisory body, with no power to take action or authority to make determinations, it is likely not a public body and not subject to the Open Meetings Law. In the event
that you are able to unearth additional information regarding the board's authority, please let me
know and I will revisit.
Camille
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VIA E-MAIL
OML-AO-5116

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, June 21, 2011 10:48 AM
Subject: RE: Open Meetings Law

Because the identity of the person about whom the personnel action is taken is
not always required to be made public at the time of the meeting, i.e., it would be an unwarranted invasion of personal privacy for the public to hear of
an employee's discipline before the employee heard... it is not always necessary to identify the person at the time of the meeting. The minutes, however, in my opinion, should include such information, when it would not cause an unwarranted invasion of personal privacy, based on Mitzner v. Sobol,
in which the court required more than a "bare bones" resolution.

The following are related (and short) advisory opinions applying Mitzner:

http://www.dos.state.ny.us/coog/otext/o2582.htm

http://www.dos.state.ny.us/coog/otext/o2477.htm

http://www.dos.state.ny.us/coog/otext/o3773.htm

See also:

http://www.dos.state.ny.us/coog/otext/o3267.htm

In my opinion, attaching a copy of those items that were approved to the minutes, would be in keeping with law.

Camille

VIA E-MAIL
OML-AO-5117

From: dos.sm.Coog.InetCoog
Sent: Thursday, June 23, 2011 11:04 AM
To:
Subject: RE: Meeting minutes

Recording a meeting and creating minutes are two separate functions and I want to make sure that I understand your question correctly. If you record your meetings on the laptop and are capable of making a duplicate copy of the recording, under FOIL, the agency would be required to do so in response to a request. There are times when a duplicate copy can only be made by placing a recording device next to the machine that plays the recording. On the other hand, if it is stored digitally in a laptop, perhaps the file can be emailed to the applicant. If the agency does not own a second recording device, or there is no way to make a duplicate recording, we recommend that you allow the applicant to listen to the recording or make a recording of his/her own, by placing his/her own recording device next to the laptop while it is playing.

Minutes of every meeting must be created, regardless of whether the agency keeps a recording.

Please let me know if you have further questions.

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VIA E-MAIL

OML-AO-5118
From: Jobin-Davis, Camille (DOS)
Sent: Thursday, June 23, 2011 4:46 PM
To: Subject: New York State Law - meeting room size

Thank you for your voice mail message and I'm sorry that it's taken me so long to reply. We're an office of two, and the Exec Director is out this week so things are a bit backed up.

In response, please note Section 103(d) of the NYS Open Meetings Law, which was added to the Law in April of 2010:

"(d) Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in an appropriate facility which can adequately accommodate members of the public who wish to attend such meetings."

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 indications 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.

Accordingly, if the public body can reasonably expect one or two hundred people to attend the meeting, as in your example, based on information from various media outlets and communications

with the public, it would have a responsibility to take reasonable efforts to hold the meeting in a
location that could reasonably accommodate the attendees.

Hope it helps –

Camille

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VIA E-MAIL

OML-AO-5120

From: dos.sm.Coog.InetCoog
Sent: Wednesday, June 08, 2011 1:19 PM
To: 'Lori Murphy'
Subject: RE: Civic Associations

The Open Meetings Law applies to governmental bodies. Civic associations, because they are not government, fall beyond the coverage of that law.

Whether meetings of a civic association can be recorded would, in my opinion, be a matter that could be determined by its governing body or via its by-laws.

I hope that I have been of assistance.

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VIA E-MAIL

OML-AO-5121

From: dos.sm.Coog.InetCoog
Sent: Wednesday, June 08, 2011 1:10 PM
Subject: RE: meeting notice

I apologize for getting back to you so late - - I was on vacation, and you can tell your mom that it involved babysitting for a new grandchild.

With respect to the issue, first, under §104 of the Open Meetings Law, when a meeting is scheduled at least week in advance, notice of the time and place must be given not less than 72 hours prior to the meeting. When a meeting is scheduled less than a week in advance, notice must be given "to the extent practicable" at a reasonable time prior to the meeting.

Second, the notice requirement is now three-fold. Notice must be given to the news media, by means of posting in one or more designated, conspicuous public locations, and when an entity has the ability to do, on a website.

With regard to your question, unless it is not "practicable" to do so, notice of a meeting must be posted to comply with law.

Hope this helps.

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VIA E-MAIL

OML-AO-5122

From: Freeman, Robert (DOS)
Sent: Wednesday, June 29, 2011 8:18 AM
To: 'Clerk of Board'

Good morning - -

While the Open Meetings Law requires that minutes be prepared and made available on request within two weeks, whether they are draft or approved, there is no requirement at this time that they be posted on your website. A government agency may choose do so at any time.

I hope that I have been of assistance.

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VIA E-MAIL

OML-AO-5123

From: dos.sm.Coog.InetCoog
Sent: Wednesday, June 29, 2011 8:38 AM
Subject: RE: NYC Department of Health meeting 6/21/11
Attachments: o4237.wpd

While this office does not have the authority or resources to conduct investigations, I point out that §103(d) of the Open Meetings Law was recently amended to require that "Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in an appropriate facility which can adequately accommodate members of the public who wish to attend such meetings." That new provision reflects the advice of this office and judicial precedent, both of which appear in the attached opinion.

It is also noted that although the Open Meetings Law provides a right to attend meetings of public bodies, it is silent with respect to the ability of the public to speak or ask questions during meetings. Many public bodies authorize limited public participation, and it has been recommended in those instances that they do so through the adoption of reasonable rules that treat members of the public equally. However, there is no obligation to permit the public to speak, nor is there a requirement that members of public bodies respond to questions.

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

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June 30, 2011

OML AO 5124
E-Mail

TO: Warren Gross

FROM: Camille S. Jobin-Davis, Assistant Director

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

Dear Mr. Gross:

Thank you for your thoughts and questions regarding transparency and open government initiatives and practices in New York. We appreciate your attention to these matters and, to the extent that it is helpful, offer our assistance and guidance.

The Committee on Open Government is responsible for overseeing the implementation of the Freedom of Information Law and the Open Meetings Law. It is comprised of 11 members, 5 from government and 6 from the public. The five government members are the Lieutenant Governor, the Secretary of State, whose office acts as secretariat for the Committee, the Commissioner of General Services, the Director of the Budget, and one elected local government official appointed by the Governor. Of the six public members, at least two must be or have been representatives of the news media.

The Freedom of Information Law directs the Committee to furnish advice to agencies, the public and the news media, issue regulations concerning the procedural implementation of that law, and report its observations and recommendations to the Governor and the Legislature annually. Similarly, under the Open Meetings Law, the Committee issues advisory opinions, reviews the operation of the law and reports its findings and recommendations.

When questions arise under either the Freedom of Information Law or the Open Meetings Law, the Committee can provide written or oral advice and attempt to resolve controversies in

which rights may be unclear. All responsibilities for providing advice have been delegated to the staff of the Committee, and since its creation in 1974, nearly 24,000 written advisory opinions have been prepared at the request of government, the public and the news media. In addition, several hundred thousand oral opinions have been provided by telephone.

With respect to enforcement, only a court can make a determination whether a response is “illegal” or whether there has been a “violation” of the Freedom of Information Law. It is our hope that the opinions are educational and persuasive, and that they serve to resolve problems and promote understanding of and compliance with the law.

The staff currently consists of two people: Robert Freeman, Executive Director, and myself. Last year, we issued 572 written opinions and answered approximately 6,000 telephone inquiries in addition to giving 90 presentations, the most in its history in any given year. Thousands received training and education through those events, and countless others benefitted from the use of the Committee’s training video online, as well as materials posted on the website.

You indicated your concern regarding “Wikileak and other sad, tragic events”, “many bloggers and negative columnists cite Open Meetings Laws, etc. as a blank check to attend most any meeting and often disrupt the flow of governance.” You wrote that in a recent newspaper article it was observed that “meeting with (City Council) and a prominent developer is an obvious intent to skirt the Open Meetings Law” and “This to me seems to presume the City Council is skirting the law for selfish political purposes instead of likely working through some important business arrangements that are best served in private negotiations until there is something to inform the public.”

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

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

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

> decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).
>
> The court also dealt with the characterization of meetings as "informal," stating that:
>
> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

It has also been held that "a planned informal conference" or a "briefing session" during which a quorum of a public body attended and functioned as a body constituted a "meeting" that fell within the coverage of the Open Meetings Law, even though the members were invited to attend by a non-member [see Goodman-Todman v. Kingston, 153 AD2d 103 (1990)].

In sum, assuming that at least a majority of the members of the City Council gathers with the “prominent developer” or any other person or group for the purpose of discussing matters within the jurisdiction of the Council, collectively, as a body, we believe that such gathering, based on the judicial interpretation of the Open Meetings Law, would constitute a meeting that must be conducted in accordance with that statute and preceded by notice given to the news media and by means of posting pursuant to §104.

Perhaps the issue in the context of your comments involves application of the Open Meetings Law to a situation in which a gathering includes less than a quorum of the Council. As stated in Tri-Village Publishers v. St. Johnsville Board of Education:

> "It has been held that, in order for a gathering of members of a public body to constitute a 'meeting' for purposes of the Open Meetings Law, a quorum must be present (*Matter of Britt v County of Niagara*, 82 AD2d 65, 68-69). In the instant case, there was never a quorum present at any of the private meetings prior to the regular meetings. Thus, none of these constituted a 'meeting' which was required to be conducted in public pursuant to the Open Meetings Law.

> "We recognize that a series of less-than-quorum meetings on a particular subject which together involve at least a quorum of the public body could be used by a public body to thwart the purposes of the Open Meetings Law...However, as noted by Special Term, the record in this case contains no evidence to indicate that the members of respondent engaged in any attempt to evade the requirements of the Open Meetings Law" [110 AD 2d 932, 933-934 (1985)].

In Tri-Village, the Court found no evidence indicating intent to circumvent the Open Meetings Law when a series of meetings were held, each involving less than a quorum of a board of education. Nevertheless, one might interpret the passage quoted above to mean that, when there is intent to evade the Law by ensuring that less than a quorum is present, such an intent would reflect a failure to comply with the Open Meetings Law.

With respect to enforcement of the provisions of both the Freedom of Information Law and the Open Meetings Law, your observation is correct that persons are authorized to initiate judicial proceedings to require compliance with the law. An applicant for records pursuant to the Freedom of Information Law is authorized, after an administrative appeals process, to initiate an Article 78 action in Supreme Court to request that a judge compel an agency to disclose records. Similarly, if a public body behaves in a manner that leads someone to believe that the requirements of the Open Meetings Law are not being met, that person has authority to bring an action in Supreme Court. This will also confirm that while this office may be helpful in clarifying the legal issues and the state of the law, in my opinion it is preferable to consult with and retain a private attorney before attempting to bring legal action.

I hope that you find this helpful.

CSJ:sb

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VIA E-MAIL

OML-AO-5125

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, June 29, 2011 3:45 PM
Subject: RE: Executive Session (School Boards)

Forgive me for the delay - we're an office of two and the demand is at times overwhelming.

Perhaps I can clarify:

If the discussion pertains to how well the Superintendent performed last year, and therefore, whether more/less compensation should be offered this year, I believe it would be appropriate for executive session. "Employment history" and "Matters leading to employment".

If the discussion with the Superintendent is characterized as a negotiation, "we are negotiating his contract" then I think it cannot be held in executive session (in keeping with OML-AO-2445), but if the discussion is with the Superintendent and involves how the board believes he merits or does not merit a higher salary, then I believe it could be held in executive session.

In the Gordon case, I believe the appellate court found fault with the board that discussed whether to create a new position for an attorney - full-time/part-time, etc., not whether a particular attorney and his credentials would be a good fit for the position.

There may be board discussions that include both the whether to create a new position/what the job responsibilities should be and whether this person is a good match for this position. In that case, I believe the board may have the authority to go into executive session for parts of the discussion but not the entire discussion.

Your first email made me think the discussion was how much to compensate this Superintendent based on his job performance and whether to offer the job to him rather than a discussion regarding the restructuring of benefits for the generic superintendent position.

Does this help?

And yes, we can talk by phone. I'm here until 5 PM today - tomorrow again from 9 to 5. Why don't I plan on calling you at 4:30 today or 9:30 tomorrow morning? What is your phone number?

Thanks.

Camille

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VIA E-MAIL

OML-AO-5126

From: Jobin-Davis, Camille (DOS)
Sent: Monday, June 27, 2011 2:25 PM
Subject: Open Meetings Law - meeting attendance

As promised, the following description is from our website:

Recent amendments to the Open Meetings Law:
1. 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 indications 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.
The following is a link to a related advisory opinion:

http://www.dos.state.ny.us/coog/otext/o4141.htm

Finally, this will confirm that the Committee on Open Government is authorized and empowered by statute to issue advisory opinions regarding application of the provisions of the Open Meetings Law (Open Meetings Law Section 109).

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
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June 30, 2011

OML AO 5127
E-Mail

TO: Janet Vito

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. Vito:

We are in receipt of your request for an advisory opinion regarding application of the Freedom of Information and Open Meetings Laws to records and meetings of the Clarence Senior Center, Inc. Linked below is an opinion issued by this office in 2002, in which we address the issue of whether the Senior Center is subject to either the Freedom of Information Law or the Open Meetings Law, and in which we set forth the analysis in support of our opinion that it is subject to both laws.

In the materials that you submitted to our office, you raised myriad issues with respect to the Not-for-Profit Corporation Law, the Center's conformance with its own bylaws, and Roberts Rules of Order. While the Committee on Open Government is authorized and empowered to provide advice regarding application of the Freedom of Information and Open Meetings Laws, we have neither the authority nor the expertise to address all of the issues that you raise and will limit our comments accordingly.

With respect to the issues raised that are governed by the Open Meetings Law, we note, first, that the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106(1) 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 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, upon their preparation and review perhaps years later, to ascertain the nature of action taken by an entity subject to the Open Meetings Law. Most importantly, minutes must be accurate. Alteration of minutes in a manner that does not accurately reflect what occurred or what was said at a meeting, would, in our view, be inconsistent with law.

In good faith, we point out that in an opinion issued by the State Comptroller, it was advised that when a member of a board requests that his statement be entered into the minutes, the board must determine, under its rules of procedure, whether the clerk should record the statement in writing, which would then be entered as part of the minutes (1980 Op.St.Comp. File #82-181). In our opinion it is unlikely that a board has the authority to require the exclusion of information from minutes of an open meeting that is accurate. Similarly, we do not believe that a member of the board may unilaterally alter or direct that minutes be altered. That person is one of the voting members; in our view, minutes may be amended only pursuant to action taken by a majority of vote of the total membership of a public body. Moreover, as suggested earlier, any such alteration must accurately reflect what transpired at a meeting.

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

In particular, subdivision (f) permits a public body to discuss the following in executive session:

> "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"

Accordingly, while there is no specific provision of the Open Meetings Law that a public body could rely on to discuss a preliminary audit in executive session, to the limited extent that the discussion concerns "the employment history of a particular person" such portion of the discussion could be held in executive session. Similarly, a discussion regarding whether a particular person is suited for an appointed position, in our opinion, could be held in executive session pursuant to this same provision, to the extent that it pertains to "the employment history of a particular person" and/or "matters leading to the appointment of a particular person."

We note that the Open Meetings Law is permissive; although a public body may conduct executive sessions in circumstances authorized in §105(1), there is no obligation to do so. If, for example, a motion to enter into executive session is not carried by a majority vote of the total membership of a public body, the entity may choose to discuss the matter in public.

At various points in your correspondence, you make reference to issues that are "confidential", and at one point you are counseled in an email not to raise "Executive Board material" in public as "This material cannot be discussed in any form and to have even mentioned it is a violation of Confidential[ity] Rules." In brief, it is our opinion that the only instances in which members of a public body are prohibited from disclosing information would involve matters that are indeed "confidential" by state or federal law. When a public body has the discretionary authority to discuss a matter in public or in private, we do not believe that the matter can properly be characterized as "confidential." Because our analysis of this issue is lengthy and relevant, we refer you to the below linked opinion, OML-AO-3929A, and other related advisory opinions available online through our OML advisory opinion index, under "E" for Executive Session, Claim of Confidentiality Regarding."

With respect to the Freedom of Information Law and the ease by which records are shared with the Finance Committee, in our view, the Freedom of Information Law is intended to enable the public to request and obtain accessible records. It has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is

reasonable, and in the absence of a rule or policy to the contrary, we believe that a member of a Committee should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records of the Center.

Viewing the matter from a more technical perspective, one of the functions of a public body involves acting collectively, as an entity. A town board, for example, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41). In our view, in most instances, a board or a member acting unilaterally, without the consent or approval of a majority of the total membership of the board, has the same rights of access as those accorded to a member of the public, unless there is some right conferred upon a board member by means of law or rule. In such a case, a member seeking records could presumably be treated in the same manner as the public generally.

In your correspondence you questioned whether appeals should be handled by the Secretary or referred to outside legal counsel, and in this regard, we note that §89(4)(a) of the Freedom of Information Law requires that appeals be directed "to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body". Further, Part 1401.7(b) of the regulations adopted by the Committee on Open Government requires that the records access officer and the appeals officer be separate individuals.

Finally, we note that Robert's Rules of Order are not law, and there are elements of Robert's Rules that may be inconsistent with the law in New York. Similarly, to the extent that bylaws conflict with provisions of the Open Meetings Law or the Freedom of Information Law, the law would control.

We hope that this is helpful.

cc: Bernard J. Kolber, Town Council
William Westley, Chair

Enclosures:

http://www.dos.state.ny.us/coog/ftext/13422.htm

http://www.dos.state.ny.us/coog/otext/o3929a.htm

CSJ:sb

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July 5, 2011

OML AO 5128
E-Mail

TO:

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:

We are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to the Division of Environmental Quality Board of Review which functions within Suffolk County Department of Health Services. You asked whether the Board of Review is subject to the Open Meetings Law.

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

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

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

Pertinent provisions of the Suffolk County Sanitary Code, are set forth as follows:

§760-220 Board of Review

> 1. The Commissioner may establish a Board of Review within the Department and rules of procedure to govern the operation thereof.
>
> 2. Such board shall consist of not less than three nor more than twenty persons, three of whom shall be designated to hear and report each appeal from the determination of a deputy or application for variance.
>
> 3. In any case where an applicant for a permit or approval is dissatisfied with a determination of the deputy authorized to act for the Commissioner, or seeks a variance from the strict application of the letter of the standards promulgated pursuant to this Code, he may appeal from the determination of the deputy or for consideration of his application to the Board of Review.
>
> 4. Such board shall be promptly designated and convene, hear the applicant and his witness, the deputy and other members of the staff or consultants, consider the evidence and exhibits adduced, and make a determination of the hearing.
>
> 5. The action, order or determination of the Board of Review shall be forthwith filed in the Office of the Commissioner, and unless reversed or modified by him within three work days after such filing, shall be deemed to be the action, order or determination of the Commissioner.
>
> 6. In all appropriate cases, proceedings before the Board of Review shall be deemed to be an administrative remedy, and as such a prerequisite to the institution of a special proceeding against the Commissioner pursuant to the civil practice law and rules.[1]

From our perspective, each of the conditions necessary to conclude that the Board of Review constitutes a public body can be met. The Board consists of “not less than three nor more than twenty persons, three of whom shall be designated to hear and report each appeal from the determination of a deputy or application for variance”. Presumably the “designated” three take action by casting votes. By so doing and carrying out their powers and duties, the members perform a governmental function for the County. 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

[1] Adopted by the Suffolk County Department of Health 9/3/1975; Amended 10/1/1975, 12/7/1988, 3/14/2001, 3/20/2002.

or similar body", they may carry out their duties only through the presence of a quorum and action taken by majority of the vote the total membership of such entity.

Assuming the accuracy of the foregoing, we believe that the Board of Review constitutes a “public body” subject to the Open Meetings Law.

With respect to the Board’s responsibilities, we note §108 of the Open Meetings Law, which 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.

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

In our view, one of the elements of a quasi-judicial proceeding is the authority to take final action. While we are 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 our opinion that the final determination of a controversy is a condition precedent that must be present before one can reach a finding that a proceeding is quasi-judicial. Reliance upon

this notion is based in part upon the definition of "quasi-judicial" appearing in Black's Law Dictionary (revised fourth edition). Black's defines "quasi-judicial" as:

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

When the Board deliberates toward a decision following an appeal concerning the validity or reasonableness of a determination of a deputy or an application for a variance, and in consideration to its powers, which are analogous to that of a court, as well as its authority to render binding determinations reviewable only by a court [see §760-220(5)(above)], we believe that those deliberations are “quasi-judicial” and therefore, exempt from the coverage of the Open Meetings Law in accordance with §108(1).

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

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

Therefore, even if the Board 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. 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, if our assumption is correct that the Board of Review is a "public body" and an "agency", it is required, among other actions necessary to comply with law, 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 this is helpful.

CSJ:sb

cc: Board of Review

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 5, 2011

OML AO 5129
Seymour and Ruth Radow
[redacted]

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

Dear Mr. and Mrs. Radow:

We have received your letter in which you sought assistance concerning compliance with the Open Meetings Law. You wrote, specifically, that the Board of Trustees of the Village of Atlantic Beach informed you that it has "nothing to do with the process of hearings of the Board of Zoning Appeals (BOZA). You also wrote that residents are not allowed to discuss zoning issues at the public monthly meetings and contend that there is no full disclosure of the Village Board of Trustees' agenda. The agenda only lists a report by the Building Inspector, which states how many building applications there are, but not what the applications are for, or whether they will come before the BOZA.

