STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML AO 5234

January 23, 2012

William H. Hill
[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. Hill:

We have received your request for an advisory opinion regarding the application of the Open Meetings Law to minutes generated from a meeting of the West Babylon Board of Education. You questioned the validity of a resolution of the Board which does not state specific information related to an agreement the Board authorized the President to sign, including the name of the employee, the period of time, or the types of services to be rendered in relation to the agreement.

From our perspective, while the motion at issue involved authorization to execute an agreement, because the agreement pertained to a particular employee, provisions related to the entry into an executive session may be helpful to an analysis. Accordingly, we note that while a motion for entry into executive session must be sufficiently detailed to enable the members of a public body, as well as others attending a meeting, to ascertain whether the issue may properly be discussed in private, the motion need not identify either the individual or his or her position.

By way of background, as you may be aware, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Section 105(1) states in relevant part that:

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

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

Further, we believe that discussions regarding employment contracts or agreements are permitted to be conducted in executive session. Section 105(1)(f) permits a public body to enter into executive session to discuss:

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

It has long been suggested that a motion made pursuant to §105(1)(f) is not required to include information that would identify the person who is the subject of the discussion. As early as 1981, citing opinions rendered by this office, it was determined judicially that:

> "When entering into executive session to discuss personnel matters of a particular individual, the Board should not be required to reveal the identity of the person but should make it clear that the reason for the executive session is because their discussion involves a 'particular' person" [Board of Education of Doolittle v. Odessa-Montour Central School District, Supreme Court, Chemung County, October 20, 1981].

The Appellate Division, Third Department, has confirmed the advice rendered by the Committee and held that:

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

> discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

Also pertinent to our analysis regarding the accuracy of the minutes, §106(1) of the Open Meetings Law pertains to minutes of open meetings and requires that:

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

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

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. Goshen Central School Dist. Board of Ed. [Supreme Ct., Orange Cty. April 15, 1993]. Furthermore, we note that for both long and short term reference purposes, the value of minutes is that they provide a concise summary of the actions taken by the Board.

Accordingly, it is our opinion that while a motion to enter into an executive session to discuss an employment-related contract with an employee need not include reference to the name of the person who is the subject of the discussion, a brief description of the nature of the agreement should be included in the motion. For historical and reference purposes, the minutes should include the name of the employee.

This will confirm your observation that it is likely the agreement would be required to be made available pursuant to the Freedom of Information Law.

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:sb

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OML-AO-5235

VIA EMAIL

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, January 24, 2012 12:01 PM
To:
Subject: Advisory Opinion - Village of Webster

Dear,

This is in response to your correspondence of January 17, 2012 regarding the recent amendment to Section 103 of the Open Meetings Law.
Please note that we have posted guidance interpreting the new provision of Section 103, which I hope you will find helpful, at the following link: http://www.dos.state.ny.us/coog/RecordsDiscussedatMeetings.html
In direct response to your question regarding an agency's responsibility to provide paper copies of records scheduled to be discussed an open meetings after having posted such records online, it is our opinion that, as is the case with many of the provisions of the Open Meetings Law, the requirements set forth in paragraph (e) must be interpreted in a reasonable manner based on the facts as they unfold. Accordingly, we recommend that if records are posted online prior to a meeting and a member of the public requests a paper copy of such record prior to a meeting, the agency provide a paper copy and request that the applicant pay the appropriate fee. If records are generated too close in time to the start of the meeting and are not able to be posted online prior to the public's attendance at a meeting, on the other hand, I would suggest that a reasonable response would be to provide paper copies at the meeting.

I hope that this is helpful.

Camille

Camille S. Jobin-Davis, Esq.
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OML-AO-5236

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Friday, January 27, 2012 9:51 AM
To: 'Kate Brindle'
Cc: 'sryan@orda.org'
Subject: RE: FOIL and Open Public Meetings Law

Dear Ms. Brindle:

The governing body of the Olympic Regional Development Authority clearly constitutes a "public body" required to comply with the Open Meetings Law. Section 106 of that statute pertains to minutes of meetings and contains what might be characterized as minimum requirements concerning the contents of minutes. At a minimum, minutes of an open meeting must consist of a record or summary or motions, proposals, resolutions, action taken and the vote of the members. Further, and more directly addressing the issue that you raised, section 106 specifies that minutes of open meetings must be prepared and made available on request within two weeks of those meetings.

I hope that I have been of assistance. If you would like to discuss the matter, please feel free to contact me.

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[redacted]

FOIL-AO-18789
OML-AO-05237

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January 27, 2012

E-Mail

TO: Ron Adam

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. Adam:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to a joint gathering of the Nunda Town and Village Boards. Please accept our apology for the delay in responding.

In conjunction with your request, the Village of Nunda submitted copies of meeting minutes from various meetings in 2010 and 2011, highlighting certain motions for entry into executive session, along with various records marked "confidential." For reasons set forth below, although there may be grounds for withholding portions of certain records, we believe that the documents submitted are not "confidential" and may be disclosed, at least in part.

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

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

Based on the foregoing, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's

membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

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

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

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

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

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

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

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

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

Our review of minutes from meetings held over the course of one year includes motions for entry into executive session "for the purpose of discussing issues with the water system", "to discuss personnel", "to discuss the Police Department" and "the Employee Policy". Various handwritten notations on the minutes indicate the alleged nature of the conversations held in executive sessions. Minutes from the joint meeting that you referenced indicate your objection to a motion to enter into executive session to discuss Code Enforcement and Zoning, and then the subsequent motion "to discuss the employment history of certain individuals of the Town and Village". A handwritten note indicates "discussion on Zoning Officer Sal NiCastro and possible elimination or position for Village Deputy Officer is Robert Lloyd current CEO/ZO for Town.

It is our opinion that it is necessary for the Village Board to clarify its motions and limit its discussions in executive sessions in order to maintain compliance with the Open Meetings

Law and avoid the risk of a lawsuit. For example, if the discussion pertained to a particular employee's employment history or job performance, the discussion would be appropriate for executive session. On the other hand, if the conversation turned to whether a position should be eliminated or added, because it does not relate to an individual person, it is our opinion that the case law outlined above would require that the board have had such discussion in public.

We hope that this opinion is helpful in differentiating between the conversations that must occur in public and those that are permitted to be held in private, and offer the resources of our website which includes copies of hundreds of advisory opinions on these and other topics, for educational purposes.

Turning now to the additional issue of the three documents forwarded by the Village and marked "Confidential", we note that the Freedom of Information Law, much like the Open Meetings Law, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (l) of the Law.

The primary issue here 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 our 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, we 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, we 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).

Finally, in addition to withholding an employee's home address based on §89(7), in our opinion there may be grounds to redact portions of the three records marked "Confidential" pursuant to a FOIL request. The records are intra-agency communications from the Mayor and the Board in which two separate employees are directed to (a) reimburse the Village for a pair of boots, and (b) and maintain a current driver's license in keeping with the requirements of the position. To the extent that the reimbursement issue was discussed during the course of an open meeting and the letter issued pursuant to Board action, there would be no basis to deny access to the letter. Portions of the communications sent to the employee who failed to maintain a current driver's license, on the other hand, might justifiably be withheld as an unwarranted invasion of personal privacy, although the passage of time and the employee's subsequent termination, in our opinion, would minimize such authority.

We hope that this is helpful.

CSJ:sb

cc: Jack Morgan, Deputy Mayor

Jobin-Davis, Camille (DOS)

From: Jobin-Davis, Camille (DOS)
Sent: Monday, January 30, 2012 2:33 PM
To: 'Alan Sorensen'
Subject: RE: Caucusing and definition of Public Body
Attachments: county lewis.pdf; glens falls.rtf

Alan,

Sorry for the delay!

In response, please note the following two cases (copies attached):

County of Lewis v. O'Connor, Supreme Court, Lewis County, January 21, 1997. Meetings of standing committees of hospital Board of Managers found to be subject to OML.

Standing committees have no power to take final action or bind the Board of Managers, even if a committee's membership would constitute a quorum of the full Board of Managers.

Rule: Standing committees with advisory authority only, made up solely of members of a public body are public bodies subject to the Open Meetings Law.

Glens Falls Newspapers v Solid Waste & Recycling Committee of Warren County Board of Supervisors, 195 AD2d 898, 601 NYS2d 29 (3rd Dept, 1993).

Issue: whether Committee violated OML when they conducted an executive session to discuss a proposal to utilize a neighboring county's landfill pursuant to §105(1)(h) re real property.

"Before a public meeting may be closed pursuant to the exception relied upon .... 'it must first be shown that publicity would substantially affect the value of the property'" p. 898-899
This is no evidence to support the respondents claim that publicity would affect the value of the real property discussed – pure speculation.

Affirm Supreme Court's finding that closure of the meeting violated the OML.

Rule: pure speculation that publicity would affect the value of real property discussed in executive session is insufficient. Must have evidence.

This case is based on a clear inference that OML applies to standing committees of County Board of Supervisors, committees made up solely of members of a public body.

You will likely find the following advisory opinion helpful: http://www.dos.ny.gov/coog/otext/o4660.html

Again, my apologies for the delay,

Camille

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

STATE OF NEW YORK
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FOI-AO-18798
OML-AO-5239

February 3, 2012

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 :

This is in response to your request for an advisory opinion regarding application of the Freedom of Information Law to records requested from the Town of East Greenbush. Please accept our apology for the delay in responding.

As indicated, you were denied access to a copy of the draft ethics code which was distributed to members of the Town Board and the Ethics Board, but not the public, during a discussion at a Town Board meeting. You indicated that the draft code was not only discussed in great detail at the meeting, but that "each member of the five (5) person Ethics Board **read aloud** a portion or section of the revised code out loud to the Town Board. This process continued for several hours and each member of the Ethics Board read aloud two or more sections of the draft of the ethics code." (Emphasis yours.)

On appeal, you were informed that the document "is still an interagency memorandum. It is not yet in a format for consideration of a local law. It will be in the correct format before the public hearing, and it will then be available for public viewing."

In this regard, we note that the Freedom of Information Law is applicable to all records maintained by or for an agency, such as a town, and §86(4) of that statute defines the term "record" expansively to include:

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

Based on the foregoing, as soon as a document is prepared for or maintained by an agency, it constitutes a "record" that falls within the coverage of the Freedom of Information Law. That a document is characterized as a "draft" or a "work in progress" is, in our view, not necessarily determinative of whether it must be disclosed or may be withheld.

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.

If the proposed code had only been discussed "at length" during an open meeting, we might agree that it could be withheld – at least up until February 2, 2012, as outlined below. Although there is no exception in FOIL dealing specifically with drafts or works in progress, §87(2)(g) pertains to internal governmental communications and authorizes an agency to withhold records that:

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

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

Again, a draft proposed code prepared by a government officer or employee reflects a recommendation that may be approved, modified or rejected and, therefore, may ordinarily be withheld. The facts in this instance, however, in our opinion, dictate that the proposal be

disclosed in great measure, or perhaps in its entirety. It has been advised on many occasions that insofar as the contents of records are disclosed through discussion at a meeting open to the public, they must be made available in response to a request made under the Freedom of Information Law. In short, public discussion reflective of the contents of the records, and a public reading of the record, results in a waiver of the ability to deny access.

Viewing the matter from a different vantage point, since tape recordings of open meetings were found to be accessible to the public under the Freedom of Information Law more than thirty years ago (Zaleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978), those portions of records read aloud or otherwise disclosed and captured on tape would be public.

In a case in which there was an "inadvertent disclosure" of a record, it was found that the disclosure did not create a right of access on the part of the person who viewed the record [see McGraw-Edison v. Williams, 509 NYS2d 285 (1986)]. Conversely, however, if a disclosure was not inadvertent, but rather purposeful, as in a situation in which members of boards read aloud portions of a record, or read the record aloud in its entirety, during a meeting at which anyone present could have heard, we believe that a public disclosure would have occurred and that the ability to deny access to that record would have been waived.

In sum, based on the facts as you presented them, at the very least, we believe that the Town is required to disclose those portions of the record that were read aloud.

As referenced earlier, we bring to your attention an amendment to the Open Meetings Law effective on February 2, 2012. The goal of a new section 103(e) is simple: those interested in the work of public bodies should have the ability, within reasonable limitations, to see the records scheduled to be discussed during open meetings prior to the meetings. The entire text of the amendment is as follows:

> (e) Agency records available to the public pursuant to article six of this chapter, as well as any proposed resolution, law, rule, regulation, policy or any amendment thereto, that is scheduled to be the subject of discussion by a public body during an open meeting shall be made available, upon request therefor, to the extent practicable as determined by the agency or the department, prior to or at the meeting during which the records will be discussed. Copies of such records may be made available for a reasonable fee, determined in the same manner as provided therefor in article six of this chapter. If the agency in which a public body functions maintains a regularly and routinely updated website and utilizes a high speed internet connection, such records shall be posted on the website to the extent practicable as determined by the agency or the department, prior to the meeting. An agency may, but shall not be required to, expend additional moneys to implement the provisions of this subdivision.

In short, when an agency schedules a proposed law, rule or regulation for discussion during a public meeting, it is required to make the record available to the public, to the extent practicable, online and prior to or at the meeting during which the record is discussed.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb
cc: Joseph Liccardi, Town Attorney

OML-AO-05240

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Friday, February 10, 2012 9:05 AM
To: [redacted]
Subject: RE: Open Meetings Law

Dear Mr. Peck:

When a public body has properly entered into an executive session, it may take action during the executive session, so long as the vote does not involve the appropriation of public monies. When action is taken during an executive session, minutes indicating the nature of the action taken, the date and the vote of the members must be prepared and made available in accordance with the Freedom of Information Law within a week of the closed session.

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

Robert J. Freeman
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[redacted]

OML-AO-05241

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Monday, February 13, 2012 2:36 PM
To: clerk@townofcaroline.org
Subject: RE: Draft minutes question

Unless draft minutes are scheduled to be discussed (not merely the subject of a motion) in public, or are the subject of a resolution scheduled to be discussed in open session, there is no obligation to post them online to comply with section 103(3) of the Open Meetings Law. This not to suggest that they cannot be posted on the Town's website, but rather that there is no obligation to do so.

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

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[redacted]

OML-AO-05242

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Tuesday, February 14, 2012 9:02 AM
To: 'Barry Zezze'
Subject: RE: Robert's Rules

Dear Mr. Zezze:

I can offer the following short answers to your questions. If you would prefer a more detailed response with explanations relating to the issues, I can prepare an expansive advisory opinion. However, we have a backlog, and it would be some time before I could do so.

First, Robert's Rules is not law, and there are elements of Robert's Rules that are inconsistent with the law of New York. It has been recommended that a public body, such as a board of commissioners, adopt reasonable rules to govern its proceedings.

Second, the Chairman presides, but he doesn't make the rules or have all the power. The Board has the authority to determine the content of minutes by means of motions that must be approved by vote of a majority of the total membership. Further, I know of no law that forbids members of public bodies from clarifying or justifying their positions or votes.

Third, although as a matter of practice or policy, most public bodies approve their minutes, there is no law that requires that minutes be approved. If it is the practice or policy to do so, in my view, most important is that the minutes be accurate and reflect what in fact occurred during a meeting.

Fourth, the Open Meetings Law authorizes the public to attend open meetings, but there is no requirement that the public be permitted to speak. Many public bodies do, however, permit limited public participation. In those instances, it has been advised that they adopt reasonable rules that treat members of the public equally. There is no requirement that a public body or its members answer questions. They may choose to do so, but there is no obligation to do so. The same would be so with respect to letters sent to a public body.

I hope that I have been of assistance.

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

State of New York
Department of State
Committee on Open Government

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VIA EMAIL

OML-AO-5243
FOI-AO-18803

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, February 15, 2012 2:19 PM
To: 'Sean Abbott'
Subject: RE: Recording a Meeting

Dear Sean,

In brief response to your first question, I cannot advise you whether you may or should record the executive session. There is no law that prohibits it. There are folks who have recorded executive sessions and/or disclosed what was discussed during executive sessions – see the following advisory opinion:

http://www.dos.ny.gov/coog/otext/o4530.html

Also, please take a look at online advisory opinions under "E" for Executive Session, Claim of Confidentiality Regarding, and Executive Session, Disclosure of Discussion After.

In short, whether it is a wise idea to record executive session discussions, or to disclose what was said in executive session is not for me to say; however, you should be aware of the surrounding issues expressed in those opinions noted above.

And, if you were to make a recording of an executive session, because you are a board member the recording would become a record of the Library, subject to FOIL, and required to be disclosed/permitted to be withheld pursuant to the Freedom of Information Law.

In response to your second question, the pertinent section sets forth, in part, as follows:

"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." (Section 103[d][1].)

The ability to record a public meeting is in no way limited to non Board members.

Hope it helps,

Camille

Camille S. Jobin-Davis, Esq.
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[redacted]

FOIL-AO-05244

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Thursday, February 16, 2012 8:31 AM
To: 'Jessica Collier'
Subject: RE: question

Hi Jessica - -

It is assumed that the content of the power point presentation would be accessible under the Freedom of Information Law. If that is so, and if the content of the power point is scheduled to be discussed during an open meeting, yes, I believe that it should be disclosed in accordance with section 103(e) in advance of a meeting.

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

Bob

[redacted]bert J. Freeman
[redacted]ecutive Director
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[redacted]

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OML AO 5245

February 15, 2012

Donald G. Hobel
[redacted]

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

Dear Mr. Hobel:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to the Niagara County Legislature. Specifically, you described a practice of inviting "guests" to speak toward the beginning of a meeting, while scheduling public comments for the end of the meeting, which can result in holding public comments to as late as 10 p.m.

Rules of Order of the Niagara County Legislature indicate that public comments regarding agenda items are scheduled early in the meeting, and public comments related to the "General Welfare of the County" are last on the order of business.

To the extent that you raised questions identical to those addressed in OML-AO-4926, enclosed please find a copy of that opinion. We continue to stand by the opinions expressed therein.

With respect to the additional issue of how a public body determines who is a "guest" and who is a member of the public, while there is no law that we know of that would address this question, it is our understanding that there are occasions when public bodies invite certain people to address the body for educational or informational purposes, or for purposes of presenting a particular application, in which case they would not be treated as "members of the public." We would expect that a public body would issue invitations in a reasonable manner and have no basis for believing that the Niagara County Legislature is not.

To the extent that you raised questions regarding the Legislature's ability to appoint a sergeant at arms, we regret that we are unable to provide assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb

cc: Claude Joerg, Niagara County Attorney
Enclosure

OML-AO-05246

Jobin-Davis, Camille (DOS)

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, February 16, 2012 11:17 AM
To: Mossberg, David (DOS)
Subject: RE: Open Meeting Law Question

Hi Dave,

Although I don't remember Jim asking this particular question, my best advice is that the MAB is a public body subject to OML.

Based on my review of Unconsolidated Law Chapter 7, Section 4 (hope I'm not missing Section 8904?), the MAB consists of nine members appointed by the Governor who serve on rotating terms, it has powers and duties to prepare and submit regulations, standards and recommendations for approval to the Commission, it is required to develop medical education programs, review credentials and performance of physicians, among other various things.

Section 102(2) defines a 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."

Relevant, I think, is the decision rendered in MFY Legal Services v. Toia [402 NYS 2d 510 (1977)]. That case involved an advisory body created by statute to advise the Commissioner of the State Department of Social Services. In MFY, it was found that "[a]lthough the duty of the committee is only to give advice which may be disregarded by the Commissioner, the Commissioner may, in some instances, be prohibited from acting before he receives that advice" (id. 511) and that, "[t]herefore, the giving of advice by the Committee either on their own volition or at the request of the Commissioner is a necessary governmental function for the proper actions of the Social Services Department" (id. 511- 512).

Because the MAB was created by state law, and/or if it performs a required function in the process of decision making, I believe that its meetings would be subject to the Open Meetings Law. In that circumstance, even if its authority is advisory, if the decision maker or decision making body must, by law, consider the advice of the Advisory Board as a condition precedent to its ability to take action, I believe that the Board would be carrying out a governmental function and, therefore, would constitute a public body. If the MAB were not a creation of law and it performed no legally necessary function in the decision making process, it would not, based on this decision, be required to comply with Open Meetings Law.

While my search did not reveal any specific reference to the quorum requirement, the term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision states that:

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

Based on the foregoing, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, is present or videoconferencing in.

Like many of the cases involving committees and subcommittees but unlike the facts here, I believe the Jae case involved an advisory committee that was not a creature of statute.

It is my understanding that most entities created by statute are public bodies subject to the OML.

For additional analysis regarding advisory bodies created in statute, you may want to take a look at advisory opinions under "A" for "Advisory Body, Statutory".

Hope it helps and that you are well! Please let me know if you have further questions -

Regards,

Camille

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[redacted]

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OML AO 5247

February 15, 2012

Lauritz Rasmussen, PE
[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. Rasmussen:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to a gathering of certain officials and employees of the City of Saratoga Springs.

Specifically, you described how the Mayor, the Deputy Mayor, the City Attorney, yourself as Building Inspector, the Assistant Building Inspector, the City Architect and a representative of a consultant met to discuss public safety issues. Various decisions were made, minutes were prepared, and you asked whether such minutes would be required to be made available pursuant to the Freedom of Information Law. You also asked whether minutes of meetings between the Building Inspector and individuals were likewise required to be made available upon request. In response to your request for the records the City denied access to meeting notes that were prepared in conjunction with meetings between (1) the City Attorney and the Deputy Mayor, and (2) the City Attorney, the Deputy Mayor, yourself and representatives of a consultant, on the grounds that such records were intra-agency and protected from disclosure pursuant to executive and attorney-client privileges.

In this regard, we note first that the Open Meetings Law applies to meetings of public bodies, and that §102(2) of the Law defines the phrase "public body" to mean:

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

Based 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. In our opinion, a gathering of two public officials and various public employees is not a gathering of a public body subject to the Open Meetings Law. Accordingly, there is no requirement that minutes of such meetings be kept.

With respect to records or minutes of gatherings such as those that you described, to the extent that they exist, we note that the Freedom of Information Law pertains to all agency records and defines the term "record" expansively in §86(4) 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."

Based on the foregoing, even though there may have been no obligation to prepare minutes, the notes or other documentation constitute "records" subject to rights of access conferred by the Freedom of Information Law.

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

Although the provision cited by the Records Access Officer as a basis for denial, §87(2)(g), potentially serves as a ground for denial of access, 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.

There is no provision in the Freedom of Information Law, or in any other applicable law of which we are aware that allows an agency to deny access to records based on "executive privilege".

On the other hand, when the attorney-client privilege is properly and justifiably asserted, records falling within the scope of the privilege are confidential and may be withheld under §87(2)(a) of the Freedom of Information Law concerning records that "are specifically exempted from disclosure by statute." When a third party is present, however, it is likely that the privilege is waived, and would not apply to records memorializing a conversation.

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

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

In short, if the content of the records memorialize a privileged conversation between an attorney and a client, the records would be confidential; however, if the records memorialize a conversation that was held between an attorney, a client and a third party, in our opinion, the privileged is waived and cannot serve as a basis for denying access to the record.

Accordingly, whether the records are required to be made available depends largely on the content of the records in accordance with §87(2)(g) and whether they memorialize discussions protected by the attorney-client privilege.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb
cc: Joseph Scala, City Attorney

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OML AO 5248

February 17, 2012

E-Mail

TO: Brian Lobel
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. Lobel:

This is in response to your request for an advisory opinion regarding application of the Freedom of Information and Open Meetings Laws to requests made to the Town of Mamaroneck. Specifically, you requested records "distributed by, and/or made by any participant, during any executive sessions" at the meeting held on September 7, 2011. The Town denied access, stating that such records "would not be available as it pertains to the Employment History of Corporations Leading to the Appointment or Employment of a Corporation." While you were primarily concerned with the denial of access to records, you also questioned the basis for the Board's entry into executive session to discuss such records.

Initially, 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. The rationale provided by the Town, as the basis for its denial of access, is not one of those that appears in the Freedom of Information Law, but rather one of the enumerated grounds for entry into executive session within the Open Meetings Law (§105[1][f]).

With respect to access to records that were apparently considered in conjunction with the Board's discussion of a corporate applicant for appointment or employment, there may be provisions of §87(2) of the Freedom of Information Law on which the Board could rely to deny access to records or portions thereof; however, we are not aware of any prohibition in law

against disclosure of such records merely because they were the subject of discussion at executive session.

With respect to the issue of the executive session, assuming that the motion for entry into executive session was, as above, to consider the employment history of a particular corporation and matters leading to the appointment or employment of a particular corporation, it is likely that the executive session discussion was appropriate.

In this regard, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. The language of the exception on which the Town Board appeared to rely in this instance, §105(1)(f) of the Open Meetings Law, permits 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..."

Again, assuming that the discussion was limited to the topic articulated, we believe that there was a valid basis to hold an executive session.

We hope that we have been of assistance.

RJF:RC:sb
cc: Town Board

STATE OF NEW YORK
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FOI-AO-18812
OML-AO-5249

February 17, 2012

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 Mr.:

This is in response to your request for an advisory opinion pertaining to a school board's ability to edit a videotape of a public meeting, and our impressions concerning a policy relating to broadcasting and taping school board meetings.

In this regard, we note that there is no law that we know of that would require a school board or any other public body to videotape or otherwise record its meetings. Accordingly, this will confirm the advice provided to you by General Counsel to the New York State School Boards Association, that there are no known restrictions or requirements based in law that govern the editing of such recordings.

You also asked whether Arts and Cultural Affairs Law §57.25 would govern the retention and disposition of recordings made by the board, and in response we point out that Records Retention and Disposition Schedule ED-1 governing records maintained by school districts provides in pertinent part as follows:

"3.[2] **Recording of voice conversations**, including audio tape, videotape, stenotype or stenographer's notebook and also including verbatim minutes used to produce official minutes and hearing proceedings, report, or other record

a. Recording of meeting of public or governing body or board, committee or commission thereof:

RETENTION: 4 months after transcription and/or approval of minutes or proceedings

NOTE: Videotapes of public hearings and meetings which have been broadcast on local government public access television are covered by item no. 314, below.

NOTE: Appraise these records for historical significance prior to disposition. Audio and videotapes of public hearings and meetings at which significant matters are discussed may have continuing value for historical or other research and should be retained permanently. Contact the State Archives for additional advice on the long-term maintenance of these records.

b. Recording other than of meeting of public or governing body or board, committee or commission thereof:

RETENTION: 0 after no longer needed…

33.[314] **Local government public access television records**

a. Videotape (or other information storage device) recording local government public access television program, where program is produced by a local government

Where program constitutes an important public meeting, significant event, important subject or documents local government policy making:

RETENTION: PERMANENT

NOTE: In order to ensure the continued preservation and availability of videotapes, local governments should consider using broadcast-quality tapes where possible. Those tapes should be periodically inspected and copied to newer tapes and formats. Contact the State Archives for additional advice.

Where program constitutes a routine meeting, event or subject:

RETENTION: 1 year

Where program is aired but **not** produced by a local government:

RETENTION: 0 after no longer needed

b. Viewer guide or other periodic listing of programs:

RETENTION: 1 year

NOTE: Appraise these records for historical significance prior to disposition. Records with historical value should be retained permanently. The State Archives recommends that local governments retain a sampling of these records on a monthly, seasonal or other periodic basis.

c. Program files on local government cable television programs:

RETENTION: 6 years" (Revised 2004.)

For further information regarding application of the Retention Schedule, please contact the New York State Archives or the State Archives' Regional Advisory Officer in your region.

With respect to the proposed policy concerning broadcasting and taping board meetings, please be advised that while public bodies are not required to record or broadcast meetings, they are now required by law to allow meetings to be photographed, broadcast, webcast or otherwise recorded and/or transmitted by audio or video means. A 2011 amendment to §103 of the Open Meetings Law states that open meetings:

> "shall be open to being photographed, photographed, broadcast, webcast, or otherwise recorded and/or transmitted by audio or video means." (§103[d][1].)

Subparagraph [d][2] further provides that

> "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."

The link below is to the model rules that the Committee has prepared for consideration by local governments.

Prior to codification of the public's ability to record public meetings, but relevant to the proposed policy that you submitted, the Appellate Division unanimously affirmed a decision which annulled a resolution adopted by a board of education prohibiting the use of tape recorders

at its meetings and directed the board to permit the public to tape record public meetings of the board [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924 (1985)]. In so holding, the Court stated that:

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

Further, 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, and the recent amendment to the Open Meetings Law, we believe that any person may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process.

With respect to the requirement that the Board and the public be informed in advance of a meeting of the intent to record, we note that the Court in Mitchell referred to "the unsupervised recording of public comment" (id.). In our view, the term "unsupervised" indicates that no permission or advance notice is required in order to record a meeting, and it is clear from the language of §103[d] that a public body must allow recording.

Again, so long as a recording device is used in an unobtrusive manner, a public body cannot prohibit its use by means of policy or rule. Moreover, situations may arise in which prior notice or permission to record would represent an unreasonable impediment. For instance, since any member of the public has the right to attend an open meeting of a public body (see Open Meetings Law, §100), a reporter from a local radio or television station might simply "show up", unannounced, in the middle of a meeting for the purpose of observing the discussion of a particular issue and recording the discussion. In our opinion, again, as long as the use of the

recording device is not disruptive, there would be no rational basis for prohibiting the recording of the meeting, even though prior notice would not have been given. Similarly, often issues arise at meetings that were not scheduled to have been considered or which do not appear on an agenda. If an item of importance or newsworthiness arises in that manner, what reasonable basis would there be for prohibiting a person in attendance, whether an employee, a member of the public or a member of the news media representing the public, from recording that portion of the meeting so long as the recording is carried out unobtrusively? In our view, there would be none.

In sum, we do not believe that a person may be required to obtain permission or provide advance notice of the intent to record an open meeting, so long as the recording device is used in a manner that is not disruptive.

We hope that this is helpful.

CSJ:sb
cc: Auburn City School Board President, Karol Soules
Model Rules

FOI-AO-18814
MLU AO-05250

Jobin-Davis, Camille (DOS)

From: Jobin-Davis, Camille (DOS)
Sent: Friday, February 17, 2012 4:05 PM
To: [redacted]
Subject: Freedom of Information Law - draft minutes

Dear Mr. Clark,

We are in receipt of your request for assistance with respect to access to a copy of draft minutes for the Fire District Commissioners meeting.

The following links are to advisory opinions that address the exact issues that you are faced with -- they apply directly to the questions that you raise as a Commissioner on the Board:

http://www.dos.ny.gov/coog/otext/o3284.htm

http://www.dos.ny.gov/coog/ftext/f15857.htm

Please note that, in sum, there is no basis in law to deny access to draft minutes, there is no basis in law to prohibit the dissemination of records that are required to be made available pursuant to the Freedom of Information Law, and I agree, there is really no good reason to require a board member to submit a written request for a copy of the draft minutes in anticipation of the meeting at which the minutes are to be examined.

Please feel free to share the advisory opinions and this email as you wish.

Should you have any further questions, please let me know.

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

FOIL-AO-05251

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Thursday, February 23, 2012 8:35 AM
To: [redacted]
Subject: RE: Executive Session Question

Anyone may request an executive session, but an executive session may be held only after the introduction of a motion by a member of a public body and approval of the motion by an affirmative vote of a majority of the members of that body. Further, the subjects that may properly be considered during an executive session are specified and limited in section 105(1) of the Open Meetings Law.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
One Commerce Plaza
Suite 650
99 Washington Avenue
Albany, NY 12231
[redacted]one: (518)474-2518
Fax: (518)474-1927
Website: www.dos.state.ny.us/coog/index/html

[redacted]

STATE OF NEW YORK
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OML AO 5252

February 24, 2012

Paul Forcella
[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. Forcella:

This is in response to your request for assistance with respect to certain proceedings of the Henrietta Town Board and specifically, with respect to your interactions with the Supervisor.

First, please know that this office is authorized to provide legal advice and counsel regarding application of the Open Meetings Law, and in this regard, we hope that our advisory opinions are educational and persuasive.

More to your concerns, we note that 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)]. 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.

In the context of your inquiry, if the allegations that you make are accurate, and the presiding officer permits those who wish to speak to do so for a particular period of time, each person who wishes to do so must, in our opinion, be given an equal opportunity to do so. Similarly, if positive comments concerning the operation of Town government are permitted, we believe that there must be equal opportunity to enable those in attendance to offer negative or critical comments.

Finally, and from our perspective, while the Supervisor may preside over Town Board meetings, it is questionable whether he may validly determine unilaterally whether the subject matter of comment proposed by a person desiring to speak involves Town business. He is but one member of the Town Board and we believe that the Town Board, if necessary, should determine by means of a majority vote of its total members if there is a question or disagreement regarding the length of time that a person is permitted to speak. We believe that the Town Board in that circumstance should determine whether the subject may be raised, rather than the Supervisor reaching a determination alone. It is also noted that §63 of the Town Law states in part that "Every act, motion or resolution shall require for its adoption the affirmative vote of all the members of the town board."

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb
cc: Town Supervisor

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OML-AO-5253

February 28, 2012

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:

As you are aware, I have received your letter and the materials relating to it, and I hope that you will accept my apologies for the delay in response.

The issue involves the authority of the City of Buffalo Common Council to conduct its organizational meetings in private.

By way of background, section 3.2 of the City Charter states in relevant part that: "The common council shall consist of nine district council members. A president of the common council shall be elected from amongst the members at the organizational meeting for a two (2) year term." Notice of the organizational meeting conducted in December was given by the City Clerk, indicating that the meeting would be held at Francesca's Restaurant at a specific time. In response to an opinion sought by the Council's Majority Leader concerning the status of the meeting, Acting Corporation Counsel David Rodriguez advised that the notice was "nothing more than a courtesy notice of a meeting, which did not need to comport with the Open Meetings Law because of its exemption from said law as provided in Section 108 of the Public Officer's [sic] Law…" The Acting Corporation Council noted that "all members are Democrats or adherents to the Democratic Party…"

From my perspective, based on the language of the law and judicial precedent, the organizational meeting should have been held in accordance with the Open Meetings Law. In this regard, I offer the following comments.

By way of background, the Open Meetings Law is applicable to meetings of a public body, such as the Common Council, and it was held more than thirty years ago that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" falling within the scope of that statute, even if there is no intent to take action, and irrespective of the manner in a gathering is characterized [Orange County Publications, Inc. v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)]. In brief, every meeting of a public body must be preceded by notice of the time and place given to the public and the news media pursuant to section 104 of the Open Meetings Law. Meetings must be conducted open to the public, except to the extent that an executive session may properly be held based on the provisions of section 105(1)(a) through (h).

As suggested by Acting Corporation Counsel, a second vehicle potentially enables a public body to meet in private. Section 108 of the Open Meetings Law pertains to "exemptions", and when an exemption applies, the Open Meetings Law does not; it is as though the Open Meetings Law does not exist.

The exemption to which he referred, subdivision (2) of section 108, pertains to "deliberations of political committees, conferences and caucuses" and states that:

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

For two reasons, I do not believe that the organizational meeting could validly have been conducted as a closed political caucus exempt from the coverage of the Open Meetings Law.

First, while a political caucus that includes the members of a public body may be held to discuss any subject, the ability to do so in private is limited to discussions and deliberations. I do not believe that the members of a public body have the ability to vote or take action in a manner that binds the public body during a closed political caucus. Stated differently, the authority to vote or take final and binding action may occur only at a meeting held in accordance with the Open Meetings Law.

Significant is the second sentence of section 3-2 of the City Charter. To reiterate, that provision states that: "A president of the common council shall be elected from amongst the members at the organizational meeting…" Because a president "shall be elected…at the organizational meeting", it is clear that action must be taken at that meeting. It is equally clear in my view that action may only be taken at a meeting held pursuant to the Open Meetings Law.

Any other conclusion would enable members of a majority party on the Common Council to take binding action in private, without providing notice of its meeting to minority party members or the public.

Second, the only decision of which I am aware concerning the application of the exemption regarding political caucuses when all of the members of a legislative body are members or adherents of the same political party involved the Common Council of the City of Buffalo. As I interpret that decision, when there is unanimity of political party membership in a legislative body, the authority to conduct a closed political caucus is limited to discussions of political party business. The exemption from the Open Meetings Law concerning political caucuses cannot be invoked when discussions or deliberations involve matters of public business.

In Buffalo News v. City of Buffalo Common Council, 585 NYS2d 275 (1992)], the issue involved a political caucus held by a public body consisting solely of members of one political party, and the court concentrated on the expressed legislative intent regarding the exemption for political caucuses, as well as the statement of intent appearing in §100 of the Open Meetings Law, stating that:

> "In a divided legislature where a meeting is restricted to the attendance of members of one political party, regardless of quorum and majority status, perhaps by that very restriction it
> would be fair to assume the meeting constitutes a political caucus. However, such a conclusion cannot be drawn if the entire legislature is of one party and the stated purpose is to adopt a proposed plan to address the deficit before going public. In view of the overall importance of Article 7, any exemption must be narrowly construed so that it will not render Section 100 meaningless. Therefore, the meeting of February 8, 1992 was in violation of Article 7 of the Open Meetings Law...
>
> "When dealing with a Legislature comprised of only one political party, it must be left to the sound discretion of honorable legislators to clearly announce the intent and purpose of future meetings and open the same accordingly consistent with the overall intent of Public Officers Law Article 7" (id., 278).

The court, however, continually referred to the term "meeting" and the deliberative process, not merely the act of "adopting" or taking action. In fact, the language of the decision in many ways is analogous to that of the Appellate Division in Orange County Publications, supra. Specifically, it was stated in Buffalo News that:

> "The Court of Appeals in Orange County (supra) also declared: 'The purpose and intention of the State Legislature in the present context are interpreted as expressed in the language of the statute and its preamble.' The legislative intent, therefore, expressed in Section 108, must be read in conjunction with the Declaration of Legislative Policy of Article 7 as set forth in its preamble, Section 100.

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonwealth will prosper and enable the governmental process to operate for the benefit of those who created it.
>
> "A literal reading of Section 108, as urged by Respondent, could effectively preclude the public from any participation whatsoever in a government which is entirely controlled by one political party. Every public meeting dealing with sensitive or controversial issues could be preceded by a 'political caucus' which would have no public input, and the public meetings decisions on such issues would be a mere formality. Such interpretation would negate the Legislature's declaration in Section 100. The Legislature could not have contemplated such a result by amending Section 108 and at the same time preserving Section 100" (id., 277).

Based on the foregoing, when a legislative body, such as the Common Council, consists of members of a single political party, to the extent that the caucuses are held to discuss public business, I believe that the Open Meetings Law would apply.

Since the election of a president involved a matter of public business, the exemption regarding political caucuses, in my opinion, would not have applied. On the contrary, in my view, action of that nature could only have been taken at a meeting held pursuant to the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:sb
cc:

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OML AO 5254 March 2, 2012

E-Mail

TO: Stephanie Kyle

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, except as otherwise indicated.

Dear Ms. Kyle:

We have received your request for an advisory opinion regarding application of the Open Meetings Law to meetings held by the Board of Trustees of the Mastics-Moriches-Shirley Community Library. Specifically, you wrote that on a Monday night you saw all five members of the Board meeting together in one of the meeting rooms of the library. You stated that you checked for notice of the meeting in the local papers and the public bulletin board, but were only able to locate notice of a series of board meetings which were to be held on Monday nights during October on the library's website and Facebook page. You posed several questions, most of which pertained to a general review of the Open Meetings Law with specific regard to notice requirements.

Counsel to the Library responded to your inquiry by stating that notice of the series of meetings was posted on the library's bulletin board and that notice was given to the library's newspapers of record, and that such notice, although not required to be published, was published in such newspapers, with the exception of notice for the very first meeting (copy attached). In this regard, we offer the following comments.

First, regarding the notice requirement under 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."