In this regard, we offer the following comments.

Freedom of Information Law

You contend that the community is unable to obtain information on flood insurance and other relevant material.

Here we point out that the Freedom of Information Law pertains to all records of an agency, such as a village, and that §86(4) of that statute defines "record" to mean:

> "any information kept, held, filed, produced or 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."

When records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of

the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

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

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

Open Meetings Law

Please note that only a court can make a determination on 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 the Law. It is our hope that these opinions are educational and persuasive, and that they serve to resolve problems and promote understanding of and compliance with the Law.

Section 103(a) of the Open Meetings Law states that:

> "Every meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with §105 of this article."

Section 102(1) 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." Section 102(2) defines "public body" to mean:

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

Based on the foregoing, any gathering of a quorum of the Board for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law.

With respect to notice, we note that there is often a distinction between a "meeting" and a "hearing". The former involves a gathering of a majority of a public body for the purpose of conducting public business collectively, as a body. Meetings are ordinarily held for the purpose of discussion, deliberation, taking action and the like. A "hearing" usually is held to allow members of the public to express their views on a particular subject (i.e., application for a variance, a change in zoning, etc.) Usually, publication of a legal notice is required to precede a hearing.

Notice requirements concerning "meetings" differ from those regarding hearings.

Every meeting must be preceded by notice given pursuant §104 of the Open Meetings Law, which 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."

In short, §104 now imposes a three-fold requirement: (1) that notice must be posted in one or more conspicuous, public locations; (2) that notice must be given to the news media; and (3) 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 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.

Based on the above information and the correspondence you provided, the meetings held by the Board of Trustees and the Mayor would appear to have been held in compliance with the Open Meetings Law.

According to your correspondence, the BOZA publishes its schedule in advance of the meetings and hearings and that the proceedings are open to the public. As provided above, the BOZA and other meetings held by the Mayor and the Board of Trustees must occur in in accordance with the notice requirements imposed by §104 of the Open Meetings Law.

From our prospective, every law, including the OML, must be implemented in a manner that gives reasonable effort to its intent. In that vein, we believe that notice of meetings should be given to news media organizations that would be most likely to make contact with those who may be interested in attending.

Although there is a constitutional right to speak, there is no such right to speak during meetings. Under the Open Meetings Law, any person has the right to attend, listen and observe the performance of public officials. The law is silent, however, with respect to the right of the public to speak or otherwise participate during meetings. Because that is so, it has been advised that a public body may choose to permit the public to speak at its meetings, but that it is not required to do so. Most public bodies do authorize limited participation by the public, and in those situations, it is suggested that they do so by adopting reasonable rules that treat members of the public equally.

We hope that we have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

BY: Chet Godley
Legal Intern

RJF:CG

cc: Board of Trustees
Board of Zoning Appeals

State of New York
Department of State
Committee on Open Government

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OML AO 5130

From: dos.sm.Coog.InetCoog
Sent: Wednesday, July 06, 2011 8:46 AM
To: 'Ken Mastro'
Subject: RE: Executive session question

It appears that your interpretation is accurate.

First, the term "personnel" appears nowhere in the grounds for entry into executive session. It has become a catchall, and I have advised that the term be eliminated from our vocabularies.

Second, as you suggested, the language of §105(1)(f) is precise and limited to certain matters as they relate to a "particular person or corporation." Insofar as the discussion dealt generally with the management of the department/district, I do not believe that an executive session could properly have been held. Only to the extent that an issue or issues focused on a particular person in conjunction with one or more of the qualifiers appearing in §105(1)(f) would an executive session have been justifiable.

I hope that I have been of assistance.

Robert J. Freeman
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[redacted]

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July 6, 2011

OML AO 5131
E-Mail

TO: Robert Phelps
FROM: Robert J. Freeman, Executive Director
BY: Chet Godley, Legal Intern

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. Phelps:

We have received your email in which you sought an advisory opinion regarding compliance with the Open Meetings Law. Specifically, your main issue is whether discussion or action related to compliance with the NYS Open Meetings Law is properly a matter for a board to discuss in executive session.

In this regard, we offer the following comments.

The provision at issue is §105 of the Open Meetings Law, which states that:

"Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys:

a. matters which will imperil the public safety if disclosed;

b. any matter which may disclose the identity of a law enforcement agent or informer;

c. information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;

d. discussions regarding proposed, pending or current litigation;

e. collective negotiations pursuant to article fourteen of the civil service law;

f. 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;

g. the preparation, grading or administration of examinations; and

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

Based on the foregoing, in our opinion, none of the grounds for entry into executive session would likely permit a public body to enter into executive session to discuss compliance with the Open Meetings Law.

We hope that we have been of some assistance.

RJF:CG

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July 6, 2011

OML AO 5132
E-Mail

TO: Robert Cox
FROM: Robert J. Freeman, Executive Director
BY: Richard Caister, Legal Intern

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. Cox:

We have received your request for an advisory opinion concerning application of the Open Meetings Law to the Municipal Civil Service Commission in New Rochelle. You stated that its meetings were being held without notice and behind closed and locked doors. In this regard, we offer the following comments.

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

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

Based on the foregoing, to constitute a "public body", an entity must consist of at least two members, conduct public business and perform a governmental function for the state or for one or more public corporations, i.e., municipalities. A municipal civil service commission is, in our view, clearly a "public body" required to comply with the Open Meetings Law.

Second, §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.

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

RJF:RC

cc: Municipal Civil Service Commission

State of New York
Department of State
Committee on Open Government

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EMAIL
OML-AO-05133

From: Freeman, Robert (DOS)
Sent: Thursday, July 07, 2011 12:46 PM
To:
Subject: RE: Note taker Albion HPC

Assuming that the Historic Preservation Commission is a creation of and carries out certain functions pursuant to law and, therefore, is a public body subject to the Open Meetings Law, there is no specification in that law concerning who takes notes or minutes.

I point out that §106 of that law provides minimum requirements concerning the content of minutes and indicates that they must consist, at a minimum, of a record or summary of motions, proposals, resolutions, action taken and the vote of the members. That provision also requires that minutes be prepared and made available on request within two weeks of the meetings to which they pertain.

I hope that I have been of assistance.

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EMAIL
OML-AO-05134

From: dos.sm.Coog.InetCoog
Sent: Tuesday, July 12, 2011 9:05 AM
To: 'Katy Cashen'
Subject: RE: audio taping of town board meeting

Dear Ms. Cashen:

With respect to your questions, first, there are judicial decisions dating to the 1970's indicating that anyone may record an open meeting of a public body, such as a town board, so long as the use of the recording device is neither obtrusive nor disruptive, and a provision was added to the Open Meetings Law on April 1 of this year specifying that to be so.

Second, if the supervisor or any other town official records an open meeting, the audio or video recording would constitute a record accessible under the Freedom of Information Law. All town records are, according to §30 of the Town Law, in the custody of the town clerk, who, by law, serves as the town's records management officer.

Third, there is no obligation to inform a public body or those present that an open meeting is being recorded.

Lastly, if a member of the public records a meeting, the recording is his/her property, and that person may do with the recording as he/she sees fit.

To obtain more expansive materials on the subject, go to our website (simply google "coog"), click on to "Advisory opinions", then the Open Meetings Law listing, and then to "T". Scroll down to "Tape recorders, use of", and several opinions will be available in full text. The higher the number of the opinion, the more recent it is. Also see information regarding the recent amendment on our home page.

I hope that I have been of assistance.

Robert J. Freeman
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-----Original Mess
From: Katy Cashen [redacted]
Sent: Monday, July
To: dos.sm.Coog.InetCoog
Subject: audio taping of town board meeting

Are there any laws/regulations governing the audio taping of town board meetings in NYS? Is there a difference if someone from the public tapes the meetings vs. the supervisor?

If the Supervisor tapes the meeting does it becomes the management of the clerk?

Do you have to let anyone officially know you are taping an open meeting, or since it is public, itâ?Ts legal?

Once the recording is made, is it the property of the taper? And can be used in any way? (ie posted on website).

Is there any relationship to FOIL and recorded minutes, if they are not recorded by the clerk?

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OML AO 5135

July 13, 2011

Mary S. Reed
[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. Reed:

We have received your request for an advisory opinion regarding application of the Open Meetings Law. Specifically, you are concerned with the Princetown Town Board and whether it is complying with the notice requirements imposed by §104 of the Open Meetings Law. The Town of Princeton also offered information concerning this issue (copy enclosed).

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."

In short, §104 now imposes a three-fold requirement: (1) notice must be posted in one or more conspicuous public locations; (2) notice must be given to the news media; and (3) 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.

In sum, every meeting of the Town Board, whether regularly scheduled or those held on an "as needed" basis, must be preceded by notice given in accordance with §104 of the Open Meetings Law. In our opinion, while it would be helpful, the Open Meetings Law does not require that the Town provide additional notice to confirm that meetings will be held or canceled on the fourth Tuesday of the month.

We hope that we have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

BY: Chet Godley
Legal Intern

RJF:CG
cc: Princetown Town Board

Hon. Carol McClaine
Enclosure

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OML AO 5136

July 14, 2011

Rose Mary Warren
[redacted]

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

Dear Mrs. Warren:

We have received your request for an advisory opinion regarding proper notice of a public meeting and conduct of executive sessions pursuant to the Open Meetings Law. Specifically, you contend that notice of a meeting was not given by the Niagara-Wheatfield Board of Education until after the meeting was held, and that the reasons the Board gave to enter an executive session were improper. Furthermore, you indicated that 30 people were invited to attend the executive session, but that you were not one of the individuals chosen.

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."

Although notice must be "given" to the news media, there's no requirement that news organizations publish or publicize the notice. Consequently, situations occur in which a public body has properly informed the news media of a meeting, but in which the media, for whatever the reason, may choose not to publish the notice. Accordingly, should the District have failed to provide notice in keeping with the provision outlined above, we believe their actions would have been in contravention of the law. On the other hand, if the District posted notice in designated locations, informed the media and placed notice on its website in a timely fashion, it would have satisfied the requirements of the law.

Next, based on the newspaper article that you provided, the Superintendent indicated that at an ensuing meeting, the Board would "immediately go into executive session to discuss budget issues. Regular public board meetings will continue at 7 p.m. the first Wednesday of the month, but the close-to-the-public budget workshops will continue on the third Wednesday of March and April."

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

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

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

In most instances, discussions involving “budget” must be conducted in public, for none of the grounds for entry into executive session would apply. Often a discussion concerning the budget has an impact on personnel. Nevertheless, and despite its frequent use, the term “personnel” appears nowhere in the Open Meetings Law. It is true that one of the grounds for entry into executive session often relates to personnel matters. From 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 <u>particular</u> person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a <u>particular</u> person or corporation..." (emphasis added).

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

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

Lastly, with respect to your concern regarding the invitation of 30 people to attend the executive session as taxpayers, we note that §105(2) of the Open Meetings Law provides that "attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." Nevertheless, every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. In our view, if an executive session is held, it would be unreasonable to permit the attendance of thirty taxpayers while excluding others.

We hope that we have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

BY: Chet Godley
Legal Intern

RJF:CG
cc:Board of Education

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OML AO 5137 July 14, 2011

E-Mail

TO: Charles Hustis
FROM: Robert J. Freeman, Executive Director
BY: Richard Caister, Legal Intern

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. Hustis:

We are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to certain proceedings of the Special Board of the Village of Cold Spring. Specifically, you allege that after closing the public comment portion of a hearing, the Board received written comments that served as the basis for significant changes to the Board's recommended Comprehensive Plan. You further expressed your belief that the public hearing might have been closed improperly, for there was no vote to close the hearing.

In defense of its actions, the Village Attorney wrote to us (copy attached) setting forth his understanding of the time line of events, attaching copies of correspondence exchanged with an attorney at the New York Conference of Mayors, along with a memorandum from the Chair of the Special Board with attached correspondence.

Based on our review of the records submitted in conjunction with your request, we believe that there are three separate issues, one of which is related to the Open Meetings Law. With respect to the unrelated issue, we note that the Conference of Mayors has provided written advice indicating that there is no requirement that a special board hold a public hearing after amending and adopting a comprehensive plan in its "final" form (copy attached). This confirms our understanding of Village Law §7-722(6)(b), which requires a special board to "hold one or

more public hearings and such other meetings as it deems necessary to assure full opportunity for citizen participation".

With respect to the closing of a public hearing without a formal vote, it is our opinion that the closing of a meeting or a hearing does not necessarily require a formal vote. In our experience, when members cease discussing the public business, and exit a meeting room, they have, in our opinion, closed the meeting.

Finally, in an email attached to your May 5th correspondence, it is alleged that there were "closed door reconciliation meetings" where "groups formed by the Special Board …meet in less than a quorum and would not allow the public to attend those meetings. These groups made changes to the Plan before their vote to forward it to our board." Without additional information it is not possible to formulate an opinion. In brief, if the "groups" were "public bodies" subject to the Open Meetings Law, and a quorum of the members of a group was present to discuss public business, such a gathering would be subject to the Open Meetings Law. On the other hand, if less than a quorum of a public body met, such gathering would be beyond the coverage of the Open Meetings Law.

Further analysis of these and related issues may be found through our online OML advisory opinion index under "P" for "Public Body", "Q" for "Quorum" and "M" for "Meeting". Should you have a more specific question, please feel free to contact our office again.

We hope that this is helpful.

RJF:RC
cc: Special Board
Stephen Gaba

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OML AO 5138 July 19, 2011

E-Mail

TO: Timothy Thibodeau
FROM: Robert J. Freeman, Executive Director
BY: Richard Caister, Legal Intern

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. Thibodeau:

We are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to certain proceedings of the Common Council of the City of Cohoes (copy attached). Specifically, you questioned whether the Council could agree to narrow a pool of candidates for appointment to the ethics board in executive session, and whether voting to appoint 3 members from the 13 applicants must occur in public session.

Corporation Counsel indicated that "when the time comes to vote, it will be done in conformance with the Open Meetings Law and not in executive session" (copy attached).

In this regard, first, §105(1) of the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before an executive session may be held. That provision states in relevant part that:

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

The ensuing provisions, paragraphs (a) through (h), specify and limit the grounds for entry into executive session.

Pertinent to your inquiry is paragraph (f), which authorizes a public body to conduct an executive session to discuss:

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

Insofar as the focus of deliberations by the Council or a committee of the Council focus on the appointment of "a particular person" or persons, we believe that an executive session could validly be held.

Second, §106(2) of the Open Meetings Law concerning minutes indicates that a public body may vote during a proper executive session, unless the vote is to appropriate public monies.

Lastly, §87(3)(a) of the Freedom of Information Law has long required that an agency maintain a record indicating the manner in which each member of a body casts his or her vote in any instance in which a vote is taken. It has been held that such a record must be prepared and made available even when action is taken during an executive session [Smithson v. Ilion Housing Authority, 130 AD2d 965 (1987), affirmed 72 NY2d 1034 (1988)].

Finally, the Open Meetings Law is permissive; although a public body *may* conduct executive sessions in circumstances authorized in §105(1), there is no obligation to do so. If, for example, a motion to enter into executive session to discuss "a matter leading to the appointment of a particular person" is not carried by a majority vote of the total membership of a public body, that entity may choose to discuss the matter in public.

We hope that we have been of assistance.

RJF:RC
cc: Common Council
Gregory J. Teresi

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OML AO 5139

July 18, 2011

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 are in receipt of your request for an advisory opinion regarding the application of the Open Meetings Law to certain proceedings of the Town Board of the Town of Evans. In part, you expressed concern that the Town removes and adds items to its agendas, has removed "privilege of the floor" from the agenda, replaced it with "limited public comment", now holds "work sessions" in addition to "meetings", and does not record comments made by the public in the minutes of its meetings. In an effort to promote understanding of the requirements of the Open Meetings Law, we offer the following.

With respect to your questions concerning the difference between a "meeting" and a "work session", 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 town board, for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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 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 though, 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."

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

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

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

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

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such 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 upon the foregoing, it is clear in our view that minutes need not consist of a verbatim account of what was said at a meeting; similarly, there is no requirement that minutes refer to every topic discussed or identify those who may have spoken. Although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are taken. If those kinds of actions, such as motions or votes, do not occur during work sessions, technically, we do not believe that minutes must be prepared. On the other hand, if motions are made or actions taken, those activities must be memorialized in minutes.

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

Finally, many of the issues that you raised are the subject of advisory opinions that are available through our website. For further analysis regarding these and other issues, we encourage you to review online Open Meetings Law opinions under the following headings: Workshop, Minutes, Agenda and Public Participation.

We hope we have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

BY: Chet Godley
Legal Intern

RJF:CG
cc: Town Board

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July 21, 2011

OML AO 5140
E-Mail

TO: Charles Hustis
FROM: Robert J. Freeman, Executive Director
BY: Richard Caister, Legal Intern

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. Hustis:

This will acknowledge receipt of a copy of the minutes taken at the October 28, 2010 meeting of the Village of Cold Spring Special Board in response to the advisory opinion issued to you on July 14, 2011. Within the minutes is reference to a motion, passed unanimously, in which the Special Board agreed to create a Comprehensive Draft Reconciliation Committee. The Committee was "composed of any members of the Special Board who wish to participate" and given the responsibility "to evaluate the comments from the standing boards and consider whether or not those comments should be reflected in a revision of the draft Comprehensive Plan and if so, to recommend draft language and if not, to provide the rationale for why the comments should not be included and distribute this to the Special Board members" for their review and consideration. As you indicated in our telephone conversation, the public was not provided with advance notice of or the ability to attend meetings of the Committee, and you questioned whether it was required to do so.

While we did not explicitly address the applicability of the Open Meetings Law to gatherings of the Special Board in our recent opinion, our opinion was based on the assumption that the Special Board of the Village of Cold Spring is a public body subject to the Open Meetings Law.

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."

As indicated by the Village Attorney, the Village Board created the Special Board (9 members) to prepare a proposed comprehensive plan pursuant to Village Law §7-722. By law, it's members must include "one or more members of the planning board and such other members as are appointed by the village board" (Village Law §7-722[2][c]). Because the Special Board consists of more than two members and performs a governmental function pursuant to Village Law, it is, in our opinion, a "public body" subject to the Open Meetings Law.

With respect to the status of the Reconciliation Committee, in view of the definition of "public body", we believe that any entity consisting solely of two or more members of a public body would fall within the requirements of the Open Meetings Law [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993); also Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Therefore, a committee of the Special Board, consisting solely of members of the Special Board, in our opinion constitutes a public body subject to the Open Meetings Law that is separate and distinct from the Special Board itself.

If our assumption is correct, and the Committee is a public body, all of the requirements of the Open Meetings Law would apply when a quorum of the Committee gathered to discuss Committee business.

We note that in your previous correspondence, you indicated that "groups formed by the Special Board" as noted in the October 28, 2010 minutes referenced earlier "meet in less [than] a quorum and would not allow the public to attend these meetings. These groups made changes to the Plan before their vote to forward it to our Board." Whether the latter statement pertains to the Committee or the Special Board, we must reiterate that when less than a quorum of a public body gathers for the purpose of discussing public business, the Open Meetings Law does not apply.

Finally, 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 Committee members or Special Board members gathers to discuss the business of the Committee or the Special Board respectively, any such gathering would, in our opinion, constitute a "meeting" subject to the Open Meetings Law. On the other hand, when less than a quorum is present, the Open Meetings Law would not apply. Further, when there is an intent to conduct a meeting, the gathering must be preceded by notice given pursuant to §104 of the Open Meetings Law, convened open to the public and conducted in public as required by the Open Meetings Law.

We hope that we have been of assistance.

RJF:RC

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BY EMAIL
OML-AO-05141

From: Jobin-Davis, Camille (DOS)
Sent: Monday, July 25, 2011 10:07 AM
To: 'Trustee Hustis'
Cc: 'sgaba@drakeloeb.com'; 'mayor@coldspringny.gov'; 'Jan Thacher'; Peter Henderson
Subject: RE: Open Meetings Law - advisory opinion

In terms of enforcement, please note that our office provides opinions regarding application of the law; however, only a court can determine whether an action is in "violation" of law, or whether to "invalidate" action taken.

Open Meetings Law section 107(1) says 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 that the public body violated this article and/or declare the action taken in relation to such violation void, in whole or in part…".

In order for a court to consider (a) whether a meeting was held in violation of the law and then, (b) whether to invalidate action taken at such meeting, a lawsuit would have to be brought within 4 months of the date of the action, and then, as you can see from the language of the statute, it is at the court's discretion "upon good cause shown" whether to invalidate action taken.

It's my understanding that the "action" that is at issue in this case was the Committee's recommendation to the Special Board, which then formed recommendations to the Town Board. If a court were to find that the committee met in "violation" of law, and if the court were then to invalidate the action taken at that meeting "upon good cause shown", the court would be invalidating the recommendation from the committee of the Special Board to the Special Board. Although I would speculate that it is not, without more information, it is not possible for me to know whether such recommendation is a crucial component of the draft comprehensive plan.

I hope that helps clarify. Please let me know if you would like to discuss.

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OML AO 5142

July 28, 2011

Connie Kulze, Town Clerk
Town of Candor
101 Owego Rd.
P.O. Box 6
Candor, NY 13743-0006

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. Kulze:

We have received your request for an advisory opinion regarding the application of the Open Meetings Law to minutes taken at a Town Board meeting. You wrote that the Board Supervisor has asked to change the wording of certain statements within the minutes. In this regard, we offer the following comments.