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

Second, if a series of meetings have been scheduled in advance to be held at particular times, the posting of a notice of a schedule of those meetings in a conspicuous public location, transmittal of that notice once to the news media and an online posting on the library's website would in our view satisfy §104 of the Open Meetings Law regarding those meetings. The only instances in which additional notice would be required would involve unscheduled meetings that are not referenced in the notice. And, while it is not necessary that a public body post notice of its meetings on its Facebook page, due to the fairly widespread use of Facebook as an information tool, we would not discourage the library from doing so.

Therefore, if, for instance, the Board of Trustees establishes that its meetings will be held on, for example, the first and third Monday of every month at 6:30 p.m. at the Library, and if notice containing that information is posted on a bulletin board and on the website continuously and transmitted once to the local news media, we believe that the Board would satisfy the notice requirements imposed by the Open Meetings Law. Again, the only additional notice would involve unscheduled meetings. We point out, too, that although notice of meetings must be given

to the news media, there is no requirement that the news media print or publicize that a meeting will be held.

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

Further, specifically in regard to emergency meetings, 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.

Finally, the link below is information from our website regarding the Open Meetings Law for further reference. We hope that we have been of assistance.

cc: Kevin Seaman, Esq.
Chair, Board of Trustees of the Library

CSJ:sb

http://www.dos.ny.gov/coog/Right_to_know.html#oml

FOIL-AO-05255

Jobin-Davis, Camille (DOS)

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, March 01, 2012 4:02 PM
To: 'Sue McCrory'
Subject: RE: Open Meetings Law Question

Hi Sue,

Thanks, hope you are well too. My kids are enjoying a day off from school today with all the snow, but it seems likely that it won't last very long.

With respect to the adjournment to obtain legal advice, I'm steering you to online OML advisory opinions under "A" for "Attorney-client privilege", such as the following: http://www.dos.ny.gov/coog/otext/o4622.html Lots of times, I think public bodies can't quite figure out what the motion should be, but take a look at the following for guidance on the actual motion - the paragraph "While it is not my intent...".

The wrinkle that you have added, that the planning consultant was invited into the meeting, makes me ask whether the attorney-client privilege was waived, and I am not sure of the answer. If the consultant were considered part of the Village, and therefore part of the "client" then the privilege would not be waived. The nature of the relationship between the consultant and the Village would be important, and I cannot say for sure whether the answer depends on whether the consultant still has contractual obligations to the village. Even if you were to provide factual information regarding this relationship, because of my unfamiliarity with the volume of case law regarding the attorney-client privilege, I'm afraid I'm not going to be very helpful.

[redacted]mille

Camille S. Jobin-Davis, Esq.
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[redacted]

FOI-AO-18831
OML-AO-05257

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Monday, March 05, 2012 5:12 PM
To: 'supervisor@townofstanford.org'
Subject: Town of Stanford Ethics Committee procedures
Attachments: article.ethics boards.doc

Dear Supervisor Stern:

I have received your questions relating to the Town of Stanford Ethics Committee procedures.

From my perspective, ethics entities are clearly subject to both the Freedom of Information and Open Meetings Laws. Because that is so, the elements of the procedures that appear to require the confidentiality of records or closing all meetings are, in my view, inconsistent with law and, therefore, invalid. I am not suggesting that all records and meetings of the Ethics Committee must be open to the public, but rather that provisions requiring confidentiality in blanket fashion are inappropriate, for some aspects of the Committee's meetings and records may, by law, be open and accessible. Attached is an article that I prepared for the Municipal Law Section of the New York State Bar Association that considers those statutes in relation to ethics entities in detail. I believe that the article can serve as a guide in terms of disclosure.

The other issue that gives rise to concern relates to the authority of the Ethics Committee, which appears in some portions of the procedure to be broad and exclusive. I am not an expert with respect to that issue, and it is suggested that you confer with an attorney at the Association of Towns in an effort to ascertain the proper scope of authority of an ethics entity.

I hope that I have been of assistance.

Robert J. Freeman
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Fax: (518)474-1927
Website: www.dos.state.ny.us/coog/index/html

FOI-AO-18831
OML-AO-05257

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Monday, March 05, 2012 5:12 PM
To: 'supervisor@townofstanford.org'
Subject: Town of Stanford Ethics Committee procedures
Attachments: article.ethics boards.doc

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I hope that I have been of assistance.

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OML AO 5258

March 8, 2012

E-Mail

TO: Kelly Myers

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. Myers:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to meetings of the Saugerties Town Board. You complained of "a consistent pattern of failure to adhere" to the Open Meetings Law, including lack of proper notice of meetings, insufficient minutes, failure to televise meetings in keeping with Board practice, and a failure to post minutes on the Town's website, among other issues. Supervisor Helmsmoortel responded to your complaints (copy attached) by indicating that adequate notice was provided, attaching copies of notices of meetings, and referring questions regarding minutes to the Town Clerk.

Initially, we 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 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.

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.

Further, §62(2) of the Town Law refers to "special meetings" of town boards and states that: "The supervisor of any town may, and upon written request of two members of the board shall within ten days, call a special meeting of the town board by giving at least two days notice in writing to members of the board of the time when and the place where the meeting is to be held." No reference is made to the subject matter to be considered.

With respect to the minutes, because the Town 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 Town 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. Most importantly, minutes must be accurate.

Minutes that indicate that a recommendation was adopted, without any information about the content or substance of the recommendation, for example, 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 recommendations that were adopted or incorporating them into the minutes in most instances is appropriate.

While not required by law, posting minutes online is a valuable courtesy and a logical step for those public bodies with functioning websites. In our opinion, not only does so doing save the Town Clerk administrative time, it permits the public to access such information without delay. Similarly, while televising meetings is a valuable service, there is no requirement to do so in law.

Finally, with respect to issues involving notice of executive sessions, and appropriate motions, we reiterate that notice of the time and place of a meeting is required to be provided in accordance with §104, as set forth above. Attached is an advisory opinion regarding appropriate notice language for meetings that are held for the sole purpose of having a discussion that may be held in executive session.

We hope that this is helpful.

CSJ:sb
cc: Town Clerk

Former Town Supervisor Helmsmoortel at Town (please forward)

http://www.dos.ny.gov/coog/otext/o3339.htm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-5259
FOI-AO-18834

March 8, 2012

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:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to meetings of the Board of Education of the Edwards-Knox Central School District. Specifically, you questioned whether the Board could enter into executive session without articulating grounds for doing so, and whether grounds that were later included in the minutes were sufficient. You asked whether minutes of executive sessions must be prepared, and finally, sought advice regarding what may be an incomplete response to a request for records made pursuant to the Freedom of Information Law.

The District responded (copy attached), indicating that subsequent to the September 6th meeting at which the motion at issue was made, the entire board, including three newly elected members, received training from the Board's attorney, and that the Open Meetings Law "has been followed since." Our review of the written materials you submitted indicates that there was a motion to enter executive session on September 19th for "discussion of individual participants and CSE", subsequent to a presentation by the school attorney regarding the role and responsibilities of the School Board.

In this regard, we note that the Open Meetings Law (copy attached) 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. In addition, the motion must be specific enough so that the public is informed that the topic or topics for discussion fall under one of the permitted options.

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

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

Based upon the foregoing, 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 Board of Education."

As another example, 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 a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion,

discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

Due to the presence of the term "particular" in §105(1)(f), we believe that a discussion of "employment history" may be considered in an executive session only when the subject involves a particular person or persons.

It has been advised that a motion involving §105(1)(f) should be based on its specific language. For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in 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.

In January of this year, the Appellate Division, rendered a decision regarding the specificity of motions for entry into executive session. In Zehner v. Board of Education of Jordan-Elbridge (copy attached), the court required a public body to "identify with particularity the topic to be discussed, … since only through such identification will the purposes of the Open Meetings Law be realized." The school board had entered into executive session in three separate scenarios, based on a recitation of the statutory language in §105. Conforming the holding in Daily Gazette, the court determined that "merely regurgitating" the statutory language was insufficient. In one instance, the court held that when the board entered into executive session to discuss "matters related to the appointment or employment of a particular person," it must identify the matter as part of the process of searching for a new superintendent.

Accordingly, we encourage board members to share more information about their intended topic(s) for discussion in executive session in a manner that clarifies that the discussions are within the parameters of the law, and to protect individuals from what might be an unwarranted invasion of personal privacy and/or the government's ability to function. A motion involving §105(1)(f) should be based on its specific language, and if the discussion will pertain to candidates for a certain vacant position, for example, it should contain reference to such position. If the discussion is limited to potential disciplinary action against a particular employee, identifying the person's title, in our opinion, would not be necessary. Such motions 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.

With respect to your questions regarding minutes of executive sessions, please note that although §106(2) refers to minutes of executive session when action is taken, only in rare instances may a board of education take action during an executive session. As a general rule, a

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

Finally, with respect to the concern that the District may not have provided all records that were requested pursuant to the Freedom of Information Law, we note that when an agency fails to respond or to respond in full to a request for records, the law provides an appeals process. See the attached "Explanation of Time Limits." Further, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." It is emphasized that when a certification is requested, an agency "shall" prepare the certification; it is obliged to do so.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb
Enclosure: Open Meetings Law

cc: Teresa Hogle, Board of Education President
Suzanne Kelly, Superintendent of Schools

OML-AO-05260

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Monday, March 12, 2012 10:49 AM
To: 'Robert Godlewski'
Subject: RE: Open Meeting

If I understand your question correctly, it appears to relate to a belief that the public has the right to speak or participate during meetings. That is not required by the Open Meetings Law. Although a public body, such as a town board, may permit the public to speak during its meetings, it is not obliged to do so. Many public bodies, however, choose to authorize limited public participation, and when they do, it has been advised that they adopt reasonable rules that treat members of the public equally.

The term "meeting" has been construed by the courts to include any gathering of a quorum of a public body for the purpose of conducting public business collectively, as a body. Assuming that an agenda meeting involves a quorum of the board, it is subject to the Open Meetings Law. If that is so, it must be preceded by notice and conducted open to the public, unless and until there is a basis for entry into executive session in accordance with section 105 of the Open Meetings Law. If the board does not want to permit the public to speak or participate during agenda sessions, that is its choice. A majority of the board could, by resolution, alter that practice.

I hope that I have been of assistance.

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

[redacted]

OML-AO-05261

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Monday, March 12, 2012 10:40 AM
To: 'Cathie W. Gehrig'
Subject: RE: Topic for Executive Session

First, the term "personnel" does not appear in any of the grounds for entry into executive session. Second, the language of the so-called "personnel" provision, section 105(1)f), is limited and precise. 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, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

It seems unlikely that an executive session could properly be held in the context of the situation that you described. Further, even if section 105(1)(f) is applicable, the board would not be required to conduct an executive session. It could choose to do so, but would not be obliged to do so.

I hope that I have been of assistance.

[redacted]bert J. Freeman
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[redacted]

OML-AO-05202

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Tuesday, March 13, 2012 1:50 PM
To: 'Angela Norris'
Subject: RE: Executive Session Question
Attachments: o4643.wpd

Dear Ms. Norris:

Assuming that the issue involves policy - - consideration of the manner in which public monies may be allocated, or perhaps whether art is important to the education of our kids - - there would be no basis for conducting an executive session. On the other hand, insofar as a discussion focuses on "a particular person" in relation to his or her performance, an executive session would be permissible.

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

I hope that I have been of assistance.

[redacted]bert J. Freeman
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[redacted]

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML AO 5263

March 15, 2012

E-Mail

TO: Lynn Teger

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. Teger:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to the Haverstraw Town Board. Specifically, you inquired whether notice of an emergency meeting was provided in compliance with law, and whether it is permissible to hold a meeting at 10 a.m., "when most people could not attend". In response to your request, the Supervisor submitted information about the necessity for holding an emergency meeting to set the town tax rates and his understanding of the facts (copy attached).

In this regard, we note that §104 of the Open Meetings Law pertains to notice and states as follows:

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

Please note that there is no requirement that notice of a meeting be published in a newspaper; whether a newspaper chooses to print notice of a meeting is within the discretion of its management.

With respect to the timing of the meeting, 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. Accordingly, if it was necessary to hold the meeting on an expedited basis in order to meet the time constraints associated with producing the tax bills, and notice of the meeting was given to the media, and both posted online and in the designated locations(s) "at a reasonable time prior thereto", it is our opinion that the meeting was held in accordance with law.

Finally, with respect to the reasonableness of scheduling a public meeting at 10 a.m. on a weekday, we note that while that statute does not indicate precisely when meetings must or must not be held, it is reiterated that every law must in our opinion be implemented in a manner that gives reasonable effect to its intent. While a meeting held during the business day may not be appropriate for some, in our opinion it is not necessarily an unreasonable time to schedule a public meeting.

In the one case that we are aware of in which a court considered the question of whether a certain time of day was unreasonable for purposes of holding a public meeting, it was stated that:

"It is...apparent to this Court that the scheduling of a board meeting at 7:30 a.m. -- even assuming arguendo that such meetings were properly noticed and promptly conducted -- does not facilitate attendance by members of the public, whether employed within or without the home, particularly those with school age or younger children..." (Matter of

Goetchius v. Board of Education, Supreme Court, Westchester County, New York Law Journal, August 8, 1996).

We reiterate our opinion that it is not necessarily unreasonable to hold a meeting during the business day.

We hope that this is helpful.

CSJ:sb
cc: Supervisor Phillips

State of New York
Department of State
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OML AO 5264

From: Jobin-Davis, Camille (DOS)
Sent: 21, 2012 2:52 PM
To: [redacted]
Subjec Freeman - how do we advertise this meeting?
Attachments: notice.doc

Helen,

In follow up to our conversation, the following links are to advisory opinions that I believe you will find helpful:

http://www.dos.ny.gov/coog/otext/o4248.htm

http://www.dos.ny.gov/coog/otext/o2438.htm (The gathering that you discussed can be differentiated from this gathering, I believe, because there is no intent "to finalize" or make a determination, the boards will not discuss information collectively as boards until they return to their own jurisdictions, and that they are there only to collect/share information.) (Please note that the statutory language regarding notice required for a public meeting in this opinion is out of date.)

Please note that if a board were to behave in a manner that suggested they were discussing or conducting public business as a board, during the course of the gathering that you described, the Open Meetings Law would apply.

Although I was unable to locate an opinion that suggests language for notice of such a meeting, that ach town and village board could give, this will confirm my suggestion that your committee advise each town and village board to provide notice of the gathering in accordance with the Open Meetings Law (posted in the designated locations, placed online and given to the news media) so as to alleviate any concerns. Attached is a document that outlines the current requirements for notice of a public meeting.

Hope it helps.

Camille

From: dos.sm.Coog.InetCoog
Sent: Wednesday, March 21, 2012 2:32 PM
To: Jobin-Davis, Camille (DOS)
Subject: FW: Robert Freeman - how do we advertise this meeting?

From: Webmail hkchase [mailto:hkchase@isp.com]
Sent: Tuesday, March 20, 2012 6:10 PM
To: dos.sm.Coog.InetCoog
Cc: Carol O'Beirne; Peter Manning
Subject: Robert Freeman - how do we advertise this meeting?

Robert Freeman - Thank you for being the person we all go to when we have a question about "open government."

I left a message today to have a staff person call me back - the day has now gone by. So, I will tell you via e-mail about our concern.

Town Board-appointed or Village Board-appointed Representatives from seven municipalities came together over three years ago to form a Central Catskills Collaborative, one purpose of which was to prepare an application to nominate a section of State Route 28 as a scenic byway. We are at the point when we are now seeking Board approval of our Corridor Management Plan.

The Towns of Andes and Middletown and the Villages of Margaretville and Fleischmanns have given their approval. The Towns of Shandaken, Olive, and Hurley have questions that they have asked the Collaborative to consider. We have answered all their concerns and want to bring the entire governing bodies together to re-present our revised Corridor Management Plan. We want there to be conversation among the Board members of both the Delaware contingent who have already approved the Corridor Management Plan, the Ulster Board members who voiced additional concerns, and the Collaborative members (all of whom were appointed by the respective Town Boards or Village Boards) who have done the immense amount of work getting us to this point and who can answer all the concerns, along with our Regional Planner, who has been guiding us through this project.

We want to have this gathering with as many Board members as we can get (so that everyone is on the same page) - and we are aware of the Open Meetings rules. We had an earlier meeting after we presented our first draft of the Corridor Management Plan, but we were limited to only two Town Board or Village Board members in attendance. All our meetings are open and notice given, but we had not given two weeks' notice to the public of this specific meeting.

How do we advertise this next meeting? We have a tentative date set for the morning of Thursday, April 19. We will be "lobbying" our own Board members to urge them to attend, since we are now at the end of this part

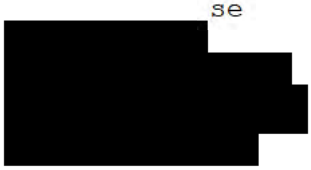
of the project and we would like to tie it up. The public has had the past three years to voice its broader concerns; we now want the Board members to feel that their very specific concerns have been met.

I hope to hear from you soon. Thanks

[a copy of this e-mail has also been sent to our current Central Catskills Collaborative member/group leader and to our regional planner]

--

[redacted]se



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OML-AO-5265

March 22, 2012

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 :

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to gatherings of the Athletic Council of one of the eleven sections of the NYS Public Health School Athletic Association, Inc. (the Association).

You indicated that while the Association is administered by a board of directors known as the Central Committee, each of the eleven geographical sections of the Association is governed by a Section Athletic Council. Each Athletic Council consists of the four members of the Central Committee that represent the section and representatives of each league in the section elected by the league or its member schools. Each of the eleven sections was incorporated in 1978, and each of the councils has authority, among other powers, to "impose and enforce a suitable penalty upon any member school which violates the constitution, bylaws, rules, regulations, sports standards, or code of ethics of the association or section." Appeals from Athletic Council decisions may be taken to the Central Committee, after which they may be challenged in court, as reflected by case law. You asked whether the Athletic Councils are subject to the Open Meetings Law.

In this regard, §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."

As set forth in OML-AO-4029 (attached), this will confirm our opinion, based on the facts set forth therein, that the governing body of the Association, the Central Committee, is a public body subject to the Open Meetings Law. If our assumption is correct, that the Central Committee conducts public business and performs a governmental function, then section Athletic Councils, vested with authority to adopt constitutions, bylaws and regulations, and to discipline members and their students, would, in a similar manner, also fall within the definition and constitute public bodies subject to the Open Meetings Law.

With respect to the responsibilities of the Athletic Councils and compliance issues raised in your correspondence and that of Mr. John McGowan, representing the interest of Section III of the Association (December 9, 2011, copy attached), we note that the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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.

According to the facts presented, that an executive session was held "to assess penalties" and "to discuss the school district's report, weigh the seriousness of the reported violations particularly in conjunction with prior reports submitted by the same school district of a rule violation by its football program, and what, if any, penalty should be imposed", it is likely that there was no basis for entry into executive session.

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.

If the duties of the Athletic Council include judicial or quasi-judicial functions, for example, gatherings held for those purposes would be subject to §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 of if a public body such as an Athletic Council deliberates within its judicial or quasi-judicial function, we believe those deliberations are exempt from the coverage of the Open Meetings Law in accordance with §108(1). Similarly, deliberations of the Central Committee may be exempt.

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 Athletic Council 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.

In an effort to provide assistance understanding the requirements of the Open Meetings Law with respect to notice of public meetings, the necessity for holding emergency meetings, and minutes, we have attached three advisory opinions.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

By: Chet Godley
Legal Intern

CSJ:CG:sb
cc: John G. McGowan
Enclosures

FOIL-AO-05266

Jobin-Davis, Camille (DOS)

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, March 28, 2012 11:56 AM
To: 'Marilyn McIntosh'
Subject: RE: Open Meetings Law

Marilyn,

In response to your voice mail, please note that the language in Education Law section 260-a regarding cities having a population of one million or more is a qualifier only for committee and subcommittee meetings, not the board of trustee meetings. In other words, this will confirm that section 260-a requires meetings of boards of trustees of free association libraries to be held in accordance with the Open Meetings Law, regardless of whether they are in cities of a certain size.

Camille

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[redacted]

OML-AO-05267

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Monday, April 02, 2012 12:05 PM
To: [redacted]
Subject: videotaping

Dear Mr. Vescera:

I have received your email inquiry. It has been advised that a member of a public body has the same right to record an open meeting as any member of the public. That being so, I believe that a member's recording device may be used in the same manner and the same general location as similar devices used by other persons who attend and record open meetings.

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FOI-AO-18859
OML-AO-05268

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Wednesday, April 04, 2012 9:54 AM
To: 'supervisor@townofstanford.org'
Subject: RE: question concerning Stanford ethics committee procedures with attachment

Dear Supervisor Stern:

I have received your note and the Town of Stanford Proposed "Ground Rules of Procedure." Having reviewed the proposal, I offer the following brief remarks.

Section 2 indicates that the Ethics Committee would have "sole authority to determine the merit for future investigation." I question whether an entity other than the Town Board, the governing body of the municipality, should or can have "sole authority" to engage in a particular function.

Does the phrase "right to summon" in section 3 include the ability to subpoena persons or things? I question whether such authority would exist absent a law conferring such power.

Section 4 refers to information being "handled in a confidential manner", that all Committee meetings would be closed, that deliberations are "excluded" from the Open Meetings Law because they would involve a "personnel matter." In short, statutes such as the Freedom of Information and Open Meetings Laws determine what is public and what is not. Insofar as the rule is inconsistent with those statutes, and I believe that it is inconsistent in a variety of areas, it would be invalid. The article sent to you previously offers guidance concerning the ability to withhold records or portions of records or engage in private discussions based on the direction provided in statutes.

The same consideration is offered with respect to section 5, and I note that a recent judicial decision involving an ethics entity confirmed the point offered in the preceding paragraph.

With respect to section 6, it is noted that §87(3)(a) of the Freedom of Information Law has long required that each agency maintain a record indicating the manner in which each member of a public body cast his/her vote.

Despite the brevity of the foregoing, I hope that I have been of assistance.

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FOI-AO-18861
OML-AO-05269

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Wednesday, April 04, 2012 12:08 PM
To: 'Stacy C'
Subject: RE: FOIL

Dear Stacy C:

I have received your correspondence, which involves an inaccuracy in minutes of a meeting of the Babylon Town Board. You wrote that the tape recording of the meeting clearly indicates that a certain word is inaccurately expressed in the minutes. That being so, you requested "that 'they' review the tape and to make the necessary correction." Because you have received no response to that request, you asked that I "confirm that constitutes a denial" that can be appealed.

In my view, a denial of access occurs when an applicant requests a record, and the request is denied in whole or in part. The situation that you described does not involve a denial of access to a record. Consequently, I do not believe that you have the right to appeal pursuant to the Freedom of Information Law. That, however, does not preclude you from attempting to encourage a correction in the minutes. If you have not done so already, it is suggested that you contact the Town Clerk, for section 30 of the Town Law specifies that the clerk has the responsibility to prepare minutes. Inherent in that responsibility, in my view, is the duty to ensure that the minutes are accurate.

I hope that I have been of assistance.

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[redacted]

FOI-AO-18864
OML-AO-05270

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Monday, April 09, 2012 3:06 PM
To: 'Barbara Boucher'
Subject: RE: County Democratic Committee

A political party is not subject to either the Freedom of Information Law or the Open Meetings Law. That being so, you may do with your minutes as you see fit, in accordance with your own rules or by-laws.

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[redacted]

FOI-AO-18867
OML-AO-05271

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Tuesday, April 10, 2012 8:27 AM
To: 'Cris Harlander'
Subject: RE: Rules on open government concerning organizations that receive government money

The receipt of government funding does not bring an entity within the coverage of the Open Meetings or Freedom of Information Laws. In short, those laws generally apply to governmental entities. However, records maintained by governmental entities that pertain to the recipients of funding are subject to rights of access conferred by FOIL.

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FOI-AO-18868
~~DOS~~-AO-05272

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Wednesday, April 11, 2012 8:37 AM
To: 'K.Keirn-Assistant Chief'
Subject: RE: Executive sessions

The Open Meetings Law does not specify who is responsible for preparing minutes. Assuming, however, that the Board of Commissioners properly conducted an executive session and made a decision during the executive session, section 106 of that law requires that minutes be prepared indicating the nature of the action taken, the date and the vote of the members, and that the minutes must be made available, to the extent required by the Freedom of Information Law, within one week of the executive session. Further, section 87(3)(a) of the Freedom of Information Law requires that a record be maintained that indicates the manner in which each member cast his/her vote.

I hope that I have been of assistance.

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[redacted]

FOI-AO 18870
OML-AO-05273

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Monday, April 16, 2012 3:20 PM
To: 'Charlotte and Frank'; Carol Hall; George Aubin; Ray Walker; Torre J Parker Lane; [redacted] Thomas Seifert
Subject: RE: SUBJECT:Bulldozer (from) trs

I have received your email and would like to offer clarification regarding the responsibilities of government bodies, officers and employees in relation to the issues raised.

First, the title of the Freedom of Information Law may be somewhat misleading, for that statute does not pertain information *per se*, but rather to existing records. Because that is so, that statute does not ordinarily require that an agency create or prepare a record in response to a request for information that does not exist in the form or a record or records. Similarly, the Freedom of Information Law does not require that an agency or agency officer or employee supply answers to questions or explanations of the contents of records or their actions. They may choose to do so, but there is no obligation to do so imposed by the Freedom of Information Law.

Second, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. At a minimum, minutes of an open meeting must consist of a record or summary of motions, proposals, resolutions, actions taken and the votes of the members. They *may* include additional detail, but there is no requirement that they must. The reasons of the members for voting as they do need not be included in the minutes. Further, while members of public bodies may explain the reasons for their votes, I know of no provision that requires that they must do so.

I hope that the foregoing will offer useful guidance and that I have been of assistance.

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FOIL-AO-05274

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Monday, April 16, 2012 5:12 PM
To: 'Li, Margaret'
Subject: RE: Open Meetings Law

Really Margaret!

I spoke with Cathy Corona about the same issue earlier today and referred to section 105(1)(f) of the Open Meetings Law. The provision permits a public body to conduct an executive session to discuss, among other things, the "employment history of a particular person or corporation, or matters leading to the appointment [or] employment....of a particular person or corporation. " That being so, assuming that the discussion involves the strengths, weaknesses, etc. relative to "particular" firms, the Legislature may choose to conduct an executive session. It doesn't have to, but it may.

Hope all is well with you and yours and I'll see you in Utica in May.

Best,
Bob

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OML AO 5275

From: dos.sm.Coog.InetCoog
Sent: Tuesday, April 17, 2012 9:28 AM
To: 'Margaret Bartley - E'town Supervisor'
Subject: RE: Question regarding Town Board meeting

Dear Supervisor Bartley:

It has been advised in similar situations in which members of a public body attend an event as observers who do not participate, or as individuals within a larger audience, that their presence would not constitute a "meeting" that falls within the coverage of the Open Meetings Law. By means of example, I spoke yesterday at a convention attended by a large group. Within the group were three members of a town board. When it was asked whether their presence constituted a meeting held in violation of the Open Meetings Law, I responded by suggesting that three members of the board within that crowd would not fall within the scope of the Open Meetings Law, for those persons were not functioning collectively, as a body; rather, they were present to listen, observe and to be educated.

I hope that I have been of assistance.

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OML-AO-05276

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Friday, April 20, 2012 1:06 PM
To: 'Pam Boening'
Subject: RE: Board of Trustees minutes

Dear Ms. Boening:

I have received your request for guidance concerning the content of minutes relating to events that occurred during a meeting of the Village of Freeport Board of Trustees on April 16. You wrote that a Trustee introduced a motion to amend the agenda, but that the Mayor "objected to the motion and would not recognize the motion and continued to state that while the Trustee was speaking." The motion was seconded, and four Trustees voted to place the item on the agenda; the Mayor did not cast a vote. The Trustee then "read a resolution pertaining to the added agenda item, another Trustee seconded the motion, a Trustee polled the board and four members of the board voted in favor." You added that "During the motion and throughout the polling and reading of the resolution the Mayor objected and said it would not be recognized." You also indicated that there are no "written rules of procedure for placing items on an agenda."

In this regard, first, section 4-412(2) of the Village Law entitled "Procedure for meetings", states in relevant part that:

> "The mayor of the village shall preside at the meetings of the board of trustees as provided in section 4-400 of this article. A majority of the board shall constitute a quorum for the transaction business....Whenever required by a member of the board, the vote upon any question shall be taken by ayes and noes, and the names of the members present and their votes shall be entered in the minutes. The board may determine the rules of its procedure..."

Second, section 4-400(1)(a) of the Village Law states that:

> "It shall be the responsibility of the mayor:
>
> a. To preside at the meetings of the board of trustees, and may have a vote upon all matters and questions coming before the board and shall vote in case of a tie, however on all matters and questions, he shall vote only in his capacity as mayor of the village and his vote shall be considered as one vote..."

Third, section 106(1) of the Open Meetings Law provides that:

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

In consideration of the statutes cited above, I believe that minutes must be prepared indicating the motion made by the Trustee and the vote of the members, as well as the resolution and the vote of the members. Although the Mayor "presides", he has but one vote, and four votes by the Trustees would be valid, particularly, in my view, in the absence of procedural rules.

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OML AO 5277

From: Freeman, Robert (DOS)
Sent: Friday, April 20, 2012 2:15 PM
To: 'Leon Sculti'
Subject: RE: Can A Person Sneak Into An Exec Session?

Good afternoon - -

Section 105(2) of the Open Meetings Law indicates that only the members of a public body have the right to attend an executive session. However, the same provision authorizes a public body to permit the presence of others. That being so, I do not believe that it would be either atypical or contrary to law for the Ethics Board to permit the City Manager to attend its executive session.

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

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-----Original Message-----
From: Leon Sculti [mailto:leon@scultiprops.com]
Sent: Friday, April 20, 2012 1:08 PM
To: Freeman, Robert (DOS)
Subject: Can A Person Sneak Into An Exec Session?

Hi Mr. Freeman:
Regards from Rye! I hope this email finds you well. I had a quick question for you if you would be so kind, which I know you are from

having listened to you speak. The other day we had a situation where the Ethics Board had a meeting, they open normally, with the public session. Of the three principals (involved in the issue before the board) "invited" to attend the meeting only one did, he was seated at the table with his attorney, the board members, some members of the public and a few reporters.

The board members cleared the room to go into executive session (with just the themselves). Everyone cleared the room leaving through the same door. As we left, I noticed the city manager, one of the principals in the matter before the board, coming through a different door in the room and enter the executive session. He saw me see him before the door closed.

When the board came back they acknowledged the city manager came into the executive session (unannounced).

Does this pass the smell test according to OML or do you have any advisory opinions on a subject like this?

Video, just in case you are so inclined:
http://www.youtube.com/watch?feature=player_embedded&v=3lKF9pRbPiI#!

Thank you -Leon

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From: Freeman, Robert (DOS) [Robert.Freeman@dos.state.ny.us]
Sent: Monday, March 05, 2012 12:10 PM
To: Leon Sculti
Subject: RE:

Hi - -

My presentation will relate to the questions that arise. In general, I offer a brief introduction regarding FOIL, the Open Meetings Law and the functions of this office. Then I ask the audience to fire away. In my view, a lecture in which I discuss what I believe to important may be of little value; by accepting questions, we cover the ground that's important or significant to the community. Unless it becomes too late, I stay until there are no more questions.

If need be, I'll be here tomorrow until about 2 or 2:30.

Bob

Robert J. Freeman
Executive Director

OML-AO-05278

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Tuesday, May 01, 2012 3:23 PM
To: 'Mary Jean Jakubowski'
Subject: RE: Open Meetings Law

Hi - -

The quick answer is that the Open Meetings Law does not apply unless a quorum of the Board has gathered to conduct the business of the Library, collectively, as a body. In a board consisting of 15, a quorum would be 8. In the situations that you described, each would involve less than a quorum and, consequently, the Open Meetings Law would not apply.

I hope that I have been of assistance.

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[redacted]

Jobin-Davis, Camille (DOS) FOIL-AO-05279

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, May 02, 2012 11:25 AM
To: [redacted]
Subject: FW: Request for Advisory Opinion - Access to minutes of Trustee Meetings - Queensborough Public Library

Dear Ms. O'Connell,

This will confirm various of our advisory opinions available online, that pursuant to the provisions of Education Law section 260-a, association libraries are required to comply with Article 7 of the Public Officers Law, the Open Meetings Law.

It is our opinion that in order to make sense of the intent of Education Law section 260-a, an association library would be required to compile minutes pursuant to Open Meetings Law section 106 (1) and (2), and as specified in subparagraph (3) make them "available to the public in accordance with the provisions of the freedom of information law".

We hope that this is helpful.

Camille

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Please note my new email address: camille.jobin-davis@dos.ny.gov.

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DEPARTMENT OF STATE
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OML-AO-5280

May 4, 2012

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 recent proceedings of the Board of the Clarkstown Central School District. It is our understanding that clarification is required regarding board action necessary to set a meeting date, notice required for a public meeting and any related executive sessions.

In this regard, we note that choosing a date for a public body to gather does not necessarily require board action. Further, holding a meeting on January 4, in close proximity to a school vacation and/or on the same night as a meeting of an equally important board or community organization, does not conflict with any known provisions of law.

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

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be

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

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

In our opinion, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. There is one case of which we are aware in which the court held that a 7:30 a.m. meeting was inappropriate. According to the court in Goetchius v. Board of Education:

> "It is...apparent to this Court that the scheduling of a board meeting at 7:30 a.m. -- even assuming arguendo that such meetings were properly noticed and promptly conducted -- does not facilitate attendance by members of the public, whether employed within or without the home, particularly those with school age or younger children, and all but insures that teachers and teacher associates at the school are unable to both attend and still comply with the requirement that they be in their classrooms by 8:40 a.m." (Matter of Goetchius v. Board of Education, Supreme Court, Westchester County, New York Law Journal, August 8, 1996).

The court focused on whether members of the public would have the ability to attend, considering whether they had small children, work schedules, commuting times, and other matters that might effectively preclude them from attending meetings held so early in the morning. In short, particularly in view of the decision cited above, the reasonableness of conducting meetings at 7:30 a.m. is in our view questionable.

Your question, however, involves different facts, specifically, whether it is reasonable to schedule a meeting in the early evening, on the same night as another meeting in the community, and close in time to the December school holiday. We know of no judicial decisions that address the issue. In light of the fact that a majority of the board members voted to hold the meeting on such date, even when faced with the objections you raised, and our experience with the difficulty in scheduling meetings that are convenient for all, we believe it to be reasonable.

With respect to your note that "the board is requesting rsvp's", this will confirm that members of the public are not required to indicate their intent to attend a meeting prior to a meeting. We can only surmise that members of the board were asked to indicate their ability to

attend the January 4 meeting. In either event, it does not appear that the Board required such information from members of the public or members of the school board.

With respect to notice requirements set forth in the Open Meetings Law and applicable to meetings of every school board in New York, §104 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 board has been designated as a location for posting notices of meetings, the public has the ability to know where to ascertain whether and when meetings of the school board will be held. Similarly, every public body with the ability to do so should post notice of the time and place of every meeting online.

As you correctly noted, it is emphasized that a public body cannot conduct an executive session prior to a meeting. Every meeting must be convened as an open meeting, for §102(3) of

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

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

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

We hope that this is helpful.

CSJ:sb
cc: Doug Katz, President, Clarkstown Central School District

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OML AO 5281

May 4, 2012

Paul R. Black
[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. Black:

We have received your request for an advisory opinion regarding the application of the Open Meetings Law to the Niagara County Legislature. You wrote that a rule enacted by the Niagara County Legislature relating to the regulation of time and subject matter of public speakers at open meetings is unreasonable, and that the rule was used in an arbitrary and capricious manner. You wrote that your major concern is that the rule itself is in violation of the New York State Constitution, Article 1, Section 8, which provides for freedom of speech and press. In this regard, we offer the following comments.

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

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

Similarly, within the language of the Open Meetings Law, there is nothing that pertains to the right of those in attendance to speak or otherwise participate. Certainly a member of the public may speak or express opinions about meetings or about the conduct of public business before or after meetings to other persons. However, since neither the Open Meetings Law nor any other provision of law of which we are aware, including the New York State and the United States Constitutions provides the public with the right to speak during meetings, we do not believe that a public body is required to permit the public to do so during meetings. Certainly a public body may in our view permit the public to speak, and if it does so, it has been suggested that rules and procedures be developed that regarding the privilege to speak that are reasonable and that treat members of the public equally. From our perspective, a rule authorizing any person in attendance to speak for a maximum prescribed time on agenda items, and those items only, would be reasonable and valid, so long as it is carried out reasonably and consistently.

Second, we believe that the rule, as it is written, is reasonable in the manner in which it limits the content of public speech at meetings to items related to the allotted agenda. Our presumption is that the purpose for this rule is to provide for a more focused and efficient meeting.

Finally, although you wrote that you believe the rule to have been written in the negative, it is our opinion that the rule is written in such a way as to allow speech at the meetings. The rule begins “Members of the public *shall* be entitled to address the Legislature…”, which, in our opinion, provides a privilege conferred upon the public to speak at the meeting, albeit on the matters itemized in the rule.

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

BY: Richard Caister
Legal Intern

CSJ:RC:sb

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OML-AO-5282

May 4, 2012

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:

I have received your letter and want to express appreciation for the efforts of the League of Women Voters in encouraging compliance with open government laws.

You referred to a "workshop" conducted by a town board during which the board took action of significance, and you raised the following question: "When is a Workshop more than a workshop?" In this regard, the commonly used terms "workshop" and "work session" are not found in the Open Meetings Law; they are terms that, in my view, have no legal meaning.

By way of historical background, soon after the Open Meetings Law became effective in 1977, issues arose concerning the status of workshops, work sessions and similar gatherings during which there was merely an intent to discuss public business, and no intent to take action. It was contended that gatherings of that nature were not "meetings" and, therefore, fell outside the coverage of the Open Meetings Law. The issue led to litigation that reached the Court of Appeals, the state's highest court, and the Court confirmed an expansive decision by the Appellate Division in which it was determined that any gathering of a quorum of a public body, such as a town board, for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, even if there is no intent to vote or take action, and irrespective of the characterization of the gathering [Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd, 45 NY2d 947 (1978)]. In short, assuming the presence of a quorum that has convened to conduct or discuss public business, there is no distinction between a workshop or work session and a meeting; they are equally subject to the Open Meetings Law, and the same obligations apply with respect to notice and openness, as well

as the same capacity to conduct an executive session when appropriate in consideration of the subject of a discussion.

Some public bodies distinguish workshops or work sessions from formal or regular meetings based on a practice of engaging in discussion only with regard to the former and taking action only during the latter. I point out, however, that there is nothing in the Open Meetings Law that precludes a public body from voting and taking action during a workshop. If, however, the public has been led to believe that workshops are held only for discussion, and that no action will be taken, it is likely that some might consider that the public was misled. Nevertheless, in the absence of its own rule or policy to the contrary, a public body may take action during a workshop, or any meeting.

I point out that section 104 of the Open Meetings Law concerning notice of meetings requires only that notice include the time and place of a meeting; there is no obligation to include an indication of the subject or subjects to be considered in the notice.

The notice requirements are now, in most instances, threefold. Notice must be given to the news media, posted in one or more designated, conspicuous publications, and when feasible to do so, notice must also be posted on the website associated with a public body. When a meeting is scheduled at least a week in advance, notice must be given at least seventy-two hours prior to a 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.

Lastly, although it does not involve the notice given pursuant to section 104, a recent amendment, section 103(e), is significant concerning the public's right to know of the nature of the discussions and deliberations of public bodies. When records are scheduled to be discussed during an open meeting, and the records are accessible to the public pursuant to the Freedom of Information Law, or the records consist of proposed resolutions, policies, law or rules, or proposed amendments to those kinds of records, the Open Meetings Law now requires that the records be posted online prior to the meeting on the entity's website when it is practicable do so, or make the records available in response to a request made under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:sb

OML-AO-05283

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Tuesday, May 08, 2012 4:50 PM
To: 'William Swiskey sr'
Subject: RE: Tampering with official records

Dear Mr. Swiskey:

I have received your letter and point out that the Open Meetings Law contains what might be considered as minimum requirements concerning the contents of minutes. Pursuant to section 106 of that law, 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, but there is no requirement that they be more expansive. Further, often draft minutes are prepared, disclosed and later amended. Amending the draft would not, in my view, constitute "tampering" with a public record.

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

Robert J. Freeman
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[redacted]

OML-AO-05284

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Monday, May 14, 2012 8:51 AM
To: 'Mary Thorpe'
Subject: RE: Sec 103(e) of the Open Meetings Law

Dear Ms. Thorpe:

Among the issues arising under the new section 103(e) of the Open Meetings Law is whether a record is scheduled to be discussed during an open meeting. If the resolution in question was not scheduled to be discussed, there would have been no obligation to disclose it in advance of the meeting. It seems, though, that the issue involved a matter of significant public concern and that a substantive discussion in public would have been appropriate. Despite that possibility, I point out that the law merely requires that notice of a meeting must only include the time and place; it may include an indication of the subjects to be considered or an agenda, but there is no requirement to do so. Similarly, although a public body may permit the public to speak during meetings, there is no requirement that it must do so.

With respect public bodies' ability to be informed regarding the new provision, first, our website includes substantial guidance, and our first posting regarding section 103(e) was made prior to its effective date. Second and perhaps more importantly, information concerning the amendment has been disseminated by local government organizations, such as the Association of Towns, the Association of Town Clerks, New York Conference of Mayors, etc. In addition, many news articles have focused on the change in the law. My belief is that governmental entities, particularly counties, cities, towns, villages and school districts have had opportunities to become familiar with the amendment.

I hope that I have been of assistance.

Robert J. Freeman
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OML AO 5285

May 15, 2012

E-Mail

TO: Steve Norris

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. Norris:

This is in response to your request for assistance regarding access to minutes of the meetings of the Town Board of Northampton. Specifically, you allege that the Town Clerk "has consistently been late in making the minutes available."

In this regard, we reiterate the comments offered in OML-AO-2815.

We hope that this is helpful to you.

CSJ:sb
cc: Elaine Mihalik, town clerk

Freeman, Robert (DOS) OML-AO-5286

From: Freeman, Robert (DOS)
Sent: Wednesday, May 16, 2012 8:17 AM
To: 'Lissa Harris'
Subject: RE: person banned from town meeting

Hi Lissa - -

I've received other inquiries regarding the matter, and my comment is simple: First, the Open Meetings Law specifies that meetings are open to the general public. Whether an individual resides in the town or Timbuktu doesn't matter; that person has the right to attend. Second, the town supervisor doesn't make the rules. The rule of law prevails over his directive, and further, as one of five members of the board, he has no unilateral authority to bar an individual from attending meetings.

I note that a public body, such as a town board, has the authority to adopt rules to govern its proceedings, but that the rules must be reasonable. It would be reasonable, in my view, to adopt rules regarding decorum, outbursts, disruptions and the like. However, barring an individual from attending based on that person's politics or point of view, without more, would be contrary to law.

I hope that this is helpful.

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OML-AO 05287

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Friday, May 18, 2012 2:57 PM
To: [redacted]
Subject: RE: Open Meeting Laws

Dear Ms. Riker:

I have received your inquiry concerning the status of a "focus panel" under the Open Meetings Law. You wrote that the entity in question consists of a member of the Town Board, a member of the Planning Board, and four Town residents, and that the panel's authority is purely advisory.

In this regard, based on numerous judicial decisions, because the panel does not consist entirely of members of a governing body of the Town, and because its functions are advisory, it does not constitute a "public body" subject to the Open Meetings Law.

I hope that I have been of assistance.

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[redacted]

OML-AO-05288

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Friday, May 18, 2012 3:49 PM
To: [redacted]
Subject: RE: Open Government

Dear Supervisor Anson:

First, one of the grounds for conducting an executive session pertains to collective bargaining negotiations involving a public employee union. If a majority of the Board will be present, the gathering would be subject to the Open Meetings Law and preceded by notice. Immediately after convening, a motion could be made to enter into executive session.

Second, if a Board member is incapable of carrying out his/her duties, an effort can be made to remove that person from office. See Public Officers Law, section 36.

Third, section 63 of the Town Law authorizes the Board to adopt rules concerning its own proceedings, and as Supervisor presiding at meetings, you would have the ability to enforce the rules. Many boards have adopted rules regarding, disruption, interruption, decorum and the like, and if an individual fails to abide by the rules, I believe that he/she may be ejected from the meeting.

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OML AO 5289 May 29, 2012

E-Mail

TO: James E. Gramkee

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. Gramkee:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to certain gatherings of the Capital Committee of the Amherst Central School District Board of Education. As described, the Committee consists of three of the seven Board of Education members, the Superintendent, the Assistant Superintendent, the Business Administrator (Chair), and the Director of Facilities. It is an ad hoc committee created "to review the building condition report, develop the five year plan and report recommendations to the Board of Education."

In this regard, we note, first, that there is no defining case law on this particular type of advisory committee, i.e., a committee that consists of three members of a public body plus a greater number of others, all of whom are employees of the public body. Judicial decisions indicate generally that advisory bodies having no authority to take binding action and which typically include persons other than members of a governing body fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71

NY 2d 964 (1988)]. Therefore, an advisory body, such as a citizens' advisory committee, would not in our opinion be subject to the Open Meetings Law, even if a member of a governing body or the staff of an agency participates.

Second, and as noted by you and the Superintendent, when the core of a committee consists of members of a public body, such as the Board of Education, and there is an equal or lesser number of other members, all of whom are employees of the District, it is likely, in our opinion that the Open Meetings Law is applicable, based on our reasoning offered in OML-AO-5068.

It is not clear whether an advisory committee consisting of board members and a greater number of school administrators, such as the one you described, would be subject to the Open Meetings Law. The ratio of board members to employees and its limited authority, in our opinion, may make it less likely that it would be subject to the Open Meetings Law.

We wish that we could be more helpful.

CSJ:sb
cc: Mark Whyle, Assistant Superintendent

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OML-AO-5290
FOI-AO-18893

May 29, 2012

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:

This is in response to your request for an advisory opinion regarding application of the Freedom of Information Law to records requested from the Ballston Lake Fire Department and District, and application of the Open Meetings Law to a certain gathering of the Ballston Lake Fire Department. Enclosed herein is a copy of the materials submitted by the Fire District, in consideration of your request.

From our perspective, both the Fire Department and the Fire District must respond in writing to written requests for records, and insofar as such records exist, either provide or deny access to such records or portions thereof in accordance with law.

In this regard, we note first, that the Freedom of Information Law is expansive in its coverage, for it pertains to all agency records. Section 86(4) defines the term "record" to mean

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

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

Based on the foregoing, the kinds of materials that you requested that are maintained by or for an agency, irrespective of their origin or function, in our view, clearly constitute "records" that fall within the coverage of the Freedom of Information Law.

Section 86(3) states that an "agency" is:

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

In consideration of the language quoted above, an agency generally is an entity of state or local government; however, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire department, the Court of Appeals, the state's highest court, found that volunteer fire departments, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the

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

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

Again, due to the determination that volunteer fire departments are subject to the Freedom of Information Law and the broad definition of the term "record", the materials of your interest would be subject to rights of access, whether they are maintained by the Department, the District, by a volunteer fire company, or all three.

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

With regard to the creation or existence of minutes, we note that §87(3)(a) of the Freedom of Information law provides that:

"Each agency shall maintain:

(a) A record of the final vote of each member in every agency proceeding in which the member votes;"

Accordingly, and based on the case law identified above, we believe that such records, if they exist, would be required to be made available pursuant to the Freedom of Information Law.

We note that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3)(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.

Based on the materials you submitted, we understand that neither the Department nor the District have responded in writing to the requests for records that you submitted with your November 19, 2011 correspondence. The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and the appeals process. 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) 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.

Finally, and with respect to the meetings of the Fire Department, we note that §102(2) of the Open Meetings Law defines "public body" to mean:

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

By reviewing the components in the definition of "public body", we believe that each is present with respect to the governing body of a volunteer fire department. A volunteer fire department is clearly an entity consisting of two or more members. We believe that it is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law. Further, in our view, a volunteer fire department at its meetings conducts public business and performs a governmental function. Such a function is carried out for a public corporation, which is defined to include a municipality, such as a town or village, for example. Since each of the elements in the definition of "public body" pertains to the voting body of a volunteer fire department, it appears that the department is a "public body" subject to the Open Meetings Law. For a contrary point of view, see: Hayes v. Chestertown Vol. Fire Col, Inc., 93 AD3d 117, 941 NYS2d 734 (3rd Dept, 2012).

We hope that we have been of some assistance.

CSJ:sb
Enclosures

cc: Bill Young
Ron Dunn

OML-AO-5291

From: Jobin-Davis, Camille (DOS)
Sent: Friday, January 27, 2012 3:39 PM
To: 'Richard Mikulec'
Subject: RE: Fairport Library

Richard,

Although I printed a copy of your January 23, 2012 email, somehow I have misplaced the electronic copy. Would you please forward it to me again? I would like to send it to the Library Board President electronically. Thank you.

In response to your January 26 email, when an agency fails to provide records in response to a request, an applicant may appeal - essentially the agency has denied access to records without providing a legal basis therefore. My suggestion is that you appeal. Please see the following link:
http://www.dos.state.ny.us/coog/explanation.html

An agency is not required to create a document in response to a FOIL request, so if there is an issue with a lack of record that is responsive to the request, in my opinion the agency should so indicate. Further, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency Ashall 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 Ashall@ prepare the certification; it is obliged to do so.
I hope it helps.

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

[redacted]

OML-AO-5292

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Tuesday, June 05, 2012 8:57 AM
To: [redacted]
Subject: RE: Opinion needed

I ask whether the resolutions are scheduled to be discussed during open meetings. If they are, I would agree that they should be posted online in advance of meetings if possible. On the other hand, if the resolutions are likely to be discussed during executive sessions, there would be no obligation to do so. Note that section 105(1)(f) of the Open Meetings Law 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, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation...." It is possible that the board may have a basis for conducting an executive session if, for example, the discussion involves consideration of one's "employment history".

I hope that I have been of assistance.

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[redacted]

FOI-AO-18896
OML-AO-5293

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Tuesday, June 05, 2012 9:30 AM
To: 'Jennifer Merritt'
Subject: RE: Executive session/BOE

Hi Jennifer:

First, based on section 105(1)(f) of the Open Meetings Law, I believe that a board may conduct an executive session to discuss its choices regarding the superintendent search firms that it will interview. That provision, as you know, permits a board to conduct an executive session to discuss, among other items, the employment history of a particular corporation, as well as matters leading to the appointment or employment of a particular corporation.

Second, in my view, the names of the three firms selected as finalists, assuming that the names of those firms appear in a record or records, would be public. Because they relate to entities rather than natural persons, the exception involving unwarranted invasions of personal privacy in FOIL would not apply. Also, although section 89(7) of FOIL authorizes agencies to withhold names of applicants for appointment to public employment, the firms in question are not seeking to become public employees.

I hope that I have been of assistance.

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Freeman, Robert (DOS)

OML-AO-5294

From: dos.sm.Coog.InetCoog
Sent: Monday, June 11, 2012 9:28 AM
To:
Subject: RE:

In short, if five of the nine members of the Legislature gather to conduct public business, and the five represent different political parties, the gathering constitutes a "meeting" that falls within the coverage of the Open Meetings Law. In that event, the meeting should be preceded by notice given pursuant to section 104 of that law and conducted open to the public, except to the extent that an executive session may properly be held in accordance with section 105(1). Because the five represent more than one political party, the exemption from the Open Meetings Law concerning political caucuses would not apply.

I hope that I have been of assistance.

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[redacted]

Jobin-Davis, Camille (DOS) OML-AO-5295

From: Jobin-Davis, Camille (DOS)
Sent: Monday, June 11, 2012 1:15 PM
To: 'robert alexander'
Subject: RE: 5/31/2012 "closed meeting"

Dear Judge Alexander,

This will confirm the advice given in the advisory opinion linked below, that in order to conduct an executive session, a public body must first hold a meeting that is open to the public, providing proper notice of the time and place of the meeting.

http://docs.dos.ny.gov/coog/otext/o3618.htm

As you know, only when the discussion pertains to those issues listed in section 105(1) of the Open Meetings Law is a public body permitted to enter into executive session, and then only after a properly articulated motion. See advisory opinions under "E" for "Executive Session, Procedure for Entry Into" on our online OML advisory opinion index.

Because I am not aware of any law that would require a village to permit an elected judge to speak at a village board meeting, I will refer you to advisory opinions available through our online OML advisory opinion index under "P" for "Public Participation." In short, when and if a public body permits a member of the public to speak at its meeting, the Board may set reasonable rules on such participation.

Please note that we are an office of two, and we are in receipt of many requests for written opinions. As is our practice, upon receipt of a request for an advisory opinion, we send a copy of the request to the municipality, inviting a response. We will not delay the issuance of an opinion pending receipt of such submission; however, at this point in time it takes approximately 4 months to respond to requests. Please advise if you would like us to proceed as requested.

Camille S. Jobin-Davis, Esq.
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Please note my new email address: camille.jobin-davis@dos.ny.gov.

[redacted]

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OML-AO-5296

June 12, 2012

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 :

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to a "privilege of the floor policy" limiting "repetitive" or "offensive" remarks, and a policy prohibiting the use of signs, banners, visual displays and audio broadcasts unless expressly permitted by the Board of Trustees of the Village of Cayuga Heights.

In this regard, we note that although the Open Meetings Law 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, 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.

Furthermore, although public bodies have the right to adopt rules to govern their own proceedings (see e.g., Village Law §4-412, Education Law, §1709), the courts have found in a

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

In direct response to your question, this will confirm my opinion that the presiding officer has the authority to limit remarks from the public that are "repetitive" and "offensive". It would not be unreasonable, in my opinion, for remarks to be limited for either of those reasons.

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

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

The court in Schuloff determined that a "compelling state interest" involved the ability to protect students' privacy in an effort to comply with the Family Educational Rights Privacy Act,

but that expressions of opinions concerning "the shortcomings" of a law school professor could not be restrained.

In the context of your inquiry, assuming that the Board of Trustees and/or the Mayor as presiding officer permit those who wish to speak to do so for a particular period of time, each person who wishes to do so must, in our opinion, be given an equal opportunity to do so. Similarly, if the Board and/or Mayor permit positive comments concerning the operation of Village government, we believe that they must offer an equal opportunity to enable those in attendance to offer negative or critical comments. It would not be unreasonable, in our opinion, to limit repetitive comments in support of opinions expressed previously, as well as those that would be offensive to reasonable people of ordinary sensibilities.

In regard to the prohibition concerning signs, banners and visual displays hung, displayed, located, projected or placed anywhere inside the meeting room or building holding said meeting without the prior express permission of the public body, from our perspective, the primary consideration should involve whether or the extent to which those items may be obtrusive or disruptive in some manner. If the presence of a sign blocks a person in attendance at a meeting from observing the proceedings or blocks a person's path to a meeting, we believe that a rule requiring that the sign be moved or perhaps, due to size, removed. If the sign or banner violates the fire code, restricting it would in our opinion be reasonable. If a sign includes obscene language, we believe that a rule could validly prohibit its presence at a meeting.

Finally, to the extent that the rule you cite prohibits "audio broadcasts" we note that a 2011 amendment to §103 of the Open Meetings Law requires every public body to allow meetings to be photographed, broadcast, webcast or otherwise recorded and/or transmitted by audio or video means (§103[d][1]). To the extent that the rule you cite prohibits "audio broadcasts" of previously recorded material in the building or the meeting room without prior approval, it is our opinion that such rule would be reasonable, and in keeping with the Board's authority as set forth in Village Law §4-412. It is difficult, in our opinion, to imagine a scenario when audio broadcasts in a public building would not be disruptive or offensive to a reasonable person who either works in the building or is attending a meeting.

CSJ:sb
cc: Mayor Supron

STATE OF NEW YORK
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OML AO 5297

June 12, 2012

Virginia Stern, Supervisor
Town of Stanford
26 Town Hall Road
PO Box 436
Stanfordville, NY 12581

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 Stern:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to a new policy and recently adopted resolution of the Stanford Town Board pertaining to the use of recording equipment at Town Board meetings. Initially, you indicated that the Board had adopted a procedure requiring that "any videotaping from the public should be done from the back of the room". Subsequently, you forwarded a copy of a resolution adopted on January 12, 2012 that contains, among others, the following provisions:

> "… all audio and video devices are welcome and their usage shall be governed by the common sense rules of civility and decorum….
>
> The devices are an aid in recording the meeting and are not intended to be utilized in a threatening or menacing manner, …
>
> The videotaping rig if utilized should be located in the back as it has all of the equipment with it, …
>
> … a handheld unit kept below the line of sight is not restricted anywhere in the room, unless it interferes with the public's viewing….
>
> If people in the audience complain that they cannot see or hear, (or for instance the front row is taken by cameras and video people, and people with poor hearing

> cannot get up front because of this), that is a valid concern, and the Town Board acting through the Town Supervisor will make arrangements to accommodate their needs and direct where the audio/video equipment be located."

In this regard, as you know, the Open Meetings Law was recently amended to codify the public's right to record and broadcast public meetings. Section 103(d) sets forth as follows:

> "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 sum, the Open Meetings Law permits the public to record and broadcast public meetings, subject to reasonable rules that allow the governing body to perform its business without interference.

Previously, the Appellate Division addressed concerns raised by those in attendance at public meetings who suggested that the use of a recording device can feel like "harassment", intimidation or would interfere with the democratic process. The court rejected the argument that the recording of meeting inhibits the democratic process, stating that,

> "Those who attend [public] meetings, and who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" (Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD2d 924, 925, 493 N.Y.S.2d 826 (2nd Dept 1985).

Like the Mitchell Court, we are not persuaded that the recording of Board meetings, or the use of cameras pointed at the public or at Board members would inhibit the democratic or deliberative process. While the Court's comments were directed to the public in attendance at a meeting, we believe the same logic applies to elected Town officials. With reasonable use of recording devices, over time, we expect that any unease associated with being filmed will dissipate.

While implementation of the Town policy set forth above may relate to any number of different situations, we offer the following general comments in an effort to provide guidance. A policy requiring that stationary cameras on tripods that could obstruct the public's view of the proceedings be limited to locations behind those in attendance, or placed apart from those in attendance, in our opinion, is reasonable. Concurrently, we believe that it would be unreasonable to prohibit the use of modern hand-held recording devices or those on tripods that do not obstruct sightlines anywhere in the room. This will confirm our opinion, previously shared with Councilman Mark D'Agostino, that "if modern video recording devices, irrespective of their physical location, are used in a manner that is neither obtrusive nor disruptive, we do not believe that a rule requiring that they be used only in the back of the room would be found to be reasonable or sustained by a court if challenged."

On the other hand, depending on the circumstances, recording or photographing the proceedings during a meeting by moving about the room, and pointing a camera close to peoples' faces may be disruptive and could validly be prohibited. In our view, conferring authority to the Supervisor to reasonably direct behavior according to the environment in the room, based on a desire to prevent disruption of the meeting, would not be unreasonable.

Enclosed are model rules adopted by the Committee for your consideration. Please note that the model rules tend to be broader than those adopted by the Town Board, and less focused on unique situations. In our opinion, the model rules permit an agency the flexibility to impose reasonable restrictions when behavior becomes disruptive or obstructive.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb
Enclosure

OML-AO-5298

Jobin-Davis, Camille (DOS)

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, June 14, 2012 10:08 AM
To: [redacted]
Subject: Open Meetings Law - executive session

Dear Alison,

Background on ZBA and quasi-judicial deliberations: http://docs.dos.ny.gov/coog/otext/o4727.html

"Possible litigation" not appropriate ground for a public body to rely on to enter executive session (Weatherwax): http://docs.dos.ny.gov/coog/otext/o2705.htm Note that the Town Board and the Zoning Board of Appeals are both public bodies, both subject to the Open Meetings Law, and this advisory opinion applies to actions of all public bodies. Additional and related advisory opinions can be found through our online OML index, under "L" for "Litigation."

After speaking with my attorney friend who works in local government issues, it appears your question "does the ZBA have authority to overturn a decision of the Village Board?" is a little more complex than I anticipated. While she agreed that typically the ZBA does not have authority to overturn a decision of the Village Board (only a Supreme Court can overturn a decision of a local governing body) she raised questions that I could not answer regarding whether the building inspector/code enforcement officer failed to revoke a permit that enforced a local zoning provision or the NYS Uniform Fire Protection Code. The good news is that she suggested you call the Division of Code Enforcement at the Department of State (518-474-4073). She believes that they will be better able to assist you.

I hope these things help! Please let me know if you have further questions.

Camille

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Please note my new email address: camille.jobin-davis@dos.ny.gov.

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OML-AO-5299

June 14, 2012

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 :

I have received your letter in which you sought an advisory opinion concerning compliance with the Open Meetings Law relative to the Board of Trustees of the New York French American Charter School (hereafter "the Board").

You wrote that the Board conducted an emergency meeting on May 18 at 5:30 p.m., but that "[n]o emails, public notices, faxes, letters in student backpacks or any form of communication was ever sent by the NYFACS board of trustees to faculty, staff parents, or any members of the media alerting them an emergency board meeting had been scheduled…" During that meeting, the Board voted to recognize a particular named individual as interim president of the NYFACS Parent Teacher Organization, "despite several communications received from members of the NYFACS parent body stating NYC Department of Education Chancellor's Regulations clearly state: upon resignation of a co-officer, the Paretn Association members must vote to determine if the remaining co-officer may fill the unexpired term on his/her own or whether an expedited election must be conducted." You wrote that no such vote was ever held, but rather that "in an unpublicized and essentially private NYFACS Board of Trustees meeting, Ms. Porter's self-claimed position as PTO president was ratified by the board, which automatically sealed Ms. Porter as voting member of the NYFACS Board of Trustees."

You also contend that the Board "has made a repeated and concerted habit of not complying" with the Open Meetings Law, for you allege that the Board "held an emergency hiring committee [meeting] on May 11" and an "emergency finance committee meeting on May 14", and that neither of those meetings was preceded by notice.

The first question pertains to compliance with the Open Meetings Law with respect to the Board's emergency meeting of May 18, and the second involves essentially the same question by "holding three emergency board meetings during the course of May 2012".

In this regard, first, §2854(1)(e) of the Education Law states that: "A charter school shall be subject to the provisions of articles six and seven of the public officers law." Articles six and seven are, respectively, the Freedom of Information Law and the Open Meetings Law. Consequently, it is clear that charter schools are required to comply with those statutes, and I believe that those entities must be considered "agencies" subject to the former, and that their boards be considered "public bodies" subject to the latter.

Second, §104 of the Open Meetings Law pertains to notice of meetings and requires that:

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

Additionally, in 2009, a new subdivision (5) states that:

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

Section 104 now imposes a three-fold requirement: first, that notice must be posted in one or more conspicuous, public locations; second, that notice must be given to the news media; and third, that notice must be conspicuously posted on the body's website, when there is an ability to do so. The requirement that notice of a meeting be "posted" in one or more "designated" locations, in our opinion, mandates that a public body, by resolution or through the adoption of policy or a directive, select one or more specific locations where notice of meetings will consistently and regularly be posted. If, for instance, a bulletin board located at the entrance of a school's offices has been designated as a location for posting notices of meetings, the public has the ability to know where to ascertain whether and when meetings of a school board will be

held. Similarly, every public body with the ability to do so must post notice of the time and place of every meeting online.

There is nothing in the Open Meetings Law the refers specifically to “emergency” or “special” meetings. However, the judicial interpretation of the Open Meetings Law suggests that the propriety of scheduling a meeting less than a week in advance is dependent upon the actual need to do so. As stated in Previdi v. Hirsch:

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

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. If there was no urgency associated with the issues considered during the meetings to which you referred, in my view, they should not have been held. More importantly, even if there is an emergency that necessitates scheduling and conducting meetings quickly, the Open Meetings Law requires that notice be given. It is not difficult to accomplish compliance with §104; notice of the time and place of a meeting can be given to the news media by email, fax or phone; notice can quickly posted in one or more conspicuous public locations; and when it is feasible for an entity to do so, notice can be posted on the entity’s website without delay. That is often done, particularly by educational institutions as a means of informing parents and others

of delays due to weather, health consideration due to an outbreak of a disease, social events and the like.

Lastly, you asked whether the Board's vote to ratify "Ms. Porter's self claimed position as PTO president" was valid. With respect to the application of the Open Meetings Law, an action remains valid unless and until a court reaches a determination to the contrary. I point out that a court has the authority under §107 of that statute to invalidate action if a violation has occurred. However, the same provision states that an "unintentional failure to fully to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action…" If in fact no notice was given and the meeting was effectively conducted in secret, I believe that a court would have the authority under the Open Meetings Law to invalidate the action.

Perhaps more significant may be the failure to give effect to the Chancellor's regulations. It is suggested that you attempt to ascertain whether the absence of compliance with the regulations constitutes a nullity of the action taken.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:sb
cc: Edith Boncompain
Board of Trustees
Recy Dunn

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-5300

June 19, 2012

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 meetings of companies and committees associated with the Plainview Fire Department. You confirmed your understanding that the Department's Board of Directors is subject to the Open Meetings Law, but you questioned whether meetings of related entities are subject to that statute.

According to your description, the Department, a not for profit corporation providing services within a defined fire protection district, is contractually obligated to provide fire protection services to the Town of Oyster Bay. It is made up of four unincorporated volunteer fire companies primarily organized for management of personnel and readiness of vehicles. Each company holds monthly meetings, requests funds from the Department's fund drive, and equipment through the Chief of the Department, with both types of requests ultimately being determined by the Department's Board of Directors. On a monthly basis, the membership as a whole (the members of all four companies) conducts a "department meeting". All privately donated funds collected by the companies and committees are pooled and budgeted by the Department as a whole, distributed upon Board of Director approval at regularly scheduled meetings. In the same manner, the Department Treasurer is responsible for drafting requests from the Department for the Chief of the Department to sign, for Board of Director approval.

The Department conducts several additional meetings each month, including officer meetings, committee meetings and squad meetings, none of which relate to the ability to authorize the expenditure of taxpayer or donated funds. You asked whether meetings of entities that "do not have direct access to funding" are subject to the Open Meetings Law.

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

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

We point out that the status of volunteer fire companies had long been unclear with respect to application of the Freedom of Information Law. Those companies are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities or fire districts. As not-for-profit corporations, it was questionable whether or not they conducted public business and performed a governmental function. Nevertheless, in a case brought under the Freedom of Information Law dealing with the coverage of that statute with respect to volunteer fire companies, the state's highest court, the Court of Appeals, found that records of a volunteer fire company fall within the provisions of the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. In its decision, the Court clearly indicated that a volunteer fire company performs a governmental function and that all of its records are subject to rights of access granted by the Freedom of Information Law.

In reviewing the components in the definition of "public body", this will confirm our understanding that each is present with respect to the board of an incorporated volunteer fire department, such as the Plainview Fire Department. The governing board of a volunteer fire department is clearly an entity consisting of two or more members. We believe that the board of directors is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law. Further, in our view, the members of a volunteer fire department such as the one you describe conduct public business and perform the governmental function of responding to fire and emergency calls for assistance. Such a function is carried out for a public corporation, which is defined to include a municipality, such as a town or village, for example, or in this case, the Town of Oyster Bay and the corresponding fire district. Since each of the elements in the definition of "public body" pertains to a volunteer fire department such as the one you describe, it appears that the Board of Directors is a "public body" subject to the Open Meetings Law.

We note that the Westchester Rockland Court "dissolved the governmental versus nongovernmental dichotomy" presented by the municipality and refused to assume that the

lottery and fire fighting activities of the company were generically separate and distinct. The Court wrote "How often does the taxpayer–lottery participant view his purchase as his 'tax' for the voluntary public service of safeguarding his or her home form fire?" (Id., at 579.)

In juxtaposition to the Court of Appeals' ruling in Westchester Rockland, we note the recent Appellate Division decision in Hayes v Chestertown Volunteer Fire Company (93 AD3d 1117, 941 NYS2d 734 [3d Dept, 2012]). In Hayes, the court determined that while an incorporated volunteer fire company is an "agency" that performs a governmental function and whose records are therefore subject to FOIL, it is not a "public body," due to its lack of authority "to dictate firefighting policy or procedure or to make any decisions regarding the expenditure of public funds." It was not relevant, the court held, that the "volunteers are deemed employees of the Fire District when engaged in firefighting activities", or that "the volunteers serve as the labor force for the Fire District when the alarm of fire or other public emergency arises."

The Hayes court relied heavily on the volunteer fire company's status as a not-for-profit charitable organization that limited its meetings to issues of social and charitable activities to find that it was not a public body. Due to the company's ability to set its own policies and procedures with respect to its operations, and its inherent control over moneys raised from "private sources," it is difficult to rectify this decision with the Court of Appeals decision in Weschester Rockland.

Based on the logic expressed by the Court of Appeals, it remains our opinion that each of the elements of a "public body" is present in a volunteer fire company, including the four entities that you describe above, whether or not they are incorporated. The companies are clearly entities consisting of two or more members. And, we believe that it would be reasonable to assume that the members of the companies perform the labor, or the governmental functions of the Department, i.e., responding to fire and emergency calls for assistance.

In consideration of the quorum requirements for entities such as an unincorporated volunteer fire company, we note the provisions of §41 of the General Construction Law. That statute 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."

Because volunteer fire companies typically consist of at least three persons, and since those persons "are charged with [a] public duty to be performed or exercised by them jointly or as a board", it is our opinion that those entities are subject to §41 of the General Construction Law, and may only take action by means of a quorum.

In the facts that you present, the volunteer companies are not incorporated, but have a similar relationship with the fire department as the fire company in Hayes has with the fire district. We are unable to distinguish between the Plainview Fire Department and the Board of Fire District Commissioners in Hayes. Due to these similarities, it seems clear that at the very least the governing board of the Plainview Fire Department is a public body subject to the Open Meetings Law.

It is not known whether there will be an appeal of the Appellate Division decision in Hayes. For now, for those counties within the Third Department (Nassau County is in the First Department), it may be that formalizing the responsibility for certain financial and policy decisions in a parent organization is sufficient to remove the entity's "governmental function" characteristic, and thereby remove the entity from application of the Open Meetings Law.

Finally, and with respect to committees and entities created by the governing body, based on the definition of "public body" mentioned above, we note the many advisory opinions on our website regarding committees made up solely of members of another public body, committees made up entirely of members of the public, and committees that are governed by a combination of both types of members. In brief, if a committee is made up solely of members of a public body (i.e., members of the Department Board of Directors) the committee would be a public body subject to the Open Meetings Law (see e.g., Glens Falls Newspapers v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 [1993]). In cases where the membership does not determine the issue, whether the committee has authority to take action on behalf of the municipality or serves only in an advisory capacity would be pertinent. Please see advisory opinions under "C" for "Committees and Subcommittees" through our online Open Meetings Law advisory opinion index at the following link: http://www.dos.ny.gov/coog/oml_listing/oindex.html

We hope that this is helpful.

CSJ:sb

Freeman, Robert (DOS)

OML-AO-5301

From: Freeman, Robert (DOS)
Sent: Wednesday, June 27, 2012 8:25 AM
To: 'Phil Barnes'
Subject: RE: Questions

Good morning - -

In brief, with respect to minutes, §106 of the Open Meetings Law contains what may be characterized as 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, but there is no requirement that they must. If none of the events described in the preceding sentence have occurred, there need not be inclusion of other items in the minutes.

Next, if indeed a quorum (a majority) of a public body gathers to conduct public business, the gathering constitutes a "meeting", even if there is no intent take action, and regardless of the means by which the gathering is characterized.

Lastly, a meeting need not be "advertised." That term suggests that notice must appear in a news publication. Section 104 requires that every meeting be preceded by notice of the time and place, and that notice be "given" to the news media, posted in one or more designated conspicuous locations, and whenever possible, posted online. When the news media receives notice of a meeting, it may choose to publish the notice, but it is not required to do so.

With respect to means of encouraging compliance, education and knowledge of the law are, in my view, the critical factors in enhancing compliance. Also important is shedding light on practices that may be inconsistent with law. Doing so often results in better compliance.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
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[redacted]

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OML-AO-5302

June 28, 2012

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 :

This is in response to your request for an advisory opinion regarding the Village of Mastic Beach Zoning Commission's compliance with the Open Meetings Law. Based on materials submitted by you and Mr. Alan Chasinov, we understand that the Zoning Commission held roughly ten workshops, with a quorum of members present, where they developed a draft of the zoning code and revised it before presenting it to the public. There was no advance notice provided for these meetings, and they were not held open to the public. The draft was made public through a series of hearings that were properly noticed and attended by the public on October 26, November 2, and November 16, 2011. Subsequent to a Village Board meeting on December 13, 2011, at which the proposed code was returned to the Commission for further consideration, the Commission held yet another public hearing (January 5, 2012) and public meeting (January 18, 2012) at which point, the Commission adopted the proposed zoning code as a final report for submission to the Board of Trustees.

In this regard we offer the following comments.

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

By way of background, the definition of a "meeting" [see Open Meetings Law § 102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for

the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)].

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

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute." (60 AD2d 409, 415).

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 constitute a "meeting" subject to the Open Meetings Law. Further, there is no distinction between a meeting and a "workshop" or work session; when a workshop is held, a public body has the same obligations in terms of notice, openness and the ability to conduct executive sessions as in the case of regular meetings.

This will confirm, as expressed in various telephone conversations between this office and yourself, Mr. Chasinov and Mr. Vigliotta, that it is our opinion that by failing to provide proper notice of and to permit the public to attend the meetings held by the Zoning Commission members between June and September 2011, the Zoning Commission failed to comply with the requirements of the Open Meetings Law. While this was the opinion that we offered in late 2011 and remains our opinion today, it reflects only half of the advice offered and opinions formed about the situation in the Village of Mastic Beach with respect to the proposal and adoption of the zoning code.

Accordingly, we turn our attention now to the remedies available under the Open Meetings Law.

The only method by which action taken by a public body can be challenged is through the filing of what is known as an Article 78 proceeding in Supreme Court. The time for initiating litigation against a public body is generally four months from the date the action is taken.

Section 107(3) of the Open Meetings Law, the provision related to enforcement of the Law sets forth in related part as follows:

> 1…. 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. An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body. The provisions of this article shall not affect the validity of the authorization, acquisition, execution or disposition of a bond issue or notes.
> 2. In any proceeding brought pursuant to this section, costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party. If a court determines that a vote was taken in material violation of this article, or that substantial deliberations relating thereto occurred in private prior to such vote, the court shall awards costs and reasonable attorney's fees to the successful petitioner, unless there was a reasonable basis for a public body to believe that a closed session could properly have been held."

In short, should a complaint be filed in a timely fashion, and should a court determine that there was a violation of Law, upon good cause shown, the court could, in its discretion, invalidate the action taken at the meeting, require the public body to attend training at the Committee on Open Government and award attorney's fees to the prevailing party.

We note that subsequent to the series of meetings held in private, the Zoning Commission held three properly noticed gatherings in October and November of 2011, through which the public was encouraged to submit written questions and on at least one occasion was given the opportunity to question the Zoning Commission members. It is our understanding that the Zoning Commission then held additional hearings and meetings in 2012, for which proper notice was provided, the public was permitted to attend, all of which culminated in the Zoning Commission's adoption of a revised proposed zoning code for consideration by the Town Board on January 18, 2012.

Mr. Chasinov's request that this office make a "formal determination as to whether the Open Meetings Law was substantially violated" is neither within the scope nor authority of this office. 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. While we understand Mr. Chasinov's contention that "the entire work of the Zoning Commission has been tainted", it is not required by law, as he suggested, to "restart from the beginning". We recognize that the Zoning Commission's actions to hold meetings and hearings in October and November of 2011, and again in January of 2012 were its attempts to cure any potential lack of prior public involvement and were in keeping with remedies a court could have provided had a complaint been successfully filed.

We hope that this is helpful. Please contact us if you should have any further questions.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

By: Deirdre Barthel
Legal Intern

CSJ:sb

cc: Alan Chasinov
Paul Breschard
Mario Vigliotta
J. Lee Snead

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OML AO 5303

June 29, 2012

Stuart R. Tiekert
[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. Tiekert:

This is in response to your request for an advisory opinion regarding compliance with the Open Meetings Law by the Board of Trustees of the Village of Mamaroneck, and specifically whether certain procedures and topics considered during for executive sessions were proper. The Board of Trustees entered executive sessions at the January 17, 2012 meeting to "discuss the parameters of new regulations regarding open meetings law," and "to discuss fire department personnel and to discuss a request from the Police Chief." Also, the meetings reflect a closed session to obtain advice of counsel.

You questioned whether these were appropriate reasons for entering executive sessions. You also asked whether there should be separate minutes for the executive session or whether they can be "merged" into the work session minutes. You asked whether "general consensus" is the same as a vote, and if so, whether this, too, should result in the preparation of separate minutes. With respect to the closed session to seek the advice of counsel, you questioned whether this was proper without adjourning from open session and whether the subjects discussed should be included in the minutes.

In this regard, we offer the following comments.

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

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

We direct your attention to §106 of the Open Meetings Law which provides that:

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

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

It is noted that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. From our perspective, even 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 [§105(1)(f)], a determination to hire or

fire that person would be recorded in minutes and would be available to the public under the Freedom of Information Law. On other hand, if a public body votes to initiate a disciplinary proceeding against a public employee, minutes reflective of its action would not have include reference to or identify the person, for the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would result in an unwarranted personal privacy [see Freedom of Information Law, §87(2)(b)].

With respect to the issue of whether a general consensus is the same as a vote, it is our belief, based upon the judicial interpretation of the Open Meetings Law, that there may be no distinction between a so-called consensus and a final action taken by a public body if the consensus is in reality a determination reflective of action upon which an entity relies.

There is only one decision of which we are aware that deals specifically with the notion of a consensus reached at a meeting of a public body. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], which involved a board of education in Westchester County, the issue pertained to access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'"(id., 646).

The court stated that:

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

In the context of the situations that you described, if the Board reaches a "consensus" that is reflective of its final determination of an issue, we believe that minutes must be prepared that indicate the manner in which each member voted. If indeed a consensus represents action upon which the Board relies in carrying out its duties, or when the Board, in effect, reaches agreement on a particular subject, we believe that the minutes should reflect the actual votes of the members.

With respect to the closed session to seek advice of counsel, a second vehicle for excluding the public from a meeting involves "exemptions." Section 108 of the Open Meetings

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

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

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

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

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

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

There are several decisions in which the assertion of the attorney-client privilege has been recognized as a means of closing a meeting. In Cioci v. Mondello (Supreme Court, Nassau County, March 18, 1991), the issue involved the ability of a county board of supervisors to seek the legal advice of its attorney in private, and the court stated that "Clearly, the Supervisors' discussions with the County Attorney...are exempt from the provisions of the Open Meetings Law (see POL §108(3), CPLR §4503...)". In another decision citing §108(3), it was found that "any confidential communications between the board and its counsel, at the time counsel allegedly advised the Board of the legal issues involved in the determination of the variance

application, were exempt from the provisions of the Open Meetings Law" [Young v. Board of Appeals, 194 AD2d 796, 599 NYS2d 632, 634 (1993)].