First, we do not believe that members of the Town Board have the authority to include or exclude language as they desire. Under §30 of the Town Law, you, as Town Clerk, have the statutory authority and obligation to prepare minutes of Town Board meetings. From our perspective, so long as minutes are accurate and include the items required by §106 of the Open Meetings Law, the circumstances under which minutes might justifiably be altered or amended would be rare.

In a prior advisory opinion, this office dealt with a similar situation. In Open Meetings Law Advisory Opinion 2616 (OML-AO-2616) this office stated:

> "… in your position as clerk, have the responsibility and the authority to prepare minutes and to ensure their accuracy. While the Board and/or the Supervisor may have other areas of authority, I do not believe that they could validly require the amendment of minutes as they see fit. Moreover, so long as the minutes you prepare are accurate and, again, presented reasonably, fairly and in a manner consistent with

the contents of minutes as required by the Open Meetings Law, I believe that you would be acting appropriately."

We hope that we have been of assistance. If you have any further inquiries please feel free to contact our office.

Sincerely,

Robert J. Freeman
Executive Director

BY: Richard Caister
Legal Intern

RJF:RC

State of New York
Department of State
Committee on Open Government

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BY EMAIL
OML-AO-05143

From: dos.sm.Coog.InetCoog
Sent: Friday, July 29, 2011 9:21 AM
To:
Subject: RE: skype

We have advised that use of skype would be appropriate in the circumstance that you described, in which all participants and attendees can be seen and heard at each location. I point that §104(4) of the Open Meetings Law also states that: "If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right attend the meeting at any of the locations."

Robert J. Freeman
Executive Director
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Original Message-

[redacted]

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OML AO 5145

July 18, 2011

Kenneth S. Panza
[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. Panza:

We have received your request for an interpretation concerning the zoning revision subcommittee created by the Woodstock Town Board and whether it constitutes a "public body" subject to the provisions of the Open Meetings Law, and whether it constitutes an "agency" subject to the provisions of the Freedom of Information Law.

In this regard, we offer the following comments.

According to your correspondence, the zoning revision subcommittee is a two person subcommittee created by the Woodstock Town Board for the purpose of accepting public input on zoning changes and drafting revisions to the Woodstock Zoning Law with the understanding that these drafts would be made available to the public during a scheduled public hearing. Both of members of the subcommittee are members of the Woodstock Town Board.

The first issue is whether the zoning revision subcommittee is a "public body" subject to the provisions of the Open Meetings Law.

Section 102(2) of the Open Meetings Law defines "public body" as:

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

It has been held that advisory ad hoc entities other than committees consisting solely of members of public bodies 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 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, assuming that the subcommittee consists solely of members of the Town Board, it is our opinion that the subcommittee constitutes a public body subject to the Open Meetings Law.

With respect to the second issue that you raised, whether the records of the subcommittee are subject to the Freedom of Information Law, we note §86(4) of the Law defines the term "record" expansively to mean:

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

Accordingly, regardless of whether our assumption regarding the status of the committee as a public body is correct, in our opinion the records collected by the subcommittee would be records kept "by, with or for an agency", the Town, that are subject to the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (1) of the Law.

One of the exceptions to rights of access that would likely be of primary importance to an analysis of records collected by the subcommittee is §87(2)(g), which states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. Statistical or factual tabulations or data;
>
> ii. Instructions to staff that affect the public;
>
> iii. Final agency policy or determinations; or

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

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

Records that are received from members of the public, are neither inter-agency or intra-agency, and would not be subject to the exception noted above. Also, insofar as the content of records is effectively disclosed during open meetings, we believe that the authority to deny access has been waived.

We hope that we have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

BY: Chet Godley
Legal Intern

RJF:CG
cc: Town Board

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OML AO 5146

July 28, 2011

Will Pflaum
[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. Pflaum:

We have received your request for a written opinion regarding application of the Freedom of Information Law. In the materials that you submitted, you raised myriad issues, many of which were addressed in an opinion of March 28. While the Committee on Open Government is authorized and empowered to provide advice concerning application of the Freedom of Information and Open Meetings Laws, we have neither the authority nor the expertise to address all of the issues that you raise and will limit our comments accordingly. Our opinions are intended to be informative and educational, and it is your right to disagree with an opinion. With respect to the issues within our advisory jurisdiction, we offer the following comments.

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, and when an agency denies access to a record or portion thereof, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

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

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

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)(a) 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."

Accordingly, we advise that when an agency, such as the Town of Stuyvesant, redacts, or denies access to records or portions thereof, the Law permits the applicant to appeal as indicated above. In addition, when an agency asserts that it has searched for requested records and is unable to locate them, an applicant can request that the agency certify that it does not have possession of the records.

We note your frustration with the redactions made on the attorney invoices provided to you. As previously advised, such invoices may be redacted to the extent that the information is protected by the attorney-client privilege, as contained in Freedom of Information Law Advisory Opinion 16511 as well as other exceptions that may apply.

Finally, with respect to the issues raised in Case 18 of your letter, the Open Meetings Law is silent concerning the reading of correspondence at a meeting. Because there is neither a reference nor a requirement to read correspondence at a meeting, doing so is in the discretion of

the public body. Nor is there reference in the Open Meetings Law pertaining to the fairness of those in charge at a given meeting.

We hope that we have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

BY: Richard Caister
Legal Intern

RJF:RC
cc: Town Board
Melissa Naegeli

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OML AO 5147

July 28, 2011

Peter DeFelice
[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. DeFelice:

We have received your correspondence involving the Town of Eastchester concerning the Freedom of Information and Open Meetings Laws.

Freedom of Information Law

The first request involved records relating to a named officer and a copy of the legal notice relating to the "Tennis Bubble RFP". The response to your request by the Town Clerk was, in our view, appropriate, for existing materials were made available, and you were informed that others do not exist.

Relevant to your request, §89(3)(a) provides in relevant part that "nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity." In other words, the Town is not required to prepare a record in response to a request.

Your second request concerned several different records. Pertinent to your request is the requirement imposed by §89(3)(a) of the Freedom of Information Law that an applicant must "reasonably describe" the records sought. In considering that standard, the State's highest court has found that requested records need not be "specifically designated", that to meet the standard, the terms of a request must be adequate to enable the agency to locate the records, and that an agency must "establish that 'the descriptions were insufficient for purposes of locating and identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)]. If, due to the means by

which records are stored or filed, those requested cannot be located with reasonable effort, the request would not reasonably describe the record.

With respect to your request for a copy of bills to the Vince Toomey Law Office regarding the 'Rosado matter,' it appears important to note that, pursuant to §89(3)(a):

> "If an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgment 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."

As a general matter, the Freedom of Information 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.

The Town informed you that your request was voluminous and that rights of access would be determined by a certain date. That response appears to be consistent with the Freedom of Information Law. Further, you were informed that some aspects of the intra-agency portions of the communications are deniable and would be redacted, but 'factual tabulations' would be made available. Pursuant to §87(2)(g)(i), it is our opinion that the Town has acted in accordance with the Freedom of Information Law. In brief, insofar as intra-agency materials consist of opinions, advice or recommendations, for example, they may be withheld. However, other aspects of those materials consisting of "statistical or factual tabulations or data" must be disclosed, unless a separate exception to rights of access is applicable.

With respect to your request for the Island Tennis Inc. 2008-2009 corporate tax return, it may have been properly withheld on the ground that it falls within §87(2)(d), which permits an agency to withhold records which were submitted to an agency by a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise.

Insofar as the records pertain to not-for-profit entities, it is questionable whether §87(2)(d) would apply. When records pertain to profit-making entities, the issue involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of those entities. If, for example, the record could be used to ascertain the value of an entity's property or involves significant financial information, it might be contended that certain of the data might, if disclosed, cause substantial injury to its competitive position.

We point out that in the event of challenge to a denial of access to records, the agency would have the burden of defending a denial in a judicial proceeding [see §89(4)(b)].

In our view, the nature of the record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive

position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

Open Meetings Law

The issue concerning the Open Meetings Law involves the reasons for entry into executive session. According to your correspondence, Supervisor Colavita called to move into executive session for the purpose of discussing the status of a Police Department disciplinary proceeding.

The provision at issue is §105(1) of the Open Meetings Law, which permits a public body to conduct executive sessions in accordance with paragraphs (a) through (h) of that provision. If the issue focused on a specific individual, §105(1)(f) would likely have applied. That provision authorizes 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."

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

Sincerely,

Robert J. Freeman
Executive Director

BY: Chet Godley
Legal Intern

RJF:CG
cc: Town Board

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OML AO 5148

July 28, 2011

E-Mail

TO: Earl Hartman
FROM: Robert J. Freeman, Executive Director
BY: Richard Caister, Legal Intern

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. Hartman:

We have received your email which consists of a request for clarification and/or verification of issues discussed previously. In this regard, we are providing a legal basis for your understanding as per the discussion with our office.

First, while public bodies have the right to adopt rules to govern their own proceedings, the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. 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, Robert's Rules is not law, and there are elements of Robert's Rules that may be inconsistent with the law of New York. Pursuant to §4-412 of the Village Law, a board of trustees is authorized to adopt rules and procedures that govern its own proceedings, but any such rules or procedures must be reasonable. A mayor or other member acting unilaterally, would not, in our view, have the authority to adopt a rule or procedure.

Third, we note that the definition of “meeting” (Open Meetings Law, §102[1]) has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be conducted open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

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

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

Based upon the direction given by the courts, when a majority of the Board is present to discuss Board business, any such gathering, in our opinion, would constitute a "meeting" subject to the Open Meetings Law. However, merely handing out a motion to be discussed at the public meeting to persons entering the facility, in our opinion, does not constitute a “meeting”. Since there was no action taken as a result of the early dispersal of the motion, there was no “meeting” of the Board.

Lastly, since its enactment in 1974, the Freedom of Information Law has required that each agency maintain a record indicating the manner in which every member voted in every

instance in which a final vote is taken [§87(3)(a)]. Consequently, secret ballot voting by members of public bodies is effectively prohibited.

We believe that your understanding of our previous correspondence is correct, and hope that this response is helpful in allaying your concerns. If you have further inquiries, please feel free to contact our office.

RJF:RC

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OML AO 5149

July 29, 2011

Ernest Waddell
Co-Chairman of Evans Taxpayers United
[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. Waddell:

We have received your request for an advisory opinion concerning compliance with the Freedom of Information Law. Specifically, you asked:

1. What is the intent of the Freedom of Information Law with regards to the time frame for providing documents?
2. Can providing readily available documents be delayed for months?
3. Is there anything in the Freedom of Information Law that would allow the town to deny providing a copy of the lease agreement for the stated reason that the lease is "on-going?"
4. When the town does provide documents, it often includes documents not requested.
   a. If the town is unclear as to documents being requested, is the intent of the Freedom of Information Law that they request a clarification before making copies?
   b. Can FOIL recipient refuse to pay for copies if the documents provided are unrelated to the original request?
   c. Can the town deny documents claiming they don't understand the request without getting a clarification as to what documents the ETU is looking for?

In this regard, we offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3)(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 acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

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

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

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

Second, §89(3)(a) of the Freedom of Information law states in relevant part that "nothing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity. If negotiations concerning a lease are ongoing, and no lease yet exists, there would be no record to be disclosed. Once the lease exists, it would be accessible.

Next, records need not be "specifically designated," and to meet the standard that records be "reasonably described" [see §89(3)(a)], the terms of a request must be adequate to enable the agency to locate the records, and an agency must "establish that 'the descriptions were insufficient for purposes of locating and identifying documents sought' … before denying a request for reasons of overbreadth" [*Konigsberg v. Coughlin*, 68 NY 2d 245, 249 (1986)]. From our perspective, when a request for copies of records is served upon an agency, the agency is responsible for compliance with the Freedom of Information Law by retrieving the records sought and disclosing them to the extent required by law. If the documents produced are not the records sought, it is our opinion that you should not have to pay for copies.

With respect to the Open Meetings Law, you asked whether discussing payment of assessor benefits should be discussed in a public forum. Section 103 of the Open Meetings Laws states that:

> "Every meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted."

Section 105, which governs the conduct of executive sessions, 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…
>
> f. The medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation."…"

If the discussion involved the benefits that would accrue to any person who might hold the position of assessor, in our opinion, there would have been no basis for conducting an executive session. In that instance, the issue would relate to the position, irrespective of the identity of the person holding that position. On the other hand, if consideration of benefits focus on a "particular person" in relation to one or more of the qualifiers appearing in §105(1)(f), an executive session would be proper.

We hope that we have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

BY: Chet Godley
Legal Intern

RJF:CG
cc: Hon. Jonica DeMartino
Town Board

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FOIL AO 18615
OML AO 5150

July 29, 2011

Rick Nudd
[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. Nudd:

We have received your letter which pertains to several actions involving the Town of Walworth that you believe to be contrary to the Open Meetings Law. We note that this office has the authority to render advisory opinions regarding the Freedom of Information and the Open Meetings Laws. The opinions are intended to be informative and educational, but they are not binding. In this regard, we offer the following comments.

First, the portion of the Open Meetings Law, §105, which pertains to executive sessions states that:

> 1. Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys:
>
> a. matters which will imperil the public safety if disclosed;
>
> b. any matter which may disclose the identity of a law enforcement agent or informer;
>
> c. information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;
>
> d. discussions regarding proposed, pending or current litigation;

> e. collective negotiations pursuant to article fourteen of the civil service law;
> f. 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;
> g. the preparation, grading or administration of examinations; and
> h. the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.

Based on the foregoing, the Open Meetings Law specifies and limits the subjects that may properly be considered during an executive session. In our view, a discussion involving "forcing the resignation" of a Town official likely would be proper in accordance with the language of §105(f).

Second, in regard to your statement that no minutes were taken at executive sessions, the Open Meetings Law §106(2), 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."

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

Third, as it pertains to your contention that meetings were held without notice, the Open Meetings Law §104 states that:

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

locations for the meeting, and state that the public has the right to attend the meeting at any of the locations.

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: notice must be posted in one or more conspicuous, public locations; it must be given to the news media; and finally, 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'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, in regard to your questions concerning the Freedom of Information Law, 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)(a) 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."

We hope that we have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

BY: Richard Caister
Legal Intern

RJF:RC
cc: Town Board of Walworth

State of New York
Department of State
Committee on Open Government

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OML AO 5151

From: dos.sm.Coog.InetCoog
Sent: Monday, August 29, 2011 8:45 AM
To: 'JohnSolak'
Subject: RE: City Of Binghamton :

Having reviewed the information regarding Binghamton Local Development Corporation, it appears that it is part of or under the substantial control of the City of Binghamton. If that is so, the meetings of its governing body are subject to the Open Meetings Law, must be preceded by notice and conducted in public, unless there is a basis for entry into executive session.

It is possible that BLDC meetings are not referenced on the City's calendar because its meetings are not regularly scheduled, but rather are scheduled as needed. Also, in consideration of its functions, it is likely that significant portions of its meetings might properly be conducted during executive sessions under §105(1)(f). That provision states in part that a public body may enter into executive session to discuss the "financial, credit or employment history of a particular person or corporation."

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
Website: www.dos.state.ny.us/coog/index/html

-----Original Me
From: JohnSolak [redacted]
Sent: Sunday, Au
To: dos.sm.Coog.InetCoog

Subject: City Of Binghamton :

http://www.cityofbinghamton.com/publicmeetings.asp

This concerns the Binghamton Local Development Corporation BLDC. Enclosed please find the public meeting schedule from the City of Binghamton official website. Notice the dates for the BLDC meetings are missing. For all months, this is not an oversight, but quite deliberate.I have had problems in the past with this agency. Holding meetings with locked doors, not allowing cameras, etc. They seem to ignore the open meeting laws.

John Solak, [redacted] Sent from my iPad

State of New York
Department of State
Committee on Open Government

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OML AO 5152

From: Jobin-Davis, Camille (DOS)
Sent: Friday, August 19, 2011 2:47 PM
To: 'Randy Glasser'; Freeman, Robert (DOS)
Cc: PMahon@islandtrees.org; krochon@islandtrees.org; kmcdonough@islandtrees.org; bmedellin@islandtrees.org; kdaum@islandtrees.org; gstorm@islandtrees.org; D.Donahue@islandtrees.org; cmurphy@islandtrees.org; CONCETTA CARR; 'brian'
Subject: RE: Advisory Opinion

Dear Ms. Glasser:

As we discussed, I stand by the opinion written by me and issued by this office.To reiterate, it is the opinion of this office that a motion to adopt a contract that references only one of various provisions on a contract does not accurately and sufficiently describe the action taken. As previously stated "Attaching a copy of the contract to the minutes upon release to the public, and making the contract available immediately may serve to alleviate some concerns; however, in our opinion, the minutes (and most likely the motions) in this case were insufficient and inadequate to comply with law." Allowing the public the opportunity to question the board regarding additional items within an adopted contract, in my opinion, has no bearing on the sufficiency of the motion and thereafter the minutes for two reasons: one, there is no requirement that such discussion be memorialized in the minutes and two, while it is encouraged, there is no requirement that a board answer questions posed. As I suggested in our conversation, it may be wiser for a board to approve a contract or an addendum to a contract by indicating approval of "the attached contract" without attempting to characterize elements of the contract, and providing a copy of such contract not only as an attachment to the minutes, but to those in attendance during the meeting. Finally, I note legislation passed both houses of the State Legislature in June and is awaiting the Governor's signature. If signed, it will require that records scheduled to be presented and discussed by a public body be made available to the public prior to or at the meeting at which the record is discussed, to the extent practicable. The full text of the bill is copied below.
Thank you for your attention to these matters.
Camille

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OML AO 5153 August 18, 2011

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:

This opinion is written pursuant to your recent telephone call in which you pointed out issues that we failed to address in our August 4, 2011 opinion.

Based on our review of materials provided in conjunction with your initial request, including minutes from two meetings at which the Board President was authorized to sign contracts and copies of signed contracts, we note the following:

Minutes from a March 24, 2010 meeting indicate that the Board authorized the President to sign an "Addendum to the Superintendent's Contract modification for the 2010-2011 school year". The "Addendum", signed March 24, 2010, described how the Superintendent declined a 3% salary increase for the 2010-2011 school year, and how "in consideration [of] the aforementioned declination of salary increase," the Board extended the existing contract through 2012-2013. The contract further indicated that the Superintendent's salary in 2012-2013 would be subject to negotiation, but would not be lower than that received in 2009-2010, and that the parties would meet to discuss the salary after January 1, 2011.

Similarly, minutes from a February 16, 2011 meeting indicate that the Board authorized the President to sign an approved "Addendum to the Superintendent's Contract and salary modification for the 2011-2012 school year." The "Agreement", signed the same day, indicated that the Superintendent's salary would remain constant for 2010-2011 and 2011-2012, that the 2012-2013 salary would be negotiable but that the increase shall be "no less than 3%". Further, it was implied that the contract was extended through the 2013-2014 school year and explicitly agreed that while the Superintendent's salary for the 2013-2014 year would be negotiated, again, the increase would be no less than 3%.

You wrote that these are the only minutes that reference an addendum of the Superintendent's contract, and that there are no minutes that reference discussions of extensions of the Superintendent's contract, either in public or in executive session.

Accordingly, in addition to those issues addressed in our previous opinion, first, as you are already aware, the Open Meetings Law requires that meetings of public bodies must be conducted open to the public, unless there is a basis for entry into an executive session. The subjects that may properly be considered in executive session are specified in paragraphs (a) through (h) of §105(1) of the Open Meetings Law. Because those subjects are limited, a public body cannot conduct an executive session to discuss the subject of its choice.

Although certain contract negotiations may be conducted or discussed in executive session, not all such negotiations fall within the grounds for entry into executive session. The only provision that pertains specifically to negotiations, §105(1)(e), deals with collective bargaining negotiations between a public employer and a public employee union under Article 14 of the Civil Service Law, which is commonly known as the Taylor Law. That provision clearly would not have applied to the circumstances presented.

There is a different ground for entry into executive session that may, depending upon the nature of the discussion, be asserted to discuss certain matters pertaining to contract negotiations. 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..."

Based on the provision quoted above, insofar as any executive session discussion by the Board focused on the Superintendent in relation to his performance, we believe that an executive session could properly have been held, and that a motion would not necessarily have to reference the Superintendent or contract extensions. On the other hand, it is our opinion that a discussion based strictly on budgetary concerns, including a discussion that pertained to the Superintendent "declining" to accept a contractually obligated increase in salary, and a contract extension based solely on such declination, as referenced in the 2010 agreement, should have been held in public, as there would be no basis to enter into executive session.

Further, with respect to the minutes, because the School Board constitutes a "public body" required to comply with the Open Meetings Law [see Open Meetings Law, §102(2)], it is

required to prepare minutes in accordance with that statute. Section 106 pertains to minutes of meetings and directs that:

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

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

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 School Board members), 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 School Board. Most importantly, minutes must be accurate.

Based on our review of the pages of the 2010 minutes and the 2011 minutes that you provided, and your assurances that there are no other references to decisions regarding the Superintendent's contract, we are unable to locate any reference to the extension of the Superintendent's contract through the 2012-2013 or the 2013-2014 school years. While the agreements clearly extend the Superintendent's contract, there is no mention in the minutes from either year that any extensions were granted or that the Board agreed to minimum 3% salary increases for two additional years; they merely indicate that there had been a modification to the Superintendent's salary for one year.