A copy of this opinion will be sent to the Village of Mamaroneck Board of Trustees. We hope that we have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

By: Deirdre Barthel
Legal Intern

RJF:DB:sb
cc: Mayor Rosenblum
Board of Trustees

Jobin-Davis, Camille (DOS)

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, July 11, 2012 2:13 PM
To: [redacted]
Cc: Phillip, Natasha (DOS)
Subject: FW: Questions from the Town of Pavilion, Planning Board
Attachments: Town Planning Board Exec. Sess..doc

Dear Mr. Hollwedel:

This is in response to the email that you forwarded to Natasha Philip, Office of General Counsel, NYS Department of State.

My office is responsible for providing advice and counsel regarding application of the Freedom of Information Law and the Open Meetings Law. In that regard, I have reviewed the questions that you raised in the attached document, and offer the following:

The description of the conversation that the Planning Board wishes to have with the Town Board, in my opinion, would not fit within any of the grounds for entry into executive session, including section 105(1)(d) which permits the discussion of proposed, pending or current litigation. There are numerous advisory opinions on our website that address this particular question, located through the Open Meetings Law advisory opinion index, under "L" for "Litigation", and in particular, one at the following link: http://docs.dos.ny.gov/coog/otext/o2705.htm. Please note the description of the court's decision in Weatherwax v. Town of Stony Point. In brief, the fact that a discussion and/or a decision may result in litigation is not necessarily enough to render the discussion appropriate for executive session. Again, I strongly recommend that you review opinions through the Open Meetings Law index.

I am not familiar with what the legal basis might be for any action to be taken by the Planning Board in order to impress the importance of any issue upon the Town Board, with one exception, and that would be for the Planning Board to adopt a recommendation for transmission to the Town Board. My best advice would be to consult with the Planning Board attorney regarding the most appropriate method for conveying the recommendation to the Town Board and/or complaint to the Code Enforcement Officer.

The content of meeting minutes are governed by section 106 of the Open Meetings Law and section 87(3)(a) of the Freedom of Information Law. Town Law puts the responsibility for minutes with the town clerk, and although I am not familiar with other provisions of law that would require the planning board clerk to keep the minutes, past experience makes be believe that this is the accepted practice. While it is my understanding that many clerks welcome input from various board members prior to making them available to the full board for "approval" I respect that this is not always the case. In my opinion, it is the clerk who is responsible for drafting the minutes; whether s/he chooses to have input from the tape recorder, the public, members of the public body or anyone else is up to her/him. Above all, it is important that the minutes be accurate.

For further information and analysis with respect to the contents of minutes, please see advisory opinions, located through the Open Meetings Law advisory opinion index, under "M" for "Minutes". There are various subsections within the Minutes category that you may find helpful.

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

Camille

Camille S. Jobin-Davis, Esq.

Freeman, Robert (DOS)

OML-AO-5305

From: dos.sm.Coog.InetCoog
Sent: Friday, July 13, 2012 10:37 AM
To: 'Gerry Pilgrim'
Subject: RE: Meeting Held In Violation of OML

Dear Trustee Pilgrim:

As you are likely aware, the Open Meetings Law applies to "meetings" of public bodies, such as village boards of trustees. A "meeting" is a gathering of a quorum, a majority of the total membership of a public body, for the purpose of conducting public business.

When the gathering that you described included the Mayor and one trustee, the Open Meetings Law would not have applied. However, when another trustee attended and participated, it would appear that his/her presence would have transformed the gathering into a meeting. It has been recommended in similar circumstances that, among the members present, there should be sufficient knowledge and vigilance to recognize that a majority is present and that action be taken to ensure that a discussion by the majority should end and continue at a meeting held in accordance with the Open Meetings Law. Stated differently, a third member should exit the gathering to ensure that no quorum is present and that the law is not contravened.

It is suggested that you raise the issue with the Board of Trustees during an open meeting and stress that any gathering of a majority of the Board for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law that must be preceded by notice and held open to the public unless and until a proper executive session may be convened.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
One Commerce Plaza
Suite 650
99 Washington Avenue
Albany, NY 12231
Phone: (518)474-2518
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[redacted]

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OML AO 5306

July 25, 2012

E-Mail

TO: Brian Lobel
FROM: Camille S. Jobin-Davis, Assistant Director
BY: Deirdre Barthel, 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. Lobel:

This is in response to your request for an advisory opinion concerning application of the Freedom of Information and Open Meetings Laws to the Mamaroneck Town Board.

In this regard, we offer the following comments.

To put the FOIL request into perspective, with certain exceptions, we agree with the Town that the Freedom of Information Law ordinarily 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. Also, in our view, 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 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 Town Board. Most importantly, minutes must be accurate.

When a public body takes action during an executive session, minutes indicating the nature of the action taken, the date, and the vote of each member must be prepared within one week and made available to the extent required by the Freedom of Information Law. It is noted, however, that if a public body merely discusses an issue or issues during an executive session but takes no action, there is no requirement that minutes of the executive session be prepared.

With respect to access to a record or records identifying persons seeking to fill a vacancy in an elective office, it is our view that such records must be disclosed at least in part. Section 87(2)(b) of the Freedom of Information Law enables an agency to withhold records or opinions thereof that could constitute "an unwarranted invasion of personal privacy". However, in typical circumstances, a person seeking to fill an elective position attempts to make his or her name known in order to attract the interest of voters. To suggest that names of those attempting to fill the same position that has become vacant and which may be filled by means of an appointment made by an elective body would in our view be an anomaly. We are not suggesting that personal details of individuals' lives must be disclosed. Nevertheless, in our opinion, disclosure of the

names of candidates for a vacant elective position could not be characterized as an unwarranted invasion of personal privacy.

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

With regard to notice of a meeting, when a public body intends to gather to discuss public business, it is required to provide notice in accordance with §104 of the Open Meetings Law. That provision states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice.
> 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, one, that notice must be posted in one or more conspicuous, public locations; two, that notice must be given to the news media; and three, that notice must be conspicuously posted on the body's website, when there is an ability to do so. The requirement that notice of a meeting be "posted" in one or more "designated" locations, in our opinion, mandates that a public body, by resolution or through the adoption of policy or a directive, select one or more specific locations where notice of meetings will consistently and regularly be posted. If, for instance, a bulletin board located at the entrance of a building in which a community board meets has been designated as a location for posting notices of meetings, the public has the ability to know where to ascertain whether and when meetings of a school board will be held. Similarly, every public body with the ability to do so should post notice of the time and place of every meeting online.

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

From our perspective, every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. In that vein, to give effect to intent of the Open Meetings Law, we believe that notice of organizational meetings should be given to news media organizations that were selected at the previous organizational meeting. Similarly, for notice to be "conspicuously" posted at a designated location, we believe that it should be posted at a location or locations previously selected, where those who may be interested in attending meetings have a reasonable opportunity to see the notice, and made accessible on a municipal website through an obvious link. Until or unless the designated location or the "newspaper of record" are changed through Board action, in our opinion, their designation would remain in effect.

We hope that we have been of assistance.

CSJ:DB:sb
cc: Town clerk

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OML AO 5307

July 26, 2012

Paul Lang
[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. Lang,

This is in response to your request for an advisory opinion concerning the Village of Washingtonville and the Village Board's responsibility to create and maintain minutes of board meetings. Specifically, you indicated your impression, after making a FOIL request, that no minutes were created or maintained with respect to certain meetings.

In this regard, the law requires that minutes be prepared and made available to the public within two weeks of the meetings to which they relate. Section 106 of the Open Meetings Law pertains to minutes of meetings and states that:

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

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

In view of the foregoing, it is clear that minutes of open meetings must be prepared and made available "within two weeks of the date of such meeting." Should action be taken during an executive session, minutes must be prepared within one week of such session.

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

With respect to a board's ability to enter into executive session, we note that 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. Every motion to enter into executive session would be required to be recorded in the minutes.

You requested information regarding the ramifications of failing to adhere to the requirements of the Open Meetings Law. In this regard, we note that there are two types of enforcement remedies available through an Article 78 proceeding brought 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 states further that:
>
> "An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body."

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

The second involves the court's authority to award costs and reasonable attorneys fees to the successful party, and to require the board members, when appropriate, to attend training.

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 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.

> In 2010, the Legislature further amended §107(1), to include the following:
>
> "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."

In short, the court has the discretionary authority to make findings against a public body, i.e., declare a violation, invalidate action taken, award attorney's fees, order the board to attend training, or any combination of the above.

Finally, we note that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3)(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.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb
cc: Mayor Kevin Hudson
Joseph Ruyack III, Village Attorney
Christine Shenkman, Village Clerk

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OML AO 5308

July 26, 2012

Paul Lang
[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. Lang:

This is in response to your request for an advisory opinion concerning compliance by the Village Board of Trustees of Washingtonville with the Open Meetings Law. Based on a meeting agenda, the Board scheduled executive sessions for reasons of "personnel, traffic court prosecutor, budget adjustments, insurance proposal and SPDES permit." Further, in the New Business category, there was a topic listed as "Resolution to purchase 5 year Tail coverage for Public Officials Liability." Based on a discussion heard at the meeting, you understood that this resolution was approved in executive session without public discussion even though it pertained to the expenditure of public funds. Also, you raised issues regarding the time and form requirements of notice of Board meetings.

In this regard, we offer the following comments.

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

Specifically, §105(1) states in relevant part that:

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

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

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

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

With respect to motions to enter into executive session, it has been held that:

> "...the public body must identify the subject matter to be discussed (see, Public Officers Law § 105 [1], and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette

> Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsbrugh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of 'a personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person' (id.). 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'."

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

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

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

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

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

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

In regard to the Board approving the purchase of 5 year "tail coverage" for public officials liability, § 105(1) states in relevant part that, "no action by formal vote shall be taken to appropriate public monies…" Based upon that clause of the provision, a public body may generally vote during a proper executive session; however, any vote to appropriate public monies must be taken during an open meeting. As such, there may be situations in which a discussion may be conducted during an executive session, but where a public body may be required to return to an open meeting to vote to appropriate public monies in relation to the subject previously considered behind closed doors. If the action involves an allocation or expenditure of funds that have previously been appropriated, such an action could, in our opinion, be taken during a proper executive session.

Lastly, § 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."

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 we have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

By: Deirdre Barthel
Legal Intern

RJF:DB:sb
cc: Mayor Kevin Hudson
Joseph Ruyack III, Village Attorney
Christine Shenkman, Village Clerk

FOI-AO-18926
OML-AO-5309

Jobin-Davis, Camille (DOS)

From: Jobin-Davis, Camille (DOS)
Sent: Friday, July 27, 2012 9:39 AM
To: 'A. Jane Johnston'
Subject: Freedom of Information Law - "Confidential"
Attachments: koweek.txt

Dear Ms. Johnston,

This is in response to your email of June 22, 2015.

In short, "confidentiality" is a legal term of art that can only be conferred, at least in the FOIL context, via state or federal law – merely stamping a document "confidential" does not make it exempt from disclosure. I encourage you to review advisory opinions filed through our online FOIL Advisory Opinion Index under "C" for "Confidentiality, Promise of", and other subheadings of "Confidentiality" for greater clarification.

While many agencies are finding that posting material online is not only an efficient way to deal with records requests but a valuable public relations move, with one exception, there is no requirement that records be posted online. The exception, section 103(e) of the Open Meetings Law, pertains to those records that are scheduled to be discussed at a public meeting (hence, the distribution of "packets"). By definition, it does not include records that are scheduled to be discussed during an executive session, or a meeting that is exempt from OML. Please review the following two publications in the News section of our website:

http://www.dos.ny.gov/coog/QA-2-12.html

http://www.dos.ny.gov/coog/RecordsDiscussedatMeetings.html

The rules for whether a particular entity is subject to the OML, and whether there is authority to conduct a closed session are all contained within the OML – the only exception would be those entities that are not subject to OML pursuant to an act of the state or federal legislature, i.e., a county legislature does not possess the authority to create an entity that is exempt from the OML.

Lastly, the exception that may apply to the records that you discuss would be section 87(2)(e) of the FOIL, pertaining to those records that are (a) compiled for law enforcement purposes, and (b) which, if disclosed, would interfere with an ongoing investigation and/or judicial proceeding. Attached is a recent advisory opinion related to this issue that you will likely find helpful. There are additional related opinions available under "C" for "Compiled for Law Enforcement Purpose" and "L" for "Law Enforcement Purpose."

I hope that you find this helpful.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
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OML AO 5310

July 27, 2012

E-Mail

TO: Councilman Jim Zecca

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 Councilman Zecca:

I have received your correspondence in which you sought an advisory opinion relating to the Open Meetings Law.

You wrote that the City of Utica Common Council consists of nine members and that "legislative council committees are made up on average of four members of the council." You indicated that "When meetings are held they are not posted on the City of Utica web site and official minutes of the meetings are not being taken or filed", and that your "corporation counsel and the council attorney have advised the council that it is not necessary because we do not have a quorum of the council and the committees are only advising the council and have no power to make any final decisions for the council as a whole."

Reference was also made to a resolution pertaining to a "pre-meeting conference" to be held by the Common Council prior to every regular and special meeting "for the purpose of discussing and reviewing new legislation, legislation that is committee and such other matters that the members of the Council have determined to require their attention at that time." The resolution also states that "The Pre-Meeting Conference is advisory in the same manner as committee meetings."

If I am interpreting the information described in the preceding paragraphs accurately, it appears that City officials may believe that a committee of the Common Council is not required to comply with the Open Meetings Law. If that is their understanding, it is, in our view, inaccurate. In this regard, I offer the following comments.

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

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

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

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members of a city council, constitutes a "public body" that falls within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993); County of

Lewis v. O'Connor, Supreme Court, Lewis County, January 21, 1997; Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)].

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

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

Based on the provision quoted above, a meeting of a public body occurs when a majority of its total membership, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Moreover, only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties.

In the context of the situations that you described, since the Common Council consists of nine members, its quorum is five. If the Council designates a committee consisting of four of its members, that entity would constitute a public body, and a quorum of that public body would be three. That being so, if three members of that committee gather to discuss the business of the committee, the gathering would constitute a meeting that falls within the coverage of the Open Meetings Law.

In short, a committee consisting of two or more members of the Common Council is itself a public body required to comply with the Open Meetings Law in the same manner as the Council with respect to notice, the preparation of minutes, openness and the ability to conduct executive sessions in accordance with the grounds for entry into executive session appearing in paragraphs (a) through (h) of §105(1) of that statute.

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

RJF:sb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML AO 5311

July 31, 2012

E-Mail

TO: Thomas Nimick
FROM: Robert J. Freeman, Executive Director
BY: Deirdre Barthel, 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. Nimick:

This is in response to your request for an advisory opinion concerning application of the Open Meetings Law to certain meetings and actions of the Clarkstown Town Board. Board members responded to your requests for minutes involving decisions made in executive sessions by indicating that they were instead "discussions" and not "decisions". You wrote that when the Town Attorney, Amy Mele, was contacted regarding those executive sessions, she said:

> "I would also like to point out for clarification that in addition to being able to discuss personnel matters in Executive Session the advice of counsel is not even a topic of the Open Meetings Law. In other words if this Board is convening to get the advice of our attorney it is exempt from the Open Meetings Law process. That said, when we retire to enter into Executive Session with some reasoning it is an absolute exemption to the entire Open Meetings Law process." (Letter dated April 15, 2012, pg. 5).

It has been asserted that you have discussed § 106 of Open Meetings Law regarding the requirements for minutes with Board members and that OML-AO-4028 has been reviewed. However, you asked whether there is a blanket exemption or shield from the Open Meetings Law for all conversations between the Town Attorney and the Town Board. Another question is

whether there are grounds for concern about a possible "violation" of the Open Meetings Law. You also sought clarification concerning classifying some meetings as "workshops" and not producing minutes from those gatherings.

In this regard, we offer the following comments.

While the Committee on Open Government is authorized to issue advisory opinions concerning application of the Open Meetings Law, this office has no authority to enforce the law or compel an entity to comply with the statutory provisions. It is our hope that these opinions are educational and persuasive, and that they serve to resolve problems and promote understanding of and compliance with the law.

First, 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. The other vehicle for excluding the public from a meeting involves "exemptions." Section 108 of the Open Meetings Law contains three such 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.

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

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

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

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

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

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

Insofar as a public body seeks legal advice from its attorney and the attorney renders legal advice, we believe that the attorney-client privilege may validly be asserted and that communications made within the scope of the privilege would be outside the coverage of the Open Meetings Law.

When a discussion turns to matters that are not within the scope of the attorney-client privilege, the Board is under an obligation to return to public session, or to reserve further discussion to occur during an open meeting.

It has been advised by this office and held judicially that the authority to assert the attorney-client privilege as an exemption from the coverage of the Open Meetings Law is narrow. In a decision that cited an advisory opinion of the Committee, the court in White v. Kimball (Supreme Court, Chautauqua County, January 27, 1997) found that:

> "While there is no question that Executive Sessions can be conducted for proper reasons and that an exception exists under the Open Meetings Law for attorney-client privileged communications, the scope of that privilege is limited. Once the legal advice is offered, discussions with regard to substance (e.g.) the closing date of a bus system, do not fall within the privilege of the exception. See Exhibit C, April 8, 1996 Open Meetings Law Advisory Opinion #2595, Robert J. Freeman, Executive Director of Committee on Open government at page 4:
>
> "I note that the mere presence of an attorney does not signify the existence of an attorney-client relationship; in order to assert the attorney-client privilege, the attorney must in my view be providing services in which the expertise of an attorney is needed and sought. Further, if at some point in a discussion, the attorney stops giving legal advice and a public body may begin discussing or deliberating independent of the attorney. When that

point is reached, I believe that the attorney-client privilege has ended and that the body should return to an open meeting."

Second, we note the use of "personnel" as one of the topics for consideration in executive session. The term "personnel" does not appear in the grounds for entry into executive session, paragraphs (a) through (h) of § 105(1). Moreover, the exception cited most frequently to discuss personnel matters often does not deal with personnel. Section 105(1)(f) permits a public to conduct an executive session to discuss:

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

Based on judicial decisions, a motion to enter into executive session should be based on the specific language of §105(1)(f), as you said you previously discussed with the Board. 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 perhaps even members of the Board, to know whether the subject at hand may properly be considered during an executive session.

In sum, based on the foregoing, while a discussion concerning the grounds for termination of an employee or a professional contractor, or the employment history of candidates applying for a professional service contract would be appropriate for discussion in executive session, a discussion regarding the cost effectiveness of retaining an outside firm would be required to be held in public.

Third, with respect to the Board's responsibility to keep minutes and make them available upon request, we note initially that there is no legal distinction between a "meeting" and a "workshop."

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)].

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

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

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

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

On occasion, public bodies have taken action by what has been characterized as "consensus." If a public body reaches a consensus upon which it relies, we believe that minutes reflective of decisions reached must be prepared and made available. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], the issue involved access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid

publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

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

If the Board reached a "consensus" that is reflective of its final determination of an issue during an executive session, we believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted.

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

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

Based upon the foregoing, it is clear in our view that minutes need not consist of a verbatim account of what was said at a meeting; similarly, there is no requirement that minutes refer to every topic discussed or identify those who may have spoken. Although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are

taken. If those kinds of actions, such as motions or votes, do not occur during workshops, technically we do not believe that minutes must be prepared.

We hope that we have been of assistance.

RJF:DB:sb

cc: Alex Gromack, Supervisor
Amy Mele, Town Attorney

FOI-AO-18931
DML-AO-05312

Jobin-Davis, Camille (DOS)

From: Jobin-Davis, Camille (DOS)
Sent: Monday, August 06, 2012 9:28 AM
To: 'Robert Cox'
Subject: Request for opinion
Attachments: Scan001.pdf

Dear Mr. Cox,

This will confirm that there would be no basis to deny access to that part of a record that was read aloud by the Superintendent during a public meeting. It is our opinion that an agency essentially waives its ability to deny access when a record is read aloud at a public meeting, effectively allowing the public to learn the content of the record. See http://docs.dos.ny.gov/coog/otext/o5239.doc

The requirement for posting records online contained within Open Meetings Law section 103(e), pertains only to records that are scheduled to be discussed during the course of an open meeting. It does not include a requirement for posting records online after a meeting.

I hope that this is helpful.

Camille

Camille S. Jobin-Davis, Esq.
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OML-AO-05313

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Tuesday, August 07, 2012 9:07 AM
To: 'Andrew Reeves'
Subject: RE: Executive session Town of Lysander Clerk

The one ground for entry into executive session that might have applied is limited in its application because the clerk is an elected official, not an employee of the town. Specifically, section 105(1)(f) of the Open Meetings Law 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..."

Because the clerk is elected, I do not believe that she can be characterized as an "employee." Similarly, with respect to the possibility of taking some sort of action, I am unaware of the means by which an elected official may be the subject of "demotion, discipline, suspension, [or] dismissal." It is possible that an elected official may be removed from office under section 36 of the Public Officers Law, but I know of no circumstance in which that has occurred.

Insofar as the discussion involved making the position of town clerk appointed rather than elected, in my view, there would be no basis for entry into executive session.

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OML AO 5314

August 9, 2012

Ms. Rhea Vogel
[redacted]

Mr. Warren E. Berbit, General Counsel
Clarkstown Central School District
Lexow, Berbit & Associates, P.C.
56 Park Avenue, PO Box 239
Suffern, NY 10901

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. Vogel and Mr. Berbit:

I have received materials from both of you relating to the implementation of the Open Meetings Law by the Clarkstown Central School District Board of Education. I recognize that this response is late in coming, but note that the materials sent to this office are voluminous, that the Committee staff consists of two, and that it has become all but impossible to respond promptly to all of those who seek guidance and opinions. It is admitted, too, that I did not review the entirety of the exhibits sent by Ms. Vogel. In short, there is simply is insufficient time to read or watch the voluminous material provided.

It is noted that the versions of events that you have described are, in some instances, inconsistent. While I am not questioning the veracity of either of you, it is clear that perceptions regarding the same events are different. Descriptions of events disseminated to the public at large in which those events are characterized as "violations" might not have involved violations of law, and Mr. Berbit has sought to offer clarification, albeit in defense of his client, the District.

For purposes of structural and chronological clarity, reference will be made to a letter of November 10 that includes information largely repetitive of the material included in Ms. Vogel's letter of December 8.

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

The first alleged violation relates to a meeting of the Board of Education on October 24. The meeting was held in the main board room where most board meetings are conducted, and the room has a capacity of 120 persons. Ms. Vogel wrote that the agenda for the meeting included "the much anticipated presentation of a consultant" who was being considered to evaluate the District's special education program, that the presentation was reported by the news media, and that the president of the Teachers Association sent an email to some 800 members of the Association encouraging them to attend. She expressed the belief that the publicity relating to the meeting, "upon information and belief," was known to Douglas Katz, the Board President. She also noted that the agenda included reference to "the expected vote of the majority members of the Board of Education to hire a firm to begin the search for a new Superintendent of Schools." She referred to other issues that would likely be addressed and contended that it was or could have been known that the main board room would not be large enough to accommodate those interested in attending and wrote that "People were standing in the back of the room and crushed into the doorway, effectively blocking the exit" and that an "ineffective attempt was made at providing a video feed into another conference room…"

Section 103(d) of the Open Meetings Law states in part 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." Further, even before the provision quoted above was enacted, it advised by this office and confirmed judicially that "if it known in advance of a meeting that a larger crowd is likely to attend than the usual meeting location will accommodate, and if a larger facility is available, it would be reasonable and consistent with the intent of the Law to hold the meeting in the larger facility" (see also, Crain v. Reynolds, Supreme Court, New York County, NYLJ, August 12, 1998, which includes the quoted language in this sentence).

In response to Ms. Vogel's contentions, Mr. Berbit wrote that "neither the Board nor District has an exact way to gauge the number of people who might attend a meeting", and that they "do the best they can….understanding the 'all reasonable effort' standard." With respect to the meeting at issue, he wrote that the President and Vice President of the Board met with the Superintendent prior to the meeting, and the officers indicated that they heard nothing regarding the number of those who might attend. Nevertheless, at the Superintendent's suggestion, "as a precaution", a video feed was arranged to operate in a room "down the hall from the main board room." Mr. Berbit added that he was present at the meeting and confirmed that there were standees at the start of the meeting, that the main meeting room was filled, that "about 20 or 25 people" were present in the room with the video feed, and that some people continued to stand

after "the crowd thinned" and seats were available in the meeting room. He expressed the belief that "everyone was able to hear and everyone had the opportunity to ask questions…" and pointed out that "Board officers indicated that they were not privy to…information [regarding the notification given by the union to its members], nor, apparently was the Superintendent."

Mr. Berbit noted that the experience gained from that meeting resulted in future actions intended to guarantee that the "all reasonable effort" requirement would be met. He referred, for example to an ensuing meeting that included an agenda item of significant public concern and moving the meeting to an auditorium with a capacity of 900. Although that step was taken in anticipation of substantial public interest, "approximately 30 people attended." In short, he wrote that Board officers "do the best they can in anticipating public interest and in reacting to information…"

The next alleged violation relates to a special meeting held on November 3 at 10:15 a.m. The purpose of the meeting, according to Ms. Vogel, involved action "to cover the legal costs" of the present and former Board presidents for their defense in relation to three petitions filed with the Commissioner of Education for their removal. A snowstorm on October 29 resulted in road closings, loss of power and the displacement of many residents, and the contentions are that many who would have attended were unaware of the meeting or unable to attend, and that "this meeting was willfully and intentionally scheduled at this time….in an effort to minimize the number attendees." She also wrote that Board policies were violated by "refusing to videotape and webcast the meeting" and "denying the public the right to comment at the meeting."

In this regard, it is noted that the Open Meetings Law is silent with respect to any obligation imposed upon a public body to record or webcast its meetings. Similarly, although that law clearly provides the public with the right to attend open meetings of public bodies, there is nothing in the law that pertains to the right of the public to comment or otherwise participate during meetings. A public body may choose to authorize recording or webcasting its meetings and to permit public participation during meetings. When that is so, it has been recommended that a public body adopt reasonable rules that treat members of the public equally.

With respect to the timing of the meeting, Mr. Berbit wrote that the Board President informed him that the meeting was scheduled in consideration of "board member availability", that Education Law, §3811, required that the meeting be scheduled "within a narrow time frame", and that the Board President "had no control over the service of removal petitions, nor that such were served in a time frame proximate to a storm", which occurred five days prior to the meeting.

Although the Open Meetings Law pertains to all meetings of public bodies, it does not distinguish between "regular" or "special" meetings, or between "formal" meetings and "workshops" or "work sessions", terms that are frequently used. When a majority of a public

body gathers to conduct public business, collectively, as a body, the gathering constitutes a "meeting" subject to the Open Meetings Law, irrespective of its characterization.

Mr. Berbit, however, wrote that the Board in its policy distinguishes "regular" and "special" meetings, and that its policy relative to special meetings indicates that those meetings need not be recorded or webcast and that public comment need not be accepted. He noted that a vote to permit public comment at the meeting in question was defeated, even though the Board President voted in favor of the motion.

Next, Ms. Vogel wrote that the Board President "intentionally discouraged the public from attending" the meeting of November 22, that the "listing for the meeting did not adequately communicate the purpose for an Executive Session", and that an executive session could not have properly been held.

I point out that the requirements concerning notice of meetings require only that the notice include the time and place of a meeting (see §104); there is no requirement that the topics to be considered be included in the notice; so doing is, in my view, a courtesy. Similarly, the Open Meetings Law makes no reference to an agenda. A public body may prepare an agenda, but it is not required by law to do so. If an agenda is prepared, a public body may choose to follow it, or on the other hand, the agenda may be ignored. A public body may adopt rules or policies regarding those two matters, but I am unaware of whether the Clarkstown Board has done so.

The focus of the November 22 meeting involved discussion with a firm retained to assist in the search for a new superintendent. Mr. Berbit wrote that the Board President indicated that he announced at that meeting that "every aspect of developing search credentials would occur in public", except for discussion of "characteristics that some board members perceived as deficient in the current Superintendent which they would wish improved in a new Superintendent", and that "there was the belief that Board could not divorce from the discussion the issues which some board members had with the current Superintendent." He added that the executive session was held "to avoid embarrassing the Superintendent, thus avoiding an unwarranted invasion of privacy."

The provision dealing with an unwarranted invasion of personal privacy is §87(2)(b) of the Freedom of Information Law, a statute pertaining to public access to government records that is separate from the Open Meetings Law. Moreover, a comparison of the exceptions to rights of access to records appearing in §87(2) of the Freedom of Information Law and the grounds for entry into executive session in the Open Meetings Law appearing in §105(1) of that statute indicates inconsistencies between the two; in some instances, consideration records or portions of records that may be withheld under the former would not necessarily result in a proper executive session under the Open Meetings Law.

One of the grounds for entry into executive session is comparable in effect in some circumstances to the exception concerning unwarranted invasions of privacy. Specifically, §105(1)(f) permits a public body to conduct an executive session to discuss:

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

To the extent that discussion of the matter could have been segmented via consideration of the search process or procedure, as opposed to consideration of attributes, strengths, weaknesses or performance of the Superintendent, I believe that the Board should have done so. The latter, in my view, would likely have involved "the employment history of a particular person." To that extent, I believe that an executive session could appropriately have been held. The remainder of the discussion that did not focus on the Superintendent or any particular candidate or applicant for the position should have occurred in public.

I recognize that the foregoing does not deal with every aspect of the views expressed by both of you. In consideration of the passage of time and the occurrence of events after the meetings to which you referred, it is likely unnecessary to offer an opinion regarding those matters. The preceding paragraphs are intended to deal with the key issues raised in your correspondence and offer guidance in as reasonable and balanced a manner as possible, and I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:sb
cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML AO 5315

August 10, 2012

E-Mail

TO: Hon. Robert Alexander
FROM: Robert J. Freeman, Executive Director
BY: Deirdre Barthel, 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, unless otherwise indicated.

Dear Judge Alexander:

This is in response to your request for an advisory opinion regarding application of the Open Meetings and the Freedom of Information Laws to certain gatherings and records of the Corfu Village Board of Trustees. Based on our review of the materials that you and the Deputy Mayor submitted (copies attached) , we offer the following comments.

Initially, we emphasize that only a court can make a determination whether a meeting was "illegal" or there has been a "violation" of the 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. Accordingly, in an effort to attempt to resolve problems and promote understanding of and compliance with law, we offer the following comments.

First, with the exception of a court order, we know of no authority on which a public body could rely to prohibit any person from attending a meeting of a public body, such as a village board of trustees. Moreover, allegations that you were prohibited from entering meetings stand in marked contrast to minutes of such meetings, and it is not possible, without more, to understand what transpired.

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 agendas, public participation, or participation by elected officials. Consequently, by means of example, if a public body, such as a village board, does not want to answer questions or permit the public to speak or otherwise participate at its meetings, it is not 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., 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 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.

Third, it is emphasized that a public body cannot conduct an executive session prior to or outside of an open 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.

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

In consideration of the length of this opinion, we enclose an advisory opinion regarding enforcement of the Open Meetings Law (OML-AO-4829) and direct your attention to §107, which includes recent amendments.

Turning to issues related to the Freedom of Information Law, and in particular, access to records reflecting payment to legal counsel, we note as a general matter, that it 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.

It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In our view, the phrase quoted in the preceding sentence evidences recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, we believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

For further analysis with respect to issue that you raised, we have enclosed a copy of FOIL-AO-14270.

We hope that we have been of assistance.

RJF:DB:sb
Enclosure: 4829, 14270

cc: Albert Graham
Mark Boylan
Mayor Skeet
Village of Corfu Trustee Board Members

FOI-AO-18935
OML-AO-05316

Jobin-Davis, Camille (DOS)

From: Jobin-Davis, Camille (DOS)
Sent: Friday, August 10, 2012 12:24 PM
To: [redacted]
Subject: Freedom of Information Law - Queens Library

Dear Ms. O'Connell,

This is in response to yours of July 10, 2012. Please accept my apology for the delay.

This will confirm that it remains our opinion that the Queens Borough Public Library is subject to both the Freedom of Information Law and the Open Meetings Law, and is therefore required to prepare and maintain minutes, and make them available to the public upon request.

The following opinion, rendered in 1993, sets forth our logic specifically with respect to the Queens Borough Public Library: http://docs.dos.ny.gov/coog/ftext/f7852.htm

This will also confirm that it remains our opinion that association libraries are not subject to the Freedom of Information Law, as set forth in the opinion cited by the Queens Library, and available at the following link: http://docs.dos.ny.gov/coog/ftext/f11535.htm

Should the Queens Borough Public Library produce any evidence that it was established as an association library, we would be willing to review the opinion issued in 1993.

Finally, if the Queens Borough Public Library is at some point determined to be an association library, subject to the Open Meetings Law and not the Freedom of Information Law, it would remain our opinion that it would be required to prepare and maintain minutes of all of its public meetings, and make such minutes available to the public. Open Meetings Law section 106 would require no less, as follows:

"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."

Please let me know if you have further questions.

Camille

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FOI-AO-18950
OML-AO-05317

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August 22, 2012

MEMORANDUM

TO: Hon. John A. Salisbury, Supervisor, Town of Lysander
Hon. Lisa Dell, Clerk, Town of Lysander
Dennis Stimson and Carol Baumgartner
Rebecca Stock

FROM: Robert J. Freeman, Executive Director RJF

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

Having received correspondence from all of you relating to a series of issues arising in the Town of Lysander, I am taking this opportunity to address the issues in a single response.

By way of background, it is clear that there are differences of opinion between the Supervisor and others and the Town Clerk. The questions largely involve the status of certain records, and I point out that I have neither seen nor heard the content of any such materials, and my goal, as in all instances in which advisory opinions are prepared, involves offering a correct response based on the language of the law and its interpretation by the courts. This office is not empowered to gain access to records that may the subjects of controversy in order to determine whether or the extent to which they must be disclosed to comply with law; it is not a court, and it has no judicial authority. We have no way of ascertaining which among conflicting points of view or factual statements are accurate.

I note that I have been informed by the Clerk that she has been the target of hostility by a particular individual whose identity is unknown to me, that she has obtained a court order prohibiting that person from being within a certain distance of her, and that she is fearful that the

individual may want to harm her. Her discomfort and fears were apparently made known to Town officials, including the Supervisor.

The initial area of controversy involves a tape recording of a conversation between the Clerk and Supervisor of June 27 that was requested by Mr. Stimson and Ms. Baumgartner. The request was denied by the clerk, her denial was appealed to the Supervisor, who "ordered" that the tape recording be disclosed. In their letter to me, Mr. Stimson and Ms. Baumgartner referred to a meeting between the Clerk and Supervisor "to discuss ongoing issues with the town clerk's office", and that the Clerk "insisted on having one town councilor present as her 'witness'". Consequently, the Supervisor invited another councilor as his witness. That being so, three of five members of the Town Board, a quorum, were present. The Clerk indicated that she would be recording the meeting.

Mr. Stimson and Ms. Baumgartner wrote that "The town clerk was acting in her official capacity as secretary to the town board," that "As secretary to the town board, the town clerk is responsible for recording meeting minutes", and they concluded that "any recordings made by the town clerk of this meeting are public records and should be made available to the public."

The Clerk, however, in a letter to me, indicated that she listened to the recording, that it "clearly does not pertain to Town business or to any of my duties as Town Clerk", and that it captured "a personal incident that occurred" between herself and the Supervisor on the previous day. She added that the Supervisor asked her to meet with him and "said that this was just a personal conversation between him and I regarding the personal incident that occurred the day before." Ms. Dell also wrote that the Supervisor told two persons present in his office "that they could not participate in our conversation and they did not."

From my perspective, two questions arise in consideration of the foregoing: first, is the tape recording a "record" that falls within the coverage of the Freedom of Information Law [FOIL]; and second, was the gathering during which three of five members of the Town Board a "meeting" that fell within the coverage of the Open Meetings Law?

FOIL is applicable to all agency records, and §86(4) of that statute defines the term "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..." If, as contended by Mr. Stimson and Ms Baumgartner, the tape recording involved Town business, such as "issues with the town clerk's office", I would agree that that tape would constitute a "record" falling within the scope of FOIL that is subject to rights of access. If, on the other hand, as contended by the Town Clerk, the tape recording involves a personal matter rather than Town business, and if the only copy of the recording is not maintained by or for the Town, but rather at her private residence, it would not likely constitute a "record" as defined by FOIL, and that statute would not apply.

Again, I have not heard the recording, and I am unaware of its specific content. To learn more of its content, I contacted the only person who has possession of the recording, the Clerk. She indicated that, before being elected as Town Clerk, she was a police officer employed by the Village of Baldwinsville. In that role, she arrested the individual who is the subject of the order of protection. His activities and hostility toward her let to the issuance of an order of protection by a court. She said that a citizen contacted the Supervisor to inform him that the subject of the order was across the street from Town Hall with a camera. He later provided the same account to the Clerk, who asked the Supervisor why he chose not to inform her of the presence of the subject of the order, and that she was upset by his lack of concern. The Supervisor, according to the Clerk, objected to her reaction to his absence of concern, and he said that she should "expect no cooperation" from him. Due to her fear of the subject of the order, she contacted the police the next morning, and soon after, the order of protection was extended until December.

The gathering the next day that was recorded involved the incident described in the preceding paragraph. If the description of the matter by the Clerk is accurate, it involves her personal safety relating to an arrest of an individual that is unrelated to her functions as Town Clerk. The hostility on the part of the subject of the order appears to relate to her due to her former position, and that her current position as Town Clerk is largely irrelevant to his actions. It does not appear, as suggested by Mr. Stimson and Ms. Baumgartner, that the Town Clerk "was acting in her official capacity as secretary to the town board."

If the recording is not a "record" subject to FOIL because it does not involve or pertain to Town business, the gathering involving the Supervisor, the Clerk and two Town Board members would not have fallen within the coverage of the Open Meetings Law. If, however, the gathering involved Town business, I believe that the gathering would have constituted a "meeting" as that term has been interpreted, that it should have been preceded by notice given in accordance with §104 that statute, as well as §62 of the Town Law, convened open to the public, and conducted open to the public, except to the extent that an executive session could properly have been convened.

The remaining issue relates to a request made pursuant to the Freedom of Information Law by Ms. Stock in which she requested "a copy of a letter dated July 6, 2012, from the town clerk to town supervisor, copying the four other members of the town board regarding a meeting between the clerk and the supervisor held in town hall on or about June 27, along with other town matters." The Clerk denied the request, stating that the record, in Ms. Stock's words, "would be intra-agency material, would constitute an unwarranted invasion of personal privacy and would endanger the life or safety of another person..."

In this instance, I believe that the letter in question is an agency "record" that falls within the coverage of the Freedom of Information Law. That statute, in brief, is based on a presumption of access. Stated differently, agency records are accessible, except those records or

portions of records that fall within one or more of the grounds for denial of access appearing in §87(2). The Clerk has referenced three of the exceptions to rights of access.

I have not seen the record, nor has any portion of the record been read aloud to me. In order to learn more of the matter, I contacted the Clerk. She informed me that the substance of the letter consists of her opinion that the unfortunate relationship between her and the Supervisor and perhaps others involves discrimination due to her political affiliation, which has, in her view, resulted in a hostile work environment. She also referred to her personal feelings relative to the situation concerning the subject of the order of protection.

A communication between the Clerk and Town officials would clearly constitute intra-agency material falling within the scope of §87(2)(g). That provision potentially serves as a basis for denying access, but due to its structure, it may also require disclosure. Specifically, §87(2)(g) states that an agency may withhold records that:

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

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

In short, to the extent that the record at issue consists of the Clerk's opinions or recommendations, for example, I believe that it may properly be withheld. Insofar as it consists of statistical or factual information, it would be accessible, again, unless a different ground for denial may be asserted.

One of those grounds for denial, §87(2)(b), authorizes an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy." If, for example, factual information is of a personal nature, i.e., concerning the Clerk's private relationships, her status or characteristics as a woman, or perhaps concerning the subject of the order of protection, that exception might properly be asserted.

The other ground for denial referenced, §87(2)(f), permits an agency to withhold records to the extent that disclosure "could endanger the life or safety of any person." In consideration of the circumstances pertinent to the meeting and the preparation of the letter sought by Ms. Stock, as well as the Clerk's former status as a police officer and the focus of the subject of the order of protection, it is possible that this exception may be applicable, depending on the content of the letter.

I hope that the foregoing serves to resolve the controversy and clarify the application of the Open Meetings and Freedom of Information Laws, and that I have been of assistance.

RJF:sb

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OML AO 5318

August 22, 2012

Diane Cirillo
[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. Cirillo:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to certain meetings of the Seaford Union Free School District Board of Education. Specifically, you mentioned §§103(a) and 105(1)(h), and the Board's motions to enter into executive session. The materials that you provided show that the Board has entered into executive session for purposes of discussing "contract negotiations," "a specific contract," "specific personnel matter," "personnel of former staff," "sale of Seaford School," and variations on those phrases.

You asked that we "validate the need for the Seaford Board of Education *to use sufficiently descriptive language when motioning to enter into executive session, and... that you cite the applicable court decisions so they can see that it absolutely carries the force of law*." You expressed interest in sharing information about the Committee's training sessions with the Board.

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

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

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

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

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

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

As you note, it has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). That section reads:

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

Based on the foregoing, an example of 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.).
>
> "Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

Based on the foregoing, a proper motion might be: '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 [see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, Supreme Court, Chemung County, April 1, 1983]. By means of the kind of motion suggested above,

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

Another provision on which the Board relied on to enter into executive session is §105(1)(h). That provision permits a public body to enter into executive session to discuss:

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

Based on the foregoing, it is clear that §105(1)(h) does not permit public bodies to conduct executive sessions to discuss all matters that may relate to the transaction of real property; only to the extent that publicity would "substantially affect the value of the property" can that provision validly be asserted.

In our opinion, §105(1)(h) is designed to shield discussions regarding a governmental entity's sale or acquisition of real property when disclosure would affect the government's interest in the value of such property. The rationale underlying that provision, in our opinion, does not involve protection of the interests of private parties in the sale of real property, but rather the government's ability to engage in an agreement or transaction optimal to the taxpayers and in their best interest. In short, it is our opinion that this provision does not apply when the government is not the seller or purchaser of a parcel.

One of the grounds for entry into executive session authorizes a public body to conduct a closed session to discuss or engage in collective bargaining negotiations with a public employee union. Although the Open Meetings Law imposes no requirement that an executive session must be held, it has been found, based on past practice and the provisions of the Taylor Law, which deals with the relationship between public employers and public employee organizations, that collective bargaining negotiations must be conducted in private [County of Saratoga v. Newman, 476 NYS2d 1020 (1984)]. Although we disagree with the determination, it is the only judicial decision that addresses the issue that you raised and, therefore, has precedential effect.

Further, although certain "contractual 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 appears to be inapplicable in the context of the situation that you described.

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 City of Geneva."

Perhaps more importantly, earlier this year the Appellate Division confirmed that a school board violated the Open Meetings Law by merely reciting statutory categories for entering executive session, and ordered the members to attend training at our office. Zehner v Board of Education of Jordan-Elbridge Central School District, Appellate Division, 4th Dept, January 31, 2012. For an analysis of the judicial determination, please see the enclosed article. In short, public bodies are required to articulate "specific and particularized" justifications for entry into executive session.

Finally, although there are only two of us in the office, upon receipt of an invitation from a public body or a local advocacy group such as a League of Women Voters, or the local newspaper, we will travel to various locations to conduct training for awareness and guidance towards compliance with the Open Meetings Law.

I hope that we have been of assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb
Enclosure
cc: Brian Fagan, President
Brian Conboy, Superintendent

STATE OF NEW YORK
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OML AO 5319

August 22, 2012

E-Mail

TO: Michael Bowman

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. Bowman:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to certain gatherings of the Board of Trustees of the Village of Cold Spring. Specifically, you raised issues regarding the Board's ability to modify a budget subsequent to a public hearing and a discussion at a Board meeting, including whether a second public hearing was necessary prior to such modification.

The Village Attorney submitted correspondence, copy attached, addressing various of the issues that you raised.

In this regard, I note that the matters at issue are not governed by the Open Meetings Law and, therefore, we are unable to provide assistance. Should you require advice regarding application of Village Law with respect to the proper procedure for the adoption of budgets, we recommend that you review Village Law provisions or seek advice and counsel from an attorney.

I regret that we cannot be of further assistance.

CSJ:sb
cc: Stephen Gaba, Village Attorney
Attachment

FOI-AO-18953
OML-AO-05320

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Thursday, August 23, 2012 9:05 AM
To: 'wbruchis'
Subject: RE: New Provision of the Open Meetings Law Goes Into Effect February 2, 2012

It's an interesting question. If you're referring to the committee that we discussed, the Open Meetings Law simply doesn't apply. If, however, you're referring to the System's Board, which is subject to the Open Meetings Law due to the direction given in §260-a of the Education Law, you may recall that we've advised that not-for-profit library entities are not subject to the Freedom of Information Law.

Based on a close reading of the new provision, §103(e) of the Open Meetings Law, it generally requires the disclosure of two categories of records scheduled to be discussed during open meetings. One involves records that are accessible under the Freedom of Information Law, and the other pertains to "any proposed resolution, law, rule regulation, policy or any amendment thereto." Therefore, I believe that the latter group of records, i.e., proposed resolutions, policies and the like, should be made available in advance of meetings to comply with §103(e) when those records are scheduled to be discussed in public by a non-governmental library board of trustees. The former, concerning records that are accessible under the Freedom of Information Law would not apply, for a non-governmental entity falls outside the scope of that law.

This is not intended to suggest that records cannot be disclosed by a non-governmental entity when the Freedom of Information Law does not apply, but rather that there is no obligation to do so.

I hope that I have been of assistance. If you would like to discuss the matter, please feel free to contact me.

Robert J. Freeman
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: http://www.dos.state.ny.us/coog/

[redacted]

FOI-AO-18957
OML-AO-05321

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Monday, August 27, 2012 9:47 AM
To: 'Colden Supervisor'
Subject: RE: Town of Colden

Dear Supervisor Hoffman:

I have received your correspondence in which you explained in writing the issues that we discussed, and I offer the following comments.

First, I believe that the Town Clerk has been designated as "records access officer." In that capacity, it is her duty to coordinate the Town's response to requests for records made pursuant to the Freedom of Information Law (see Committee on Open Government regulations, 21 NYCRR §1401.2, available on the Committee's website). In that role, the Clerk may, in my view, ensure that records in your physical custody or the physical custody of other Town officers or employees be made available in accordance with law.

Second, an applicant is not empowered to direct a government officer or employee to make records available at the location of his/her choice. Rather, particularly in situations in which staff is limited, it has been advised that an agency contact the person seeking records for the purpose of establishing a mutually convenient time during which records may be inspected. Further, the applicant does not have the right to specify where he or she wants to inspect records. As part of the function of coordinating responses to requests, the records access officer may, in my view, specify where records may be inspected.

Third, an agency may have an officer or employee present while records are being records are being inspected. That is often so if there is a possibility that records may be misfiled or otherwise taken out of order, misused, etc.

And fourth, section 89(3)(a) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Stated differently, sufficient detail must be included in a request to enable agency officials to locate and identify the records of interest.

The remaining issue relates to a meeting of the Planning Board during which a majority of the Town Board is present, and whether their presence would constitute a meeting of the Town Board that must be preceded by notice given in accordance with section 104 of the Open Meetings Law. In this regard, the term "meeting" has been construed by the courts to mean a gathering of a majority of a public body for the purpose of conducting public business. If, for example, the Planning Board and the Town Board seek to discuss an issue or issues together, it has been held that a "joint meeting" is falls within the coverage of the Open Meetings Law and that both public bodies participating must provide notice and comply with that law. On the other hand, if members of a public body attend a meeting, essentially as interested citizens, and do not function or participate collectively, as a body, it has been advised that their presence would not constitute a "meeting" or, therefore, that the Open Meetings Law would apply. There have been many instances in which I have given presentations during which a majority of the membership of a public body is present in the audience. In those instances, assuming that those persons are present to observe as interested citizens, to obtain training or education, etc., and not to conduct business as a body, their presence would not trigger the application of the Open Meetings Law.

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OML AO 5322

August 29, 2012

Hon. Anthony J. Garramone
Office of the City Clerk
City of Utica
1 Kennedy Plaza
Utica NY 13502

Dear Judge Garramone:

I have received your memorandum and the Rules of Order adopted by the City of Utica Common Council. You referred to "misinformation" concerning meeting procedures, and I offer the following brief remarks based on our conversation concerning those procedures as they relate to the Open Meetings Law.

First, we agreed that the "pre-meeting conference" referenced in the Rules constitutes a "meeting" that falls within the coverage of the Open Meetings Law that must be and, in fact, is preceded by notice given in accordance with that statute.

Second, we agreed, and it was confirmed that committees of the Common Council constitute "public bodies" required to comply with the Open Meetings Law. The Rules so specify, stating that "Committee meetings shall be open to all members of the Common Council, the public and the media and so shall all be informed of meetings." You added that "all committee meetings of the council are on notice to the public and media with an announced agenda."

Third, issues have arisen concerning the placement of videotaping equipment, and Rules indicate that the Council has "dedicated space at the rear of the caucus room and beyond the Council barrier in the Common Council Chambers so as not to interfere with the conducting of business by the members of the Council." The Rule further states that "all videotaping of Council proceeding[s] by members of the media, councilpersons or any other persons, shall be

conducted in the designated area…" It is my understanding that one Council member has sought to place his video recorder on the Council table or physically near Council members, rather than in the designated area. Another Council member has indicated that the placement of the device so near to her and other members is distracting and creates difficulty in relation to her ability to fully concentrate or participate in Council proceedings. That being so, in my opinion, the Council member seeking to record the proceedings must abide by the Rule requiring that video recording be accomplished in a designated area, so long as that area reasonably enables video equipment to record the proceedings.

Lastly, the Rule involving the Public Comment Period and "Sign-up" requires that those who want to address the Council must identify themselves by name. In this regard, it has been advised that if members of the public are given the opportunity to speak during meetings, they cannot be required to provide their names or addresses as a condition precedent to speaking. As you know, the Open Meetings Law states that meetings of public bodies are open to the "general public." That being so, whether those who wish to attend are residents of the City of Utica or otherwise, they have the same right to attend. Similarly, when a public body authorizes public participation, we believe that those who attend must have an equal opportunity to do so. When a person speaks, ordinarily his or her identity is largely irrelevant; what is important is the nature of that person's comments. Perhaps most importantly, in a variety of circumstances, those who want to speak are reluctant to identify themselves for personal reasons, often reasons involving their safety. For instance, victims of batterers or other violence have sought to avoid indicating their names based on their desire for safety. In other instances, parents have sought to avoid identifying themselves in consideration of issues involving the privacy of their children.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:sb

OML-AO-05323

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Friday, August 31, 2012 12:56 PM
To: 'Diane Addesso'
Subject: RE: question on Open Meeting Law
Attachments: o3717.wpd

Hi Diane - -

It's unusual for a board to have an even number of members. Nevertheless, if the Board of Trustees consists of 8 at full strength, its quorum would be a majority of its total membership, notwithstanding absences or vacancies, and the quorum would remain at 5. The applicable provision of law regarding quorum requirements is section 41 of the General Construction Law.

Under the Open Meetings Law, members can conduct a valid meeting by means of physical presence, or via videoconferencing that enables those in attendance at two locations to hear and observe each other. Use of a telephone does not enable the public to "observe the performance" of members as is required in the statute's statement of intent. That being so, members cannot vote or be counted toward a quorum if connected by phone, and proxy voting would be inconsistent with law. I believe that a court would determine that a vote cast by means of a proxy would be deemed a nullity.

Attached is an advisory opinion that deals with both issues that you raised more fully.

I hope that I have been of assistance and that you and yours will enjoy the long weekend.

[redacted]

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OML-AO-5324

September 12, 2012

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 :

This is in response to your request for an advisory opinion concerning the manner in which a resolution was passed by the Town Board of Fremont at a regularly scheduled monthly meeting. Specifically, you requested clarification regarding the Board's responsibility to make a copy of the resolution available prior to the meeting, to what degree "pro-active openness is required of, or can be expected", public participation allowed only after a vote, and when, if ever, a formal hearing can be required prior to a vote.

In this regard, 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."
>
> 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 thereby 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.

Second, members of the public have on many occasions complained that they cannot fully understand discussions among members of public bodies, even though the discussions occur in public. For example, a board member might refer to the second paragraph of page 3 of a record without disclosing its content prior to the meeting. Although the public has the right to be present, the ability to understand or contribute to the decision-making process may be minimal and frustrating.

Based on complaints such as these, the Legislature added §103(e) to the Open Meetings Law, effective February 2012. The purpose of the legislation is simple: those interested in the work of public bodies should have the ability, within reasonable limitations, to see the records scheduled to be discussed during open meetings prior to the meetings and concurrently with the public discussion involving those records.

The amendment addresses two types of records: first, those that are required to be made available pursuant to FOIL; and second, proposed resolutions, law, rules, regulations, policies or amendments thereto. When either is scheduled to be discussed during an open meeting, the law requires that copies of records must be made available to the public prior to or at the meeting, upon request upon payment of a reasonable fee, and, when practicable, online prior to the meeting. The amendment authorizes an agency to determine when and what may be "practicable" in making records available.

It is important to stress that the amendment involves an effort to take advantage of today's information technology to promote transparency and citizens' participation in

government, and to reduce waste. If the agency in which a public body functions (i.e., a state department, a county, city, town, village or school district) "maintains a regularly and routinely updated website and utilizes a high speed internet connection," the records described above that are scheduled to be discussed in public "shall be posted on the website to the extent practicable as determined by the agency…". It is not incumbent upon the public to make a request that such records be posted online, it is the agency's responsibility to do so.

With respect to public participation, we note that although the Open Meetings Law 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.

Furthermore, 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. Whether it is logical to entertain public comments on an issue after a vote has already been taken, in our opinion, is a question best raised before the Board, and/or may be an issue for voters in the next election.

Finally, the Open Meetings Law does not address when a public hearing is required or may be demanded. Whether a public hearing is mandatory would depend on the nature of the resolution. For example, based on Town Law §108, town boards are required to hold a public hearing on the preliminary budget on or before the Thursday immediately following the general election. Similarly, town boards are required to hold public hearings prior to the adoption of a local law. There is no law that we know of that would require a board to hold a public hearing prior to the adoption of a resolution such as the one described in the materials that you submitted; however, that would not prohibit the town board from doing so.

I hope that we have been of assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb
cc: George Conklin, Supervisor, Town of Fremont

OML-AO-5325

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Friday, September 14, 2012 4:57 PM
To: 'Chronicle Newsroom'
Subject: RE: I'd like to see your comment...

In short, the Open Meetings Law gives the public the right to attend, listen and observe; it is silent regarding the ability to speak or otherwise participate. That being so, a board need not authorize the public to speak at all. Most boards, however, permit limited public participation, and it has been advised that if they choose to do, they should adopt reasonable rules that treat members of the public equally. For example, it would be unreasonable to permit those in favor of hydrofracking to speak while prohibiting those who are against from speaking. My belief is that a board may adopt a rule precluding any comments, whether in favor or opposed, dealing with a particular subject.

Notwithstanding the adoption of a rule or policy prohibiting comments regarding hydrofracking during meetings of a board, any member of the public may speak on an issue on the steps of town hall, with friends, relatives or others. Certainly they may express their views to members of the news media, and what they (you) choose to share would involve a matter of editorial judgment.

I hope that I have been of assistance.

[redacted]

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OML AO 5326

September 27, 2012

Rona Klopman
[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. Klopman,

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to certain gatherings of the East Hampton Town Board during which the Board enters into executive session. Specifically, you raised concerns regarding the Board's apparent failure to vote to enter executive session, failure to articulate grounds for entry into executive session, and the scheduling of executive sessions through the Board's agenda.

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

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

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

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

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

Second, from our perspective, every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. Based on that presumption, we believe that minutes must be sufficiently descriptive to enable the public and others (i.e., future 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 Town Board. Most importantly, minutes must be accurate.

We note that §106(1) of the Open Meetings Law provides that:

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

Accordingly, minutes of meetings should indicate, at a minimum, a record of motions and how each member voted. This provision clearly requires that motions for entry into executive session be recorded in the minutes, with an indication of how each member voted.

We emphasize that 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. In addition, the motion must be specific enough so that the public is informed that the topic or topics for discussion fall under one of the permitted options.

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

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

Based upon the foregoing, we believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Under a broader construction, as the court points out, almost every issue could be discussed in executive session, which would be contrary to the intent of the law.

On one occasion, meeting minutes that you submitted indicate "The Town Board went into Executive Session to discuss State owned parkland called Fort Pond House, a town property in Montauk. Members of the public requested that this issue be discussed openly because there was talk that the Town Supervisor was considering putting this parkland up for sale."

The authority to discuss matters related to the sale of real property under particular circumstances exists within §105(1)(h). That provision permits a public body to enter into executive session to discuss:

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

Based on the foregoing, it is clear that §105(1)(h) does not permit public bodies to conduct executive sessions to discuss all matters that may relate to the transaction of real property; only to the extent that publicity would "substantially affect the value of the property" can that provision validly be asserted.

In our opinion, §105(1)(h) is designed to shield discussions regarding a governmental entity's sale or acquisition of real property when disclosure would affect the government's interest in the value of such property. The rationale underlying that provision, in our opinion, does not involve protection of the interests of private parties in the sale of real property, but rather the government's ability to engage in an agreement or transaction optimal to the taxpayers and in their best interest. In short, it is our opinion that this provision does not apply when the government is not the seller or purchaser of a parcel.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb
cc: William Wilkinson, Town Supervisor

DML-AO-05327

Jobin-Davis, Camille (DOS)

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, November 13, 2012 9:22 AM
To: [redacted]
Subject: RE: RE: Public meting Laws

Dear Trustee Peterson,

Please accept my apology for the delay in responding.

This will confirm that when a quorum of the town board gathers to discuss the business of the town, the meeting must be held open to the public, with appropriate notice to the public of the time and place of the meeting.

There are certain gatherings, however, that are exempt from the Open Meetings Law pursuant to Section 108. Matters that are made confidential by state or federal law, and judicial or quasi-judicial proceedings, for example. Although it is not clear from your description, if the parties were involved in litigation and a court ordered a negotiation of some sort, then in my mind that would qualify as a judicial proceeding exempt from Open Meetings Law. See online opinions through our OML Advisory Opinion Index, under "J" for "Judicial Proceedings" and "E" for "Exemptions".

There are occasions when municipal boards receive training and/or education that is generic to all municipal boards, in which case the Open Meetings Law would not apply, as the board would not be discussing the business of the particular town, but issues that are generic to all municipalities. This may or may not apply in your case. See online opinions through our OML Advisory Opinion Index, under "T" for "Training Session."

Again, I am sorry for the delay. Hope that this is helpful.

Camille

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By EMAIL

OML-AO-5328

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, November 13, 2012 10:01 AM
To:
Subject: RE: Request for opinion

Dear ,

By now, I hope that things in New Rochelle are getting back to something that approximates normalcy. The severity of the Hurricane and then the snowstorm soon thereafter took many of us by surprise, and I hope that you and your loved ones are well.

In response to your question, I've not seen any case law that is directly on point, and although it may be unfair, there isn't anything that I know of that would prevent them from meeting. There are times, in emergencies, when boards have to meet quickly, or have to address issues. We have advised that holidays and weekends are not necessarily contrary to law either – even when many would choose not to attend.

Camille

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November 13, 2012

OML AO 5329

E-Mail

TO: Kerry Achilli

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. Achilli,

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to certain actions of the Board of Trustees and the Historic Preservation Commission/Planning Commission in the Village of Lewiston. Specifically, you raised concerns regarding minutes of both public bodies, including their existence, accuracy, and publication. In response, the Village Clerk provided the attached correspondence.

Initially, we note that the Open Meetings Law is applicable to meetings of all public bodies. Section 102(2) of the Law defines "public body" to mean:

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

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. Accordingly, both the Village Board and the Historic Preservation Commission/Planning Commission are public bodies subject to the Open Meetings Law.

Section 106 of the Open Meetings Law deals directly with minutes of meetings and states that:

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

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

Based upon the foregoing, it is clear that minutes must be prepared and made available within two weeks by all public bodies, including the Village Board and the Commission. In our opinion, inherent in law is intent that the requirements be carried out reasonably, fairly, with consistency, and that above all minutes be accurate.

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

If a clerk does not prepare minutes within two weeks of the meeting, as required by law, s/he would have failed to carry out her/his statutory duties. A legal remedy addressing any such failure would involve the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules to compel the clerk to carry out her/his duties in a manner consistent with law. However, and we recognize that on occasion it is not possible for a clerk to prepare minutes, a clerk is not the only person who is "allowed" to prepare minutes. A record of a meeting may be taken by anyone in attendance and, we note that, there is no strict format regarding the format of minutes. As long as the information required by §106 is included and it is accurate, the requirements of the Open Meetings Law have been met.

While minutes of meetings must be prepared and made available on request within two weeks of the meetings to which they pertain, there is no requirement as yet that minutes of meetings be posted on a website. An agency such as the Village may choose to do so, and we applaud those that do, but there is currently no such obligation in law.

Similarly, there is nothing in the Open Meetings Law or any other law of which we are aware that deals specifically with agendas. While many public bodies prepare agendas, the Open Meetings Law does not require that they do so. A public body on its own initiative may adopt rules or procedures concerning the preparation and use of agendas. Insofar as an agenda is created, we believe it would constitute a "record" subject to disclosure under the Freedom of Information Law.

Finally, and with respect to the Freedom of Information Law, this will confirm that an agency has the authority to require that a request for records be made in writing, pursuant to §89(3).

We hope that this is helpful.

cc: Mayor Terry Collesano, Village of Lewiston

Planning Board Chair, Village of Lewiston

OML-AO-5330

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Thursday, November 29, 2012 10:06 AM
To: [redacted]
Subject: Time of Town Board Meeting

Dear Ms. Dannhauser:

Your letter of November 18 has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice and opinions concerning the state's Open Meetings Law.

You asked whether it is legal for a town board to approve a tax increase during a meeting held at 2 p.m. "when everyone is working." In this regard, the Open Meetings Law does not specify the time of day during which public bodies, such as the Islip Town Board, may conduct meetings. Nevertheless, it has been advised on many occasions that the law should be implemented in a manner that gives reasonable effect to its intent. For example, in a case in which a board of education held its meetings at 7 a.m., it was determined by a court that meetings held so early would be unreasonable. In few, if any, of those interested in attending would have a reasonable opportunity to do so. However, when a meeting is held during regular business hours, i.e., 2 p.m., or early evening, I do not believe that a court would conclude that the time of the meeting is inappropriate or that it would constitute a failure to comply with law.

When those interested in attending are unable to do, it has been suggested that a person who can attend might record the meeting. The Open Meetings Law as recently amended permits any person to audio record, video record or broadcast an open meeting, so long as the use of the equipment is not obtrusive or disruptive. Additionally, often meetings of municipal boards are recorded and can be viewed on public access television. In short, it may be possible in many instances to be aware of information discussed and disclosed during meetings, even though an individual may not be able to attend.

I hope that I have been of assistance.

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OML-AO-5331

BY EMAIL

From: Freeman, Robert (DOS)
Sent: Tuesday, December 11, 2012 10:27 AM
To:
Cc:
Subject: Executive Committee
Attachments: o3989.wpd; o3926.wpd

Dear :

This to confirm the advice offered during our conversations that the Executive Committee to which you referred constitutes a "public body" required to comply with the Open Meetings Law.

As indicated in the attached opinions previously rendered, the legislative history of that statute clearly indicates that a committee or subcommittee consisting solely of members of a governing body is itself a public body. Further, even though there may be no specific reference to a quorum, §41 of the General Construction Law has for more than a century imposed quorum requirements on any entity that carries out a governmental duty that consists of three or more members. In brief, based on §41, a quorum is a majority of the total membership of a public body, notwithstanding absences or vacancies. If, for example, a community board consists of 51 members, its quorum would be 26. If a committee of a community board consists of 7, its quorum would be 4, and a gathering of 4 or more members of the committee in their capacities as committee members would constitute a meeting of the committee.

In the event that the attached opinions cannot be opened, they will be sent to you separately as well.

I hope that I have been of assistance.

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OML-AO-5332

December 11, 2012

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.:

In response to your request, this will confirm that in our opinion it is likely to be reasonable to designate one general location from which those who are recording public meetings may record.

It has long been our advice that recording meetings was permissible, so long as the recording was carried out unobtrusively and in a manner that did not detract from the deliberative process. See attached OML-AO-4767.

In 2011, §103(d) the Open Meetings Law was amended and now permits as follows:

> "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."

Accordingly, it is our advice that a public body may adopt a rule that limits the location of equipment and personnel used to record public meetings so as to conduct its

proceedings in an orderly manner. In order for a designated location to be reasonable, it would be important, as you point out, that it not impair the public's ability to record the images or sounds of the proceedings. In the event that it is not possible or reasonable to record from the back of the room, in my opinion, the Town would be required to make reasonable accommodations.

The Town has designated one corner in the back of the meeting room as the location from which recordings may be made. While it could be argued that the amendment was intended to permit the recording of both the members of the public body and those in attendance, we believe that the primary intent of the amendment is to enable the public body to limit the disruptions associated with recording.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

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OML AO 5333 December 19, 2012

E-Mail

TO: Josh Stack

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. Stack:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to a recent meeting of the Schoharie Town Board. Specifically, pursuant to a motion to discuss pending litigation, the Town Board invited those in attendance at a special meeting, including members of a residents group and the group's attorneys into the executive session portion of the meeting. There were no other people present at the public meeting.

> Minutes from the meeting record the following motion for entry into executive session:
> "A motion was made to go into executive session at 1:37 pm with advice of counsel and all other visitors regarding the Article 78 with Cobleskill Stone Products."

Those in attendance and therefore those who attended the public meeting included the Town Board, the Town Attorney, members of a residents group, attorneys representing the residents group, the Mayor of the Village of Schoharie, and a Village Board Member.

It is clear from the minutes that the Board relied on the provision of the Open Meetings Law which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation" (§105[1][d]). While the courts have not sought to define the distinction between "proposed" and "pending" or "pending" and "current" litigation, they have

provided direction concerning the scope of the exception in a manner consistent with the general intent of the grounds for entry into executive session. Specifically, it has been held that:

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

In view of the foregoing, the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, so as not to divulge its strategy to its adversary. We note too, that unlike the circumstances here, the Concerned Citizens decision cited in Weatherwax involved a situation in which a town board involved in litigation met with its adversary in an executive session to discuss a settlement. The court determined that there was no basis for entry into executive session; the ability of the board to conduct a closed session ended when the adversary was permitted to attend.

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

In the context of the matter at issue, you indicated that there are only two parties involved in the litigation and that none of those present at the meeting were there on behalf of Cobleskill Stone Products, the adversary in the litigation. Those present, as you described them, "most likely attended so they could advocate and advise the Town Board regarding the position of their respective group rather than providing some special knowledge or expertise to aid the Town

Board in its discussion of litigation strategy." If this is accurate, in our opinion, the Board's behavior would not have been outside the parameters of the Open Meetings Law.

We hope that you find this helpful.

CSJ:mm

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OML-AO-5235

VIA EMAIL

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, January 24, 2012 12:01 PM
To:
Subject: Advisory Opinion - Village of Webster

Dear,

This is in response to your correspondence of January 17, 2012 regarding the recent amendment to Section 103 of the Open Meetings Law.
Please note that we have posted guidance interpreting the new provision of Section 103, which I hope you will find helpful, at the following link: http://www.dos.state.ny.us/coog/RecordsDiscussedatMeetings.html
In direct response to your question regarding an agency's responsibility to provide paper copies of records scheduled to be discussed an open meetings after having posted such records online, it is our opinion that, as is the case with many of the provisions of the Open Meetings Law, the requirements set forth in paragraph (e) must be interpreted in a reasonable manner based on the facts as they unfold. Accordingly, we recommend that if records are posted online prior to a meeting and a member of the public requests a paper copy of such record prior to a meeting, the agency provide a paper copy and request that the applicant pay the appropriate fee. If records are generated too close in time to the start of the meeting and are not able to be posted online prior to the public's attendance at a meeting, on the other hand, I would suggest that a reasonable response would be to provide paper copies at the meeting.

I hope that this is helpful.

Camille

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OML-AO-5236

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Friday, January 27, 2012 9:51 AM
To: 'Kate Brindle'
Cc: 'sryan@orda.org'
Subject: RE: FOIL and Open Public Meetings Law

Dear Ms. Brindle:

The governing body of the Olympic Regional Development Authority clearly constitutes a "public body" required to comply with the Open Meetings Law. Section 106 of that statute pertains to minutes of meetings and contains what might be characterized as minimum requirements concerning the contents of minutes. At a minimum, minutes of an open meeting must consist of a record or summary or motions, proposals, resolutions, action taken and the vote of the members. Further, and more directly addressing the issue that you raised, section 106 specifies that minutes of open meetings must be prepared and made available on request within two weeks of those meetings.

I hope that I have been of assistance. If you would like to discuss the matter, please feel free to contact me.

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[redacted]

FOIL-AO-18789
OML-AO-05237

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January 27, 2012

E-Mail

TO: Ron Adam

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. Adam:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to a joint gathering of the Nunda Town and Village Boards. Please accept our apology for the delay in responding.

In conjunction with your request, the Village of Nunda submitted copies of meeting minutes from various meetings in 2010 and 2011, highlighting certain motions for entry into executive session, along with various records marked "confidential." For reasons set forth below, although there may be grounds for withholding portions of certain records, we believe that the documents submitted are not "confidential" and may be disclosed, at least in part.

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

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

Based on the foregoing, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's

membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

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

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

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

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

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

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

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

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

Our review of minutes from meetings held over the course of one year includes motions for entry into executive session "for the purpose of discussing issues with the water system", "to discuss personnel", "to discuss the Police Department" and "the Employee Policy". Various handwritten notations on the minutes indicate the alleged nature of the conversations held in executive sessions. Minutes from the joint meeting that you referenced indicate your objection to a motion to enter into executive session to discuss Code Enforcement and Zoning, and then the subsequent motion "to discuss the employment history of certain individuals of the Town and Village". A handwritten note indicates "discussion on Zoning Officer Sal NiCastro and possible elimination or position for Village Deputy Officer is Robert Lloyd current CEO/ZO for Town.

It is our opinion that it is necessary for the Village Board to clarify its motions and limit its discussions in executive sessions in order to maintain compliance with the Open Meetings

Law and avoid the risk of a lawsuit. For example, if the discussion pertained to a particular employee's employment history or job performance, the discussion would be appropriate for executive session. On the other hand, if the conversation turned to whether a position should be eliminated or added, because it does not relate to an individual person, it is our opinion that the case law outlined above would require that the board have had such discussion in public.

We hope that this opinion is helpful in differentiating between the conversations that must occur in public and those that are permitted to be held in private, and offer the resources of our website which includes copies of hundreds of advisory opinions on these and other topics, for educational purposes.

Turning now to the additional issue of the three documents forwarded by the Village and marked "Confidential", we note that the Freedom of Information Law, much like the Open Meetings Law, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (l) of the Law.

The primary issue here 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 our 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, we 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, we 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).

Finally, in addition to withholding an employee's home address based on §89(7), in our opinion there may be grounds to redact portions of the three records marked "Confidential" pursuant to a FOIL request. The records are intra-agency communications from the Mayor and the Board in which two separate employees are directed to (a) reimburse the Village for a pair of boots, and (b) and maintain a current driver's license in keeping with the requirements of the position. To the extent that the reimbursement issue was discussed during the course of an open meeting and the letter issued pursuant to Board action, there would be no basis to deny access to the letter. Portions of the communications sent to the employee who failed to maintain a current driver's license, on the other hand, might justifiably be withheld as an unwarranted invasion of personal privacy, although the passage of time and the employee's subsequent termination, in our opinion, would minimize such authority.

We hope that this is helpful.

CSJ:sb

cc: Jack Morgan, Deputy Mayor

Jobin-Davis, Camille (DOS)

From: Jobin-Davis, Camille (DOS)
Sent: Monday, January 30, 2012 2:33 PM
To: 'Alan Sorensen'
Subject: RE: Caucusing and definition of Public Body
Attachments: county lewis.pdf; glens falls.rtf

Alan,

Sorry for the delay!

In response, please note the following two cases (copies attached):

County of Lewis v. O'Connor, Supreme Court, Lewis County, January 21, 1997. Meetings of standing committees of hospital Board of Managers found to be subject to OML.

Standing committees have no power to take final action or bind the Board of Managers, even if a committee's membership would constitute a quorum of the full Board of Managers.

Rule: Standing committees with advisory authority only, made up solely of members of a public body are public bodies subject to the Open Meetings Law.

Glens Falls Newspapers v Solid Waste & Recycling Committee of Warren County Board of Supervisors, 195 AD2d 898, 601 NYS2d 29 (3rd Dept, 1993).

Issue: whether Committee violated OML when they conducted an executive session to discuss a proposal to utilize a neighboring county's landfill pursuant to §105(1)(h) re real property.

"Before a public meeting may be closed pursuant to the exception relied upon .... 'it must first be shown that publicity would substantially affect the value of the property'" p. 898-899
This is no evidence to support the respondents claim that publicity would affect the value of the real property discussed – pure speculation.

Affirm Supreme Court's finding that closure of the meeting violated the OML.

Rule: pure speculation that publicity would affect the value of real property discussed in executive session is insufficient. Must have evidence.

This case is based on a clear inference that OML applies to standing committees of County Board of Supervisors, committees made up solely of members of a public body.

You will likely find the following advisory opinion helpful: http://www.dos.ny.gov/coog/otext/o4660.html

Again, my apologies for the delay,

Camille

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

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FOI-AO-18798
OML-AO-5239

February 3, 2012

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 :

This is in response to your request for an advisory opinion regarding application of the Freedom of Information Law to records requested from the Town of East Greenbush. Please accept our apology for the delay in responding.

As indicated, you were denied access to a copy of the draft ethics code which was distributed to members of the Town Board and the Ethics Board, but not the public, during a discussion at a Town Board meeting. You indicated that the draft code was not only discussed in great detail at the meeting, but that "each member of the five (5) person Ethics Board **read aloud** a portion or section of the revised code out loud to the Town Board. This process continued for several hours and each member of the Ethics Board read aloud two or more sections of the draft of the ethics code." (Emphasis yours.)

On appeal, you were informed that the document "is still an interagency memorandum. It is not yet in a format for consideration of a local law. It will be in the correct format before the public hearing, and it will then be available for public viewing."

In this regard, we note that the Freedom of Information Law is applicable to all records maintained by or for an agency, such as a town, and §86(4) of that statute defines the term "record" expansively to include:

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

Based on the foregoing, as soon as a document is prepared for or maintained by an agency, it constitutes a "record" that falls within the coverage of the Freedom of Information Law. That a document is characterized as a "draft" or a "work in progress" is, in our view, not necessarily determinative of whether it must be disclosed or may be withheld.

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.

If the proposed code had only been discussed "at length" during an open meeting, we might agree that it could be withheld – at least up until February 2, 2012, as outlined below. Although there is no exception in FOIL dealing specifically with drafts or works in progress, §87(2)(g) pertains to internal governmental communications and authorizes an agency to withhold records that:

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

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

Again, a draft proposed code prepared by a government officer or employee reflects a recommendation that may be approved, modified or rejected and, therefore, may ordinarily be withheld. The facts in this instance, however, in our opinion, dictate that the proposal be

disclosed in great measure, or perhaps in its entirety. It has been advised on many occasions that insofar as the contents of records are disclosed through discussion at a meeting open to the public, they must be made available in response to a request made under the Freedom of Information Law. In short, public discussion reflective of the contents of the records, and a public reading of the record, results in a waiver of the ability to deny access.

Viewing the matter from a different vantage point, since tape recordings of open meetings were found to be accessible to the public under the Freedom of Information Law more than thirty years ago (Zaleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978), those portions of records read aloud or otherwise disclosed and captured on tape would be public.

In a case in which there was an "inadvertent disclosure" of a record, it was found that the disclosure did not create a right of access on the part of the person who viewed the record [see McGraw-Edison v. Williams, 509 NYS2d 285 (1986)]. Conversely, however, if a disclosure was not inadvertent, but rather purposeful, as in a situation in which members of boards read aloud portions of a record, or read the record aloud in its entirety, during a meeting at which anyone present could have heard, we believe that a public disclosure would have occurred and that the ability to deny access to that record would have been waived.

In sum, based on the facts as you presented them, at the very least, we believe that the Town is required to disclose those portions of the record that were read aloud.

As referenced earlier, we bring to your attention an amendment to the Open Meetings Law effective on February 2, 2012. The goal of a new section 103(e) is simple: those interested in the work of public bodies should have the ability, within reasonable limitations, to see the records scheduled to be discussed during open meetings prior to the meetings. The entire text of the amendment is as follows:

> (e) Agency records available to the public pursuant to article six of this chapter, as well as any proposed resolution, law, rule, regulation, policy or any amendment thereto, that is scheduled to be the subject of discussion by a public body during an open meeting shall be made available, upon request therefor, to the extent practicable as determined by the agency or the department, prior to or at the meeting during which the records will be discussed. Copies of such records may be made available for a reasonable fee, determined in the same manner as provided therefor in article six of this chapter. If the agency in which a public body functions maintains a regularly and routinely updated website and utilizes a high speed internet connection, such records shall be posted on the website to the extent practicable as determined by the agency or the department, prior to the meeting. An agency may, but shall not be required to, expend additional moneys to implement the provisions of this subdivision.

In short, when an agency schedules a proposed law, rule or regulation for discussion during a public meeting, it is required to make the record available to the public, to the extent practicable, online and prior to or at the meeting during which the record is discussed.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb
cc: Joseph Liccardi, Town Attorney

OML-AO-05240

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Friday, February 10, 2012 9:05 AM
To: [redacted]
Subject: RE: Open Meetings Law

Dear Mr. Peck:

When a public body has properly entered into an executive session, it may take action during the executive session, so long as the vote does not involve the appropriation of public monies. When action is taken during an executive session, minutes indicating the nature of the action taken, the date and the vote of the members must be prepared and made available in accordance with the Freedom of Information Law within a week of the closed session.

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

Robert J. Freeman
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[redacted]

OML-AO-05241

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Monday, February 13, 2012 2:36 PM
To: clerk@townofcaroline.org
Subject: RE: Draft minutes question

Unless draft minutes are scheduled to be discussed (not merely the subject of a motion) in public, or are the subject of a resolution scheduled to be discussed in open session, there is no obligation to post them online to comply with section 103(3) of the Open Meetings Law. This not to suggest that they cannot be posted on the Town's website, but rather that there is no obligation to do so.

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

Robert J. Freeman
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[redacted]

OML-AO-05242

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Tuesday, February 14, 2012 9:02 AM
To: 'Barry Zezze'
Subject: RE: Robert's Rules

Dear Mr. Zezze:

I can offer the following short answers to your questions. If you would prefer a more detailed response with explanations relating to the issues, I can prepare an expansive advisory opinion. However, we have a backlog, and it would be some time before I could do so.

First, Robert's Rules is not law, and there are elements of Robert's Rules that are inconsistent with the law of New York. It has been recommended that a public body, such as a board of commissioners, adopt reasonable rules to govern its proceedings.

Second, the Chairman presides, but he doesn't make the rules or have all the power. The Board has the authority to determine the content of minutes by means of motions that must be approved by vote of a majority of the total membership. Further, I know of no law that forbids members of public bodies from clarifying or justifying their positions or votes.