In a decision that may be pertinent to the matter, Mitzner v. Goshen Central School District Board of Education [Supreme Court, Orange County, April 15, 1993], the case involved a series of complaints that were reviewed by the School Board president, and the minutes of the Board meeting merely stated that "the Board hereby ratifies the action of the President in signing and issuing eight Determinations in regard to complaints received from Mr. Bernard Mitzner." The court held that "these bare-bones resolutions do not qualify as a record or summary of the final determination as required" by §106 of the Open Meetings Law. As such, the court found that the failure to indicate the nature of the determination of the complaints was inadequate. In the context of your question, we believe that, in order to comply with the Open Meetings Law and to be consistent with the holding in Mitzner, minutes must at the very least indicate that the Board agreed to items in addition to the one year salary modification. Attaching a copy of the contract to the minutes upon release to the public, and making the contract available immediately may serve to alleviate some concerns; however, in our opinion, the minutes (and most likely the motions) in this case were insufficient and inadequate to comply with law.

Subsequent to our August 4, 2011 opinion, we received additional materials from counsel to the District (copies attached), including copies of minutes from June 22 and July 12, 2011. At

the June meeting, we note that the District held a discussion in executive session regarding the following:

> "1. Superintendents Evaluation
> 2. Personnel Issue – faculty member"

And from the July 12 meeting minutes, we note the following item:

> "**10. <u>Board of Education Approal of Superintendent's Contract</u>**
>
> Upon the recommendation of the Superintendent of Schools, a **Motion** was made by Mrs. McDonough, seconded by Mrs. Medellin, and unanimously carried (6-0) to approve the Superintendent's Contract on file with the District Clerk, superseding prior contracts; authorizes the Board President to execute such contract, and directs that a copy of the contract be attached to the Board meeting minutes.*
>
> *(Note: The agreement which is the subject of this resolution amends and extends the Superintendent's term of employment. The term under this agreement is: July 1, 2011 to June 30, 2016, unless otherwise terminated earlier pursuant to the terms and provisions contained therein; and maintains the Superintendent's salary at the level set for his first year of employment in the District, with no subsequent salary increases throughout the entire term)."

In our opinion, by including a description of the specific contract amendments in the discussion of the motion and also in the minutes, the Board has provided adequate description of the action taken. Because the new agreement supersedes the prior contract and various amendments thereto, we believe it wise to attach a copy of the contract to the minutes so as to prevent any further misunderstanding.

Lastly, although not an issue that was raised by either party, we are constrained to note that the June 22 meeting minutes noted "personnel issue – faculty member" as one of the topics for executive session. While it was helpful for the movant to indicate that the personnel issue was related to one faculty member, the motion should be based on the specific language of §105(1)(f), as previously outlined. For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in our opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

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

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

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

We hope that we have been of assistance. If you have any further inquiries, please feel free to contact this office.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

cc: Board of Education
Randy Glasser

State of New York
Department of State
Committee on Open Government

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OML AO 5154

From: dos.sm.Coog.InetCoog
Sent: Wednesday, August 17, 2011 10:58 AM
To: 'Gregory Wichser'
Subject: RE: Town Of Spafford Conflict of Interest

Dear Mr. Wichser:

I offer the following with regard to the issues that you raised.

First, the Open Meetings Law provides the public with right to attend, listen and observe the performance of public officials during meetings of public bodies, such as town boards. It is silent, however, concerning public participation. Therefore, there is no right to speak at meetings conferred upon the public.

Second, the Supervisor is one of five members of the Board, and the Town Law, section 63, indicates that the Board is empowered to adopt rules and procedures to govern its own proceedings; the Supervisor is not authorized to do so unilaterally. When a public body wants to permit limited public participation, it has been advised that it should adopt reasonable rules that treat members of the public equally. By so doing, it would not permit those who favor a particular course of action or policy to have more time to speak than those who may be opposed.

Third, there is often a difference between a meeting and a hearing. The former is held for the purpose of enabling a public body to discuss, deliberate and perhaps to take action. The latter is typically held to provide the public with the opportunity to speak with respect to a particular issue or proposed action.

Lastly, this office has no authority or expertise concerning compliance with ethics provisions. It is suggested that you review the Town's ethics code as well as Article 18 of the General Municipal Law, which includes a series of requirements imposed on state and local government officials pertaining to ethical conduct.

I hope that the foregoing serves to clarify your understanding and that I have been 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
Website: www.dos.state.ny.us/coog/index/html

From: Gregory Wichser [redacted]
Sent: Tuesday, August
To: dos.sm.Coog.InetCoog
Subject: Town Of Spafford Conflict of Interest

To Whom it May Concern;
I am writing with a concern about open government in the Town of Spafford. With Hydrofracking potentially being allowed in New York State, town are looking into local moratoriums. However, the Town of Spafford has thus far squashed debate at town hall meetings, and as outlined in the attached articles, the Town Supervisor, Webb Stevens, holds a lease with a drilling company. As both a citizen, and an employee of State Government, I am ever aware of conflict of interest concerns. And whenever a public servant is doing business with a company that can be affected by a decision, that public servant must openly recuse themselves from the decision. Second to that, this Town Supervisor has shutdown debate. This is not only unethical, it is illegal.

Please let me know which direction I can take this matter, or if your agency can carry this matter to the appropriate authorities.

http://www.baldwinsvillemessenger.com/Articles-c-2011-08-15-110397.114134-sub-Spafford-to-hold-public-hearing-on-hydrofracking-moratorium.html#axzz1VE8AiIrF

http://www.syracuse.com/news/index.ssf/2010/08/town_of_spafford_tables_decisi.html

Thank You in advance for your time and attention to this matter.

Gregory Wichser, P.E.

State of New York
Department of State
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OML AO 5155

From: Freeman, Robert (DOS)
Sent: Monday, August 15, 2011 3:43 PM
To: 'shannon emmons'
Subject: RE: Open Meetings...Minutes

There is no obligation to read correspondence sent to a governmental entity during a meeting, nor is there a requirement that it be referenced in or appended to minutes of a meeting. The Open Meetings Law contains what might be considered to be minimum requirements concerning the contents of minutes. At a minimum, they must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of the members. They may include additional information, e.g., reference to correspondence, but again, there is no requirement that information of that nature be included in the minutes.

I hope that this helps to clarify.

Best,
Bob

Robert J. Freeman
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Committee on Open Government
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From: shannon emmons [redacted]
Sent: Monday, August
To: Freeman, Robert (DOS)
Subject: Open Meetings...Minutes

Hi Bob, it's been a while since I bothered you, I hope all is well.

I have a quick question I hope you will be able to help with.

If someone writes a letter to a board (Town Board, Planning Board, ZBA, etc..) and requests that it be read into the minutes of that meeting (or even if they don't request it) should that letter become part of the minutes for that particular meeting?

Thank you,
Shannon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML AO 5156

August 12, 2011

E-Mail

TO: Paola de Kock

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. de Kock:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to the minutes recorded at a Citywide Council on High Schools meeting. You questioned the Council's authority to use "consensus voting" during a meeting, the recording of certain votes in the minutes, and the Council's authority to determine how the minutes are prepared. In this regard, we offer the following comments.

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

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

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 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 Council members gathers to conduct public business, any such gathering would, in our opinion, constitute a "meeting" subject to the Open Meetings Law. On the other hand, when less than a quorum is present, the Open Meetings Law would not apply.

Second, the Open Meetings Law is applicable to meetings of public bodies, such as the Citywide Council on High Schools, created pursuant to §2590-B of the Education Law. Section 102(2) of the Open Meetings Law defines the phrase "public body" to include:

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

A public body may validly conduct a meeting or carry out its authority only at a meeting during which a majority of its members has physically convened or during which a majority has convened by means of videoconferencing.

Third, whenever action is taken by a public body, we believe that it must be memorialized in minutes, and §106 of the Open Meetings Law provides that:

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

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, upon their preparation and review perhaps years later, to ascertain the nature of action taken by an entity subject to the Open Meetings Law. Most importantly, minutes must be accurate.

Although tangential to the issues raised, we note that at the beginning of the draft minutes of the April 13, 2011 meeting, the names of those present are indicated. It is also indicated that the business portion of the meeting began at 6:14 PM, but that a quorum was not present until

6:35 PM. Various reports seem to have been presented between 6:14 and 6:35, after which time additional members joined the gathering to constitute a quorum. Although not a legal requirement, perhaps the minutes could be amended to better reflect when a quorum was present by listing the names of those attending the meeting at the times that they joined the meeting.

In any event, it appears that the only decision that was made prior to the presence of a quorum involved setting the date and time of an upcoming special meeting. Based on our review of the Council's bylaws, it does not appear that the setting of the date and time of a special meeting requires Council approval.

If these assumptions are correct, it appears there was a quorum present during the "business" meeting at which the first mention of voting was as follows:

> "A [con]census vote was taken to have one-thousand dollars moved towards council reimbursements, six-hundred dollars towards office supplies, and plaques for the members who wish to receive one…." All members present were listed by name and indicated as "in agreement."

In this regard, we note a judicial decision that dealt with the notion of a consensus reached at a meeting of a public body Previdi v. Hirsch [524 NYS 2d 643 (1988)], which involved a board of education. 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).

In the context of the situation that you described, if the Council reaches a "consensus" that is reflective of its final determination of an issue, we believe that minutes must be prepared, as they were in this case and that a record must indicate the manner in which each member voted. We point out that §87(3)(a) of the Freedom of Information Law requires that an agency, such as the Council, must maintain "a record of the final vote of each member in every agency proceeding in which the member votes." If indeed a consensus represents action upon which the

Council relies in carrying out its duties, or when the Council, in effect, reaches agreement on a particular subject, we believe that the minutes must reflect the actual decision of the members. It is our opinion that the draft minutes referenced above sufficiently reflect that all Council members present agreed to the financial arrangement; however, as you indicated this may be inaccurate. If this representation is the case, we recommend that a motion be made to amend the minutes to accurately reflect what transpired.

A method of avoiding confusion in the future, in our opinion, would be for the chair to ensure the formality of inviting motions and votes on every issue to be determined.

Finally, based on a review of the Council's bylaws, we note that at least one provision of the Open Meetings Law has been amended since the adoption of the bylaws, specifically, §104 regarding notice of meetings, which now includes an additional requirement that notice of meetings be provided online, whenever possible.

We hope that this is helpful.

CSJ:sb
cc: Citywide Council on High Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
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Robert J. Duffy
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OML AO 5157

August 4, 2011

Hon. Thomas Quackenbush, Chairman
Montgomery County Board of Supervisors
20 Park Street
P.O. Box 1500
Fonda, NY 12068-1500

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 Chairman Quackenbush:

We have received your request for an advisory opinion concerning the application of the Open Meetings Law to standing committees. You have raised the following three questions:

> "If all Board members are in attendance at a standing Committee meeting can those who are not members of the Committee sponsor, second or offer amendments to the Resolution in front of the Committee?"
>
> "Can Board members who are not part of the standing Committee join in the discussion?"
>
> "Who is privileged to enter an executive session of the standing Committee?"

In this regard, judicial decisions indicate that committees consisting solely of members of a governing body are "public bodies" subject to the Open Meetings Law. Those decisions include Lewis v. O'Connor, Supreme Court, Lewis County, January 21, 1997 (standing committees of the county hospital, made up entirely of members of the hospital's board of managers, with no power to take final action nor bind the board of managers, are public bodies subject to the OML), in which it was held that: "To keep their deliberations and decisions secret from the public would be violative of the letter and spirit of the legislative declaration as stated in the Public Officers Law" [see also Bogulski v. Erie County Medical Center, Supreme Court, Erie County, January 13, 1998 (subcommittee of county hospital's board of managers required to

comply with OML); Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993) (committee of the county board of supervisors required to comply with OML].

In support of this opinion and by way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject also involved a situation in which a governing body, a school board, designated committees consisting of less than a majority of the total membership of the board. In Daily Gazette Co., Inc. v. North Colonie Board of Education [67 AD2d 803 (1978)], it was held that those advisory committees, which had no capacity to take final action, fell outside the scope of the definition of "public body".

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

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

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

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

In view of the amendments to the definition of "public body", we believe that any entity consisting of two or more members of a public body, such as a committee, a subcommittee or "similar body" consisting of 3 members of the Board of Trustees, would fall within the requirements of the Open Meetings Law when such an entity discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD2d 984, 437 NYS2d 466, (4th Dept. 1981), appeal dismissed 55 NY2d 995, 449 NYS2d 201 (1982)].

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

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

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

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" [Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, 415, affirmed 45 NY2d 947 (1978)].

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

With respect to your specific questions, unless the Board of Supervisors has adopted rules to the contrary, first, we believe that only members of the committee that is conducting the meeting may sponsor, second or offer amendments to resolutions before the committee; second, whether board members who are not members of a committee may join in a discussion would, in our view, be within the discretionary authority of the committee. In general, there is no right to speak on the part of those who attend meetings. If a public body permits those in attendance to speak, it has been recommended that they do so through the adoption of rules that treat attendees equally.

Lastly, §105(2) of the Open Meetings Law states that:

> "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body."

Based on that provision, we believe that only the members of a public body, such as a committee, have the right to attend an executive session. While a public body, such as a committee, may permit others to attend, those who are not members have no right to attend.

We hope that we have been of assistance. If you have further inquiries, please feel free to contact us.

Sincerely,

Robert J. Freeman
Executive Director

BY: Richard Caister
Legal Intern

RJF:RC

FOIL-AO-05158

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

One Commerce Plaza, 99 Washington Ave., Suite 650
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Tel (518) 474-2518
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www.dos.ny.gov/coog

August 4, 2011

Ronald Lineman
[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. Lineman:

We have received your request for a written opinion regarding application of the Open Meetings Law to certain proceedings of the Board of Trustees of the Village of Forestville. Specifically, you wrote of your concern pertaining to the "legality" of an emergency "budget review meeting" held on March 18. You indicated that notice of the time and place of the meeting was posted at the post office 24 hours prior to the meeting.

In conjunction with your request, counsel to the Village submitted additional facts (copy attached), indicating that the tentative budget is "officially" received at the last meeting in March, which in this case would have been March 29, the date of a regularly scheduled Board meeting. The March 18 meeting, counsel wrote, "was called on short notice given the imminent departure of a number of Board members. No action was anticipated at any of these initial sessions it is simply an opportunity for the Board members to informally review the tentative budget which was available and on file by that date...". Counsel also wrote that the Clerk was "unable to contact the media via the normal fax or phone call within the 24 hours prior to the meeting" and reiterated that the gathering served as an "additional" opportunity for the board and the public to review the tentative budget prior to its "formal reception" and adoption.

In this regard, first, §104 of the Open Meetings Law pertains to notice of meetings of public bodies, such as a village 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."

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.

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

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

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

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

In consideration of the information provided, the meeting of March 18 was called as means of allowing a greater opportunity for the board and the public to obtain information concerning the budget. We believe that you are correct in questioning the urgency of the March 18 meeting. In our opinion, notice of the March 18 meeting should have been given prior to the meeting in a manner consistent with the requirements imposed by §104 of the Open Meetings Law. It appears that the official, and more significant meeting was to be held on March 29, 2011. According to our information, the meeting of March 29 was preceded by proper notice under the Open Meetings Law.

Our understanding of Village Law, §5-508, which governs the adoption of the budget, is that the village clerk must present a tentative budget to the village board prior to March 31st, at which point the board may make changes. A public hearing on the tentative budget must be held shortly thereafter, on or before April 15th. If we understand the sequence of events in this case, the Clerk was ready to "present" the budget before the regularly scheduled meeting on March 29, but Board members may not have been able to meet between March 18 and the 29th. What is not

quite clear is whether it was necessary to "present" the tentative budget on the 18th, and why it then was presented again on the 29th, if that was the case. If the budget could have been shared with Board members and the public at any time, there would have been no necessity for holding the meeting on the 18th. Because it is difficult to know whether this assumption is correct based on the materials provided, and because no reason was given for the inability to contact the media via fax or telephone, this will confirm that if it was necessary to conduct the meeting on an emergency basis, the Village should have provided proper notice to the media.

We hope that we have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

BY: Richard Caister
Legal Intern

RJF:RC
cc: Board of Trustees

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Committee on Open Government

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OML AO 5159

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, August 03, 2011 12:28 PM
To: 'Scott Fickbohm'
Subject: RE: quick question

Dear Mr. Fickbohm,

In response, please note that members must be present at the meeting or video-conferenced in to the meeting in order to be counted for quorum purposes, and in order to vote. Members are not permitted to vote by any other means.

See the following advisory opinion:
http://www.dos.ny.gov/coog/otext/o4306.htm

Please let me know if you have further questions.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
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OML AO 5160

From: Jobin-Davis, Camille (DOS)
Sent: 11 10:30 AM
To: [redacted]
Subjec committees

Dear Philip,

This is in response to the voice mail message that you left yesterday regarding the Open Meetings Law and whether it applied to two committees of the Orange County IDA. You described both of the committees as those made up solely of members of the IDA board. If this description is accurate, then it is my opinion that each committee would also be subject to the Open Meetings Law, due to it's membership.

Please see the following advisory opinion:
http://www.dos.ny.gov/coog/otext/o4660.html

You may also wish to review other advisory opinions through our online OML Advisory Opinion Index, under "C" for "Committee" and/or "A" for "Advisory Bodies".

I hope that this is helpful.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
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OML-AO-5161

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Monday, August 01, 2011 3:05 PM
To: 'Newzjunky'
Subject: RE: Mr. Freeman Questions

Mr. Smith:

It seems that there may be several misunderstandings.

First, there is no reference in the Open Meetings Law to agendas. If, however, an agenda has been prepared, it would be subject to rights conferred by the Freedom of Information Law.

Second, the Open Meetings Law specifies that the notice required to be given pursuant to that law, which must only include reference to the time and place, prior to meetings need not be a legal notice. Stated differently, the notice requirements in that law do not involve a significant expenditure of public moneys. In contrast, often public hearings must, based on other statutes, require the publication of a legal notice.

Third, to comply with the Open Meetings Law, notice must be given to the news media, by means of posting, and when possible to do so, on an entity's website. If notice is routinely given to a news media organization other than yours, there is no obligation to provide notice directly to you.

Lastly, because the Open Meetings Law states that any member of the public may attend an open meeting, it has been advised that a public body cannot require a person to identify him/herself on a sign in sheet as a condition precedent to attending a meeting. In short, simply being human provides the right to attend; one's identity, residence, etc. have no impact on the right to do so.

I hope that I have been of assistance. If you would like to discuss these or other issues relating to either the Freedom of Information or Open Meetings Laws, please feel free to contact me.

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FOIL AO 5162

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, August 02, 2011 1:37 PM
To: 'richardhague@earthlink.net'
Subject: Open Meetings Law
Attachments: notice.doc

Dear Trustee Hague,

This is in response to your voicemail message, and will confirm that all meetings of a quorum of a public body must be preceded by notice even when the intent is to enter into executive session.

In order for a public body to enter into executive session, it must first vote, based on any one of the bases for entering into executive session listed in section 105(1) of the Open Meetings Law. The vote to enter into executive session must be passed by a majority of the total membership of the board, and must be held in public session. Minutes of such vote must be taken.

The following advisory opinion explains in more detail:
http://www.dos.ny.gov/coog/otext/o3618.htm

The notice requirements set forth in the Open Meetings Law are attached.

Although it may not be an issue in the situation you described, I note that all members of a public body must receive notice of all meetings that are subject to the Open Meetings Law, pursuant to the provisions of General Construction Law section 41. See the following advisory opinion for more detail:
http://www.dos.ny.gov/coog/otext/o4744.html

Please let me know if you have further questions.

Camille

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

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OML AO 5163

August 4, 2011

Brian Kelty
[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. Kelty:

We have received your fax which pertains to the Island Trees Board of Education extending the superintendent's contract. According to your letter, the Board did so without discussing or voting to do so at a public meeting. You also wrote that there is no record of the vote taken to approve the contract extension. In this regard, we offer the following comments.

First, as you are likely aware, the Open Meetings Law requires that meetings of public bodies must be conducted open to the public, unless there is a basis for entry into an executive session. The subjects that may properly be considered in executive session are specified in paragraphs (a) through (h) of §105(1) of the Open Meetings Law. Because those subjects are limited, a public body cannot conduct an executive session to discuss the subject of its choice.

Although certain contract negotiations may be conducted or discussed in executive session, not all such negotiations fall within the grounds for entry into executive session. The only provision that pertains specifically to negotiations, §105(1)(e), deals with collective bargaining negotiations between a public employer and a public employee union under Article 14 of the Civil Service Law, which is commonly known as the Taylor Law.

There is a different ground for entry into executive session that may, depending upon the nature of the discussion, be asserted to discuss certain matters pertaining to contract negotiations. 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..."

Based on the provision quoted above, insofar as the discussion by the Board focused on the Superintendent in relation to his performance, we believe that an executive session could properly have been held.

Second, although you suggested that there was no vote by the Board, the minutes that you forwarded indicate that a motion was made, and that the vote on the motion was 4-0. According to the District's website, the Board consists of seven members. Notwithstanding the approval of the motion, we point out that §87(3)(a) of the Freedom of Information Law has long required that an agency, such as a school district, prepare a record specifying the manner in which each member of a board cast his or her vote.

In short, a motion indicating approval of a motion by 4-0 vote is inadequate to comply with law; "a record of the final vote of each member in every agency proceeding in which the member votes" must be maintained by the District.

We hope that we have been of assistance. If you have any further inquiries, please feel free to contact this office.