Third, although as a matter of practice or policy, most public bodies approve their minutes, there is no law that requires that minutes be approved. If it is the practice or policy to do so, in my view, most important is that the minutes be accurate and reflect what in fact occurred during a meeting.

Fourth, the Open Meetings Law authorizes the public to attend open meetings, but there is no requirement that the public be permitted to speak. Many public bodies do, however, permit limited public participation. In those instances, it has been advised that they adopt reasonable rules that treat members of the public equally. There is no requirement that a public body or its members answer questions. They may choose to do so, but there is no obligation to do so. The same would be so with respect to letters sent to a public body.

I hope that I have been of assistance.

Robert J. Freeman
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-----Original Message-----

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VIA EMAIL

OML-AO-5243
FOI-AO-18803

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, February 15, 2012 2:19 PM
To: 'Sean Abbott'
Subject: RE: Recording a Meeting

Dear Sean,

In brief response to your first question, I cannot advise you whether you may or should record the executive session. There is no law that prohibits it. There are folks who have recorded executive sessions and/or disclosed what was discussed during executive sessions – see the following advisory opinion:

http://www.dos.ny.gov/coog/otext/o4530.html

Also, please take a look at online advisory opinions under "E" for Executive Session, Claim of Confidentiality Regarding, and Executive Session, Disclosure of Discussion After.

In short, whether it is a wise idea to record executive session discussions, or to disclose what was said in executive session is not for me to say; however, you should be aware of the surrounding issues expressed in those opinions noted above.

And, if you were to make a recording of an executive session, because you are a board member the recording would become a record of the Library, subject to FOIL, and required to be disclosed/permitted to be withheld pursuant to the Freedom of Information Law.

In response to your second question, the pertinent section sets forth, in part, as follows:

"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." (Section 103[d][1].)

The ability to record a public meeting is in no way limited to non Board members.

Hope it helps,

Camille

Camille S. Jobin-Davis, Esq.
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[redacted]

FOIL-AO-05244

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Thursday, February 16, 2012 8:31 AM
To: 'Jessica Collier'
Subject: RE: question

Hi Jessica - -

It is assumed that the content of the power point presentation would be accessible under the Freedom of Information Law. If that is so, and if the content of the power point is scheduled to be discussed during an open meeting, yes, I believe that it should be disclosed in accordance with section 103(e) in advance of a meeting.

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

Bob

[redacted]bert J. Freeman
[redacted]ecutive Director
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[redacted]

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OML AO 5245

February 15, 2012

Donald G. Hobel
[redacted]

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

Dear Mr. Hobel:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to the Niagara County Legislature. Specifically, you described a practice of inviting "guests" to speak toward the beginning of a meeting, while scheduling public comments for the end of the meeting, which can result in holding public comments to as late as 10 p.m.

Rules of Order of the Niagara County Legislature indicate that public comments regarding agenda items are scheduled early in the meeting, and public comments related to the "General Welfare of the County" are last on the order of business.

To the extent that you raised questions identical to those addressed in OML-AO-4926, enclosed please find a copy of that opinion. We continue to stand by the opinions expressed therein.

With respect to the additional issue of how a public body determines who is a "guest" and who is a member of the public, while there is no law that we know of that would address this question, it is our understanding that there are occasions when public bodies invite certain people to address the body for educational or informational purposes, or for purposes of presenting a particular application, in which case they would not be treated as "members of the public." We would expect that a public body would issue invitations in a reasonable manner and have no basis for believing that the Niagara County Legislature is not.

To the extent that you raised questions regarding the Legislature's ability to appoint a sergeant at arms, we regret that we are unable to provide assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb

cc: Claude Joerg, Niagara County Attorney
Enclosure

OML-AO-05246

Jobin-Davis, Camille (DOS)

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, February 16, 2012 11:17 AM
To: Mossberg, David (DOS)
Subject: RE: Open Meeting Law Question

Hi Dave,

Although I don't remember Jim asking this particular question, my best advice is that the MAB is a public body subject to OML.

Based on my review of Unconsolidated Law Chapter 7, Section 4 (hope I'm not missing Section 8904?), the MAB consists of nine members appointed by the Governor who serve on rotating terms, it has powers and duties to prepare and submit regulations, standards and recommendations for approval to the Commission, it is required to develop medical education programs, review credentials and performance of physicians, among other various things.

Section 102(2) defines a 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."

Relevant, I think, is the decision rendered in MFY Legal Services v. Toia [402 NYS 2d 510 (1977)]. That case involved an advisory body created by statute to advise the Commissioner of the State Department of Social Services. In MFY, it was found that "[a]lthough the duty of the committee is only to give advice which may be disregarded by the Commissioner, the Commissioner may, in some instances, be prohibited from acting before he receives that advice" (id. 511) and that, "[t]herefore, the giving of advice by the Committee either on their own volition or at the request of the Commissioner is a necessary governmental function for the proper actions of the Social Services Department" (id. 511- 512).

Because the MAB was created by state law, and/or if it performs a required function in the process of decision making, I believe that its meetings would be subject to the Open Meetings Law. In that circumstance, even if its authority is advisory, if the decision maker or decision making body must, by law, consider the advice of the Advisory Board as a condition precedent to its ability to take action, I believe that the Board would be carrying out a governmental function and, therefore, would constitute a public body. If the MAB were not a creation of law and it performed no legally necessary function in the decision making process, it would not, based on this decision, be required to comply with Open Meetings Law.

While my search did not reveal any specific reference to the quorum requirement, the term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision states that:

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

Based on the foregoing, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, is present or videoconferencing in.

Like many of the cases involving committees and subcommittees but unlike the facts here, I believe the Jae case involved an advisory committee that was not a creature of statute.

It is my understanding that most entities created by statute are public bodies subject to the OML.

For additional analysis regarding advisory bodies created in statute, you may want to take a look at advisory opinions under "A" for "Advisory Body, Statutory".

Hope it helps and that you are well! Please let me know if you have further questions -

Regards,

Camille

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OML AO 5247

February 15, 2012

Lauritz Rasmussen, PE
[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. Rasmussen:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to a gathering of certain officials and employees of the City of Saratoga Springs.

Specifically, you described how the Mayor, the Deputy Mayor, the City Attorney, yourself as Building Inspector, the Assistant Building Inspector, the City Architect and a representative of a consultant met to discuss public safety issues. Various decisions were made, minutes were prepared, and you asked whether such minutes would be required to be made available pursuant to the Freedom of Information Law. You also asked whether minutes of meetings between the Building Inspector and individuals were likewise required to be made available upon request. In response to your request for the records the City denied access to meeting notes that were prepared in conjunction with meetings between (1) the City Attorney and the Deputy Mayor, and (2) the City Attorney, the Deputy Mayor, yourself and representatives of a consultant, on the grounds that such records were intra-agency and protected from disclosure pursuant to executive and attorney-client privileges.

In this regard, we note first that the Open Meetings Law applies to meetings of public bodies, and that §102(2) of the Law defines the phrase "public body" to mean:

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

Based 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. In our opinion, a gathering of two public officials and various public employees is not a gathering of a public body subject to the Open Meetings Law. Accordingly, there is no requirement that minutes of such meetings be kept.

With respect to records or minutes of gatherings such as those that you described, to the extent that they exist, we note that the Freedom of Information Law pertains to all agency records and defines the term "record" expansively in §86(4) 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."

Based on the foregoing, even though there may have been no obligation to prepare minutes, the notes or other documentation constitute "records" subject to rights of access conferred by the Freedom of Information Law.

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

Although the provision cited by the Records Access Officer as a basis for denial, §87(2)(g), potentially serves as a ground for denial of access, 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.

There is no provision in the Freedom of Information Law, or in any other applicable law of which we are aware that allows an agency to deny access to records based on "executive privilege".

On the other hand, when the attorney-client privilege is properly and justifiably asserted, records falling within the scope of the privilege are confidential and may be withheld under §87(2)(a) of the Freedom of Information Law concerning records that "are specifically exempted from disclosure by statute." When a third party is present, however, it is likely that the privilege is waived, and would not apply to records memorializing a conversation.

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

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

In short, if the content of the records memorialize a privileged conversation between an attorney and a client, the records would be confidential; however, if the records memorialize a conversation that was held between an attorney, a client and a third party, in our opinion, the privileged is waived and cannot serve as a basis for denying access to the record.

Accordingly, whether the records are required to be made available depends largely on the content of the records in accordance with §87(2)(g) and whether they memorialize discussions protected by the attorney-client privilege.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb
cc: Joseph Scala, City Attorney

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OML AO 5248

February 17, 2012

E-Mail

TO: Brian Lobel
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. Lobel:

This is in response to your request for an advisory opinion regarding application of the Freedom of Information and Open Meetings Laws to requests made to the Town of Mamaroneck. Specifically, you requested records "distributed by, and/or made by any participant, during any executive sessions" at the meeting held on September 7, 2011. The Town denied access, stating that such records "would not be available as it pertains to the Employment History of Corporations Leading to the Appointment or Employment of a Corporation." While you were primarily concerned with the denial of access to records, you also questioned the basis for the Board's entry into executive session to discuss such records.

Initially, 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. The rationale provided by the Town, as the basis for its denial of access, is not one of those that appears in the Freedom of Information Law, but rather one of the enumerated grounds for entry into executive session within the Open Meetings Law (§105[1][f]).

With respect to access to records that were apparently considered in conjunction with the Board's discussion of a corporate applicant for appointment or employment, there may be provisions of §87(2) of the Freedom of Information Law on which the Board could rely to deny access to records or portions thereof; however, we are not aware of any prohibition in law

against disclosure of such records merely because they were the subject of discussion at executive session.

With respect to the issue of the executive session, assuming that the motion for entry into executive session was, as above, to consider the employment history of a particular corporation and matters leading to the appointment or employment of a particular corporation, it is likely that the executive session discussion was appropriate.

In this regard, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. The language of the exception on which the Town Board appeared to rely in this instance, §105(1)(f) of the Open Meetings Law, permits 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..."

Again, assuming that the discussion was limited to the topic articulated, we believe that there was a valid basis to hold an executive session.

We hope that we have been of assistance.

RJF:RC:sb
cc: Town Board

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FOI-AO-18812
OML-AO-5249

February 17, 2012

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 Mr.:

This is in response to your request for an advisory opinion pertaining to a school board's ability to edit a videotape of a public meeting, and our impressions concerning a policy relating to broadcasting and taping school board meetings.

In this regard, we note that there is no law that we know of that would require a school board or any other public body to videotape or otherwise record its meetings. Accordingly, this will confirm the advice provided to you by General Counsel to the New York State School Boards Association, that there are no known restrictions or requirements based in law that govern the editing of such recordings.

You also asked whether Arts and Cultural Affairs Law §57.25 would govern the retention and disposition of recordings made by the board, and in response we point out that Records Retention and Disposition Schedule ED-1 governing records maintained by school districts provides in pertinent part as follows:

"3.[2] **Recording of voice conversations**, including audio tape, videotape, stenotype or stenographer's notebook and also including verbatim minutes used to produce official minutes and hearing proceedings, report, or other record

a. Recording of meeting of public or governing body or board, committee or commission thereof:

RETENTION: 4 months after transcription and/or approval of minutes or proceedings

NOTE: Videotapes of public hearings and meetings which have been broadcast on local government public access television are covered by item no. 314, below.

NOTE: Appraise these records for historical significance prior to disposition. Audio and videotapes of public hearings and meetings at which significant matters are discussed may have continuing value for historical or other research and should be retained permanently. Contact the State Archives for additional advice on the long-term maintenance of these records.

b. Recording other than of meeting of public or governing body or board, committee or commission thereof:

RETENTION: 0 after no longer needed…

33.[314] **Local government public access television records**

a. Videotape (or other information storage device) recording local government public access television program, where program is produced by a local government

Where program constitutes an important public meeting, significant event, important subject or documents local government policy making:

RETENTION: PERMANENT

NOTE: In order to ensure the continued preservation and availability of videotapes, local governments should consider using broadcast-quality tapes where possible. Those tapes should be periodically inspected and copied to newer tapes and formats. Contact the State Archives for additional advice.

Where program constitutes a routine meeting, event or subject:

RETENTION: 1 year

Where program is aired but **not** produced by a local government:

RETENTION: 0 after no longer needed

b. Viewer guide or other periodic listing of programs:

RETENTION: 1 year

NOTE: Appraise these records for historical significance prior to disposition. Records with historical value should be retained permanently. The State Archives recommends that local governments retain a sampling of these records on a monthly, seasonal or other periodic basis.

c. Program files on local government cable television programs:

RETENTION: 6 years" (Revised 2004.)

For further information regarding application of the Retention Schedule, please contact the New York State Archives or the State Archives' Regional Advisory Officer in your region.

With respect to the proposed policy concerning broadcasting and taping board meetings, please be advised that while public bodies are not required to record or broadcast meetings, they are now required by law to allow meetings to be photographed, broadcast, webcast or otherwise recorded and/or transmitted by audio or video means. A 2011 amendment to §103 of the Open Meetings Law states that open meetings:

> "shall be open to being photographed, photographed, broadcast, webcast, or otherwise recorded and/or transmitted by audio or video means." (§103[d][1].)

Subparagraph [d][2] further provides that

> "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."

The link below is to the model rules that the Committee has prepared for consideration by local governments.

Prior to codification of the public's ability to record public meetings, but relevant to the proposed policy that you submitted, the Appellate Division unanimously affirmed a decision which annulled a resolution adopted by a board of education prohibiting the use of tape recorders

at its meetings and directed the board to permit the public to tape record public meetings of the board [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924 (1985)]. In so holding, the Court stated that:

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

Further, 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, and the recent amendment to the Open Meetings Law, we believe that any person may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process.

With respect to the requirement that the Board and the public be informed in advance of a meeting of the intent to record, we note that the Court in Mitchell referred to "the unsupervised recording of public comment" (id.). In our view, the term "unsupervised" indicates that no permission or advance notice is required in order to record a meeting, and it is clear from the language of §103[d] that a public body must allow recording.

Again, so long as a recording device is used in an unobtrusive manner, a public body cannot prohibit its use by means of policy or rule. Moreover, situations may arise in which prior notice or permission to record would represent an unreasonable impediment. For instance, since any member of the public has the right to attend an open meeting of a public body (see Open Meetings Law, §100), a reporter from a local radio or television station might simply "show up", unannounced, in the middle of a meeting for the purpose of observing the discussion of a particular issue and recording the discussion. In our opinion, again, as long as the use of the

recording device is not disruptive, there would be no rational basis for prohibiting the recording of the meeting, even though prior notice would not have been given. Similarly, often issues arise at meetings that were not scheduled to have been considered or which do not appear on an agenda. If an item of importance or newsworthiness arises in that manner, what reasonable basis would there be for prohibiting a person in attendance, whether an employee, a member of the public or a member of the news media representing the public, from recording that portion of the meeting so long as the recording is carried out unobtrusively? In our view, there would be none.

In sum, we do not believe that a person may be required to obtain permission or provide advance notice of the intent to record an open meeting, so long as the recording device is used in a manner that is not disruptive.

We hope that this is helpful.

CSJ:sb
cc: Auburn City School Board President, Karol Soules
Model Rules

FOI-AO-18814
MLU AO-05250

Jobin-Davis, Camille (DOS)

From: Jobin-Davis, Camille (DOS)
Sent: Friday, February 17, 2012 4:05 PM
To: [redacted]
Subject: Freedom of Information Law - draft minutes

Dear Mr. Clark,

We are in receipt of your request for assistance with respect to access to a copy of draft minutes for the Fire District Commissioners meeting.

The following links are to advisory opinions that address the exact issues that you are faced with -- they apply directly to the questions that you raise as a Commissioner on the Board:

http://www.dos.ny.gov/coog/otext/o3284.htm

http://www.dos.ny.gov/coog/ftext/f15857.htm

Please note that, in sum, there is no basis in law to deny access to draft minutes, there is no basis in law to prohibit the dissemination of records that are required to be made available pursuant to the Freedom of Information Law, and I agree, there is really no good reason to require a board member to submit a written request for a copy of the draft minutes in anticipation of the meeting at which the minutes are to be examined.

Please feel free to share the advisory opinions and this email as you wish.

Should you have any further questions, please let me know.

Camille

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

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FOIL-AO-05251

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Thursday, February 23, 2012 8:35 AM
To: [redacted]
Subject: RE: Executive Session Question

Anyone may request an executive session, but an executive session may be held only after the introduction of a motion by a member of a public body and approval of the motion by an affirmative vote of a majority of the members of that body. Further, the subjects that may properly be considered during an executive session are specified and limited in section 105(1) of the Open Meetings Law.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
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Suite 650
99 Washington Avenue
Albany, NY 12231
[redacted]one: (518)474-2518
Fax: (518)474-1927
Website: www.dos.state.ny.us/coog/index/html

[redacted]

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OML AO 5252

February 24, 2012

Paul Forcella
[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. Forcella:

This is in response to your request for assistance with respect to certain proceedings of the Henrietta Town Board and specifically, with respect to your interactions with the Supervisor.

First, please know that this office is authorized to provide legal advice and counsel regarding application of the Open Meetings Law, and in this regard, we hope that our advisory opinions are educational and persuasive.

More to your concerns, we note that 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)]. 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.

In the context of your inquiry, if the allegations that you make are accurate, and the presiding officer permits those who wish to speak to do so for a particular period of time, each person who wishes to do so must, in our opinion, be given an equal opportunity to do so. Similarly, if positive comments concerning the operation of Town government are permitted, we believe that there must be equal opportunity to enable those in attendance to offer negative or critical comments.

Finally, and from our perspective, while the Supervisor may preside over Town Board meetings, it is questionable whether he may validly determine unilaterally whether the subject matter of comment proposed by a person desiring to speak involves Town business. He is but one member of the Town Board and we believe that the Town Board, if necessary, should determine by means of a majority vote of its total members if there is a question or disagreement regarding the length of time that a person is permitted to speak. We believe that the Town Board in that circumstance should determine whether the subject may be raised, rather than the Supervisor reaching a determination alone. It is also noted that §63 of the Town Law states in part that "Every act, motion or resolution shall require for its adoption the affirmative vote of all the members of the town board."

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb
cc: Town Supervisor

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OML-AO-5253

February 28, 2012

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:

As you are aware, I have received your letter and the materials relating to it, and I hope that you will accept my apologies for the delay in response.

The issue involves the authority of the City of Buffalo Common Council to conduct its organizational meetings in private.

By way of background, section 3.2 of the City Charter states in relevant part that: "The common council shall consist of nine district council members. A president of the common council shall be elected from amongst the members at the organizational meeting for a two (2) year term." Notice of the organizational meeting conducted in December was given by the City Clerk, indicating that the meeting would be held at Francesca's Restaurant at a specific time. In response to an opinion sought by the Council's Majority Leader concerning the status of the meeting, Acting Corporation Counsel David Rodriguez advised that the notice was "nothing more than a courtesy notice of a meeting, which did not need to comport with the Open Meetings Law because of its exemption from said law as provided in Section 108 of the Public Officer's [sic] Law…" The Acting Corporation Council noted that "all members are Democrats or adherents to the Democratic Party…"

From my perspective, based on the language of the law and judicial precedent, the organizational meeting should have been held in accordance with the Open Meetings Law. In this regard, I offer the following comments.

By way of background, the Open Meetings Law is applicable to meetings of a public body, such as the Common Council, and it was held more than thirty years ago that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" falling within the scope of that statute, even if there is no intent to take action, and irrespective of the manner in a gathering is characterized [Orange County Publications, Inc. v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)]. In brief, every meeting of a public body must be preceded by notice of the time and place given to the public and the news media pursuant to section 104 of the Open Meetings Law. Meetings must be conducted open to the public, except to the extent that an executive session may properly be held based on the provisions of section 105(1)(a) through (h).

As suggested by Acting Corporation Counsel, a second vehicle potentially enables a public body to meet in private. Section 108 of the Open Meetings Law pertains to "exemptions", and when an exemption applies, the Open Meetings Law does not; it is as though the Open Meetings Law does not exist.

The exemption to which he referred, subdivision (2) of section 108, pertains to "deliberations of political committees, conferences and caucuses" and states that:

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

For two reasons, I do not believe that the organizational meeting could validly have been conducted as a closed political caucus exempt from the coverage of the Open Meetings Law.

First, while a political caucus that includes the members of a public body may be held to discuss any subject, the ability to do so in private is limited to discussions and deliberations. I do not believe that the members of a public body have the ability to vote or take action in a manner that binds the public body during a closed political caucus. Stated differently, the authority to vote or take final and binding action may occur only at a meeting held in accordance with the Open Meetings Law.

Significant is the second sentence of section 3-2 of the City Charter. To reiterate, that provision states that: "A president of the common council shall be elected from amongst the members at the organizational meeting…" Because a president "shall be elected…at the organizational meeting", it is clear that action must be taken at that meeting. It is equally clear in my view that action may only be taken at a meeting held pursuant to the Open Meetings Law.

Any other conclusion would enable members of a majority party on the Common Council to take binding action in private, without providing notice of its meeting to minority party members or the public.

Second, the only decision of which I am aware concerning the application of the exemption regarding political caucuses when all of the members of a legislative body are members or adherents of the same political party involved the Common Council of the City of Buffalo. As I interpret that decision, when there is unanimity of political party membership in a legislative body, the authority to conduct a closed political caucus is limited to discussions of political party business. The exemption from the Open Meetings Law concerning political caucuses cannot be invoked when discussions or deliberations involve matters of public business.

In Buffalo News v. City of Buffalo Common Council, 585 NYS2d 275 (1992)], the issue involved a political caucus held by a public body consisting solely of members of one political party, and the court concentrated on the expressed legislative intent regarding the exemption for political caucuses, as well as the statement of intent appearing in §100 of the Open Meetings Law, stating that:

> "In a divided legislature where a meeting is restricted to the attendance of members of one political party, regardless of quorum and majority status, perhaps by that very restriction it
> would be fair to assume the meeting constitutes a political caucus. However, such a conclusion cannot be drawn if the entire legislature is of one party and the stated purpose is to adopt a proposed plan to address the deficit before going public. In view of the overall importance of Article 7, any exemption must be narrowly construed so that it will not render Section 100 meaningless. Therefore, the meeting of February 8, 1992 was in violation of Article 7 of the Open Meetings Law...
>
> "When dealing with a Legislature comprised of only one political party, it must be left to the sound discretion of honorable legislators to clearly announce the intent and purpose of future meetings and open the same accordingly consistent with the overall intent of Public Officers Law Article 7" (id., 278).

The court, however, continually referred to the term "meeting" and the deliberative process, not merely the act of "adopting" or taking action. In fact, the language of the decision in many ways is analogous to that of the Appellate Division in Orange County Publications, supra. Specifically, it was stated in Buffalo News that:

> "The Court of Appeals in Orange County (supra) also declared: 'The purpose and intention of the State Legislature in the present context are interpreted as expressed in the language of the statute and its preamble.' The legislative intent, therefore, expressed in Section 108, must be read in conjunction with the Declaration of Legislative Policy of Article 7 as set forth in its preamble, Section 100.

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonwealth will prosper and enable the governmental process to operate for the benefit of those who created it.
>
> "A literal reading of Section 108, as urged by Respondent, could effectively preclude the public from any participation whatsoever in a government which is entirely controlled by one political party. Every public meeting dealing with sensitive or controversial issues could be preceded by a 'political caucus' which would have no public input, and the public meetings decisions on such issues would be a mere formality. Such interpretation would negate the Legislature's declaration in Section 100. The Legislature could not have contemplated such a result by amending Section 108 and at the same time preserving Section 100" (id., 277).

Based on the foregoing, when a legislative body, such as the Common Council, consists of members of a single political party, to the extent that the caucuses are held to discuss public business, I believe that the Open Meetings Law would apply.

Since the election of a president involved a matter of public business, the exemption regarding political caucuses, in my opinion, would not have applied. On the contrary, in my view, action of that nature could only have been taken at a meeting held pursuant to the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:sb
cc:

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OML AO 5254 March 2, 2012

E-Mail

TO: Stephanie Kyle

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, except as otherwise indicated.

Dear Ms. Kyle:

We have received your request for an advisory opinion regarding application of the Open Meetings Law to meetings held by the Board of Trustees of the Mastics-Moriches-Shirley Community Library. Specifically, you wrote that on a Monday night you saw all five members of the Board meeting together in one of the meeting rooms of the library. You stated that you checked for notice of the meeting in the local papers and the public bulletin board, but were only able to locate notice of a series of board meetings which were to be held on Monday nights during October on the library's website and Facebook page. You posed several questions, most of which pertained to a general review of the Open Meetings Law with specific regard to notice requirements.

Counsel to the Library responded to your inquiry by stating that notice of the series of meetings was posted on the library's bulletin board and that notice was given to the library's newspapers of record, and that such notice, although not required to be published, was published in such newspapers, with the exception of notice for the very first meeting (copy attached). In this regard, we offer the following comments.

First, regarding the notice requirement under 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."

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

Second, if a series of meetings have been scheduled in advance to be held at particular times, the posting of a notice of a schedule of those meetings in a conspicuous public location, transmittal of that notice once to the news media and an online posting on the library's website would in our view satisfy §104 of the Open Meetings Law regarding those meetings. The only instances in which additional notice would be required would involve unscheduled meetings that are not referenced in the notice. And, while it is not necessary that a public body post notice of its meetings on its Facebook page, due to the fairly widespread use of Facebook as an information tool, we would not discourage the library from doing so.

Therefore, if, for instance, the Board of Trustees establishes that its meetings will be held on, for example, the first and third Monday of every month at 6:30 p.m. at the Library, and if notice containing that information is posted on a bulletin board and on the website continuously and transmitted once to the local news media, we believe that the Board would satisfy the notice requirements imposed by the Open Meetings Law. Again, the only additional notice would involve unscheduled meetings. We point out, too, that although notice of meetings must be given

to the news media, there is no requirement that the news media print or publicize that a meeting will be held.

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

Further, specifically in regard to emergency meetings, 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:
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> "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.

Finally, the link below is information from our website regarding the Open Meetings Law for further reference. We hope that we have been of assistance.

cc: Kevin Seaman, Esq.
Chair, Board of Trustees of the Library

CSJ:sb

http://www.dos.ny.gov/coog/Right_to_know.html#oml

FOIL-AO-05255

Jobin-Davis, Camille (DOS)

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, March 01, 2012 4:02 PM
To: 'Sue McCrory'
Subject: RE: Open Meetings Law Question

Hi Sue,

Thanks, hope you are well too. My kids are enjoying a day off from school today with all the snow, but it seems likely that it won't last very long.

With respect to the adjournment to obtain legal advice, I'm steering you to online OML advisory opinions under "A" for "Attorney-client privilege", such as the following: http://www.dos.ny.gov/coog/otext/o4622.html Lots of times, I think public bodies can't quite figure out what the motion should be, but take a look at the following for guidance on the actual motion - the paragraph "While it is not my intent...".

The wrinkle that you have added, that the planning consultant was invited into the meeting, makes me ask whether the attorney-client privilege was waived, and I am not sure of the answer. If the consultant were considered part of the Village, and therefore part of the "client" then the privilege would not be waived. The nature of the relationship between the consultant and the Village would be important, and I cannot say for sure whether the answer depends on whether the consultant still has contractual obligations to the village. Even if you were to provide factual information regarding this relationship, because of my unfamiliarity with the volume of case law regarding the attorney-client privilege, I'm afraid I'm not going to be very helpful.

[redacted]mille

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
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[redacted]

FOI-AO-18831
OML-AO-05257

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Monday, March 05, 2012 5:12 PM
To: 'supervisor@townofstanford.org'
Subject: Town of Stanford Ethics Committee procedures
Attachments: article.ethics boards.doc

Dear Supervisor Stern:

I have received your questions relating to the Town of Stanford Ethics Committee procedures.

From my perspective, ethics entities are clearly subject to both the Freedom of Information and Open Meetings Laws. Because that is so, the elements of the procedures that appear to require the confidentiality of records or closing all meetings are, in my view, inconsistent with law and, therefore, invalid. I am not suggesting that all records and meetings of the Ethics Committee must be open to the public, but rather that provisions requiring confidentiality in blanket fashion are inappropriate, for some aspects of the Committee's meetings and records may, by law, be open and accessible. Attached is an article that I prepared for the Municipal Law Section of the New York State Bar Association that considers those statutes in relation to ethics entities in detail. I believe that the article can serve as a guide in terms of disclosure.

The other issue that gives rise to concern relates to the authority of the Ethics Committee, which appears in some portions of the procedure to be broad and exclusive. I am not an expert with respect to that issue, and it is suggested that you confer with an attorney at the Association of Towns in an effort to ascertain the proper scope of authority of an ethics entity.

I hope that I have been of assistance.

Robert J. Freeman
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Phone: (518)474-2518
Fax: (518)474-1927
Website: www.dos.state.ny.us/coog/index/html

FOI-AO-18831
OML-AO-05257

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Monday, March 05, 2012 5:12 PM
To: 'supervisor@townofstanford.org'
Subject: Town of Stanford Ethics Committee procedures
Attachments: article.ethics boards.doc

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I hope that I have been of assistance.

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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML AO 5258

March 8, 2012

E-Mail

TO: Kelly Myers

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. Myers:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to meetings of the Saugerties Town Board. You complained of "a consistent pattern of failure to adhere" to the Open Meetings Law, including lack of proper notice of meetings, insufficient minutes, failure to televise meetings in keeping with Board practice, and a failure to post minutes on the Town's website, among other issues. Supervisor Helmsmoortel responded to your complaints (copy attached) by indicating that adequate notice was provided, attaching copies of notices of meetings, and referring questions regarding minutes to the Town Clerk.

Initially, we 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 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.

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.
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> "Moreover, given the short notice provided by respondents, it should have been apparent that the posting of a single notice in the School District offices would hardly serve to apprise the public that an executive session was being called...

> "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:
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> "Fay Powell, then president of the board, began contacting board members at 4:00 p.m. on June 27 to ask them to attend a meeting at 7:30 that evening at the central office, which was not the usual meeting date or place. The only notice given to the public was one typewritten announcement posted on the central office bulletin board...Special Term could find on this record that appellants violated the...Public Officers Law...in that notice was not given 'to the extent practicable, to the news media' nor was it 'conspicuously posted in one or more designated public locations' at a reasonable time 'prior thereto' (emphasis added)" [524 NYS 2d 643, 645 (1988)].

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

Further, §62(2) of the Town Law refers to "special meetings" of town boards and states that: "The supervisor of any town may, and upon written request of two members of the board shall within ten days, call a special meeting of the town board by giving at least two days notice in writing to members of the board of the time when and the place where the meeting is to be held." No reference is made to the subject matter to be considered.

With respect to the minutes, because the Town 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 Town 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. Most importantly, minutes must be accurate.

Minutes that indicate that a recommendation was adopted, without any information about the content or substance of the recommendation, for example, 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 recommendations that were adopted or incorporating them into the minutes in most instances is appropriate.

While not required by law, posting minutes online is a valuable courtesy and a logical step for those public bodies with functioning websites. In our opinion, not only does so doing save the Town Clerk administrative time, it permits the public to access such information without delay. Similarly, while televising meetings is a valuable service, there is no requirement to do so in law.

Finally, with respect to issues involving notice of executive sessions, and appropriate motions, we reiterate that notice of the time and place of a meeting is required to be provided in accordance with §104, as set forth above. Attached is an advisory opinion regarding appropriate notice language for meetings that are held for the sole purpose of having a discussion that may be held in executive session.

We hope that this is helpful.

CSJ:sb
cc: Town Clerk

Former Town Supervisor Helmsmoortel at Town (please forward)

http://www.dos.ny.gov/coog/otext/o3339.htm

STATE OF NEW YORK
DEPARTMENT OF STATE
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OML-AO-5259
FOI-AO-18834

March 8, 2012

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:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to meetings of the Board of Education of the Edwards-Knox Central School District. Specifically, you questioned whether the Board could enter into executive session without articulating grounds for doing so, and whether grounds that were later included in the minutes were sufficient. You asked whether minutes of executive sessions must be prepared, and finally, sought advice regarding what may be an incomplete response to a request for records made pursuant to the Freedom of Information Law.

The District responded (copy attached), indicating that subsequent to the September 6th meeting at which the motion at issue was made, the entire board, including three newly elected members, received training from the Board's attorney, and that the Open Meetings Law "has been followed since." Our review of the written materials you submitted indicates that there was a motion to enter executive session on September 19th for "discussion of individual participants and CSE", subsequent to a presentation by the school attorney regarding the role and responsibilities of the School Board.

In this regard, we note that the Open Meetings Law (copy attached) 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. In addition, the motion must be specific enough so that the public is informed that the topic or topics for discussion fall under one of the permitted options.

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

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

Based upon the foregoing, 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 Board of Education."

As another example, 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 a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion,

discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

Due to the presence of the term "particular" in §105(1)(f), we believe that a discussion of "employment history" may be considered in an executive session only when the subject involves a particular person or persons.

It has been advised that a motion involving §105(1)(f) should be based on its specific language. For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in 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.

In January of this year, the Appellate Division, rendered a decision regarding the specificity of motions for entry into executive session. In Zehner v. Board of Education of Jordan-Elbridge (copy attached), the court required a public body to "identify with particularity the topic to be discussed, … since only through such identification will the purposes of the Open Meetings Law be realized." The school board had entered into executive session in three separate scenarios, based on a recitation of the statutory language in §105. Conforming the holding in Daily Gazette, the court determined that "merely regurgitating" the statutory language was insufficient. In one instance, the court held that when the board entered into executive session to discuss "matters related to the appointment or employment of a particular person," it must identify the matter as part of the process of searching for a new superintendent.

Accordingly, we encourage board members to share more information about their intended topic(s) for discussion in executive session in a manner that clarifies that the discussions are within the parameters of the law, and to protect individuals from what might be an unwarranted invasion of personal privacy and/or the government's ability to function. A motion involving §105(1)(f) should be based on its specific language, and if the discussion will pertain to candidates for a certain vacant position, for example, it should contain reference to such position. If the discussion is limited to potential disciplinary action against a particular employee, identifying the person's title, in our opinion, would not be necessary. Such motions 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.

With respect to your questions regarding minutes of executive sessions, please note that although §106(2) refers to minutes of executive session when action is taken, only in rare instances may a board of education take action during an executive session. As a general rule, a

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

Finally, with respect to the concern that the District may not have provided all records that were requested pursuant to the Freedom of Information Law, we note that when an agency fails to respond or to respond in full to a request for records, the law provides an appeals process. See the attached "Explanation of Time Limits." Further, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." It is emphasized that when a certification is requested, an agency "shall" prepare the certification; it is obliged to do so.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb
Enclosure: Open Meetings Law

cc: Teresa Hogle, Board of Education President
Suzanne Kelly, Superintendent of Schools

OML-AO-05260

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Monday, March 12, 2012 10:49 AM
To: 'Robert Godlewski'
Subject: RE: Open Meeting

If I understand your question correctly, it appears to relate to a belief that the public has the right to speak or participate during meetings. That is not required by the Open Meetings Law. Although a public body, such as a town board, may permit the public to speak during its meetings, it is not obliged to do so. Many public bodies, however, choose to authorize limited public participation, and when they do, it has been advised that they adopt reasonable rules that treat members of the public equally.

The term "meeting" has been construed by the courts to include any gathering of a quorum of a public body for the purpose of conducting public business collectively, as a body. Assuming that an agenda meeting involves a quorum of the board, it is subject to the Open Meetings Law. If that is so, it must be preceded by notice and conducted open to the public, unless and until there is a basis for entry into executive session in accordance with section 105 of the Open Meetings Law. If the board does not want to permit the public to speak or participate during agenda sessions, that is its choice. A majority of the board could, by resolution, alter that practice.

I hope that I have been of assistance.

Robert J. Freeman
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Committee on Open Government
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Website: www.dos.state.ny.us/coog/index/html

[redacted]

OML-AO-05261

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Monday, March 12, 2012 10:40 AM
To: 'Cathie W. Gehrig'
Subject: RE: Topic for Executive Session

First, the term "personnel" does not appear in any of the grounds for entry into executive session. Second, the language of the so-called "personnel" provision, section 105(1)f), is limited and precise. 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, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

It seems unlikely that an executive session could properly be held in the context of the situation that you described. Further, even if section 105(1)(f) is applicable, the board would not be required to conduct an executive session. It could choose to do so, but would not be obliged to do so.

I hope that I have been of assistance.

[redacted]bert J. Freeman
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[redacted]

OML-AO-05202

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Tuesday, March 13, 2012 1:50 PM
To: 'Angela Norris'
Subject: RE: Executive Session Question
Attachments: o4643.wpd

Dear Ms. Norris:

Assuming that the issue involves policy - - consideration of the manner in which public monies may be allocated, or perhaps whether art is important to the education of our kids - - there would be no basis for conducting an executive session. On the other hand, insofar as a discussion focuses on "a particular person" in relation to his or her performance, an executive session would be permissible.

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

I hope that I have been of assistance.

[redacted]bert J. Freeman
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[redacted]

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

Committee Members

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Robert J. Duffy
Robert L. Megna
Cesar A. Perales
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OML AO 5263

March 15, 2012

E-Mail

TO: Lynn Teger

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. Teger:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to the Haverstraw Town Board. Specifically, you inquired whether notice of an emergency meeting was provided in compliance with law, and whether it is permissible to hold a meeting at 10 a.m., "when most people could not attend". In response to your request, the Supervisor submitted information about the necessity for holding an emergency meeting to set the town tax rates and his understanding of the facts (copy attached).

In this regard, we note that §104 of the Open Meetings Law pertains to notice and states as follows:

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

Please note that there is no requirement that notice of a meeting be published in a newspaper; whether a newspaper chooses to print notice of a meeting is within the discretion of its management.

With respect to the timing of the meeting, 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. Accordingly, if it was necessary to hold the meeting on an expedited basis in order to meet the time constraints associated with producing the tax bills, and notice of the meeting was given to the media, and both posted online and in the designated locations(s) "at a reasonable time prior thereto", it is our opinion that the meeting was held in accordance with law.

Finally, with respect to the reasonableness of scheduling a public meeting at 10 a.m. on a weekday, we note that while that statute does not indicate precisely when meetings must or must not be held, it is reiterated that every law must in our opinion be implemented in a manner that gives reasonable effect to its intent. While a meeting held during the business day may not be appropriate for some, in our opinion it is not necessarily an unreasonable time to schedule a public meeting.

In the one case that we are aware of in which a court considered the question of whether a certain time of day was unreasonable for purposes of holding a public meeting, it was stated that:

"It is...apparent to this Court that the scheduling of a board meeting at 7:30 a.m. -- even assuming arguendo that such meetings were properly noticed and promptly conducted -- does not facilitate attendance by members of the public, whether employed within or without the home, particularly those with school age or younger children..." (Matter of

Goetchius v. Board of Education, Supreme Court, Westchester County, New York Law Journal, August 8, 1996).

We reiterate our opinion that it is not necessarily unreasonable to hold a meeting during the business day.

We hope that this is helpful.

CSJ:sb
cc: Supervisor Phillips

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OML AO 5264

From: Jobin-Davis, Camille (DOS)
Sent: 21, 2012 2:52 PM
To: [redacted]
Subjec Freeman - how do we advertise this meeting?
Attachments: notice.doc

Helen,

In follow up to our conversation, the following links are to advisory opinions that I believe you will find helpful:

http://www.dos.ny.gov/coog/otext/o4248.htm

http://www.dos.ny.gov/coog/otext/o2438.htm (The gathering that you discussed can be differentiated from this gathering, I believe, because there is no intent "to finalize" or make a determination, the boards will not discuss information collectively as boards until they return to their own jurisdictions, and that they are there only to collect/share information.) (Please note that the statutory language regarding notice required for a public meeting in this opinion is out of date.)

Please note that if a board were to behave in a manner that suggested they were discussing or conducting public business as a board, during the course of the gathering that you described, the Open Meetings Law would apply.

Although I was unable to locate an opinion that suggests language for notice of such a meeting, that ach town and village board could give, this will confirm my suggestion that your committee advise each town and village board to provide notice of the gathering in accordance with the Open Meetings Law (posted in the designated locations, placed online and given to the news media) so as to alleviate any concerns. Attached is a document that outlines the current requirements for notice of a public meeting.

Hope it helps.

Camille

From: dos.sm.Coog.InetCoog
Sent: Wednesday, March 21, 2012 2:32 PM
To: Jobin-Davis, Camille (DOS)
Subject: FW: Robert Freeman - how do we advertise this meeting?

From: Webmail hkchase [mailto:hkchase@isp.com]
Sent: Tuesday, March 20, 2012 6:10 PM
To: dos.sm.Coog.InetCoog
Cc: Carol O'Beirne; Peter Manning
Subject: Robert Freeman - how do we advertise this meeting?

Robert Freeman - Thank you for being the person we all go to when we have a question about "open government."

I left a message today to have a staff person call me back - the day has now gone by. So, I will tell you via e-mail about our concern.

Town Board-appointed or Village Board-appointed Representatives from seven municipalities came together over three years ago to form a Central Catskills Collaborative, one purpose of which was to prepare an application to nominate a section of State Route 28 as a scenic byway. We are at the point when we are now seeking Board approval of our Corridor Management Plan.

The Towns of Andes and Middletown and the Villages of Margaretville and Fleischmanns have given their approval. The Towns of Shandaken, Olive, and Hurley have questions that they have asked the Collaborative to consider. We have answered all their concerns and want to bring the entire governing bodies together to re-present our revised Corridor Management Plan. We want there to be conversation among the Board members of both the Delaware contingent who have already approved the Corridor Management Plan, the Ulster Board members who voiced additional concerns, and the Collaborative members (all of whom were appointed by the respective Town Boards or Village Boards) who have done the immense amount of work getting us to this point and who can answer all the concerns, along with our Regional Planner, who has been guiding us through this project.

We want to have this gathering with as many Board members as we can get (so that everyone is on the same page) - and we are aware of the Open Meetings rules. We had an earlier meeting after we presented our first draft of the Corridor Management Plan, but we were limited to only two Town Board or Village Board members in attendance. All our meetings are open and notice given, but we had not given two weeks' notice to the public of this specific meeting.

How do we advertise this next meeting? We have a tentative date set for the morning of Thursday, April 19. We will be "lobbying" our own Board members to urge them to attend, since we are now at the end of this part

of the project and we would like to tie it up. The public has had the past three years to voice its broader concerns; we now want the Board members to feel that their very specific concerns have been met.

I hope to hear from you soon. Thanks

[a copy of this e-mail has also been sent to our current Central Catskills Collaborative member/group leader and to our regional planner]

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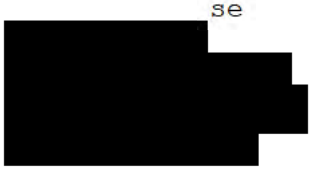
[redacted]se



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OML-AO-5265

March 22, 2012

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 :

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to gatherings of the Athletic Council of one of the eleven sections of the NYS Public Health School Athletic Association, Inc. (the Association).

You indicated that while the Association is administered by a board of directors known as the Central Committee, each of the eleven geographical sections of the Association is governed by a Section Athletic Council. Each Athletic Council consists of the four members of the Central Committee that represent the section and representatives of each league in the section elected by the league or its member schools. Each of the eleven sections was incorporated in 1978, and each of the councils has authority, among other powers, to "impose and enforce a suitable penalty upon any member school which violates the constitution, bylaws, rules, regulations, sports standards, or code of ethics of the association or section." Appeals from Athletic Council decisions may be taken to the Central Committee, after which they may be challenged in court, as reflected by case law. You asked whether the Athletic Councils are subject to the Open Meetings Law.

In this regard, §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."

As set forth in OML-AO-4029 (attached), this will confirm our opinion, based on the facts set forth therein, that the governing body of the Association, the Central Committee, is a public body subject to the Open Meetings Law. If our assumption is correct, that the Central Committee conducts public business and performs a governmental function, then section Athletic Councils, vested with authority to adopt constitutions, bylaws and regulations, and to discipline members and their students, would, in a similar manner, also fall within the definition and constitute public bodies subject to the Open Meetings Law.

With respect to the responsibilities of the Athletic Councils and compliance issues raised in your correspondence and that of Mr. John McGowan, representing the interest of Section III of the Association (December 9, 2011, copy attached), we note that the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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.

According to the facts presented, that an executive session was held "to assess penalties" and "to discuss the school district's report, weigh the seriousness of the reported violations particularly in conjunction with prior reports submitted by the same school district of a rule violation by its football program, and what, if any, penalty should be imposed", it is likely that there was no basis for entry into executive session.

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.

If the duties of the Athletic Council include judicial or quasi-judicial functions, for example, gatherings held for those purposes would be subject to §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 of if a public body such as an Athletic Council deliberates within its judicial or quasi-judicial function, we believe those deliberations are exempt from the coverage of the Open Meetings Law in accordance with §108(1). Similarly, deliberations of the Central Committee may be exempt.

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 Athletic Council 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.

In an effort to provide assistance understanding the requirements of the Open Meetings Law with respect to notice of public meetings, the necessity for holding emergency meetings, and minutes, we have attached three advisory opinions.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

By: Chet Godley
Legal Intern

CSJ:CG:sb
cc: John G. McGowan
Enclosures

FOIL-AO-05266

Jobin-Davis, Camille (DOS)

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, March 28, 2012 11:56 AM
To: 'Marilyn McIntosh'
Subject: RE: Open Meetings Law

Marilyn,

In response to your voice mail, please note that the language in Education Law section 260-a regarding cities having a population of one million or more is a qualifier only for committee and subcommittee meetings, not the board of trustee meetings. In other words, this will confirm that section 260-a requires meetings of boards of trustees of free association libraries to be held in accordance with the Open Meetings Law, regardless of whether they are in cities of a certain size.

Camille

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[redacted]

OML-AO-05267

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Monday, April 02, 2012 12:05 PM
To: [redacted]
Subject: videotaping

Dear Mr. Vescera:

I have received your email inquiry. It has been advised that a member of a public body has the same right to record an open meeting as any member of the public. That being so, I believe that a member's recording device may be used in the same manner and the same general location as similar devices used by other persons who attend and record open meetings.

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FOI-AO-18859
OML-AO-05268

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Wednesday, April 04, 2012 9:54 AM
To: 'supervisor@townofstanford.org'
Subject: RE: question concerning Stanford ethics committee procedures with attachment

Dear Supervisor Stern:

I have received your note and the Town of Stanford Proposed "Ground Rules of Procedure." Having reviewed the proposal, I offer the following brief remarks.

Section 2 indicates that the Ethics Committee would have "sole authority to determine the merit for future investigation." I question whether an entity other than the Town Board, the governing body of the municipality, should or can have "sole authority" to engage in a particular function.

Does the phrase "right to summon" in section 3 include the ability to subpoena persons or things? I question whether such authority would exist absent a law conferring such power.

Section 4 refers to information being "handled in a confidential manner", that all Committee meetings would be closed, that deliberations are "excluded" from the Open Meetings Law because they would involve a "personnel matter." In short, statutes such as the Freedom of Information and Open Meetings Laws determine what is public and what is not. Insofar as the rule is inconsistent with those statutes, and I believe that it is inconsistent in a variety of areas, it would be invalid. The article sent to you previously offers guidance concerning the ability to withhold records or portions of records or engage in private discussions based on the direction provided in statutes.

The same consideration is offered with respect to section 5, and I note that a recent judicial decision involving an ethics entity confirmed the point offered in the preceding paragraph.

With respect to section 6, it is noted that §87(3)(a) of the Freedom of Information Law has long required that each agency maintain a record indicating the manner in which each member of a public body cast his/her vote.

Despite the brevity of the foregoing, I hope that I have been of assistance.

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FOI-AO-18861
OML-AO-05269

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Wednesday, April 04, 2012 12:08 PM
To: 'Stacy C'
Subject: RE: FOIL

Dear Stacy C:

I have received your correspondence, which involves an inaccuracy in minutes of a meeting of the Babylon Town Board. You wrote that the tape recording of the meeting clearly indicates that a certain word is inaccurately expressed in the minutes. That being so, you requested "that 'they' review the tape and to make the necessary correction." Because you have received no response to that request, you asked that I "confirm that constitutes a denial" that can be appealed.

In my view, a denial of access occurs when an applicant requests a record, and the request is denied in whole or in part. The situation that you described does not involve a denial of access to a record. Consequently, I do not believe that you have the right to appeal pursuant to the Freedom of Information Law. That, however, does not preclude you from attempting to encourage a correction in the minutes. If you have not done so already, it is suggested that you contact the Town Clerk, for section 30 of the Town Law specifies that the clerk has the responsibility to prepare minutes. Inherent in that responsibility, in my view, is the duty to ensure that the minutes are accurate.

I hope that I have been of assistance.

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[redacted]

FOI-AO-18864
OML-AO-05270

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Monday, April 09, 2012 3:06 PM
To: 'Barbara Boucher'
Subject: RE: County Democratic Committee

A political party is not subject to either the Freedom of Information Law or the Open Meetings Law. That being so, you may do with your minutes as you see fit, in accordance with your own rules or by-laws.

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[redacted]

FOI-AO-18867
OML-AO-05271

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Tuesday, April 10, 2012 8:27 AM
To: 'Cris Harlander'
Subject: RE: Rules on open government concerning organizations that receive government money

The receipt of government funding does not bring an entity within the coverage of the Open Meetings or Freedom of Information Laws. In short, those laws generally apply to governmental entities. However, records maintained by governmental entities that pertain to the recipients of funding are subject to rights of access conferred by FOIL.

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[redacted]

FOI-AO-18868
~~DOS~~-AO-05272

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Wednesday, April 11, 2012 8:37 AM
To: 'K.Keirn-Assistant Chief'
Subject: RE: Executive sessions

The Open Meetings Law does not specify who is responsible for preparing minutes. Assuming, however, that the Board of Commissioners properly conducted an executive session and made a decision during the executive session, section 106 of that law requires that minutes be prepared indicating the nature of the action taken, the date and the vote of the members, and that the minutes must be made available, to the extent required by the Freedom of Information Law, within one week of the executive session. Further, section 87(3)(a) of the Freedom of Information Law requires that a record be maintained that indicates the manner in which each member cast his/her vote.

I hope that I have been of assistance.

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[redacted]

FOI-AO 18870
OML-AO-05273

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Monday, April 16, 2012 3:20 PM
To: 'Charlotte and Frank'; Carol Hall; George Aubin; Ray Walker; Torre J Parker Lane; [redacted] Thomas Seifert
Subject: RE: SUBJECT:Bulldozer (from) trs

I have received your email and would like to offer clarification regarding the responsibilities of government bodies, officers and employees in relation to the issues raised.

First, the title of the Freedom of Information Law may be somewhat misleading, for that statute does not pertain information *per se*, but rather to existing records. Because that is so, that statute does not ordinarily require that an agency create or prepare a record in response to a request for information that does not exist in the form or a record or records. Similarly, the Freedom of Information Law does not require that an agency or agency officer or employee supply answers to questions or explanations of the contents of records or their actions. They may choose to do so, but there is no obligation to do so imposed by the Freedom of Information Law.

Second, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. At a minimum, minutes of an open meeting must consist of a record or summary of motions, proposals, resolutions, actions taken and the votes of the members. They *may* include additional detail, but there is no requirement that they must. The reasons of the members for voting as they do need not be included in the minutes. Further, while members of public bodies may explain the reasons for their votes, I know of no provision that requires that they must do so.

I hope that the foregoing will offer useful guidance and that I have been of assistance.

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FOIL-AO-05274

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Monday, April 16, 2012 5:12 PM
To: 'Li, Margaret'
Subject: RE: Open Meetings Law

Really Margaret!

I spoke with Cathy Corona about the same issue earlier today and referred to section 105(1)(f) of the Open Meetings Law. The provision permits a public body to conduct an executive session to discuss, among other things, the "employment history of a particular person or corporation, or matters leading to the appointment [or] employment....of a particular person or corporation. " That being so, assuming that the discussion involves the strengths, weaknesses, etc. relative to "particular" firms, the Legislature may choose to conduct an executive session. It doesn't have to, but it may.

Hope all is well with you and yours and I'll see you in Utica in May.

Best,
Bob

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[redacted]

State of New York
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OML AO 5275

From: dos.sm.Coog.InetCoog
Sent: Tuesday, April 17, 2012 9:28 AM
To: 'Margaret Bartley - E'town Supervisor'
Subject: RE: Question regarding Town Board meeting

Dear Supervisor Bartley:

It has been advised in similar situations in which members of a public body attend an event as observers who do not participate, or as individuals within a larger audience, that their presence would not constitute a "meeting" that falls within the coverage of the Open Meetings Law. By means of example, I spoke yesterday at a convention attended by a large group. Within the group were three members of a town board. When it was asked whether their presence constituted a meeting held in violation of the Open Meetings Law, I responded by suggesting that three members of the board within that crowd would not fall within the scope of the Open Meetings Law, for those persons were not functioning collectively, as a body; rather, they were present to listen, observe and to be educated.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
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Suite 650
99 Washington Avenue
Albany, NY 12231
Phone: (518)474-2518
Fax: (518)474-1927
Website: http://www.dos.state.ny.us/coog/

[redacted]

OML-AO-05276

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Friday, April 20, 2012 1:06 PM
To: 'Pam Boening'
Subject: RE: Board of Trustees minutes

Dear Ms. Boening:

I have received your request for guidance concerning the content of minutes relating to events that occurred during a meeting of the Village of Freeport Board of Trustees on April 16. You wrote that a Trustee introduced a motion to amend the agenda, but that the Mayor "objected to the motion and would not recognize the motion and continued to state that while the Trustee was speaking." The motion was seconded, and four Trustees voted to place the item on the agenda; the Mayor did not cast a vote. The Trustee then "read a resolution pertaining to the added agenda item, another Trustee seconded the motion, a Trustee polled the board and four members of the board voted in favor." You added that "During the motion and throughout the polling and reading of the resolution the Mayor objected and said it would not be recognized." You also indicated that there are no "written rules of procedure for placing items on an agenda."

In this regard, first, section 4-412(2) of the Village Law entitled "Procedure for meetings", states in relevant part that:

> "The mayor of the village shall preside at the meetings of the board of trustees as provided in section 4-400 of this article. A majority of the board shall constitute a quorum for the transaction business....Whenever required by a member of the board, the vote upon any question shall be taken by ayes and noes, and the names of the members present and their votes shall be entered in the minutes. The board may determine the rules of its procedure..."

Second, section 4-400(1)(a) of the Village Law states that:

> "It shall be the responsibility of the mayor:
>
> a. To preside at the meetings of the board of trustees, and may have a vote upon all matters and questions coming before the board and shall vote in case of a tie, however on all matters and questions, he shall vote only in his capacity as mayor of the village and his vote shall be considered as one vote..."

Third, section 106(1) of the Open Meetings Law provides that:

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

In consideration of the statutes cited above, I believe that minutes must be prepared indicating the motion made by the Trustee and the vote of the members, as well as the resolution and the vote of the members. Although the Mayor "presides", he has but one vote, and four votes by the Trustees would be valid, particularly, in my view, in the absence of procedural rules.

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OML AO 5277

From: Freeman, Robert (DOS)
Sent: Friday, April 20, 2012 2:15 PM
To: 'Leon Sculti'
Subject: RE: Can A Person Sneak Into An Exec Session?

Good afternoon - -

Section 105(2) of the Open Meetings Law indicates that only the members of a public body have the right to attend an executive session. However, the same provision authorizes a public body to permit the presence of others. That being so, I do not believe that it would be either atypical or contrary to law for the Ethics Board to permit the City Manager to attend its executive session.

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

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-----Original Message-----
From: Leon Sculti [mailto:leon@scultiprops.com]
Sent: Friday, April 20, 2012 1:08 PM
To: Freeman, Robert (DOS)
Subject: Can A Person Sneak Into An Exec Session?

Hi Mr. Freeman:
Regards from Rye! I hope this email finds you well. I had a quick question for you if you would be so kind, which I know you are from

having listened to you speak. The other day we had a situation where the Ethics Board had a meeting, they open normally, with the public session. Of the three principals (involved in the issue before the board) "invited" to attend the meeting only one did, he was seated at the table with his attorney, the board members, some members of the public and a few reporters.

The board members cleared the room to go into executive session (with just the themselves). Everyone cleared the room leaving through the same door. As we left, I noticed the city manager, one of the principals in the matter before the board, coming through a different door in the room and enter the executive session. He saw me see him before the door closed.

When the board came back they acknowledged the city manager came into the executive session (unannounced).

Does this pass the smell test according to OML or do you have any advisory opinions on a subject like this?

Video, just in case you are so inclined:
http://www.youtube.com/watch?feature=player_embedded&v=3lKF9pRbPiI#!

Thank you -Leon

Leon Sculti
Licensed Real Estate Broker, ABR
Sculti Properties, Inc.
6 Ridgeland Terrace
Rye, NY 10580
Cell: (914) 490-9615
Fax: (888) 355-9128

From: Freeman, Robert (DOS) [Robert.Freeman@dos.state.ny.us]
Sent: Monday, March 05, 2012 12:10 PM
To: Leon Sculti
Subject: RE:

Hi - -

My presentation will relate to the questions that arise. In general, I offer a brief introduction regarding FOIL, the Open Meetings Law and the functions of this office. Then I ask the audience to fire away. In my view, a lecture in which I discuss what I believe to important may be of little value; by accepting questions, we cover the ground that's important or significant to the community. Unless it becomes too late, I stay until there are no more questions.

If need be, I'll be here tomorrow until about 2 or 2:30.

Bob

Robert J. Freeman
Executive Director

OML-AO-05278

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Tuesday, May 01, 2012 3:23 PM
To: 'Mary Jean Jakubowski'
Subject: RE: Open Meetings Law

Hi - -

The quick answer is that the Open Meetings Law does not apply unless a quorum of the Board has gathered to conduct the business of the Library, collectively, as a body. In a board consisting of 15, a quorum would be 8. In the situations that you described, each would involve less than a quorum and, consequently, the Open Meetings Law would not apply.

I hope that I have been of assistance.

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[redacted]

Jobin-Davis, Camille (DOS) FOIL-AO-05279

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, May 02, 2012 11:25 AM
To: [redacted]
Subject: FW: Request for Advisory Opinion - Access to minutes of Trustee Meetings - Queensborough Public Library

Dear Ms. O'Connell,

This will confirm various of our advisory opinions available online, that pursuant to the provisions of Education Law section 260-a, association libraries are required to comply with Article 7 of the Public Officers Law, the Open Meetings Law.

It is our opinion that in order to make sense of the intent of Education Law section 260-a, an association library would be required to compile minutes pursuant to Open Meetings Law section 106 (1) and (2), and as specified in subparagraph (3) make them "available to the public in accordance with the provisions of the freedom of information law".

We hope that this is helpful.

Camille

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

Tel: 518-474-2518
Fax: 518-474-1927
www.dos.ny.gov/coog

Please note my new email address: camille.jobin-davis@dos.ny.gov.

[redacted]

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OML-AO-5280

May 4, 2012

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 recent proceedings of the Board of the Clarkstown Central School District. It is our understanding that clarification is required regarding board action necessary to set a meeting date, notice required for a public meeting and any related executive sessions.

In this regard, we note that choosing a date for a public body to gather does not necessarily require board action. Further, holding a meeting on January 4, in close proximity to a school vacation and/or on the same night as a meeting of an equally important board or community organization, does not conflict with any known provisions of law.

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

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be

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

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

In our opinion, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. There is one case of which we are aware in which the court held that a 7:30 a.m. meeting was inappropriate. According to the court in Goetchius v. Board of Education:

> "It is...apparent to this Court that the scheduling of a board meeting at 7:30 a.m. -- even assuming arguendo that such meetings were properly noticed and promptly conducted -- does not facilitate attendance by members of the public, whether employed within or without the home, particularly those with school age or younger children, and all but insures that teachers and teacher associates at the school are unable to both attend and still comply with the requirement that they be in their classrooms by 8:40 a.m." (Matter of Goetchius v. Board of Education, Supreme Court, Westchester County, New York Law Journal, August 8, 1996).

The court focused on whether members of the public would have the ability to attend, considering whether they had small children, work schedules, commuting times, and other matters that might effectively preclude them from attending meetings held so early in the morning. In short, particularly in view of the decision cited above, the reasonableness of conducting meetings at 7:30 a.m. is in our view questionable.

Your question, however, involves different facts, specifically, whether it is reasonable to schedule a meeting in the early evening, on the same night as another meeting in the community, and close in time to the December school holiday. We know of no judicial decisions that address the issue. In light of the fact that a majority of the board members voted to hold the meeting on such date, even when faced with the objections you raised, and our experience with the difficulty in scheduling meetings that are convenient for all, we believe it to be reasonable.

With respect to your note that "the board is requesting rsvp's", this will confirm that members of the public are not required to indicate their intent to attend a meeting prior to a meeting. We can only surmise that members of the board were asked to indicate their ability to

attend the January 4 meeting. In either event, it does not appear that the Board required such information from members of the public or members of the school board.

With respect to notice requirements set forth in the Open Meetings Law and applicable to meetings of every school board in New York, §104 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 board has been designated as a location for posting notices of meetings, the public has the ability to know where to ascertain whether and when meetings of the school board will be held. Similarly, every public body with the ability to do so should post notice of the time and place of every meeting online.

As you correctly noted, it is emphasized that a public body cannot conduct an executive session prior to a meeting. Every meeting must be convened as an open meeting, for §102(3) of

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

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

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

We hope that this is helpful.

CSJ:sb
cc: Doug Katz, President, Clarkstown Central School District

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OML AO 5281

May 4, 2012

Paul R. Black
[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. Black:

We have received your request for an advisory opinion regarding the application of the Open Meetings Law to the Niagara County Legislature. You wrote that a rule enacted by the Niagara County Legislature relating to the regulation of time and subject matter of public speakers at open meetings is unreasonable, and that the rule was used in an arbitrary and capricious manner. You wrote that your major concern is that the rule itself is in violation of the New York State Constitution, Article 1, Section 8, which provides for freedom of speech and press. In this regard, we offer the following comments.

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

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

Similarly, within the language of the Open Meetings Law, there is nothing that pertains to the right of those in attendance to speak or otherwise participate. Certainly a member of the public may speak or express opinions about meetings or about the conduct of public business before or after meetings to other persons. However, since neither the Open Meetings Law nor any other provision of law of which we are aware, including the New York State and the United States Constitutions provides the public with the right to speak during meetings, we do not believe that a public body is required to permit the public to do so during meetings. Certainly a public body may in our view permit the public to speak, and if it does so, it has been suggested that rules and procedures be developed that regarding the privilege to speak that are reasonable and that treat members of the public equally. From our perspective, a rule authorizing any person in attendance to speak for a maximum prescribed time on agenda items, and those items only, would be reasonable and valid, so long as it is carried out reasonably and consistently.

Second, we believe that the rule, as it is written, is reasonable in the manner in which it limits the content of public speech at meetings to items related to the allotted agenda. Our presumption is that the purpose for this rule is to provide for a more focused and efficient meeting.

Finally, although you wrote that you believe the rule to have been written in the negative, it is our opinion that the rule is written in such a way as to allow speech at the meetings. The rule begins “Members of the public *shall* be entitled to address the Legislature…”, which, in our opinion, provides a privilege conferred upon the public to speak at the meeting, albeit on the matters itemized in the rule.

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

BY: Richard Caister
Legal Intern

CSJ:RC:sb

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OML-AO-5282

May 4, 2012

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:

I have received your letter and want to express appreciation for the efforts of the League of Women Voters in encouraging compliance with open government laws.

You referred to a "workshop" conducted by a town board during which the board took action of significance, and you raised the following question: "When is a Workshop more than a workshop?" In this regard, the commonly used terms "workshop" and "work session" are not found in the Open Meetings Law; they are terms that, in my view, have no legal meaning.

By way of historical background, soon after the Open Meetings Law became effective in 1977, issues arose concerning the status of workshops, work sessions and similar gatherings during which there was merely an intent to discuss public business, and no intent to take action. It was contended that gatherings of that nature were not "meetings" and, therefore, fell outside the coverage of the Open Meetings Law. The issue led to litigation that reached the Court of Appeals, the state's highest court, and the Court confirmed an expansive decision by the Appellate Division in which it was determined that any gathering of a quorum of a public body, such as a town board, for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, even if there is no intent to vote or take action, and irrespective of the characterization of the gathering [Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd, 45 NY2d 947 (1978)]. In short, assuming the presence of a quorum that has convened to conduct or discuss public business, there is no distinction between a workshop or work session and a meeting; they are equally subject to the Open Meetings Law, and the same obligations apply with respect to notice and openness, as well

as the same capacity to conduct an executive session when appropriate in consideration of the subject of a discussion.

Some public bodies distinguish workshops or work sessions from formal or regular meetings based on a practice of engaging in discussion only with regard to the former and taking action only during the latter. I point out, however, that there is nothing in the Open Meetings Law that precludes a public body from voting and taking action during a workshop. If, however, the public has been led to believe that workshops are held only for discussion, and that no action will be taken, it is likely that some might consider that the public was misled. Nevertheless, in the absence of its own rule or policy to the contrary, a public body may take action during a workshop, or any meeting.

I point out that section 104 of the Open Meetings Law concerning notice of meetings requires only that notice include the time and place of a meeting; there is no obligation to include an indication of the subject or subjects to be considered in the notice.

The notice requirements are now, in most instances, threefold. Notice must be given to the news media, posted in one or more designated, conspicuous publications, and when feasible to do so, notice must also be posted on the website associated with a public body. When a meeting is scheduled at least a week in advance, notice must be given at least seventy-two hours prior to a 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.

Lastly, although it does not involve the notice given pursuant to section 104, a recent amendment, section 103(e), is significant concerning the public's right to know of the nature of the discussions and deliberations of public bodies. When records are scheduled to be discussed during an open meeting, and the records are accessible to the public pursuant to the Freedom of Information Law, or the records consist of proposed resolutions, policies, law or rules, or proposed amendments to those kinds of records, the Open Meetings Law now requires that the records be posted online prior to the meeting on the entity's website when it is practicable do so, or make the records available in response to a request made under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:sb

OML-AO-05283

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Tuesday, May 08, 2012 4:50 PM
To: 'William Swiskey sr'
Subject: RE: Tampering with official records

Dear Mr. Swiskey:

I have received your letter and point out that the Open Meetings Law contains what might be considered as minimum requirements concerning the contents of minutes. Pursuant to section 106 of that law, 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, but there is no requirement that they be more expansive. Further, often draft minutes are prepared, disclosed and later amended. Amending the draft would not, in my view, constitute "tampering" with a public record.

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

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[redacted]

OML-AO-05284

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Monday, May 14, 2012 8:51 AM
To: 'Mary Thorpe'
Subject: RE: Sec 103(e) of the Open Meetings Law

Dear Ms. Thorpe:

Among the issues arising under the new section 103(e) of the Open Meetings Law is whether a record is scheduled to be discussed during an open meeting. If the resolution in question was not scheduled to be discussed, there would have been no obligation to disclose it in advance of the meeting. It seems, though, that the issue involved a matter of significant public concern and that a substantive discussion in public would have been appropriate. Despite that possibility, I point out that the law merely requires that notice of a meeting must only include the time and place; it may include an indication of the subjects to be considered or an agenda, but there is no requirement to do so. Similarly, although a public body may permit the public to speak during meetings, there is no requirement that it must do so.

With respect public bodies' ability to be informed regarding the new provision, first, our website includes substantial guidance, and our first posting regarding section 103(e) was made prior to its effective date. Second and perhaps more importantly, information concerning the amendment has been disseminated by local government organizations, such as the Association of Towns, the Association of Town Clerks, New York Conference of Mayors, etc. In addition, many news articles have focused on the change in the law. My belief is that governmental entities, particularly counties, cities, towns, villages and school districts have had opportunities to become familiar with the amendment.

I hope that I have been of assistance.

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OML AO 5285

May 15, 2012

E-Mail

TO: Steve Norris

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. Norris:

This is in response to your request for assistance regarding access to minutes of the meetings of the Town Board of Northampton. Specifically, you allege that the Town Clerk "has consistently been late in making the minutes available."

In this regard, we reiterate the comments offered in OML-AO-2815.

We hope that this is helpful to you.

CSJ:sb
cc: Elaine Mihalik, town clerk

Freeman, Robert (DOS) OML-AO-5286

From: Freeman, Robert (DOS)
Sent: Wednesday, May 16, 2012 8:17 AM
To: 'Lissa Harris'
Subject: RE: person banned from town meeting

Hi Lissa - -

I've received other inquiries regarding the matter, and my comment is simple: First, the Open Meetings Law specifies that meetings are open to the general public. Whether an individual resides in the town or Timbuktu doesn't matter; that person has the right to attend. Second, the town supervisor doesn't make the rules. The rule of law prevails over his directive, and further, as one of five members of the board, he has no unilateral authority to bar an individual from attending meetings.

I note that a public body, such as a town board, has the authority to adopt rules to govern its proceedings, but that the rules must be reasonable. It would be reasonable, in my view, to adopt rules regarding decorum, outbursts, disruptions and the like. However, barring an individual from attending based on that person's politics or point of view, without more, would be contrary to law.

I hope that this is helpful.

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[redacted]

OML-AO 05287

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Friday, May 18, 2012 2:57 PM
To: [redacted]
Subject: RE: Open Meeting Laws

Dear Ms. Riker:

I have received your inquiry concerning the status of a "focus panel" under the Open Meetings Law. You wrote that the entity in question consists of a member of the Town Board, a member of the Planning Board, and four Town residents, and that the panel's authority is purely advisory.

In this regard, based on numerous judicial decisions, because the panel does not consist entirely of members of a governing body of the Town, and because its functions are advisory, it does not constitute a "public body" subject to the Open Meetings Law.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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Fax: (518)474-1927
Website: http://www.dos.state.ny.us/coog/

[redacted]

OML-AO-05288

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Friday, May 18, 2012 3:49 PM
To: [redacted]
Subject: RE: Open Government

Dear Supervisor Anson:

First, one of the grounds for conducting an executive session pertains to collective bargaining negotiations involving a public employee union. If a majority of the Board will be present, the gathering would be subject to the Open Meetings Law and preceded by notice. Immediately after convening, a motion could be made to enter into executive session.

Second, if a Board member is incapable of carrying out his/her duties, an effort can be made to remove that person from office. See Public Officers Law, section 36.

Third, section 63 of the Town Law authorizes the Board to adopt rules concerning its own proceedings, and as Supervisor presiding at meetings, you would have the ability to enforce the rules. Many boards have adopted rules regarding, disruption, interruption, decorum and the like, and if an individual fails to abide by the rules, I believe that he/she may be ejected from the meeting.

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[redacted]

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

Committee Members

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Robert J. Duffy
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Cesar A. Perales
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OML AO 5289 May 29, 2012

E-Mail

TO: James E. Gramkee

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. Gramkee:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to certain gatherings of the Capital Committee of the Amherst Central School District Board of Education. As described, the Committee consists of three of the seven Board of Education members, the Superintendent, the Assistant Superintendent, the Business Administrator (Chair), and the Director of Facilities. It is an ad hoc committee created "to review the building condition report, develop the five year plan and report recommendations to the Board of Education."

In this regard, we note, first, that there is no defining case law on this particular type of advisory committee, i.e., a committee that consists of three members of a public body plus a greater number of others, all of whom are employees of the public body. Judicial decisions indicate generally that advisory bodies having no authority to take binding action and which typically include persons other than members of a governing body fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71

NY 2d 964 (1988)]. Therefore, an advisory body, such as a citizens' advisory committee, would not in our opinion be subject to the Open Meetings Law, even if a member of a governing body or the staff of an agency participates.

Second, and as noted by you and the Superintendent, when the core of a committee consists of members of a public body, such as the Board of Education, and there is an equal or lesser number of other members, all of whom are employees of the District, it is likely, in our opinion that the Open Meetings Law is applicable, based on our reasoning offered in OML-AO-5068.

It is not clear whether an advisory committee consisting of board members and a greater number of school administrators, such as the one you described, would be subject to the Open Meetings Law. The ratio of board members to employees and its limited authority, in our opinion, may make it less likely that it would be subject to the Open Meetings Law.

We wish that we could be more helpful.

CSJ:sb
cc: Mark Whyle, Assistant Superintendent

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DEPARTMENT OF STATE
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OML-AO-5290
FOI-AO-18893

May 29, 2012

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:

This is in response to your request for an advisory opinion regarding application of the Freedom of Information Law to records requested from the Ballston Lake Fire Department and District, and application of the Open Meetings Law to a certain gathering of the Ballston Lake Fire Department. Enclosed herein is a copy of the materials submitted by the Fire District, in consideration of your request.

From our perspective, both the Fire Department and the Fire District must respond in writing to written requests for records, and insofar as such records exist, either provide or deny access to such records or portions thereof in accordance with law.

In this regard, we note first, that the Freedom of Information Law is expansive in its coverage, for it pertains to all agency records. Section 86(4) defines the term "record" to mean

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

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

Based on the foregoing, the kinds of materials that you requested that are maintained by or for an agency, irrespective of their origin or function, in our view, clearly constitute "records" that fall within the coverage of the Freedom of Information Law.

Section 86(3) states that an "agency" is:

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

In consideration of the language quoted above, an agency generally is an entity of state or local government; however, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire department, the Court of Appeals, the state's highest court, found that volunteer fire departments, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the

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

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

Again, due to the determination that volunteer fire departments are subject to the Freedom of Information Law and the broad definition of the term "record", the materials of your interest would be subject to rights of access, whether they are maintained by the Department, the District, by a volunteer fire company, or all three.

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

With regard to the creation or existence of minutes, we note that §87(3)(a) of the Freedom of Information law provides that:

"Each agency shall maintain:

(a) A record of the final vote of each member in every agency proceeding in which the member votes;"

Accordingly, and based on the case law identified above, we believe that such records, if they exist, would be required to be made available pursuant to the Freedom of Information Law.

We note that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3)(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.

Based on the materials you submitted, we understand that neither the Department nor the District have responded in writing to the requests for records that you submitted with your November 19, 2011 correspondence. The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and the appeals process. 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) 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.

Finally, and with respect to the meetings of the Fire Department, we note that §102(2) of the Open Meetings Law defines "public body" to mean:

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

By reviewing the components in the definition of "public body", we believe that each is present with respect to the governing body of a volunteer fire department. A volunteer fire department is clearly an entity consisting of two or more members. We believe that it is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law. Further, in our view, a volunteer fire department at its meetings conducts public business and performs a governmental function. Such a function is carried out for a public corporation, which is defined to include a municipality, such as a town or village, for example. Since each of the elements in the definition of "public body" pertains to the voting body of a volunteer fire department, it appears that the department is a "public body" subject to the Open Meetings Law. For a contrary point of view, see: Hayes v. Chestertown Vol. Fire Col, Inc., 93 AD3d 117, 941 NYS2d 734 (3rd Dept, 2012).

We hope that we have been of some assistance.

CSJ:sb
Enclosures

cc: Bill Young
Ron Dunn

OML-AO-5291

From: Jobin-Davis, Camille (DOS)
Sent: Friday, January 27, 2012 3:39 PM
To: 'Richard Mikulec'
Subject: RE: Fairport Library

Richard,

Although I printed a copy of your January 23, 2012 email, somehow I have misplaced the electronic copy. Would you please forward it to me again? I would like to send it to the Library Board President electronically. Thank you.

In response to your January 26 email, when an agency fails to provide records in response to a request, an applicant may appeal - essentially the agency has denied access to records without providing a legal basis therefore. My suggestion is that you appeal. Please see the following link:
http://www.dos.state.ny.us/coog/explanation.html

An agency is not required to create a document in response to a FOIL request, so if there is an issue with a lack of record that is responsive to the request, in my opinion the agency should so indicate. Further, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency Ashall 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 Ashall@ prepare the certification; it is obliged to do so.
I hope it helps.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
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[redacted]

OML-AO-5292

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Tuesday, June 05, 2012 8:57 AM
To: [redacted]
Subject: RE: Opinion needed

I ask whether the resolutions are scheduled to be discussed during open meetings. If they are, I would agree that they should be posted online in advance of meetings if possible. On the other hand, if the resolutions are likely to be discussed during executive sessions, there would be no obligation to do so. Note that section 105(1)(f) of the Open Meetings Law 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, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation...." It is possible that the board may have a basis for conducting an executive session if, for example, the discussion involves consideration of one's "employment history".

I hope that I have been of assistance.

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[redacted]

FOI-AO-18896
OML-AO-5293

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Tuesday, June 05, 2012 9:30 AM
To: 'Jennifer Merritt'
Subject: RE: Executive session/BOE

Hi Jennifer:

First, based on section 105(1)(f) of the Open Meetings Law, I believe that a board may conduct an executive session to discuss its choices regarding the superintendent search firms that it will interview. That provision, as you know, permits a board to conduct an executive session to discuss, among other items, the employment history of a particular corporation, as well as matters leading to the appointment or employment of a particular corporation.

Second, in my view, the names of the three firms selected as finalists, assuming that the names of those firms appear in a record or records, would be public. Because they relate to entities rather than natural persons, the exception involving unwarranted invasions of personal privacy in FOIL would not apply. Also, although section 89(7) of FOIL authorizes agencies to withhold names of applicants for appointment to public employment, the firms in question are not seeking to become public employees.

I hope that I have been of assistance.

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Freeman, Robert (DOS)

OML-AO-5294

From: dos.sm.Coog.InetCoog
Sent: Monday, June 11, 2012 9:28 AM
To:
Subject: RE:

In short, if five of the nine members of the Legislature gather to conduct public business, and the five represent different political parties, the gathering constitutes a "meeting" that falls within the coverage of the Open Meetings Law. In that event, the meeting should be preceded by notice given pursuant to section 104 of that law and conducted open to the public, except to the extent that an executive session may properly be held in accordance with section 105(1). Because the five represent more than one political party, the exemption from the Open Meetings Law concerning political caucuses would not apply.

I hope that I have been of assistance.

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[redacted]

Jobin-Davis, Camille (DOS) OML-AO-5295

From: Jobin-Davis, Camille (DOS)
Sent: Monday, June 11, 2012 1:15 PM
To: 'robert alexander'
Subject: RE: 5/31/2012 "closed meeting"

Dear Judge Alexander,

This will confirm the advice given in the advisory opinion linked below, that in order to conduct an executive session, a public body must first hold a meeting that is open to the public, providing proper notice of the time and place of the meeting.

http://docs.dos.ny.gov/coog/otext/o3618.htm

As you know, only when the discussion pertains to those issues listed in section 105(1) of the Open Meetings Law is a public body permitted to enter into executive session, and then only after a properly articulated motion. See advisory opinions under "E" for "Executive Session, Procedure for Entry Into" on our online OML advisory opinion index.

Because I am not aware of any law that would require a village to permit an elected judge to speak at a village board meeting, I will refer you to advisory opinions available through our online OML advisory opinion index under "P" for "Public Participation." In short, when and if a public body permits a member of the public to speak at its meeting, the Board may set reasonable rules on such participation.

Please note that we are an office of two, and we are in receipt of many requests for written opinions. As is our practice, upon receipt of a request for an advisory opinion, we send a copy of the request to the municipality, inviting a response. We will not delay the issuance of an opinion pending receipt of such submission; however, at this point in time it takes approximately 4 months to respond to requests. Please advise if you would like us to proceed as requested.