Sincerely,

Robert J. Freeman
Executive Director

BY: Richard Caister
Legal Intern

RJF:RC
cc: Board of Education
Randy Glasser

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E-MAIL

FOIL-AO-18648
FOIL-AO-5164

From: dos.sm.Coog.InetCoog
Sent: Tuesday, July 26, 2011 8:51 AM
To:
Subject: RE: Open Meetings Law

Dear Trustee:

I believe that there is confusion involving the Open Meetings Law and its companion, the Freedom of Information Law. The two statutes are separate, and the standards regarding disclosure and the ability to withhold information, either via a basis for entry into executive session or assertion of the grounds for denying access to records, differ. In short, as the grounds for conducting an executive session are compared with the grounds for withholding records under the Freedom of Information Law, they are often inconsistent. There are instances in which there is no basis for conducting an executive session, but in which there may be a basis for withholding records, and vice versa.

From my perspective, the issue under consideration, the Village of Brockport and the Towns of Sweden and Clarkson forming a fire district, must be discussed in public to comply with the Open Meetings Law. Unless there is unusual information that has not been shared, none of the grounds for entry into executive session could properly be asserted to discuss the matter. On the other hand, there may be elements of the records transmitted between or among the three municipalities that may be withheld under the Freedom of Information Law. I emphasize "may", for even when the kinds of records in question fall within an exception to rights of access and may be withheld, there is no obligation to withhold them.

The exception in this instance is §87(2)(g) of the Freedom of Information Law concerning "inter-agency or intra-agency materials." Communications between or among the three municipalities would constitute inter-agency materials, and those portions that consist of advice, opinion, recommendations, questions and the like may be withheld. However, the

same provision requires that other portions of those materials that consist of statistical or factual information, that reflect final agency policies or determinations, or which are external audits must be disclosed.

In sum, there would appear to be no basis for conducting an executive session to discuss the formation of a fire district. That being so, insofar as the content of records have been or should have been discussed and, therefore, effectively disclosed to the public, I believe that those records or portions of records should be made available to comply with law. Again, other portions of the records reflective of advice, opinions or recommendations may, but need not be, withheld.

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

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OML AO 5165

From: dos.sm.Coog.InetCoog
Sent: Thursday, September 22, 2011 11:38 AM
To: 'Sue and Bill Palmer'
Subject: RE: Telephone Voting
Attachments: o4306.wpd

As indicated in the attached opinion, based on the language of the law and judicial decisions, a member of a board cannot vote or be counted toward a quorum by telephone. A member, however, may participate, vote and be counted toward a quorum by means of videoconferencing. If that method is used, the notice of the meeting must so indicate, and the public must be given the opportunity to attend at any location in which a member may be participating in a meeting.

I hope that I have been of assistance.

Robert J. Freeman
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From: Sue and Bill Palmer [redacted]
Sent: Monday, September 19
To: dos.sm.Coog.InetCoog
Subject: Telephone Voting

Hello,

I am the Board President of a special district library, D. R. Evarts Library located in Athens, NY.

One of our Board members will be away in Florida for three months. She asked if it would be possible to vote by telephone conference call in the event we do not have a physical quorum at one of our meetings.

Is this allowed or must a quorum be made up of physical members present at the public meeting? And if a quorum is not present, it is my understanding that we may reconvene within one week to vote again...is this correct?

Your help is appreciated.

Sincerely,

er
[redacted] (Home telephone)

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OML AO 5166

From: [redacted]
Sent: [redacted] 2011 1:06 PM
To: [redacted]; guilfordtownclerk@gmail.com; mmiles1; [redacted]ek@gmucsd.org
[redacted]ed pulblic comment policy
Attachments: Policy_-_Public_Comment[1].doc

I have attached draft #3 of the proposed public comment policy for the Town of Guilford. The town board tabled taking action on this policy until next month. Can the town board require the public to sign in, require those wishing to speak to sign up and ask individuals who speak to give their name and address? I look forward to receiving the committee's opinion of the proposed Town of Guilford Public Comment Policy.

Sincerely, George Seneck,
Town Supervisor.

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OML AO 5167

From: dos.sm.Coog.InetCoog
Sent: Thursday, September 15, 2011 12:30 PM
To: townoffice@nnymail.com
Subject: RE: Question on interviews
Attachments: O2565.doc

Mr. Murray:

Assuming that the position of assessor is appointive rather than elective, I believe that the Board would have the authority to conduct the interviews in executive session pursuant to §105(1)(f) of the Open Meetings Law. That provision refers to the ability to enter into executive session to discuss the employment history of a particular person, as well as matters leading to the appointment or employment of a particular person. If the position is elective, and the Board would be interviewing candidates to fill a vacancy in the elective office, the only judicial decision on the subject indicates that there is no basis for holding an executive session when the issue involves selection of a person to fill a vacancy in such an office (see the attached opinion, which quotes from that decision).

I hope that I have been of assistance.

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From: David Murray [mailto:townoffice@nnymail.com]
Sent: Wednesday, September 14, 2011 1:38 PM
To: dos.sm.Coog.InetCoog
Subject: Question on interviews

Hello, this is David Murray, I’m the Town Clerk of the Town of Morristown in Morristown , New York. My Board will be conducting interviews with applicants for the open position of assessor soon (September 26th). Our local reporter wants to sit in on these interviews. My Board has asked me to find out if this is an open process. If it’s open to the reporter it would be open to everyone, including the other applicants. They are concerned it will alter the candidness and validity of the interview process with an audience looking on. Personal information may also be disclosed during the interview. Can you please advise me on this. Thank you very much.

David Murray, Town Clerk

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OML AO 5168

From: dos.sm.Coog.InetCoog
Sent: 12, 2011 8:46 AM
To: [redacted]
Subjec[redacted]e session

Dear Mary:

There may not be a basis for entry into executive session to discuss actions of a board member who has not engaged in actions that, in your words, are not "illegal, criminal or contractual".

The only provision that might apply, §105(1)(f), permits a public body to conduct an executive session to discuss "the medical, credit, financial 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 board member is elected and, therefore, is not an employee, often the only qualifier that would authorize an executive session would be discussion of a "matter leading to the….removal of a particular person." In my experience, it is rare that the foregoing is applicable.

If you would like to discuss the issue, please feel free to contact me.

I hope that I have been of assistance.

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From: [redacted]
Sent:

To: dos.sm.Coog.InetCoog
Subject: Executive session

Robert Freeman
Executive Director,
Committee on Open Government

Mr. Freeman:

Re: Executive Session

Which of the regulations can be used if a Board member wants to discuss the actions of a fellow colleague on the Board. These actions are not involving anything illegal, criminal or contractual.

Please answer as soon as possible.

Thank you,
Mary

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OML-AO-5169

From: dos.sm.Coog.InetCoog
Sent: Monday, September 12, 2011 9:00 AM
To:
Subject: RE: question

Dear Mr.:

As you are likely aware, the Open Meetings Law includes provisions that permit meetings of public bodies to be conducted by means of videoconferencing that enables members of a public body, as well as any others who may be present at a location in which a member is participating, to observe and hear the participants. Further, §104(4) of that statute states that:

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

Although there are no judicial decisions concerning the use of Skype, it is our view that if all of the conditions described in the Open Meetings Law are met, Skype serves as a method of videoconferencing that would be valid to comply with the Open Meetings Law.

I hope that I have been of assistance.

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OML AO 5170

September 8, 2011

E-Mail

TO: Darrin Davis

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. Davis:

Once again, I apologize for the delay in responding to your correspondence.

Please note that the Committee on Open Government is authorized to provide advice and opinions relating to the Open Meetings Law. Neither the Committee nor its staff have the authority or resources to conduct in-depth investigations or compel compliance with law.

Your focus relates to the Peekskill City Council and the Peekskill Public Housing Authority. In consideration of the issues that you raised, I offer the following comments.

The first area of controversy involves the public's ability to speak at City Council meetings. You wrote that the Mayor "has repeatedly walked out of council meetings and left us standing there after waiting patiently to speak, sometimes for hours." You added that she "lets people she agrees with go over the allotted time andhas never closed the meeting on them" and "answers their questions while just staring silently at us."

In this regard, while the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100), the Law is silent with respect to public participation. Consequently, by means of example, if a public body, such as a village board of trustees, does not want to answer questions or permit the public to

speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally.

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

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

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

The court in Schuloff determined that a “compelling state interest” involved the ability to protect students’ privacy in an effort to comply with the Family Educational Rights Privacy Act, but that expressions of opinions concerning “the shortcomings” of a law school professor could not be restrained.

In the context of the situation as you described it, assuming that the Council and/or the Mayor as presiding officer permit those who wish to speak to do so for a particular period of time, each person who wishes to do so must, in my opinion, be given an equal opportunity to do so. Similarly, if the Council and/or Mayor permit positive comments concerning the operation of City government, I believe that they must offer an equal opportunity to enable those in attendance to offer negative or critical comments.

Second, §103(a) of the Open Meetings Law provides in relevant part that "Every meeting of a public body," such as the City Council or the governing body of a municipal housing authority, "shall be open to the general public." That being so, any person, whether a resident of a municipality or otherwise, has the right to attend an open meeting of a public body. From my perspective, absent a court order, a person cannot be "banned" from a meeting of a public body that is subject to the Open Meetings Law.

Lastly, until recently, there was no statute that dealt with the ability or right to record meetings of public bodies. However, judicial decisions rendered since 1979 stood for the same principle that any member of the public may record an open meeting, so long as the use of recording device is neither obtrusive nor disruptive. That principle led to the enactment of legislation that became part of the Open Meetings Law on April 1 of this year. Specifically, a new §103(d) provides that:

> "1. Any meeting of a public body that is open to the public shall be open to being photographed, broadcast, webcast, or otherwise recorded and/or transmitted by audio or video means. As used herein the term "broadcast" shall also include the transmission of signals by cable.
> 2. A public body may adopt rules, consistent with recommendations from the committee on open government, reasonably governing the location of equipment and personnel used to photograph, broadcast, webcast, or otherwise record a meeting so as to conduct its proceedings in an orderly manner. Such rules shall be conspicuously posted during meetings and written copies shall be provided upon request to those in attendance."

In an effort to enhance understanding of and compliance with law, copies of this opinion will be sent to the City Council and the Housing Authority.

I hope that I have been of assistance.

RJF:sb
cc: Peekskill City Council
Peekskill Housing Authority

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OML AO 5171

September 6, 2011

E-Mail

TO: Mary Adams

FROM: Robert J. Freeman, Executive Director

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

Dear Ms. Adams:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain gatherings of the City of Rochester Board of Education. Specifically, you indicated that the Board met with the Superintendent and staff to discuss the budget, and that it may have done so on more than one occasion. In this regard, we offer the following comments.

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

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

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

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

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

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

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

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

Based upon the terms of the Open Meetings Law and its judicial interpretation, if a majority of Board members gathers to conduct public business, any such gathering would, in our opinion, constitute a "meeting" subject to the Open Meetings Law. If, as you describe, a majority

of the Board met to discuss budget issues with the Superintendent and/or other staff, in our opinion, such gatherings would have constituted “meetings” subject to the Open Meetings Law. On the other hand, when less than a quorum is present, the Open Meetings Law would not apply. Further, when there is an intent to conduct a meeting, the gathering must be preceded by notice given pursuant to §104 of the Open Meetings Law, convened open to the public and conducted in public as required by the Open Meetings Law.

We hope that this is helpful.

RJF:sb

cc: Board of Education

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OML-AO-5172

September 8, 2011

E-Mail

TO:
FROM: Robert J. Freeman, Executive Director
BY: Richard Caister, Legal Intern

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.:

We have received your request for clarification of the amendments to the Open Meetings Law concerning the broadcasting of open school board meetings. In this regard, we offer the following comments.

As you know, Open Meetings Law §103(d), effective April 1, 2011, which specifically pertains to your inquiry, provides that:

> "Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in an appropriate facility which can adequately accommodate members of the public who wish to attend such meetings.
>
> 1. Any meeting of a public body that is open to the public shall be open to being photographed, broadcast, webcast, or otherwise recorded and/or transmitted by audio or video means. As used herein the term "broadcast" shall also include the transmission of signals by cable.
>
> 2. A public body may adopt rules, consistent with recommendations from the committee on open government, reasonably governing the location of equipment and personnel used to photograph, broadcast, webcast, or

> otherwise record a meeting so as to conduct its proceedings in an orderly manner. Such rules shall be conspicuously posted during meetings and written copies shall be provided upon request to those in attendance."

This will confirm your interpretation, that the amendment requires a public body to allow its meetings to be photographed, broadcast, or otherwise recorded, and permits it to adopt reasonable rules regarding the use of equipment and the conduct of those who use it.

Please note that while there is no requirement to do so, a public body may choose to photograph, broadcast, or otherwise record its meetings, and many do so.

We hope that we have been of assistance.

RJF:RC:sb

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OML AO 5173

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, September 08, 2011 11:54 AM
To: 'A. Jane Johnston'
Subject: RE: Discussions via email

Jane,

You've raised interesting issues. Bottom line, I think, is that board members can email each other just about anything; however, when the discussion rises to the level of "taking action", such behavior would be prohibited by law. The advisory opinion that you referenced is lengthy and offers many different opinions. The reality is that there is no case law that I know of that addresses the extent to which a board may discuss issues via email.

The one case that I can draw comparisons to is Cheevers v Town of Union, in which town board members communicated through a series of telephone calls to sign a joint letter. Although they argued that none of them were in the room signing the letter at the same time, the court held that the series of communications resulted in action taken, and was therefore in violation of the Open Meetings Law.

With respect to the straw poll question, my response is based on your definition of "straw poll". If by "straw poll" you mean a communication that says something like, "If we had a vote at the next meeting on subject A how would you vote" and a majority of the members responded, indicating how they would vote, such "action" would be prohibited. On the other hand, if a "straw poll" is more like, "Do you feel you have enough information at this time to put it on the agenda for a vote?" or " are you ready to vote on subject A", I think those types of Communications would not be prohibited. The question that seems to be posed in the email you refer to is whether or not to hold a meeting. Whether or not to schedule a meeting, or when to schedule a meeting, without more, I think, would not be considered "taking action".

Depending on how easy it is to locate related emails, if an item were discussed via email, a FOIL request should at the very least reveal that there were emails exchanged on a particular issue. Intra-

agency communications, to the extent that they contain statistical or factual information, would be required to be disclosed. To the extent that they contain opinion, no disclosure is required; however, at the very least you would be informed that they exist and are being withheld.

Hoping that helps.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
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[redacted]

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OML AO 5174

September 7, 2011

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:

We have received your request for a written advisory opinion concerning application of the Open Meetings Law and the contents of minutes of a Town Board meeting. You wrote that you were asked to remove the disciplined employee's name from the minutes pursuant to an agreement between the Board and the employee's attorney. In this regard, we offer the following comments.

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

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

In view of the foregoing, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken

during an executive session, minutes reflective of the action, the date and the vote must generally be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared.

We point out that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. From our perspective, when a public body makes a final determination during an executive session, that determination will, in most instances, be public. For example, although a discussion to hire or fire a particular employee could clearly be discussed during an executive session [see Open Meetings Law, §105(1)(f), a determination to hire or fire that person would be recorded in minutes and would be available to the public under the Freedom of Information Law. On the other hand, if a public body votes to initiate a disciplinary proceeding against a public employee, and there is no determination indicating misconduct yet, minutes reflective of its action would not have to include reference to or identify the person, for the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would result in an unwarranted personal privacy such as unsubstantiated charges or allegations [see Freedom of Information Law, §87(2)(b)].

In the context of your inquiry, perhaps of greatest significance is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In addition, as you are aware, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

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

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

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

In terms of the judicial interpretation of the Freedom of Information Law, we point out that in situations in which allegations or charges have resulted in the issuance of a written reprimand, disciplinary action, or findings or admissions that public employees have engaged in misconduct, records reflective of those kinds of determinations have been found to be available, including the names of those who are the subjects of disciplinary action [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell, Geneva Printing, Scaccia and Sinicropi, supra].

In Geneva Printing, supra, a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is benefited by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. On the contrary, it was determined that:

"the citizen's right to know that public servants are held accountable when they abuse the public trust outweighs any advantage that would accrue to municipalities were they able to negotiate disciplinary matters with its employee with the power to suppress the terms of any settlement".

It was also found that the record indicating the terms of the settlement constituted a final agency determination available under the Law. The decision states that:

> "It is the terms of the settlement, not just a notation that a settlement resulted, which comprise the final determination of the matter. The public is entitled to know what penalty, if any, the employee suffered...The instant records are the decision or final determination of the village, albeit arrived at by settlement..."

In another decision involving a settlement agreement between a school district and a teacher, it was held in Anonymous v. Board of Education [616 NYS 2d 867 (1994)] that:

> "...it is disingenuous for petitioner to argue that public disclosure is permissible...only where an employee is found guilty of a specific charge. The settlement agreement at issue in the instant case contains the petitioner's express admission of guilt to a number of charges and specifications. This court does not perceive the distinction between a finding of guilt after a hearing and an admission of guilt insofar as protection from disclosure is concerned" (id., 870).

The court also referred to contentions involving privacy as follows:

> "Petitioner contends that disclosure of the terms of the settlement at issue in this case would constitute an unwarranted invasion of his privacy prohibited by Public Officers Law § 87(2)(b). Public Officers Law § 89(2)(b) defines an unwarranted invasion of personal privacy as, in pertinent part, '(i) disclosure of employment, medical or credit histories or personal references of applicants for employment.' Petitioner argues that the agreement itself provides that it shall become part of his personnel file and that material in his personnel file is exempt from disclosure..." (id.).

In response to those contentions, the decision stated that:

> "This court rejects that conclusion as establishing an exemption from disclosure not created by statute (Public Officers Law § 87[2][a]), and not within the contemplation of the 'employment, medical or credit history' language found under the definition of 'unwarranted invasion of personal privacy' at Public Officers Law § 89(2)(b)(i). In fact, the information sought in the instant case, i.e., the terms of settlement of charges of misconduct lodged against a teacher by the Board of Education, is not information in which petitioner has any reasonable expectation of privacy where the agreement contains the teacher's admission to much of the misconduct charged. The agreement does not contain details of the petitioner's personal history-but it does contain the details of admitted misconduct toward students, as well as the agreed penalty. The information is clearly of significant interest to the public, insofar as it is a final determination and disposition of matters within the work of the Board of Education and reveals the process of and basis for government decision-making. This is not a case where

> petitioner is to be protected from possible harm to his professional reputation from unfounded accusations (Johnson Newspaper Corp. v. Melino, 77 N.Y.2d 1, 563 N.Y.S.2d 380, 564 N.E.ed 1046), for this court regards the petitioner's admission to the conduct described in the agreement as the equivalent of founded accusations. As such, the agreement is tantamount to a final agency determination not falling within the privacy exemption of FOIL 'since it was not a disclosure of employment history.'" (id., 871).

In LaRocca v. Board of Education of Jericho Union Free School District [632 NYS 2d 576 (1995)], even though the sanction was far short of a removal from employment, the Appellate Division held that a settlement agreement was available insofar as it included admissions of misconduct. In that case, charges were initiated under §3020-a of the Education Law, but were later "disposed of by negotiation and settled by an Agreement" (id., 577) and withdrawn. The court rejected claims that the record could be characterized as an employment history that could be withheld as an unwarranted invasion of privacy, and found that a confidentiality agreement was invalid.

Accordingly, it is our opinion that because disclosure of the name of the employee with whom the Board entered into a settlement agreement would not constitute an unwarranted invasion of personal privacy, it should be included in the minutes. Similarly, it is our opinion that the Town would have no basis to deny access to the agreement insofar as it identifies the employee and the agreement to retire on a certain date, or the document detailing that he was placed on administrative leave, with or without pay.

Finally, although not an issue that you raised, in light of the Board's motion to enter executive session was to discuss "personnel litigation matters", we include a copy of OML-AO-4246 and OML-AO-4814.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb

Enclosures

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OML AO 5175

September 6, 2011

E-Mail

TO: Cassie Guthrie

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 Ms. Guthrie:

I have received your letter and hope that you will accept my apologies for the delay in response. In all honesty, your correspondence was misplaced and only recently resurfaced.

Following the receipt of your letter, the Brockport Seymour Library was contacted, and we received a letter from the President of its Board of Trustees, Ms. Mary Ellen Baker, concerning your remarks. Although you wrote that meetings were held on four specific dates, Ms. Baker wrote that the Board conducted a meeting on only one of those dates, that it "was an informal session held in the children's story tower to work out contracts for our Director and Libarian" and that "no secret meetings [were] held."

In this regard, while details concerning the "informal session" were not described, if a quorum, a majority of the total membership of the Board gathered to discuss Library business, I believe that the gathering would have constituted "meeting" [see Open Meetings Law, §102(1)] that fell within the scope of the Open Meetings Law, even if there was no intent to take action [see Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, 45 NY2d 947 (1978)]. The decision cited in the preceding sentence involved "work sessions" held solely for the purpose of discussion, and the Court of Appeals, the state's highest court, determined that any gathering of a quorum of a public body for the purpose of conducting public business

constitutes a "meeting" subject to the requirements of the Open Meetings Law. As you may be aware, every meeting must be preceded by notice given in accordance with §104 of that statute, and conducted open to the public, except to the extent that there is a proper basis for entry into executive session.

If the Board's discussion involved consideration of contracts pertaining to specific individuals, I believe that the Board could validly have conducted an executive session pursuant to §105(1)(f) of the Open Meetings Law. That provision 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…"

On the other hand, when a discussion involves a position, irrespective of who might hold or be hired to fill that position, I do not believe that there would be a basis for entry into executive session, for the issue would not focus on a "particular person."

Lastly, with respect to minutes of meetings of the Board of Trusteees, Ms. Baker indicated that the Library's "public file cabinet [was] in disarray", but that minutes regarding each monthly meeting held from the beginning of 2010 to the present are available and kept at the circulation desk.

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

RJF:sb

cc: Mary Ellen Baker

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OML-AO-5176

September 6, 2011

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:

We have received your request for a written opinion regarding access to meetings held by the Board of Fire Commissioners of the Providence Fire District. You wrote that a few meetings were held at Town Hall due to renovations to the firehouse, and that at one point persons attending a Board meeting sought access through your courtroom while court was in session. It was at this point that you realized that the only method for gaining access to meetings at the firehouse was through a locked door, for which members of the fire department have access via use of an electronic fob.

Counsel to the Board responded by stating that access to meetings at Town Hall were possible through an unlocked exterior door at the rear of the building, for those who remembered to park in the rear of the building. Counsel further indicated that the reason for keeping the door to the firehouse locked, except to those with key fobs, was based on a fear of someone entering the building and vandalizing equipment in the bay area, which is between the exterior door and the interior meeting room door, without being noticed during a meeting. It was indicated that members of the public could gain access to a meeting at the firehouse by knocking on the exterior door.

In this regard, we offer the following comments.

The Open Meetings Law provides requirements for meetings held by public bodies, and §103 specifically provide that:

> "(a) Every meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with section one hundred five of this article.
>
> (b) Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty of the public buildings law.
>
> (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.
>
> (d) Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in an appropriate facility which can adequately accommodate members of the public who wish to attend such meetings."

Pursuant to these provisions a public body, such as the Board of Fire Commissioners, must provide the public with access to its meetings.

We believe that the Law imposes a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit access to the public. From our prospective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In our opinion, if it is known in advance of a meeting that the main entrance to the firehouse is locked and that it may be difficult to hear someone who knocks, it would be reasonable and consistent with the intent of the Law for the Board to either post notice on the door that the public is welcome to access the meeting by knocking on the door or by calling a certain phone number.

In this regard, it is difficult to understand how it is possible for those in attendance at a meeting to hear someone knocking on an exterior door through a closed interior door and a bay area, yet not be able to hear someone who might be vandalizing equipment in the adjoining bay area. It is more likely, in our opinion, that neither person nor persons would be heard, and that the Board should be more proactive in allowing public access, as recommended, above.

In conjunction with §105 of the Open Meetings Law, of significance is §104 of the Open Meetings Law, which provides in relevant part that:

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

Again, every provision of law should be implemented in a manner that gives reasonable effect to its intent. Therefore, it would seem reasonable in this instance to post notices at locked doors of the Town Hall and firehouse to inform members of the public who want to attend the meeting to use another accessible entrance, to knock loudly or to call a certain phone number.

With respect to the validity of what transpires at meetings that are not accessible to the public, we note that the method for challenging action taken by a public body in court, namely an Article 78 proceeding, carries with it a 4 month statute of limitations.

We hope that we have been of some assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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Robert J. Duffy
Robert L. Megna
Cesar A. Perales
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OML AO 5177

September 6, 2011

E-Mail

TO: T. Allen Lambert

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. Lambert:

We have received your request for a written advisory opinion concerning application of the Open Meetings Law to certain gatherings of the Ithaca City School District Board of Education (copy enclosed). In this regard, we offer the following comments.

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

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's

total membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

In most instances, discussions involving a budget must be conducted in public, for none of the grounds for entry into executive session would apply.

Second, §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 school building 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 education 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.

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

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

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

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

We hope that we have been of assistance.

RJF:sb

State of New York
Department of State
Committee on Open Government

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OML AO 5178

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, September 01, 2011 9:44 AM
To: 'A. Jane Johnston'
Subject: RE: Request via email not honored

Jane,
It is our view that if an agency has the ability to scan records in order to transmit them via email and doing so will not involve any effort additional to an alternative method of responding, it is required to do so. For example, when copy machines are equipped with scanning technology that can create electronic copies of records as easily as paper copies, and the agency would not be required to perform any additional task in order to create an electronic record as opposed to a paper copy, we believe that the agency is required to do so. In that instance, transferring a paper record into electronic format would eliminate any need to collect and account for money owed or paid for preparing paper copies, as well as tasks that would otherwise be carried out. In addition, when a paper record is converted into a digital image, it remains available in electronic format for future use. In sum, when an agency has the technology to scan a record without an effort additional to responding to a request in a different manner, and a request is made to supply the record via email, in our opinion, the agency must do so to comply with the Freedom of Information Law. You may find the following opinion helpful too:

http://www.dos.ny.gov/coog/ftext/f17734.html

Making the assumptions outlined above, when the agency fails to provide the records in electronic form, my suggestion is to appeal, based on the information provided above.

Hope it helps.

Camille

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

State of New York
Department of State
Committee on Open Government

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OML AO 5179

From: Jobin-Davis, Camille (DOS)
Sent: [redacted]r 01, 2011 2:15 PM
To: [redacted]
Subjec[redacted]Open Meetings Law

Martha,

As we likely discussed before, while the Commissioner of Education has issued a contrary determination, in my opinion, there is no law that prohibits someone from speaking about something that was said during an executive session. My opinion does not change based on whether the person is testifying under oath.

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
www.dos.ny.gov/coog

From: [redacted]
Sent: [redacted]t
To: Jobin-Davis, Camille (DOS)
Subject: Re: RE: RE: Open Meetings Law

Camille,
I got to thinking about my initial request. I wanted to know if it is permissible for Board Members to discuss executive session topics when

they are sworn underoath in a legal [redacted] there opinions written by your dept on this topic? [redacted]
On Aug 29, 2011 3:07 PM, "Jobin-Davi[redacted]" <Camille.Jobin-Da[redacted]s.state.ny.us> wrote:
> [redacted],
>
> Although it's a little late, I have another suggestion. You may want to reach out to the Erie County Chapter of the NY Civil Liberties Union on the Order to Show Cause issue. They may be able to assist with legal representation, and in any event might be able to support the attorney you have retained.
>
> Camille
>
> From: [redacted]
> Sent: [redacted]9
> To: Jobin-Davis, Camille (DOS)
> Subject: Re: RE: Open Meetings Law
>
>
> Yes, if we could talk by phone. That would be good. Id be curious to kno[redacted]hought incorrect in the stephenson case. I can be reached at [redacted]. Thank you > On Aug 29, 2011 2:06 PM, "Jobin-Davis, Cam[redacted]<Camille.Jobin-Davis@dos.state.ny.us<mailto:Camille.Jobin-Davis@dos.stat[redacted]s>> wrote:
>> Thank you, [redacted],
>>
>> Yes, if you would like an advisory opinion, it is our policy to send a copy of the request to the school district. I haven't done so at this point. Also, once we issue an opinion, we would send a copy to the school district.
>>
>> Would you prefer that we discuss these issues by phone?
>>
>> In addition to the opinion previously forwarded (http://www.dos.state.ny.us/coog/otext/o4489.htm) and despite the somewhat positive but at times incorrect ruling in Stephenson v Board of Ed, you will likely find the following advisory opinions helpful, in response to the issues you raised:
>>
>> http://www.dos.ny.gov/coog/otext/o4895.html
>>
>> http://www.dos.ny.gov/coog/otext/o4813.html
>>
>>
>>
>>
>>
>> Unless I hear otherwise, I will assume that you would prefer that we not issue an advisory opinion at this point.
>>
>> 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
>>
www.dos.ny.gov/coog<http://www.dos.ny.gov/coog><http://www.dos.ny.gov/coo
g>
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>>
>>
>>

[redacted]

>> To: Jobin-Davis, Camille (DOS)
>> Subject: Re: Open Meetings Law
>>
>>
>>
>>
>> Miss Jobin-Davis, Here is the letter I wrote to Mr Freeman. When you
say you will contact the agency, does that mean Hamburg Schools? If so,
it that necessary? Frankly, they are my employer and they will likely try
to make my life miserable for contacting Mr Freeman, as I believe they
know they are not in the right, and they have a history of harassing
staff members that point out some of their shortcomings. In fact the very
teacher who was the greivant in the mention issued was in fact fired
because she was exercising her constitutional rights . Its like the
Twilight Zone :-) Please let me know if you will be contacting the school
district. Thank you for your time, Martha
>>
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>>
>>
>> August 20, 2011
>>
>>
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>>
>>
>> Mr. Robert J. Freeman
>>
>> Executive Director
>>
>> New York State, Department of State
>>

>> Committee on Open Government
>>
>> One Commerce Plaza
>> 99 Washington Ave.
>> Albany, New York 12231
>>
>>
>>
>> Dear Mr. Freeman,
>>
>>
>>
>> I am writing to request the opinion of the Committee on Open Government relative to the obligation, if any, of a member of a school board of education to disclose while under sworn oath information discussed in an illegally convened executive session.
>>
>>
>>
>> In preparation for a labor grievance arbitration held on June 16, 2011 two members of the Hamburg Central Schools Board of Education, Mrs. Patricia Brunner-Collins and Dr. Joan Calkins were properly subpoenaed to appear as witnesses to answer questions relating to the improper monitoring, observation and evaluation of a teacher, who was discharged from her place on the preferred eligibility list (recall rights) on September 21, 2010.
>>
>>
>>
>> The two Hamburg Central School Board members were sworn under oath by the attending Arbitrator, Mrs. Margery Gootnick. As grievance coordinator of the Hamburg Teachers' Association and counsel to the discharged teacher, I made several requests during the examination and cross-examination of the two board members to have them reveal the information which they had or were told about the grievant.
>>
>>
>>
>> Background:
>>
>> The September 21, 2010 Hamburg Board of Education meeting was improperly noticed. The Hamburg Board of Education posted a start time for their regularly scheduled meeting to be at 7:30 p.m.. The entire Board of Education, which is the audit committee, met behind closed doors at approximately 6 p.m. for a presentation from auditors of the school district. At approximately 6:30 p.m. the Board of Education and guests entered into an executive session, that was not properly noticed, nor were any of the 8 topics permissible for making a motion to go into executive session provided.
>>
>>
>>
>> On April 12, 2011, NYS Supreme Court Justice Devlin ruled on an Article 78 proceeding filed by petitioner Sally Stephenson that , "On

July 6, August 12, August 17, August 31, September 21, October 19, October 21, November 1, November 16 and December 7, 2010, the Respondents (Hamburg Central Schools) failed to properly follow one or more of the Open Meeting Law requirements as to the notice of the meetings and/or failing to set forth any reason for going into executive session."
>>
>>
>>
>> Judge Devlin further stated, " I am granting Petitioner's (Sally Stephenson) request to declare that the executive sessions conducted on these several dates (mentioned above) violated Open Meeting Law." Judge Devlin ruled the violations to be inadvertent, but nonetheless did make the ruling of the district's violation of Open Meeting Laws. Judge Devlin additionally ruled that the petitioner be awarded reasonable costs and attorney fees.
>>
>>
>>
>> During aforementioned arbitration hearing, counsel for the Hamburg Central School District, Mr. Douglas Gerhardt, Harris Beach, Albany N.Y. admitted into evidence the NYS Department of Education Commissioner's decision of Nett v. Raby (October 24, 2005) as well as a memorandum from Kathy Ahern (September 9, 2005) Application of Nett v. Raby.
>>
>>
>>
>> Mr. Gerhardt's claim, which I believe to be a misinterpretation of the NYS Open Meeting laws, was " board members cannot divulge what is discussed to them in executive session". The district, as well as counsel Mr. Gerhardt continue to maintain the August and September 2010 Board of Education meetings were properly conducted, despite the ruling by Judge Devlin.
>>
>>
>>
>> Mr. Gerhardt's directive to Mrs. Brunner Collins and Dr. Calkins while under oath in the arbitration hearing was that they were not permitted to discuss what they talked about or learned regarding the dismissed teacher during the illegally convened executive sessions of August 12, 17 and 31and September 21, 2010 despite the simple fact both were sworn under oath in an arbitration hearing regarding the dismissed teacher and the ruling of Judge Devlin.
>>
>>
>>
>> As I understand, there has been a conflict between the NYS Education Commissioner's ruling and that of the NYS Committee on Open Government regarding disclosing information discussed in executive session.
>>
>>
>>
>> I am attaching a link that will take you to NYS Supreme Court Justice Devlin's ruling on the Article 78 proceedings.

>>
>>
>>
>> http://law.justia.com/cases/new-york/other-courts/2011/2011-50865.html
>>
>>
>>
>> Thank you in advance for your consideration.
>>
>>
>>
>> [redacted]
>>
[redacted]

[redacted]

>> On Mon, Aug 22, 2011 at 4:08 PM, Jobin-Davis, Camille (DOS)
<Camille.Jobin-
Davis@dos.state.ny.us<mailto:Camille.Jobin-
Davis@dos.state.ny.us><mailto:Camille.Jobin-
Davis@dos.state.ny.us<mailto:Camille.Jobin-Davis@dos.state.ny.us>>>
wrote:
>> Dear [redacted],
>>
>> Unfortunately, I am unable to open the document that you attached due to it's unknown format (".pages"). If you could save it in Word or WordPerfect, I will be able to read it, or you could cut and paste it into the email, that would be helpful. At this point it takes us anywhere from 2 - 4 months to prepare an advisory opinion. We will send a copy of your request to the agency, inviting them to submit additional material for our consideration, and send a copy to them when we issue the opinion to you.
>> In the meantime, this will confirm that you may rely on the opinion provided previously:
http://www.dos.state.ny.us/coog/otext/o4489.htm
>> 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<tel:518-474-2518>

>> Fax: 518-474-1927<tel:518-474-1927>
>>
www.dos.ny.gov/coog<http://www.dos.ny.gov/coog><http://www.dos.ny.gov/coo
g>
>>
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>>
>>
>>
>>

[redacted]11 1:34 PM
>> To: Jobin-Davis, Camille (DOS)
>> Subject: Re: Open Meetings Law
>>
>> Dear Miss Jobin-Davis,
>>
>> I spoke to you in June regarding Open Meeting Law, and you kindly sent
me the below email. I have attached to this email, a letter written your
department asking for an opinion on a particular situation that I
described to you in June. At its core, is the obligation of BOE members
to discuss information that they learned in "illegally" convened
executive sessions while the BOE members are under oath. I know there is
a disconnect between State Ed and your department on this topic.
>>
>> I am in the process of having to reply to an arbitrator regarding the
situation I write about in the attachment. I am wondering if I may
request an opinion be done so that I can promptly use your opinion in a
brief which is due to the arbitration soon.
>>
>> Please advise how long it might take for have this done. If you have
estions after reading my letter, please let me know. Thank you,
[redacted] >> On Wed, Jun 22, 2011 at 10:24 AM, Jobin-Davis, Camille (DOS)
le.Jobin-
Davis@dos.state.ny.us<mailto:Camille.Jobin-
Davis@dos.state.ny.us><mailto:Camille.Jobin-
Davis@dos.state.ny.us<mailto:Camille.Jobin-Davis@dos.state.ny.us>>>
wro
>> [redacted]
>>
>> As promised.
>>
>> http://www.dos.state.ny.us/coog/otext/o4489.htm
>>
>> Additional related opinions may be found through our online OML
advisory opinion index, under "C" for "Confidentiality" and "E" for
"Executive Session, Claim of Confidentiality Regarding".
>>
>> Also, with respect to notice of executive sessions - please note
opinions under "E" for "Executive Session" and "Executive Session,
Scheduled in Advance.

>>
>> Attached is our most recent language regarding notice. Please note that the statute was amended in 2009 to require notice on the website.
>>
>> 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<tel:518-474-2518>
>> Fax: 518-474-1927<tel:518-474-1927>
>> http://www.dos.state.ny.us/coog/index.html
>>
>>
>>

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML AO 5180

September 1, 2011

E-Mail

TO: Brijen K. Gupta

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. Gupta:

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

The issue relates to the Brighton Memorial Library, and you indicated that the Town of Brighton's website states that "Library Board members are appointed by the Town upon the recommendation of the Trustees." According to your letter, prior to filling a vacancy on the Library's Board of Trustees, the Town Board sought the Trustees' recommendation, and the President of the Board, "purportedly after electronic solicitation of the views of other Board members", offered a recommendation to the Town Board. However, in your words, "No public meeting of the trustees took place, and hence the recommendation lacked any formal vote of the Board." The President of the Board apparently contends that the phrase "upon the recommendation of the trustees" does not require a formal vote by the trustees. You asked whether he is "correct that private consultations with fellow Board members were sufficient in order to arrive at the Board's recommendation."

Assuming that the description of the facts as you presented them is accurate, in short, I disagree. In this regard, I offer the following comments.

First, §260-a of the Education Law specifies that meetings “of the board of trustees of a public library system, cooperative library system, public library or free association library” are subject to “the provisions of article seven of the public officers law”, which is also known as the Open Meetings Law.

Second, from my perspective, because the Board of Trustees is required to comply with the Open Meetings Law, and because the Town Board appoints members following the receipt of a recommendation by the Board of Trustees, it is my opinion that the Board of Trustees may function as a body and carry out its duties only at a meeting during which a majority is physically present or by means of meeting of a majority of the Board conducted through videoconferencing. I do not believe that the Board of Trustees may take action by means of a series of telephonic communications or via email.

By way of background, as amended in 2000, §102(1) of the Open Meetings Law defines the term “meeting” to mean “the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body.” Based upon an ordinary dictionary definition of “convene”, that term means:

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

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

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

The definition of the phrase “public body” appearing in §102(2) of the Open Meetings Law 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)].

While I believe that the Board of Trustees could only have determined to offer a recommendation concerning an appointment during a meeting held in accordance with the Open Meetings Law, it is clear in my view that the Board could have considered the matter during an executive session. The phrase "executive session" is defined in §102(3) to mean a portion of an open meeting during which the public may be excluded. That being so, an executive session is not separate from an open meeting, but rather is a portion of an open meeting. Further, that statute limits the ability of a public body to enter into executive session to discussion of the subjects described in paragraphs (a) through (h) of §105(1). Paragraph (f) permits entry 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…"

Assuming that any discussion would have involved a matter leading to the appointment of a particular person, I believe that an executive session could validly have been held.

In an effort to enhance understanding of and compliance with the Open Meetings Law, copies of this opinion will be sent to the Board of Trustees and its President.

I hope that I have been of assistance.

cc: Board of Trustees
Andrew Kappy

RJF:sb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML AO 5181

September 8, 2011

E-Mail

TO: Anthony Fusco

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. Fusco:

We have received your request for any advisory opinion concerning access to a letter referring to discussion held during an executive session held by the Carmel Town Board. You were informed by Lieutenant Karst and the Town Supervisor that the letter referred to the Town Board ordering or authorizing the Highway Department to remove political signs from various locations. In response to your request for the letter, the Town Attorney offered several grounds for denial. You focused on the reference to §87(2)(g) and contend that the ability to rely on that provision was "effectively waived" when the letter was shared with the Police Department.

In conjunction with the foregoing, you asked the following questions:

"1. Is the document excludable as is the position of the town attorney?
2. Should an investigation be launched into the allegations that the order was given in executive session? And if so, what laws may have been violated?
3. What state official would I request the initiation of such an investigation (AG or Comptroller)?"

In this regard, we offer the following comments.

First, the procedure for entry into an executive session is governed by §105(1) of the Open Meetings Law. Specifically, that provision states that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys:
>
> a. matters which will imperil the public safety if disclosed;
>
> b. any matter which may disclose the identity of a law enforcement agent or informer;
>
> c. information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;
>
> d. discussions regarding proposed, pending or current litigation;
>
> e. collective negotiations pursuant to article fourteen of the civil service law;
>
> f. 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;
>
> g. the preparation, grading or administration of examinations; and
>
> h. the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof."

Without knowledge of the nature of the discussion in executive session, specific guidance cannot be offered concerning its propriety. If issues were raised concerning a violation of law, it is possible that §105(1)(c) might have been applicable; if the discussion involved the conduct of a town employee or employees, §105(1)(f) might have applied. In our view, only to the extent that either of two exceptions were pertinent could an executive session validly have been held.

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 (l) of the Law.

The term "agency" is defined in §86(3) to mean an entity of state or local government. The Town of Carmel is an agency, and communications between or among Town officials

constitute “intra-agency” materials. Consequently, a disclosure by a Town official made to the Town Police Department would be intra-agency material; such a disclosure would not result in a waiver of the authority to deny access under §87(2)(g).

That provision permits an agency, such as the Town, to withhold records that:

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

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

In sum, the letter at issue in our view consists of intra-agency material, and its content is the determining factor in ascertaining the extent to which it is accessible or deniable.

Lastly, only a court can determine whether there was a violation of the Open Meetings or Freedom of Information Laws. Further, we know of no state agency whose routine function would include an investigation of the actions of the Town to which you referred.

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

RJF:sb
cc: Town Board

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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OML AO 5183

September 8, 2011

E-Mail

TO: Rose Tait

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. Tait:

We are in receipt of your request for an advisory opinion regarding application of the Freedom of Information Law to records requested from the City of Saratoga Springs. Specifically, you were informed that you could expect a response to your request to inspect a noise study conducted by the City within 20 days of the acknowledgment of the receipt of your request. You submitted the request, however, ten days prior to a joint meeting of the Planning and Zoning Boards, with the expectation that you would, as you had in the past, be permitted to inspect records on demand at the Building Department. Although the records were scheduled to be discussed at the meeting, they were not provided to the public prior thereto. In this regard, we note the following.

First, as you know, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Section 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.

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

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

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

"Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).

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

Based upon the precedent referenced above, records prepared by a consultant for an agency, i.e., a noise study, may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox

specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

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

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

Third, in 2006 the Legislature amended §98(3) of the Freedom of Information Law to require agencies to receive and respond to requests for records via email, as follows:

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

Accordingly, it is our opinion that if an agency, such as the City of Saratoga Springs, has the ability to receive and respond to requests via email, it is required to do so.

Lastly, as previously indicated, we are hopeful that legislation regarding access to records discussed at meetings will be signed by the Governor in the very near future. For a number of years the Committee on Open Government has recommended that records discussed at meetings be made available prior to or contemporaneously with the meeting. A copy of the text of the bill is attached.

We hope that this is helpful to you.

CSJ:sb
cc: Joe Scala, City Attorney

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OML AO 5185

September 7, 2011

E-Mail

TO: Theodore Shaffer
FROM: Robert J. Freeman, Executive Director
BY: Richard Caister, Legal Intern

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. Shaffer:

We have received your request for an advisory opinion concerning denial of access to records requested under the Freedom of Information Law. In your correspondence you also raised issues pertaining to the application of the Open Meetings Law. In this regard, we offer the following comments.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment of the receipt of such request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when such request will be granted or denied, which shall be reasonable in consideration of the circumstanced relating to the request and shall not exceed twenty business days from the date of such acknowledgment, except in unusual circumstances. In the event that such unusual circumstances prevent the grant or denial of the request within twenty business days, the agency shall state in writing both the reason for the inability to do

so and a date certain within a reasonable time, based on such unusual circumstances, when the request shall be granted or denied."

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

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

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

Second, with regards to the Town's response that the minutes from 2010 are no longer kept in electronic form, when an agency indicates that it does not maintain a record in a particular format, an applicant for the record may seek a certification to that effect. Section 89(3)(a) 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." It is emphasized that when a certification is requested, an agency "shall" prepare the certification; it is obliged to do so.

Lastly, in regard to the application of the Open Meetings Law, §104 of that statute 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 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 must post notice of the time and place of every meeting online.

We hope that we have been of assistance. If you have any further inquiries please feel free to contact our office.

RJF:RC:sb
cc: Town Board

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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OML AO 5187

October 3, 2011

William Florence
One Park Place, Suite 300
Peekskill, NY 10566

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. Florence:

We have received your request for an advisory opinion regarding application of the Open Meetings Law to "closed sessions" held in the Village of Cold Spring. You wrote that the Mayor has held on at least two occasion "closed sessions" which he has claimed to be distinct from executive sessions. In this regard, we offer the following comments.

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

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

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

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

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

It has been advised that members of a public body may meet in private to seek legal advice from their attorney, and that when they do so, their communications fall within the attorney-client privilege. Because the communications are confidential, a gathering of that nature would be exempt from the coverage of the Open Meetings Law pursuant to §108(3) of that statute, which exempts from the Open Meetings Law matters made confidential by state or federal law. In situations in which a public body has been sued by one of its own members, that member, in my opinion, could be excluded from a gathering of the other members of the body when they are seeking legal advice. It is our opinion that under §108(3) of the Open Meetings Law the Mayor may enter into a closed session, in this instance, without having to adhere to the requirements of §105(1) if he is seeking advice from his attorney.

With respect to the validity of any action taken, there are two types of enforcement remedies available through an Article 78 proceeding pursuant to the Open Meetings Law. The first pertains to the court's authority to invalidate action taken at a meeting held in violation of the law, as follows:

> "Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part." OML §107(1).
>
> The same provision further states that:
>
> "An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body." As such, when a legal challenge is initiated relating to a failure to provide notice, a key issue is whether a failure to comply with the notice requirements imposed by the Open Meetings Law was "unintentional".

The second is the court's discretionary authority to award costs and reasonable attorneys' fees to the successful party.

In 2008, the Legislature amended §107(2) of the Open Meetings Law to include the following:

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

This new mandatory award of attorney's fees would apply only when secrecy is the issue. In other instances, those in which the matter involves compliance with other aspects of the Open Meetings Law, such as a failure to fully comply with notice requirements, the sufficiency of a motion for entry into executive session, or the preparation of minutes in a timely manner, the award of attorney's fees by a court would remain discretionary.

We hope that we have been of assistance. If you have any further inquiries please feel free to contact our office.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb

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OML AO 5188

October 3, 2011

Donald Price
[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. Price:

We have received your request for an advisory opinion regarding application of the Open Meetings Law to a gathering of the Commissioners of the Gordon Heights Fire District. You wrote that you were prohibited from attending a meeting at which all five Commissioners were present, based on advice allegedly given by the District's attorney, William Glass. In this regard, 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).

Based upon the terms of the Open Meetings Law and its judicial interpretation, if a majority of board members gathers to conduct public business, any such gathering would, in our opinion, constitute a "meeting" subject to the Open Meetings Law. On the other hand, when less than a quorum is present, the Open Meetings Law would not apply.

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

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

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

Accordingly, if the facts as you present them are accurate, it is our opinion that the Commissioners were engaged in a "meeting" subject to the Open Meetings Law. Unless there was a basis for entry into executive session, in which case a motion should have been made during the public portion of the meeting, or the meeting was exempt from the Open Meetings Law, perhaps pursuant to the attorney-client privilege, the Board of Commissioners was required by law to hold its meeting open to the public. For more information regarding these issues, see attached advisory opinion, OML-AO-4622.

There are two types of enforcement remedies available through an Article 78 proceeding initiated pursuant to the Open Meetings Law. The first pertains to the court's authority to invalidate action taken at a meeting held in violation of the law, as follows:

> "Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, 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 that the public body violated this article and/or 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." OML §107(1).

The second is the court's discretionary authority to award costs and reasonable attorneys' fees to the successful party.

In 2008, the Legislature amended §107(2) of the Open Meetings Law to include the following:

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

This is a new, mandatory award of attorney's fees that would 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 would remain discretionary.

We hope that we have been of assistance. If you have any further inquiries please feel free to contact our office.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb

State of New York
Department of State
Committee on Open Government

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OML-AO-5190

VIA EMAIL

From: Freeman, Robert (DOS)
Sent: Monday, October 17, 2011 9:47 AM
To:
Subject: RE: committee meetings

Since the exact time of a committee meeting to be held immediately following the close of a preceding meeting of a different committee cannot be known, it is suggested that notice of that second meeting provide an approximate start time within a certain range. For instance, if the first committee meeting starts at 5 p.m. and typically lasts between one and two hours, the notice regarding the second meeting might indicate that it will begin immediately after the end of the 5 p.m. meeting, between 6 and 7 p.m. That may be the best that can be accomplished if there is no specific start time of the second meeting.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
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OML AO 5191

From: dos.sm.Coog.InetCoog
Sent: Monday, October 17, 2011 3:14 PM
To: 'Margaret Golovey'
Subject: RE: Public Comment at MEETINGS

Dear Ms. Golovey:

Please note that the Open Meetings Law provides the public with the right to attend, listen and observe meetings of public bodies. That statute is silent with respect to the right of the public to speak or otherwise participate. That being so, the board to which you referred would have the authority to preclude the public from speaking. Most public bodies permit limited public participation, and when they choose to do so, it has been suggested that they adopt reasonable rules that treat members of the public equally.

I would conjecture that if those who attend are given an equal opportunity to speak, a court would find that such practice is reasonable, irrespective of whether the opportunity to speak is conferred at the beginning, the middle or the end of a meeting.

To obtain more detailed responses to similar questions, you may visit our website, click on to "advisory opinions" under "Open Meetings Law," click on to "P" and scroll down to "Public participation." Many opinions relating to the issue of the public's ability to speak during meetings are accessible by so doing.

I hope that I have been of assistance.

Robert J. Freeman
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Website: www.dos.state.ny.us/coog/index/html

From: Margaret Golovey [redacted]
Sent: Friday, October 14, 2011 3:47 PM
To: dos.sm.Coog.InetCoog
Cc: Barbara Kolbe
Subject: Public Comment at MEETINGS

Dear Mr. Freeman:

Thank you for returning my call with regard to Town Board meetings in Henderson, NY.

Another matter with regard to these meetings: The Board has recently placed public comments at the very beginning of the meetings instead of at the end, as in the past, so that citizens do not have an opportunity to comment on the proceedings of the evening. This essentially muzzles the public from commenting on events at hand until the following monthly meeting. Do we have any recourse with this type of strategy?

This board, with the Supervisor leading the meetings, have been especially hostile to the public this summer, with disrespectful comments towards the citizenry attending Town Board meetings.

Thank you again,
Margaret Golovey,
Henderson Taxpayer

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OML AO 5196

October 25, 2011

Louis J. Lourinia
[redacted]

Dear Mr. Lourinia:

This is in response to your correspondence regarding meetings of the Common Council of the City of Rensselaer.

As outlined in the attached advisory opinion (OML-AO-4246), this will confirm that "personnel" is not an appropriate description of a basis for entry into executive session, that an executive session can only be held upon motion during a meeting convened pursuant to the Open Meetings Law, and that the motion must be more descriptive than "for personnel reasons."

Further, as outlined in the attached advisory opinion (OML-AO-4041), this will confirm that without more, there would be no basis in law to discuss "unsettled water contracts" in executive session; the provision regarding the discussion of contracts pertains to the negotiation of collective bargaining agreements with unions.

In an effort to ensure compliance with law, a copy of your correspondence is included in our copy of this letter to the Mayor of the City of Rensselaer.

Thank you for your attention to these matters.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb
Enclosure
cc: Daniel J. Dwyer, Mayor

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OML AO 5197

July 21, 2011

E-Mail

TO: Edmund Wiatr
FROM: Robert J. Freeman, Executive Director
BY: Richard Caister, Legal Intern

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

Dear Mr. Wiatr:

We have received your request for a written opinion regarding access to records you seek from Mohawk Valley Economic Development Growth Enterprises Corporation (EDGE) pursuant to the Freedom of Information Law. You wrote that Mohawk Valley EDGE responded to your request, stating that it would cost over $10,000 to produce the records you seek. You questioned its authority to charge such amount for production of the records. In this regard, we offer the following comments.

First, with respect to Mohawk Valley EDGE's assertion that it has the authority to charge for time spent searching for records, we note that the specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Significant in this instance is the meaning of "search."

Amendments to the law enacted in 2008 allow an agency to charge for labor time only when spent in preparation of electronic records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this

> article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> "iii. the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record in accordance with the provisions of paragraph (c) of this subdivision, except when a different fee is otherwise prescribed by statute."
>
> The regulations promulgated by the Committee state in relevant part that:
>
> "Except when a different fee is otherwise prescribed by statute:
> (a) An agency shall not charge a fee for the following:
> (1) inspection of records for which no redaction is permitted;
> (2) search for, administrative costs of, or employee time to prepare photocopies of records;
> (3) review of the content of requested records to determine the extent to which records must be disclosed or may be withheld; or
> (4) any certification required pursuant to this Part." (21 NYCRR section 1401.8).

As such, the Committee's regulations specify that no fee may be charged for personnel time to search for records or to determine which records or portions therefore must be disclosed, except as otherwise prescribed by statute.

However, new provisions to the Freedom of Information Law relate specifically to fees for electronic information. A new §87(1)(c) for the first time delineates the basis for determining the actual cost of reproducing records maintained electronically. For many years, §87(1)(b)(iii) of the Freedom of Information Law stated that unless a different fee is prescribed by statute, an agency could charge a maximum of twenty-five cents per photocopy when records are made available, or the actual cost of reproducing other records, i.e., those that are not or cannot be photocopied. The new provisions balance the public interest in gaining access to computerized records at low cost with the tasks carried out by agencies when making those records available.

In most instances, gaining access to records can be realized without a financial hardship, for the actual cost relating to most requests involves only the cost of the storage medium in which the information is made available, i.e., a computer tape or disk. However, in those instances in which substantial time is needed to prepare a copy, at least two hours of an employee's time, the legislation permits an agency to now charge a fee based on the cost of the storage medium used, as well the hourly salary of the lowest paid employee who has the skill needed to do so. This change in FOIL for the first time authorizes agencies to determine and assess a fee to be charged on the basis of an employee's time.

In rare cases, those in which an agency's information technology equipment is incapable of preparing a copy, an agency can charge the actual cost of engaging a private professional service to do so. In analogous circumstances, it has been advised that a fee based on actual cost

may include all expenditures incurred by an agency associated with preparing a copy, such as postage, transportation, and the like. Expenditures of that nature may, in our view, be included as part of the actual cost and the fee that an agency could charge. An applicant must be informed of the fee in advance if more than two hours of employee time or an outside professional service is needed to prepare a copy of a record. With advance knowledge of the amount of the fee that would be assessed, applicants in many situations may narrow the scope of their requests.

It is our understanding, based upon the foregoing amendments to the Freedom of Information Law that Mohawk Valley EDGE may charge the estimated amount of $10,140.00, provided that it is necessary for the agency to seek an outside service in retrieving the requested information, and if a "search" involves entering queries, for example, as a means of locating, generating or extracting the data or records of your interest.

We hope that we have been of assistance.

RJF:RC
Cc: Steven J. DiMeo
Shawna M. Papale

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OML-AO-5201

November 7, 2011

E-Mail

TO:

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:

We are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to chance gatherings of members of the Board of Trustees of the Village of Mamaroneck. Specifically, you inquired about meetings of the members in public places, whether for a Veteran's Ceremony, a meeting of the Chamber of Commerce, a wake or funeral, or even at a street fair. There are occasions when a member will approach you, for example, with a question regarding Village business and two other members will gather to listen and possibly comment. You asked how these kinds of situations should be handled.

In this regard, we note that the Open Meetings Law is applicable to meetings of public bodies, such as boards of trustees, and the courts have construed the term "meeting" [§102(1)] expansively. In a landmark decision rendered in 1978, the state's highest court, the Court of Appeals, held that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. In our opinion,

inherent in the definition of "meeting" is the notion of intent. If a majority of a public body gathers in order to conduct public business collectively, as a body, we believe that such a gathering would constitute a "meeting" subject to the Open Meetings Law. In the decision cited above, the Court affirmed a decision rendered by the Appellate Division that dealt specifically with so-called "work sessions" and similar gatherings during which there was merely an intent to discuss, but no intent to take formal action. In so holding, the court stated:

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

With respect to social gatherings or chance meetings, it was found that:

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

In view of the foregoing, if members of a public body meet by chance or at a social gathering, for example, we do not believe that the Open Meetings Law would apply, for there would be no intent to conduct public business, collectively, as a body. If, by design, however, the members of a public body seek to meet to socialize and to discuss public business, formally or otherwise, we believe that a gathering of a majority would trigger the application of the Open Meetings Law, for such gatherings would, according to judicial interpretations, constitute "meetings" subject to the Law.

Further, if indeed the only discussion at the social gathering is social in nature, the Open Meetings Law, in our view, would not apply; however, if during the social gathering, a majority of the members of a public body begin to discuss the business of that body, collectively as a group, we believe that they should recognize that they are conducting public business without notice to the public and immediately cease their discussion of public business. Moreover, in that situation, we would conjecture that if a discussion regarding public business continued, a court would determine that the public body would have acted in a manner inconsistent with law.

Similarly, when a quorum of a public body remains in the room after a public meeting has adjourned, in keeping with the judicial interpretation of the intent and purpose of the Open Meetings Law, we believe the members have a responsibility to refrain from continuing a collective discussion of public business.

We hope that this is helpful.

CSJ:sb

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FOIL-AO-18737
OML-AO-5208

November 18, 2011

E-Mail

TO:

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 :

We are in receipt of your request for an advisory opinion regarding application of the Freedom of Information Law to records requested from the Cherry Valley-Springfield Central School District. Specifically, in response to your request for "elements of the agreement for the teachers contract that was voted on earlier this year" you were informed of the following:

> "Negotiations concluded with an agreement on changes to the document. The District and CVSTA still need to incorporate the language of past grievances into the contract which will be completed over the summer. Once all the changes are incorporated into the document the document will be printed, published on the web page and sent to you. The new contract does not physically exist and need not be created for you as the result of a FOIL request."

In this regard, as a general matter, we note that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (l) of the law.

To put the matter into perspective, with certain exceptions, we agree with the District that the Freedom of Information Law does not require an agency to create records. Section 89(3)(a) of the Law states in relevant part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not in possession or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

Section 87(3)(a), however, has long required that an agency maintain a record indicating the manner in which each member of a body casts his or her vote in any instance in which a vote is taken.

Likewise, 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 of the date of a meeting.

While §106(2) of the Open Meetings Law requires the creation of minutes of executive session when action is taken, only in rare instances may a board of education take action during an executive session. As a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. In the case of most public bodies, if action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Various interpretations of the Education Law, §1708(3), however, indicate that, except in situations in which action

during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al. v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session, except in those unusual circumstances in which a statute permits or requires such a vote.

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 the school board reached an "agreement" that is reflective of its final determination of an issue, i.e., "changes to the document", we believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted. As indicated earlier, §87(3)(a) of the Freedom of Information Law states that: "Each agency shall maintain...a record of the final vote of each member in every agency proceeding in which the member votes." As such, members of public bodies cannot take action by secret ballot.

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 school board members), 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 School Board. Most importantly, minutes must be accurate.

In a decision that may be pertinent to the matter, Mitzner v. Goshen Central School District Board of Education, Supreme Court, Orange County, April 15, 1993 (copy attached), the case involved a series of complaints that were reviewed by the School Board president, and the minutes of the Board meeting merely stated that "the Board hereby ratifies the action of the President in signing and issuing eight Determinations in regard to complaints received from Mr. Bernard Mitzner." The court held that "these bare-bones resolutions do not qualify as a record or summary of the final determination as required" by §106 of the Open Meetings Law. Consequently, the court found that the failure to indicate the nature of the determination of the complaints was inadequate. In the context of your question, we believe that, in order to comply with the Open Meetings Law and to be consistent with the holding in Mitzner, minutes must at the very least indicate that the Board agreed to certain amendments to the contract. Attaching a copy of the documents which outline the agreed upon changes, and briefly outlining what those changes are in the motion would likely alleviate many concerns.

With respect to the documents that currently exist, that the District did not address in its response, the only ground for denial of relevance is §87(2)(c), which enables agencies to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations." From our perspective, the key word in the exception is "impair", and the question involves whether or the extent to which disclosure of records that memorialize the agreement would impair collective bargaining negotiations.

In other contexts, it has been advised that §87(2)(c) is intended to ensure that government agencies are not placed at a disadvantage at the bargaining table and to ensure that there is a "level playing field." For instance, if a teachers' association requested records from a school district indicating the district's collective bargaining strategy, the issues that it considers to be important or minor, or the parameters reflective of how much or little it would accept, disclosure would place the district at a disadvantage and the negotiations would be unfair and unbalanced. In that kind of situation, it has been advised that disclosure would indeed impair collective negotiations and that the records may be withheld. Similarly, when an agency has sought to sell real property, it has been held that premature disclosure of the agency's appraisal of the property could be withheld under §87(2)(c) [see Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982)]. In that situation, if a potential buyer knew of the figure that an agency would be willing to accept, there would likely be little capacity on the part of the agency to negotiate effectively.

In both kinds of situations described above, there would be an inequality of knowledge between or among the parties. In the illustration concerning collective bargaining, the teachers' association would not know or have the right to know of the contents of the records indicating a school district's strategy in negotiations. In the appraisal situation, the person seeking that record would be unfamiliar with its contents and, as suggested above, premature disclosure would enable a potential purchaser to gain knowledge in a manner unfair to other bidders and

possibly to the detriment of an agency and, therefore, the public. Disclosure in both instances would provide knowledge to the recipients that might effectively prevent an agency from engaging in an agreement that is most beneficial to taxpayers.

If there is no inequality of knowledge between or among the parties to negotiations, and if records have been shared or exchanged by the parties, it is unlikely that disclosure would impair contract awards or collective bargaining negotiations (see Community Board 7 of Borough of Manhattan v. Schaffer, 570 NYS 2d 769, affirmed 83 AD 2d 422; reversed on unrelated grounds, 84 NY 2d 148 [1994]). In Community Board 7, the request involved materials exchanged between a New York City agency and the Trump organization in conjunction with negotiations between those two entities. The court rejected a contention that §87(2)(c) could be applied because there was "no bidding process involved where an edge could be unfairly given to one company" and "since the Trump organization is the only party involved these negotiations, there is no inequality of knowledge between the parties" (id., 771). Based on the holding in Community Board 7, since the parties agreed to essential terms, there is no inequality of knowledge regarding the terms of the agreement.

Moreover, as the superintendent specified in his response to your request, negotiations have concluded. That being so, even though the formal wording of the agreement might not yet exist, records or portions of that represent the terms of the agreement must, in our view, be disclosed. In short, §87(2)(c) would no longer apply.

In a decision rendered by the Court of Appeals, it was held that:

> "Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, Farbman & Sons v. New York City, 62 NY 2d 75, 80 (1984); and Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

Moreover, in the same decision, in a statement regarding the intent and utility of the Freedom of Information Law, it was found that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to

make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (id., 565-566).

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

CSJ:sb
cc: Robert J. Miller, Superintendent

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OML-AO-05210

December 2, 2011

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 :

We are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to public hearings/meetings held at both the Towns of Coventry and Bainbridge. In response to our notification, Supervisors from both Towns submitted additional information for our consideration, copies of which are enclosed.

Initially, we must emphasize that only a court can make a determination whether a meeting was "illegal" or 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 the Law, and it is our hope that these opinions are educational and persuasive.

In an effort to attempt to resolve problems and promote understanding of and compliance with the law, we offer the following comments:

First, we note Open Meetings Law §103(d), a provision added in April of 2010:

> "(d) Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in an appropriate facility which can adequately accommodate members of the public who wish to attend such meetings."

The intent of the amendment, as expressed in the accompanying legislative memorandum, is for public bodies to hold meetings in facilities 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 and there are

indications 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, larger than the usual meeting location.

An analysis of whether a public body's actions are reasonable, we believe, would include information available prior to the event regarding the possible number of attendees, and the number of people who attend the gathering. We note somewhat conflicting descriptions of the June 14 meeting in Bainbridge involving your experience of having to wait for two hours before being able to enter the meeting, how many people left prior to being able to enter the meeting, and the Supervisor's characterization that the meeting was closed only after every person that was in attendance was able to speak, including some that spoke multiple times. While we assume that a court would consider evidence of the information available to the Town Board prior to the meeting, when an unexpectedly and perhaps overwhelmingly large number of people attend, we do not believe that it would be unreasonable for a board to either immediately reconvene at a more accommodating location or to schedule a meeting for a larger venue at a later date.

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

We note that a "meeting" is different from a public 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 posed. Further, there is no requirement that a newspaper, for example, publish a notice given regarding a meeting to be held under the Open Meetings Law. We note, too, that a meeting of a public body held in accordance with the Open Meetings Law can only occur with the presence of a quorum. A hearing, on the other hand, can be conducted without a quorum present.

Although public bodies 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 those who are in favor of a particular issue to speak before any of those who are opposed to the issue, such a rule, in our view, would be unreasonable.

There can be a distinction, in our opinion, between the finite amount of time each citizen is permitted to comment on a particular application or topic and the amount of time allocated for entities or persons who have been invited to make a presentation that is the subject of public comment. It would not be unreasonable, for example, for a public body to permit an applicant/entity such as a gas company, to spend time at the beginning of the meeting presenting the application and then later in the meeting to spend time answering questions or clarifying information. It would not be unreasonable therefore, in our opinion, to permit an applicant to spend more total time talking than any one member of the public.

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

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

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb
Enclosures

cc:

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OML-AO-5211

December 2, 2011

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:

We are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to a recent gathering of various local public officials with two US Senators concerning the state of local schools, including enrollment and population loss, community broadband access, and other economic issues. You noted, among various other elected and appointed officials, the presence of seven of the nine Supervisors on the Hamilton County Board of Supervisors, three of the five Members of the Long Lake Town Board, and four out of the six Hamilton County School Superintendents. You asked whether this gathering would be subject to the Open Meetings Law.

In this regard, first we note that §102(2) of the Open Meetings Law applies to meetings of public bodies, and §102(2) of the Open Meetings Law defines the phrase "public body" to mean:

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

Based upon the language quoted above, a public body, in brief, is an entity consisting of two or more members that conducts public business and performs a governmental function for one or more governmental entities. The Board of Supervisors and the Town Board mentioned above, for example, would both constitute "public bodies" subject to the Open Meetings Law.

Whether the gathering described constitutes a meeting of any of various public bodies, would depend on the facts associated with their presence. The issue relates to §102(1) of the Open Meetings Law, which defines the term "meeting" as "the official convening of a public body for the purpose of

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

Inherent in the definition and its judicial interpretation is the notion of intent. If there is intent that a majority of a public body convene, collectively, as a body, for the purpose of conducting public business, such a gathering would, in our opinion, constitute a meeting subject to the requirements of the Open Meetings Law. However, if there is no intent that a majority of public body gather for purpose of conducting public business, as a body, but rather for the purpose of gaining education, or to listen to a speaker as part of an audience or group, we do not believe that the Open Meetings Law would be applicable.

Analogous questions have arisen in the past, and in some instances, the manner in which members of public bodies are situated suggests whether a meeting is being held. If a majority of the public body, such as the Board of Supervisors or the Town Board attending the gathering, sits at a dais or table together in the front of the room and functions as a Board, we believe that it would be conducting a "meeting" that falls within the coverage of the Open Meetings Law. On the other hand, if Board members are merely attendees, and not functioning as a body, in our view, their presence would not constitute a "meeting." Similarly, if one Board member is sitting at one table, a second member sits at a different table, and a third is situated apart from the other two, the three Board members clearly would not be functioning as a body, and again, the Open Meetings Law in our opinion would not apply.

Here, you indicated that, among others, quorums of various public bodies were present, that "85 % of the speaking was done by local presenters, [and that] senators asked specific questions and made opening and closing statements…". In our opinion, although the topics were certainly related to issues pertinent to those gathered, it is likely that the activity did not rise to the level of "conducting public business" of a board, as a body.

Accordingly, and because it is unlikely that the gathering constituted a meeting of any of the public bodies represented, the Open Meetings Law would not have applied or required that the gathering be held open to the public.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb

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OML-AO-5212

December 13, 2011

Veronica Harris, Account Clerk
Village of Patchogue
Community Development Agency
14 Baker Street, P.O. Box 719
Patchogue, NY 11772

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. Harris:

This is in response to your correspondence regarding the approval and amendment of minutes.

This will confirm that we know of no requirement in law that public bodies approve minutes; administratively, we respect that many public bodies wish to do so in order to maintain accuracy.

Accordingly, it is our opinion that typographical errors can be corrected at any time, without need for separate action by the governing body.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb

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OML-AO-5213

August 1, 2011

E-Mail

TO: Linda Mangano

FROM: Robert J. Freeman, Executive Director

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

Dear Ms. Mangano:

We have received your request for guidance concerning your right to obtain a report entitled "Waterfront Vision Preliminary Discussion" relating to the Village of Ossining.

You wrote that the Village Board of Trustees created a "Waterfront Vision Committee" and that you "saw this report in front of Susanne Donnelly, Village Trustee", at an Earth Day event. In response to a request for the report made pursuant to the Freedom of Information Law, you were informed that the "Village does not have a copy." Included in your correspondence is an email message sent by Trustee Donnelly to several Village officials in which she wrote that a named individual, Gareth Hougham, prepared the report "for a small group of people" and brought it to the Waterfront Vision Committee to "discuss as some suggestions." She added that "It was never submitted to the Village as a report", that "No one in the village officially has a copy of the report", and that, in her view, "it is the private property of the people who worked on it, on their OWN time" (emphasis hers).

The issue in my view focuses on scope of the Freedom of Information Law and the definition of the term "record" appearing in §86(4). An agency record includes "any information kept, held, filed, produced or reproduced by, with or for an agency…in any physical form whatsoever…" If the report at issue was not prepared "for" the Village, but rather by a private

citizen or citizens, on their own initiative, and is not maintained by an Village official, in his or her capacity as such, I do not believe that it would constitute a Village record or, therefore, that the Freedom of Information Law would apply. On the other hand, if Ms. Donnelly was approached by interested persons because she is a member of the Board, and if she participated in drafting the report or has possession of the report as a result of her membership on the Board, I believe that the report would constitute a Village record that would fall within the coverage of the Freedom of Information Law.

I hope that I have been of assistance.

RJF:sb

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OML-AO-5214

December 22, 2011

E-Mail

TO: John Delgiudice

FROM: Camille S. Jobin-Davis, Assistant Director

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

Dear Mr. Delgiudice:

This is in response to your request that this office intercede in a matter involving application of the Open Meetings Law to certain gatherings of the Seaford School District Board of Education. Specifically, you indicated that those persons interested in filling a vacancy on the School Board were to be interviewed in executive session, and you referred to an executive session during which you believe that the decision to select a certain applicant, as opposed to holding a special election to fill the vacancy, was made.

Initially, we note that this office is authorized to issue advisory opinions regarding the requirements of the Open Meetings Law. It is our hope that our opinions are educational and persuasive, and that they serve to resolve problems and promote understanding and compliance with that statute. Linked, below, for your information, is material regarding the enforcement of the law.

With respect to your questions regarding executive sessions, we note that 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 our view, the only provision that might have justified the holding of an executive session to interview applicants to the Board member position 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 we are 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 in this instance. We point out that the Appellate Division affirmed the substance of the lower court decision but did not refer to the passage quoted above.

Further, and for purposes of clarification concerning the ability of a board of education to take action in private, only in rare instances may a board of education take action during an executive session. Various interpretations of Education Law §1708(3) 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, none of which would apply in the context of the situation that you described.

We hope that this is helpful.

CSJ:sb
cc: Brian Fagan, President, Seaford School District

http://www.dos.ny.gov/coog/otext/o4829.html

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OML-AO-5215

December 22, 2011

E-Mail

TO: Todd Elzey

FROM: Camille S. Jobin-Davis, Assistant Director

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

Dear Mr. Elzey:

We are in receipt of your request for an advisory opinion regarding application of the Freedom of Information Law to records requested from the Ontario County Planning & Research Committee. Specifically, you relayed the following sequence of events:

> "Last week… the Committee released its agenda two days prior to its meeting…. On that agenda was an item to consider the 2012 budget for the public transit department. I immediately contacted the Transportation Director to see what is in the new budget and to get a copy of it. I was hoping to obtain a copy prior to the meeting so that I could submit either verbal or written comments to the Committee. The transportation director informed me via e-mail a day before the meeting that he would not release the budget document because it was deemed to be a draft. I believe under my reading of FOIL that this document would have been considered a public document and that I could have eventually forced production of the document. However, this would have done little good as the Committee's consideration of the budget will have been long past by the time this happens…. It appears many within Ontario County Government do not deem documents related to proposals as being public until after the proposal has been approved

by the Board of Supervisors. To me this feels like nothing more than thwarting public involvement in the governing process."

We agree that the timing of the release of records is of paramount importance especially when, as in your case, records are released only after adoption or approval by the governing board. As you recognize, because there is no provision in FOIL to provide records in an expedited fashion, unless a request is received well in advance of a meeting, an applicant may have no ability to inspect records prior to a meeting at which they are considered and adopted.

In this regard, we note that this issue is the subject of what may be an imminent amendment to the Open Meetings Law. Both the New York State Senate and the Assembly have passed a bill (A.72/S.3255) that would require public bodies to make records scheduled to be discussed at meetings available to the public prior to the meeting, either online or in paper, as soon as practicable. It is our hope that this legislation will soon be signed into law by the Governor.

We hope that this is helpful.

CSJ:sb
Ontario Planning & Research Committee

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OML-AO-5216

December 23, 2011

Susie C. Jacobs, Town Clerk
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. Jacobs:

We are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to minutes of the Board of the Town of Walworth, in which you serve as Clerk. Specifically, you forwarded email correspondence between yourself and one of the Board members concerning corrections and/or amendments to the minutes.

In this regard, and in an effort to provide education and guidance, we note that §106(1) of the Open Meetings Law pertains to minutes of open meetings and requires that:

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

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

From our perspective, every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. Based on that presumption, we believe that minutes must be sufficiently descriptive to enable the public and others (i.e., future elected officials), upon their preparation and review perhaps years later, to ascertain the nature of action taken by an entity subject to the Open Meetings Law. Most importantly, minutes must be accurate. Alteration of minutes in a manner that does not accurately reflect what occurred or what was said at a meeting in our view would be inconsistent with law.

Additionally, we do not believe that a member of the board may unilaterally alter or direct that minutes be altered. That person is one among five members; in our view, minutes may be amended only pursuant to action taken by a majority of vote of the total membership of a town board. As suggested earlier, we believe that any such alteration must accurately reflect what transpired at a meeting. Under §30 of the Town Law, the Town Clerk has the statutory authority and obligation to prepare minutes of Town Board meetings. From our perspective, as long as minutes are accurate and, again, presented reasonably, fairly and in a manner consistent with the contents of minutes as required by the Open Meetings Law, we believe that you would be acting appropriately.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb

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OML-AO-5217

December 23, 2011

Louis J. Lourinia
Rensselaer Concerned Citizens
[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. Lourinia:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to meetings of the City of Rensselaer Planning Commission. Specifically, you raise questions regarding adequate notice pursuant to both the Open Meetings Law and the City Code.

In an effort to provide education and guidance with respect to these issues, we note that the §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.

Our review of the Rensselaer City Charter reveals one provision concerning notice of a public hearing to be published in a newspaper, §23-1, set forth as follows:

> "A. Whenever a local law, after its passage by the Common Council, shall be presented to the Mayor for approval, he shall forthwith fix a date for a public hearing concerning such local law and give public notice of the time and place of such hearing to be given. Such notice shall be given by publication once in the official newspaper of the City. Such notice shall contain the title of the local law and an explanatory statement concerning the same."

Accordingly, we believe that the City Charter imposes an additional requirement to publish notice in the official newspaper of hearings at which proposed local laws are to be considered.

With respect to issues regarding the public's ability to hear what transpires at a public meeting, 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. Accordingly, every public body must situate itself and conduct its meetings in a manner in which those in attendance can observe and hear the proceedings. To do otherwise would in our opinion be unreasonable and fail to comply with a basic requirement of the Open Meetings Law.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb

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OML AO 5218

December 30, 2011

E-Mail

TO: Joe Suarez

FROM: Camille S. Jobin-Davis, Assistant Director

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

Dear Mr. Suarez:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to certain gatherings of the Industrial Development Authority of the City of Newburgh. Specifically, you described meetings during which the IDA Board would "adjourn" a public meeting into executive session "for the purpose of discussing real property litigation". On one occasion, the motion was to enter into executive session "for legal advice concerning an extension of time for The Foundry." Over time, it came to be your understanding, however, that the Board was discussing litigation pending against another entity, not the IDA.

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

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

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

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

It has been advised that members of a public body may meet in private to seek legal advice from their attorney, and that when they do so, their communications fall within the attorney-client privilege. Because the communications are confidential, a gathering of that nature would be exempt from the coverage of the Open Meetings Law pursuant to §108(3) of that statute, which exempts from the Open Meetings Law matters made confidential by state or federal law. Having a meeting at the Town Attorney's office, for example, as long as the discussion is limited to that which is confidential pursuant to the attorney-client privilege, would likely fall under this exemption.

As you know, a public body has the authority to enter into executive session only for the purposes set forth in §105(1) of the Open Meetings Law. Based on case law interpreting §105(1)(d), the "litigation exception", a belief that a discussion or a decision could ultimately lead to litigation, without more, is an insufficient reason for entry into executive session. Specifically, it has been held that:

> "The purpose of paragraph d is 'to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. of Town of Yorktown, 83 AD2d 612, 613, 441 NYS2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be

> contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD2d 840, 841 (1983)].

Based upon the foregoing, we believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. With regard to the sufficiency of a motion to discuss litigation, it has been held that:

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

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

Based on the analysis provided above, it is our opinion that §105(1)(d) permits discussion of strategy regarding litigation during executive session; however, it does not permit discussion of litigation pending against a separate entity during executive session. Further, while legal advice may be rendered in a gathering exempt from the Open Meetings Law, we caution that discussions held during such exempt gatherings are limited.

We hope that this is helpful.

CSJ:sb

cc: Joshua Smith

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OML AO 5222

December 13, 2011

E-Mail

TO: Airinhos Serradas

FROM: Camille S. Jobin-Davis, Assistant Director

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

Dear Mr. Serradas:

This is in response to your request for a written opinion regarding certain gatherings and records of the Cold Spring Village Board, of which you are a member. Specifically, you requested clarification of the grounds for entry into executive or "closed" session, and when documents that are discussed during meetings are required to be made available.

In this regard, we note first, 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.

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

It has been advised that members of a public body may meet in private to seek legal advice from their attorney, and that when they do so, their communications fall within the attorney-client privilege. Because the communications are confidential, a gathering of that nature would be exempt from the coverage of the Open Meetings Law pursuant to §108(3) of that statute, which exempts from the Open Meetings Law matters made confidential by state or federal law.

The advisory opinion included in the materials you submitted (OML-AO-3012) elaborates further on this issue and is relevant to the situation that you have described. Technically, when a public body wishes to conduct a gathering that is exempt from the Open Meetings Law during the course of a public meeting, it would be logical to indicate that the Board will address matters that are exempt by law. Further explaining that the discussion is protected by the attorney-client privilege, in our opinion, would benefit all of those concerned with good government practice.

With respect to documents that are discussed during a gathering that is exempt from the Open Meetings Law versus those that are adopted by resolution at a public meeting, we offer additional clarification. As you indicated, during an attorney-client privileged discussion, the Village Attorney was directed to issue a letter to the Fire Department, which then refused to "acknowledge" the letter until it was approved by resolution of the Village Board. Accordingly, the letter was approved by the Board during the course of a public meeting. Subsequently, a copy of the letter was provided, upon request, to a member of the news media.

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 (l) of the Law, in which case the agency would have the discretionary authority to deny access.

Depending on the contents of the letter sent from the Board to the Fire Department (between agencies) the record may have been required to be made available in its entirety pursuant to FOIL. Specifically, §87(2)(g) authorizes an agency, such as the Village, to withhold records that:

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

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

Accordingly, should the letter reflect the Village's final determination on a matter, or its policy, of course, such content would be accessible under subparagraph (iii) unless another provision of law would apply to limit access. We note, too, that the Freedom of Information is permissive. Even when records may be withheld, i.e., opinions directed from the Village to the Fire Department, the Board is not obliged to do so and may choose to disclose.

We note that this issue is the subject of what may be an imminent amendment to the Open Meetings Law. Both the New York State Senate and the Assembly have passed a bill (A.72/S.3255) that would require public bodies to make records scheduled to be discussed at meetings available to the public prior to the meeting, either online or in paper, as soon as practicable. It is our hope that this legislation will soon be signed into law by the Governor

We hope that this is helpful.

CSJ:sb

cc: John Mancini
Stephen J. Gaba

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OML-AO-5223
FOIL-AO-18743

December 22, 2011

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 :

We are in receipt of your request for an advisory opinion regarding application of the Freedom of Information Law to records submitted to zoning or planning boards. Specifically, you asked whether there are previous opinions prepared by this office pertaining to access to written comments submitted, and indicated your concerns about a recently adopted procedure of the Zoning Board of Appeals of the Town of Milo. It is in this regard that we offer various comments.

First, although this is an issue that our office has previously considered, after reviewing our records we are unable to locate an advisory opinion that addresses your particular questions.

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 (l) of the Law. We note that the introductory language of §87(2) refers to the ability to withhold "records or portions thereof" that fall within the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that there may be instances in which a single record includes both accessible and deniable information, and that an agency is required to review a record that has been requested to determine which portions, if any, may properly be withheld.

The exception to rights of access of primary significance with respect to submissions from the public, in our view, pertains to the protection of privacy, and §87(2)(b) permits an

agency to deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." It has consistently been advised that those portions of a complaint or other record which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. We point out that §89(2)(b) states that an "agency may delete identifying details when it makes records available." Further, the same provision contains five examples of unwarranted invasions of personal privacy, the last two of which include:

> "iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or
>
> v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency."

In our opinion, what is relevant to the work of the agency is the substance of the complaint, i.e., whether or not the complaint has merit. The identity of the person who made the complaint is often irrelevant to the work of the agency, and in most circumstances, we believe that identifying details may be deleted.

There is a difference, however, in our opinion, between complaints and comments that would be made at a public meeting or hearing but instead are submitted in writing. The difference, in our opinion, is that there is no expectation that what is said at a public meeting or hearing is private. Case law indicates, for example, that a tape recording of an open meeting is accessible for listening and/or copying under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978].

The fact that any person could have heard the content of the recording of the meeting, in our view, constitutes a waiver of the capacity to withhold what has become part of the public domain. As stated in a decision in which the ability to prohibit the use of audio tape recorders at open meetings was rejected, the Appellate Division determined that:

> "[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" [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924, 925 (1985)].

Additionally, the nature of comments invited to be submitted during the course of a recognized "comment period" (i.e., between certain dates) is different from unsolicited comments, for it is likely that they do not contain allegations about particular people for which a

complainant believes some agency investigation and/or action is warranted. For the most part, it is likely that comments reviewed at the agency's request, are relevant to a pending application or proposal before the public body. Accordingly, it is our opinion, due to the difference in the nature of comments versus complaints, and based on the above analysis, that disclosure of comments and the identities of those who make them would not be an unwarranted invasion of personal privacy.

That said, there are times when issues in a community become so contentious that those who would typically engage in discussion in a public forum will choose to submit written comments in lieu of expressing their opinions in public in order to avoid unpleasant backlash. When tempers flare and communities are strongly divided, in our opinion, there may be grounds on which an agency could rely in order to show that disclosure of the identities of those making written comments would cause an unwarranted invasion of personal privacy or perhaps endanger life or safety. As stated by the Court of Appeals, the exception in the Freedom of Information Law pertaining to the protection of personal privacy involves details about one's life "that would ordinarily and reasonably be regarded as intimate, private information" [Hanig v. State Department of Motor Vehicles, 79 NY2d 106, 112 (1992)]. In these situations, we suggest that an agency denying access would face questions of fact regarding the level of disagreement, the nature of the issue, and the degree to which an ordinary person of reasonable sensibilities would react to the disclosure of comments coupled with the identity of the person making the comments.

Further, we note that the Freedom of Information Law is permissive; even in situations in which an agency may withhold records or portions of records, it is not obliged to do so [see Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)]. There are many situations in which an agency may choose to release information that it might otherwise have the authority to withhold. Therefore, in our opinion, for the Zoning Board to limit its ability to release comments without permission from the submitting party would be contrary to law.

Finally, although you did not raise it in your correspondence, we note that the procedures you sent include a requirement that speakers identify themselves by name and address. Because we have addressed this issue in previous advisory opinions, I enclose two for your reference.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb
Enclosures