Camille S. Jobin-Davis, Esq.
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NYS Committee on Open Government
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Please note my new email address: camille.jobin-davis@dos.ny.gov.

[redacted]

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OML-AO-5296

June 12, 2012

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 :

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to a "privilege of the floor policy" limiting "repetitive" or "offensive" remarks, and a policy prohibiting the use of signs, banners, visual displays and audio broadcasts unless expressly permitted by the Board of Trustees of the Village of Cayuga Heights.

In this regard, we note that although the Open Meetings Law 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, 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.

Furthermore, although public bodies have the right to adopt rules to govern their own proceedings (see e.g., Village Law §4-412, Education Law, §1709), the courts have found in a

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

In direct response to your question, this will confirm my opinion that the presiding officer has the authority to limit remarks from the public that are "repetitive" and "offensive". It would not be unreasonable, in my opinion, for remarks to be limited for either of those reasons.

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

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

The court in Schuloff determined that a "compelling state interest" involved the ability to protect students' privacy in an effort to comply with the Family Educational Rights Privacy Act,

but that expressions of opinions concerning "the shortcomings" of a law school professor could not be restrained.

In the context of your inquiry, assuming that the Board of Trustees and/or the Mayor as presiding officer permit those who wish to speak to do so for a particular period of time, each person who wishes to do so must, in our opinion, be given an equal opportunity to do so. Similarly, if the Board and/or Mayor permit positive comments concerning the operation of Village government, we believe that they must offer an equal opportunity to enable those in attendance to offer negative or critical comments. It would not be unreasonable, in our opinion, to limit repetitive comments in support of opinions expressed previously, as well as those that would be offensive to reasonable people of ordinary sensibilities.

In regard to the prohibition concerning signs, banners and visual displays hung, displayed, located, projected or placed anywhere inside the meeting room or building holding said meeting without the prior express permission of the public body, from our perspective, the primary consideration should involve whether or the extent to which those items may be obtrusive or disruptive in some manner. If the presence of a sign blocks a person in attendance at a meeting from observing the proceedings or blocks a person's path to a meeting, we believe that a rule requiring that the sign be moved or perhaps, due to size, removed. If the sign or banner violates the fire code, restricting it would in our opinion be reasonable. If a sign includes obscene language, we believe that a rule could validly prohibit its presence at a meeting.

Finally, to the extent that the rule you cite prohibits "audio broadcasts" we note that a 2011 amendment to §103 of the Open Meetings Law requires every public body to allow meetings to be photographed, broadcast, webcast or otherwise recorded and/or transmitted by audio or video means (§103[d][1]). To the extent that the rule you cite prohibits "audio broadcasts" of previously recorded material in the building or the meeting room without prior approval, it is our opinion that such rule would be reasonable, and in keeping with the Board's authority as set forth in Village Law §4-412. It is difficult, in our opinion, to imagine a scenario when audio broadcasts in a public building would not be disruptive or offensive to a reasonable person who either works in the building or is attending a meeting.

CSJ:sb
cc: Mayor Supron

STATE OF NEW YORK
DEPARTMENT OF STATE
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Committee Members

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OML AO 5297

June 12, 2012

Virginia Stern, Supervisor
Town of Stanford
26 Town Hall Road
PO Box 436
Stanfordville, NY 12581

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 Stern:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to a new policy and recently adopted resolution of the Stanford Town Board pertaining to the use of recording equipment at Town Board meetings. Initially, you indicated that the Board had adopted a procedure requiring that "any videotaping from the public should be done from the back of the room". Subsequently, you forwarded a copy of a resolution adopted on January 12, 2012 that contains, among others, the following provisions:

> "… all audio and video devices are welcome and their usage shall be governed by the common sense rules of civility and decorum….
>
> The devices are an aid in recording the meeting and are not intended to be utilized in a threatening or menacing manner, …
>
> The videotaping rig if utilized should be located in the back as it has all of the equipment with it, …
>
> … a handheld unit kept below the line of sight is not restricted anywhere in the room, unless it interferes with the public's viewing….
>
> If people in the audience complain that they cannot see or hear, (or for instance the front row is taken by cameras and video people, and people with poor hearing

> cannot get up front because of this), that is a valid concern, and the Town Board acting through the Town Supervisor will make arrangements to accommodate their needs and direct where the audio/video equipment be located."

In this regard, as you know, the Open Meetings Law was recently amended to codify the public's right to record and broadcast public meetings. Section 103(d) sets forth as follows:

> "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 sum, the Open Meetings Law permits the public to record and broadcast public meetings, subject to reasonable rules that allow the governing body to perform its business without interference.

Previously, the Appellate Division addressed concerns raised by those in attendance at public meetings who suggested that the use of a recording device can feel like "harassment", intimidation or would interfere with the democratic process. The court rejected the argument that the recording of meeting inhibits the democratic process, stating that,

> "Those who attend [public] meetings, and who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" (Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD2d 924, 925, 493 N.Y.S.2d 826 (2nd Dept 1985).

Like the Mitchell Court, we are not persuaded that the recording of Board meetings, or the use of cameras pointed at the public or at Board members would inhibit the democratic or deliberative process. While the Court's comments were directed to the public in attendance at a meeting, we believe the same logic applies to elected Town officials. With reasonable use of recording devices, over time, we expect that any unease associated with being filmed will dissipate.

While implementation of the Town policy set forth above may relate to any number of different situations, we offer the following general comments in an effort to provide guidance. A policy requiring that stationary cameras on tripods that could obstruct the public's view of the proceedings be limited to locations behind those in attendance, or placed apart from those in attendance, in our opinion, is reasonable. Concurrently, we believe that it would be unreasonable to prohibit the use of modern hand-held recording devices or those on tripods that do not obstruct sightlines anywhere in the room. This will confirm our opinion, previously shared with Councilman Mark D'Agostino, that "if modern video recording devices, irrespective of their physical location, are used in a manner that is neither obtrusive nor disruptive, we do not believe that a rule requiring that they be used only in the back of the room would be found to be reasonable or sustained by a court if challenged."

On the other hand, depending on the circumstances, recording or photographing the proceedings during a meeting by moving about the room, and pointing a camera close to peoples' faces may be disruptive and could validly be prohibited. In our view, conferring authority to the Supervisor to reasonably direct behavior according to the environment in the room, based on a desire to prevent disruption of the meeting, would not be unreasonable.

Enclosed are model rules adopted by the Committee for your consideration. Please note that the model rules tend to be broader than those adopted by the Town Board, and less focused on unique situations. In our opinion, the model rules permit an agency the flexibility to impose reasonable restrictions when behavior becomes disruptive or obstructive.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb
Enclosure

OML-AO-5298

Jobin-Davis, Camille (DOS)

From: Jobin-Davis, Camille (DOS)
Sent: Thursday, June 14, 2012 10:08 AM
To: [redacted]
Subject: Open Meetings Law - executive session

Dear Alison,

Background on ZBA and quasi-judicial deliberations: http://docs.dos.ny.gov/coog/otext/o4727.html

"Possible litigation" not appropriate ground for a public body to rely on to enter executive session (Weatherwax): http://docs.dos.ny.gov/coog/otext/o2705.htm Note that the Town Board and the Zoning Board of Appeals are both public bodies, both subject to the Open Meetings Law, and this advisory opinion applies to actions of all public bodies. Additional and related advisory opinions can be found through our online OML index, under "L" for "Litigation."

After speaking with my attorney friend who works in local government issues, it appears your question "does the ZBA have authority to overturn a decision of the Village Board?" is a little more complex than I anticipated. While she agreed that typically the ZBA does not have authority to overturn a decision of the Village Board (only a Supreme Court can overturn a decision of a local governing body) she raised questions that I could not answer regarding whether the building inspector/code enforcement officer failed to revoke a permit that enforced a local zoning provision or the NYS Uniform Fire Protection Code. The good news is that she suggested you call the Division of Code Enforcement at the Department of State (518-474-4073). She believes that they will be better able to assist you.

I hope these things help! Please let me know if you have further questions.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
Department of State
99 Washington Ave, Suite 650
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Tel: 518-474-2518
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Please note my new email address: camille.jobin-davis@dos.ny.gov.

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OML-AO-5299

June 14, 2012

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 :

I have received your letter in which you sought an advisory opinion concerning compliance with the Open Meetings Law relative to the Board of Trustees of the New York French American Charter School (hereafter "the Board").

You wrote that the Board conducted an emergency meeting on May 18 at 5:30 p.m., but that "[n]o emails, public notices, faxes, letters in student backpacks or any form of communication was ever sent by the NYFACS board of trustees to faculty, staff parents, or any members of the media alerting them an emergency board meeting had been scheduled…" During that meeting, the Board voted to recognize a particular named individual as interim president of the NYFACS Parent Teacher Organization, "despite several communications received from members of the NYFACS parent body stating NYC Department of Education Chancellor's Regulations clearly state: upon resignation of a co-officer, the Paretn Association members must vote to determine if the remaining co-officer may fill the unexpired term on his/her own or whether an expedited election must be conducted." You wrote that no such vote was ever held, but rather that "in an unpublicized and essentially private NYFACS Board of Trustees meeting, Ms. Porter's self-claimed position as PTO president was ratified by the board, which automatically sealed Ms. Porter as voting member of the NYFACS Board of Trustees."

You also contend that the Board "has made a repeated and concerted habit of not complying" with the Open Meetings Law, for you allege that the Board "held an emergency hiring committee [meeting] on May 11" and an "emergency finance committee meeting on May 14", and that neither of those meetings was preceded by notice.

The first question pertains to compliance with the Open Meetings Law with respect to the Board's emergency meeting of May 18, and the second involves essentially the same question by "holding three emergency board meetings during the course of May 2012".

In this regard, first, §2854(1)(e) of the Education Law states that: "A charter school shall be subject to the provisions of articles six and seven of the public officers law." Articles six and seven are, respectively, the Freedom of Information Law and the Open Meetings Law. Consequently, it is clear that charter schools are required to comply with those statutes, and I believe that those entities must be considered "agencies" subject to the former, and that their boards be considered "public bodies" subject to the latter.

Second, §104 of the Open Meetings Law pertains to notice of meetings and requires that:

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

Additionally, in 2009, a new subdivision (5) states that:

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

Section 104 now imposes a three-fold requirement: first, that notice must be posted in one or more conspicuous, public locations; second, that notice must be given to the news media; and third, that notice must be conspicuously posted on the body's website, when there is an ability to do so. The requirement that notice of a meeting be "posted" in one or more "designated" locations, in our opinion, mandates that a public body, by resolution or through the adoption of policy or a directive, select one or more specific locations where notice of meetings will consistently and regularly be posted. If, for instance, a bulletin board located at the entrance of a school's offices has been designated as a location for posting notices of meetings, the public has the ability to know where to ascertain whether and when meetings of a school board will be

held. Similarly, every public body with the ability to do so must post notice of the time and place of every meeting online.

There is nothing in the Open Meetings Law the refers specifically to “emergency” or “special” meetings. However, the judicial interpretation of the Open Meetings Law suggests that the propriety of scheduling a meeting less than a week in advance is dependent upon the actual need to do so. As stated in Previdi v. Hirsch:

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

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. If there was no urgency associated with the issues considered during the meetings to which you referred, in my view, they should not have been held. More importantly, even if there is an emergency that necessitates scheduling and conducting meetings quickly, the Open Meetings Law requires that notice be given. It is not difficult to accomplish compliance with §104; notice of the time and place of a meeting can be given to the news media by email, fax or phone; notice can quickly posted in one or more conspicuous public locations; and when it is feasible for an entity to do so, notice can be posted on the entity’s website without delay. That is often done, particularly by educational institutions as a means of informing parents and others

of delays due to weather, health consideration due to an outbreak of a disease, social events and the like.

Lastly, you asked whether the Board's vote to ratify "Ms. Porter's self claimed position as PTO president" was valid. With respect to the application of the Open Meetings Law, an action remains valid unless and until a court reaches a determination to the contrary. I point out that a court has the authority under §107 of that statute to invalidate action if a violation has occurred. However, the same provision states that an "unintentional failure to fully to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action…" If in fact no notice was given and the meeting was effectively conducted in secret, I believe that a court would have the authority under the Open Meetings Law to invalidate the action.

Perhaps more significant may be the failure to give effect to the Chancellor's regulations. It is suggested that you attempt to ascertain whether the absence of compliance with the regulations constitutes a nullity of the action taken.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:sb
cc: Edith Boncompain
Board of Trustees
Recy Dunn

STATE OF NEW YORK
DEPARTMENT OF STATE
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OML-AO-5300

June 19, 2012

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 meetings of companies and committees associated with the Plainview Fire Department. You confirmed your understanding that the Department's Board of Directors is subject to the Open Meetings Law, but you questioned whether meetings of related entities are subject to that statute.

According to your description, the Department, a not for profit corporation providing services within a defined fire protection district, is contractually obligated to provide fire protection services to the Town of Oyster Bay. It is made up of four unincorporated volunteer fire companies primarily organized for management of personnel and readiness of vehicles. Each company holds monthly meetings, requests funds from the Department's fund drive, and equipment through the Chief of the Department, with both types of requests ultimately being determined by the Department's Board of Directors. On a monthly basis, the membership as a whole (the members of all four companies) conducts a "department meeting". All privately donated funds collected by the companies and committees are pooled and budgeted by the Department as a whole, distributed upon Board of Director approval at regularly scheduled meetings. In the same manner, the Department Treasurer is responsible for drafting requests from the Department for the Chief of the Department to sign, for Board of Director approval.

The Department conducts several additional meetings each month, including officer meetings, committee meetings and squad meetings, none of which relate to the ability to authorize the expenditure of taxpayer or donated funds. You asked whether meetings of entities that "do not have direct access to funding" are subject to the Open Meetings Law.

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

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

We point out that the status of volunteer fire companies had long been unclear with respect to application of the Freedom of Information Law. Those companies are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities or fire districts. As not-for-profit corporations, it was questionable whether or not they conducted public business and performed a governmental function. Nevertheless, in a case brought under the Freedom of Information Law dealing with the coverage of that statute with respect to volunteer fire companies, the state's highest court, the Court of Appeals, found that records of a volunteer fire company fall within the provisions of the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. In its decision, the Court clearly indicated that a volunteer fire company performs a governmental function and that all of its records are subject to rights of access granted by the Freedom of Information Law.

In reviewing the components in the definition of "public body", this will confirm our understanding that each is present with respect to the board of an incorporated volunteer fire department, such as the Plainview Fire Department. The governing board of a volunteer fire department is clearly an entity consisting of two or more members. We believe that the board of directors is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law. Further, in our view, the members of a volunteer fire department such as the one you describe conduct public business and perform the governmental function of responding to fire and emergency calls for assistance. Such a function is carried out for a public corporation, which is defined to include a municipality, such as a town or village, for example, or in this case, the Town of Oyster Bay and the corresponding fire district. Since each of the elements in the definition of "public body" pertains to a volunteer fire department such as the one you describe, it appears that the Board of Directors is a "public body" subject to the Open Meetings Law.

We note that the Westchester Rockland Court "dissolved the governmental versus nongovernmental dichotomy" presented by the municipality and refused to assume that the

lottery and fire fighting activities of the company were generically separate and distinct. The Court wrote "How often does the taxpayer–lottery participant view his purchase as his 'tax' for the voluntary public service of safeguarding his or her home form fire?" (Id., at 579.)

In juxtaposition to the Court of Appeals' ruling in Westchester Rockland, we note the recent Appellate Division decision in Hayes v Chestertown Volunteer Fire Company (93 AD3d 1117, 941 NYS2d 734 [3d Dept, 2012]). In Hayes, the court determined that while an incorporated volunteer fire company is an "agency" that performs a governmental function and whose records are therefore subject to FOIL, it is not a "public body," due to its lack of authority "to dictate firefighting policy or procedure or to make any decisions regarding the expenditure of public funds." It was not relevant, the court held, that the "volunteers are deemed employees of the Fire District when engaged in firefighting activities", or that "the volunteers serve as the labor force for the Fire District when the alarm of fire or other public emergency arises."

The Hayes court relied heavily on the volunteer fire company's status as a not-for-profit charitable organization that limited its meetings to issues of social and charitable activities to find that it was not a public body. Due to the company's ability to set its own policies and procedures with respect to its operations, and its inherent control over moneys raised from "private sources," it is difficult to rectify this decision with the Court of Appeals decision in Weschester Rockland.

Based on the logic expressed by the Court of Appeals, it remains our opinion that each of the elements of a "public body" is present in a volunteer fire company, including the four entities that you describe above, whether or not they are incorporated. The companies are clearly entities consisting of two or more members. And, we believe that it would be reasonable to assume that the members of the companies perform the labor, or the governmental functions of the Department, i.e., responding to fire and emergency calls for assistance.

In consideration of the quorum requirements for entities such as an unincorporated volunteer fire company, we note the provisions of §41 of the General Construction Law. That statute 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."

Because volunteer fire companies typically consist of at least three persons, and since those persons "are charged with [a] public duty to be performed or exercised by them jointly or as a board", it is our opinion that those entities are subject to §41 of the General Construction Law, and may only take action by means of a quorum.

In the facts that you present, the volunteer companies are not incorporated, but have a similar relationship with the fire department as the fire company in Hayes has with the fire district. We are unable to distinguish between the Plainview Fire Department and the Board of Fire District Commissioners in Hayes. Due to these similarities, it seems clear that at the very least the governing board of the Plainview Fire Department is a public body subject to the Open Meetings Law.

It is not known whether there will be an appeal of the Appellate Division decision in Hayes. For now, for those counties within the Third Department (Nassau County is in the First Department), it may be that formalizing the responsibility for certain financial and policy decisions in a parent organization is sufficient to remove the entity's "governmental function" characteristic, and thereby remove the entity from application of the Open Meetings Law.

Finally, and with respect to committees and entities created by the governing body, based on the definition of "public body" mentioned above, we note the many advisory opinions on our website regarding committees made up solely of members of another public body, committees made up entirely of members of the public, and committees that are governed by a combination of both types of members. In brief, if a committee is made up solely of members of a public body (i.e., members of the Department Board of Directors) the committee would be a public body subject to the Open Meetings Law (see e.g., Glens Falls Newspapers v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 [1993]). In cases where the membership does not determine the issue, whether the committee has authority to take action on behalf of the municipality or serves only in an advisory capacity would be pertinent. Please see advisory opinions under "C" for "Committees and Subcommittees" through our online Open Meetings Law advisory opinion index at the following link: http://www.dos.ny.gov/coog/oml_listing/oindex.html

We hope that this is helpful.

CSJ:sb

Freeman, Robert (DOS)

OML-AO-5301

From: Freeman, Robert (DOS)
Sent: Wednesday, June 27, 2012 8:25 AM
To: 'Phil Barnes'
Subject: RE: Questions

Good morning - -

In brief, with respect to minutes, §106 of the Open Meetings Law contains what may be characterized as 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, but there is no requirement that they must. If none of the events described in the preceding sentence have occurred, there need not be inclusion of other items in the minutes.

Next, if indeed a quorum (a majority) of a public body gathers to conduct public business, the gathering constitutes a "meeting", even if there is no intent take action, and regardless of the means by which the gathering is characterized.

Lastly, a meeting need not be "advertised." That term suggests that notice must appear in a news publication. Section 104 requires that every meeting be preceded by notice of the time and place, and that notice be "given" to the news media, posted in one or more designated conspicuous locations, and whenever possible, posted online. When the news media receives notice of a meeting, it may choose to publish the notice, but it is not required to do so.

With respect to means of encouraging compliance, education and knowledge of the law are, in my view, the critical factors in enhancing compliance. Also important is shedding light on practices that may be inconsistent with law. Doing so often results in better compliance.

I hope that I have been of assistance.

Robert J. Freeman
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OML-AO-5302

June 28, 2012

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 :

This is in response to your request for an advisory opinion regarding the Village of Mastic Beach Zoning Commission's compliance with the Open Meetings Law. Based on materials submitted by you and Mr. Alan Chasinov, we understand that the Zoning Commission held roughly ten workshops, with a quorum of members present, where they developed a draft of the zoning code and revised it before presenting it to the public. There was no advance notice provided for these meetings, and they were not held open to the public. The draft was made public through a series of hearings that were properly noticed and attended by the public on October 26, November 2, and November 16, 2011. Subsequent to a Village Board meeting on December 13, 2011, at which the proposed code was returned to the Commission for further consideration, the Commission held yet another public hearing (January 5, 2012) and public meeting (January 18, 2012) at which point, the Commission adopted the proposed zoning code as a final report for submission to the Board of Trustees.

In this regard we offer the following comments.

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

By way of background, the definition of a "meeting" [see Open Meetings Law § 102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for

the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)].

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

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute." (60 AD2d 409, 415).

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 constitute a "meeting" subject to the Open Meetings Law. Further, there is no distinction between a meeting and a "workshop" or work session; when a workshop is held, a public body has the same obligations in terms of notice, openness and the ability to conduct executive sessions as in the case of regular meetings.

This will confirm, as expressed in various telephone conversations between this office and yourself, Mr. Chasinov and Mr. Vigliotta, that it is our opinion that by failing to provide proper notice of and to permit the public to attend the meetings held by the Zoning Commission members between June and September 2011, the Zoning Commission failed to comply with the requirements of the Open Meetings Law. While this was the opinion that we offered in late 2011 and remains our opinion today, it reflects only half of the advice offered and opinions formed about the situation in the Village of Mastic Beach with respect to the proposal and adoption of the zoning code.

Accordingly, we turn our attention now to the remedies available under the Open Meetings Law.

The only method by which action taken by a public body can be challenged is through the filing of what is known as an Article 78 proceeding in Supreme Court. The time for initiating litigation against a public body is generally four months from the date the action is taken.

Section 107(3) of the Open Meetings Law, the provision related to enforcement of the Law sets forth in related part as follows:

> 1…. 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. An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body. The provisions of this article shall not affect the validity of the authorization, acquisition, execution or disposition of a bond issue or notes.
> 2. In any proceeding brought pursuant to this section, costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party. If a court determines that a vote was taken in material violation of this article, or that substantial deliberations relating thereto occurred in private prior to such vote, the court shall awards costs and reasonable attorney's fees to the successful petitioner, unless there was a reasonable basis for a public body to believe that a closed session could properly have been held."

In short, should a complaint be filed in a timely fashion, and should a court determine that there was a violation of Law, upon good cause shown, the court could, in its discretion, invalidate the action taken at the meeting, require the public body to attend training at the Committee on Open Government and award attorney's fees to the prevailing party.

We note that subsequent to the series of meetings held in private, the Zoning Commission held three properly noticed gatherings in October and November of 2011, through which the public was encouraged to submit written questions and on at least one occasion was given the opportunity to question the Zoning Commission members. It is our understanding that the Zoning Commission then held additional hearings and meetings in 2012, for which proper notice was provided, the public was permitted to attend, all of which culminated in the Zoning Commission's adoption of a revised proposed zoning code for consideration by the Town Board on January 18, 2012.

Mr. Chasinov's request that this office make a "formal determination as to whether the Open Meetings Law was substantially violated" is neither within the scope nor authority of this office. 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. While we understand Mr. Chasinov's contention that "the entire work of the Zoning Commission has been tainted", it is not required by law, as he suggested, to "restart from the beginning". We recognize that the Zoning Commission's actions to hold meetings and hearings in October and November of 2011, and again in January of 2012 were its attempts to cure any potential lack of prior public involvement and were in keeping with remedies a court could have provided had a complaint been successfully filed.

We hope that this is helpful. Please contact us if you should have any further questions.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

By: Deirdre Barthel
Legal Intern

CSJ:sb

cc: Alan Chasinov
Paul Breschard
Mario Vigliotta
J. Lee Snead

STATE OF NEW YORK
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OML AO 5303

June 29, 2012

Stuart R. Tiekert
[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. Tiekert:

This is in response to your request for an advisory opinion regarding compliance with the Open Meetings Law by the Board of Trustees of the Village of Mamaroneck, and specifically whether certain procedures and topics considered during for executive sessions were proper. The Board of Trustees entered executive sessions at the January 17, 2012 meeting to "discuss the parameters of new regulations regarding open meetings law," and "to discuss fire department personnel and to discuss a request from the Police Chief." Also, the meetings reflect a closed session to obtain advice of counsel.

You questioned whether these were appropriate reasons for entering executive sessions. You also asked whether there should be separate minutes for the executive session or whether they can be "merged" into the work session minutes. You asked whether "general consensus" is the same as a vote, and if so, whether this, too, should result in the preparation of separate minutes. With respect to the closed session to seek the advice of counsel, you questioned whether this was proper without adjourning from open session and whether the subjects discussed should be included in the minutes.

In this regard, we offer the following comments.

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

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

We direct your attention to §106 of the Open Meetings Law which provides that:

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

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

It is noted that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. From our perspective, even 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 [§105(1)(f)], a determination to hire or

fire that person would be recorded in minutes and would be available to the public under the Freedom of Information Law. On other hand, if a public body votes to initiate a disciplinary proceeding against a public employee, minutes reflective of its action would not have include reference to or identify the person, for the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would result in an unwarranted personal privacy [see Freedom of Information Law, §87(2)(b)].

With respect to the issue of whether a general consensus is the same as a vote, it is our belief, based upon the judicial interpretation of the Open Meetings Law, that there may be no distinction between a so-called consensus and a final action taken by a public body if the consensus is in reality a determination reflective of action upon which an entity relies.

There is only one decision of which we are aware that deals specifically with the notion of a consensus reached at a meeting of a public body. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], which involved a board of education in Westchester County, the issue pertained to access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'"(id., 646).

The court stated that:

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

In the context of the situations that you described, if the Board reaches a "consensus" that is reflective of its final determination of an issue, we believe that minutes must be prepared that indicate the manner in which each member voted. If indeed a consensus represents action upon which the Board relies in carrying out its duties, or when the Board, in effect, reaches agreement on a particular subject, we believe that the minutes should reflect the actual votes of the members.

With respect to the closed session to seek advice of counsel, a second vehicle for excluding the public from a meeting involves "exemptions." Section 108 of the Open Meetings

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

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

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

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

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

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

There are several decisions in which the assertion of the attorney-client privilege has been recognized as a means of closing a meeting. In Cioci v. Mondello (Supreme Court, Nassau County, March 18, 1991), the issue involved the ability of a county board of supervisors to seek the legal advice of its attorney in private, and the court stated that "Clearly, the Supervisors' discussions with the County Attorney...are exempt from the provisions of the Open Meetings Law (see POL §108(3), CPLR §4503...)". In another decision citing §108(3), it was found that "any confidential communications between the board and its counsel, at the time counsel allegedly advised the Board of the legal issues involved in the determination of the variance

application, were exempt from the provisions of the Open Meetings Law" [Young v. Board of Appeals, 194 AD2d 796, 599 NYS2d 632, 634 (1993)].

A copy of this opinion will be sent to the Village of Mamaroneck Board of Trustees. We hope that we have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

By: Deirdre Barthel
Legal Intern

RJF:DB:sb
cc: Mayor Rosenblum
Board of Trustees

Jobin-Davis, Camille (DOS)

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, July 11, 2012 2:13 PM
To: [redacted]
Cc: Phillip, Natasha (DOS)
Subject: FW: Questions from the Town of Pavilion, Planning Board
Attachments: Town Planning Board Exec. Sess..doc

Dear Mr. Hollwedel:

This is in response to the email that you forwarded to Natasha Philip, Office of General Counsel, NYS Department of State.

My office is responsible for providing advice and counsel regarding application of the Freedom of Information Law and the Open Meetings Law. In that regard, I have reviewed the questions that you raised in the attached document, and offer the following:

The description of the conversation that the Planning Board wishes to have with the Town Board, in my opinion, would not fit within any of the grounds for entry into executive session, including section 105(1)(d) which permits the discussion of proposed, pending or current litigation. There are numerous advisory opinions on our website that address this particular question, located through the Open Meetings Law advisory opinion index, under "L" for "Litigation", and in particular, one at the following link: http://docs.dos.ny.gov/coog/otext/o2705.htm. Please note the description of the court's decision in Weatherwax v. Town of Stony Point. In brief, the fact that a discussion and/or a decision may result in litigation is not necessarily enough to render the discussion appropriate for executive session. Again, I strongly recommend that you review opinions through the Open Meetings Law index.

I am not familiar with what the legal basis might be for any action to be taken by the Planning Board in order to impress the importance of any issue upon the Town Board, with one exception, and that would be for the Planning Board to adopt a recommendation for transmission to the Town Board. My best advice would be to consult with the Planning Board attorney regarding the most appropriate method for conveying the recommendation to the Town Board and/or complaint to the Code Enforcement Officer.

The content of meeting minutes are governed by section 106 of the Open Meetings Law and section 87(3)(a) of the Freedom of Information Law. Town Law puts the responsibility for minutes with the town clerk, and although I am not familiar with other provisions of law that would require the planning board clerk to keep the minutes, past experience makes be believe that this is the accepted practice. While it is my understanding that many clerks welcome input from various board members prior to making them available to the full board for "approval" I respect that this is not always the case. In my opinion, it is the clerk who is responsible for drafting the minutes; whether s/he chooses to have input from the tape recorder, the public, members of the public body or anyone else is up to her/him. Above all, it is important that the minutes be accurate.

For further information and analysis with respect to the contents of minutes, please see advisory opinions, located through the Open Meetings Law advisory opinion index, under "M" for "Minutes". There are various subsections within the Minutes category that you may find helpful.

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

Camille

Camille S. Jobin-Davis, Esq.

Freeman, Robert (DOS)

OML-AO-5305

From: dos.sm.Coog.InetCoog
Sent: Friday, July 13, 2012 10:37 AM
To: 'Gerry Pilgrim'
Subject: RE: Meeting Held In Violation of OML

Dear Trustee Pilgrim:

As you are likely aware, the Open Meetings Law applies to "meetings" of public bodies, such as village boards of trustees. A "meeting" is a gathering of a quorum, a majority of the total membership of a public body, for the purpose of conducting public business.

When the gathering that you described included the Mayor and one trustee, the Open Meetings Law would not have applied. However, when another trustee attended and participated, it would appear that his/her presence would have transformed the gathering into a meeting. It has been recommended in similar circumstances that, among the members present, there should be sufficient knowledge and vigilance to recognize that a majority is present and that action be taken to ensure that a discussion by the majority should end and continue at a meeting held in accordance with the Open Meetings Law. Stated differently, a third member should exit the gathering to ensure that no quorum is present and that the law is not contravened.

It is suggested that you raise the issue with the Board of Trustees during an open meeting and stress that any gathering of a majority of the Board for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law that must be preceded by notice and held open to the public unless and until a proper executive session may be convened.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
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Phone: (518)474-2518
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[redacted]

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OML AO 5306

July 25, 2012

E-Mail

TO: Brian Lobel
FROM: Camille S. Jobin-Davis, Assistant Director
BY: Deirdre Barthel, 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. Lobel:

This is in response to your request for an advisory opinion concerning application of the Freedom of Information and Open Meetings Laws to the Mamaroneck Town Board.

In this regard, we offer the following comments.

To put the FOIL request into perspective, with certain exceptions, we agree with the Town that the Freedom of Information Law ordinarily 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. Also, in our view, 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 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 Town Board. Most importantly, minutes must be accurate.

When a public body takes action during an executive session, minutes indicating the nature of the action taken, the date, and the vote of each member must be prepared within one week and made available to the extent required by the Freedom of Information Law. It is noted, however, that if a public body merely discusses an issue or issues during an executive session but takes no action, there is no requirement that minutes of the executive session be prepared.

With respect to access to a record or records identifying persons seeking to fill a vacancy in an elective office, it is our view that such records must be disclosed at least in part. Section 87(2)(b) of the Freedom of Information Law enables an agency to withhold records or opinions thereof that could constitute "an unwarranted invasion of personal privacy". However, in typical circumstances, a person seeking to fill an elective position attempts to make his or her name known in order to attract the interest of voters. To suggest that names of those attempting to fill the same position that has become vacant and which may be filled by means of an appointment made by an elective body would in our view be an anomaly. We are not suggesting that personal details of individuals' lives must be disclosed. Nevertheless, in our opinion, disclosure of the

names of candidates for a vacant elective position could not be characterized as an unwarranted invasion of personal privacy.

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

With regard to notice of a meeting, when a public body intends to gather to discuss public business, it is required to provide notice in accordance with §104 of the Open Meetings Law. That provision states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice.
> 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, one, that notice must be posted in one or more conspicuous, public locations; two, that notice must be given to the news media; and three, that notice must be conspicuously posted on the body's website, when there is an ability to do so. The requirement that notice of a meeting be "posted" in one or more "designated" locations, in our opinion, mandates that a public body, by resolution or through the adoption of policy or a directive, select one or more specific locations where notice of meetings will consistently and regularly be posted. If, for instance, a bulletin board located at the entrance of a building in which a community board meets has been designated as a location for posting notices of meetings, the public has the ability to know where to ascertain whether and when meetings of a school board will be held. Similarly, every public body with the ability to do so should post notice of the time and place of every meeting online.

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

From our perspective, every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. In that vein, to give effect to intent of the Open Meetings Law, we believe that notice of organizational meetings should be given to news media organizations that were selected at the previous organizational meeting. Similarly, for notice to be "conspicuously" posted at a designated location, we believe that it should be posted at a location or locations previously selected, where those who may be interested in attending meetings have a reasonable opportunity to see the notice, and made accessible on a municipal website through an obvious link. Until or unless the designated location or the "newspaper of record" are changed through Board action, in our opinion, their designation would remain in effect.

We hope that we have been of assistance.

CSJ:DB:sb
cc: Town clerk

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OML AO 5307

July 26, 2012

Paul Lang
[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. Lang,

This is in response to your request for an advisory opinion concerning the Village of Washingtonville and the Village Board's responsibility to create and maintain minutes of board meetings. Specifically, you indicated your impression, after making a FOIL request, that no minutes were created or maintained with respect to certain meetings.

In this regard, the law requires that minutes be prepared and made available to the public within two weeks of the meetings to which they relate. Section 106 of the Open Meetings Law pertains to minutes of meetings and states that:

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

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

In view of the foregoing, it is clear that minutes of open meetings must be prepared and made available "within two weeks of the date of such meeting." Should action be taken during an executive session, minutes must be prepared within one week of such session.

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

With respect to a board's ability to enter into executive session, we note that 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. Every motion to enter into executive session would be required to be recorded in the minutes.

You requested information regarding the ramifications of failing to adhere to the requirements of the Open Meetings Law. In this regard, we note that there are two types of enforcement remedies available through an Article 78 proceeding brought 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 states further that:
>
> "An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body."

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

The second involves the court's authority to award costs and reasonable attorneys fees to the successful party, and to require the board members, when appropriate, to attend training.

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 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.

> In 2010, the Legislature further amended §107(1), to include the following:
>
> "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."

In short, the court has the discretionary authority to make findings against a public body, i.e., declare a violation, invalidate action taken, award attorney's fees, order the board to attend training, or any combination of the above.

Finally, we note that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3)(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.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb
cc: Mayor Kevin Hudson
Joseph Ruyack III, Village Attorney
Christine Shenkman, Village Clerk

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OML AO 5308

July 26, 2012

Paul Lang
[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. Lang:

This is in response to your request for an advisory opinion concerning compliance by the Village Board of Trustees of Washingtonville with the Open Meetings Law. Based on a meeting agenda, the Board scheduled executive sessions for reasons of "personnel, traffic court prosecutor, budget adjustments, insurance proposal and SPDES permit." Further, in the New Business category, there was a topic listed as "Resolution to purchase 5 year Tail coverage for Public Officials Liability." Based on a discussion heard at the meeting, you understood that this resolution was approved in executive session without public discussion even though it pertained to the expenditure of public funds. Also, you raised issues regarding the time and form requirements of notice of Board meetings.

In this regard, we offer the following comments.

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

Specifically, §105(1) states in relevant part that:

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

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

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

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

With respect to motions to enter into executive session, it has been held that:

> "...the public body must identify the subject matter to be discussed (see, Public Officers Law § 105 [1], and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette

> Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsbrugh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of 'a personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person' (id.). 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'."

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

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

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

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

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

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

In regard to the Board approving the purchase of 5 year "tail coverage" for public officials liability, § 105(1) states in relevant part that, "no action by formal vote shall be taken to appropriate public monies…" Based upon that clause of the provision, a public body may generally vote during a proper executive session; however, any vote to appropriate public monies must be taken during an open meeting. As such, there may be situations in which a discussion may be conducted during an executive session, but where a public body may be required to return to an open meeting to vote to appropriate public monies in relation to the subject previously considered behind closed doors. If the action involves an allocation or expenditure of funds that have previously been appropriated, such an action could, in our opinion, be taken during a proper executive session.

Lastly, § 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."

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 we have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

By: Deirdre Barthel
Legal Intern

RJF:DB:sb
cc: Mayor Kevin Hudson
Joseph Ruyack III, Village Attorney
Christine Shenkman, Village Clerk

FOI-AO-18926
OML-AO-5309

Jobin-Davis, Camille (DOS)

From: Jobin-Davis, Camille (DOS)
Sent: Friday, July 27, 2012 9:39 AM
To: 'A. Jane Johnston'
Subject: Freedom of Information Law - "Confidential"
Attachments: koweek.txt

Dear Ms. Johnston,

This is in response to your email of June 22, 2015.

In short, "confidentiality" is a legal term of art that can only be conferred, at least in the FOIL context, via state or federal law – merely stamping a document "confidential" does not make it exempt from disclosure. I encourage you to review advisory opinions filed through our online FOIL Advisory Opinion Index under "C" for "Confidentiality, Promise of", and other subheadings of "Confidentiality" for greater clarification.

While many agencies are finding that posting material online is not only an efficient way to deal with records requests but a valuable public relations move, with one exception, there is no requirement that records be posted online. The exception, section 103(e) of the Open Meetings Law, pertains to those records that are scheduled to be discussed at a public meeting (hence, the distribution of "packets"). By definition, it does not include records that are scheduled to be discussed during an executive session, or a meeting that is exempt from OML. Please review the following two publications in the News section of our website:

http://www.dos.ny.gov/coog/QA-2-12.html

http://www.dos.ny.gov/coog/RecordsDiscussedatMeetings.html

The rules for whether a particular entity is subject to the OML, and whether there is authority to conduct a closed session are all contained within the OML – the only exception would be those entities that are not subject to OML pursuant to an act of the state or federal legislature, i.e., a county legislature does not possess the authority to create an entity that is exempt from the OML.

Lastly, the exception that may apply to the records that you discuss would be section 87(2)(e) of the FOIL, pertaining to those records that are (a) compiled for law enforcement purposes, and (b) which, if disclosed, would interfere with an ongoing investigation and/or judicial proceeding. Attached is a recent advisory opinion related to this issue that you will likely find helpful. There are additional related opinions available under "C" for "Compiled for Law Enforcement Purpose" and "L" for "Law Enforcement Purpose."

I hope that you find this helpful.

Camille

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OML AO 5310

July 27, 2012

E-Mail

TO: Councilman Jim Zecca

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 Councilman Zecca:

I have received your correspondence in which you sought an advisory opinion relating to the Open Meetings Law.

You wrote that the City of Utica Common Council consists of nine members and that "legislative council committees are made up on average of four members of the council." You indicated that "When meetings are held they are not posted on the City of Utica web site and official minutes of the meetings are not being taken or filed", and that your "corporation counsel and the council attorney have advised the council that it is not necessary because we do not have a quorum of the council and the committees are only advising the council and have no power to make any final decisions for the council as a whole."

Reference was also made to a resolution pertaining to a "pre-meeting conference" to be held by the Common Council prior to every regular and special meeting "for the purpose of discussing and reviewing new legislation, legislation that is committee and such other matters that the members of the Council have determined to require their attention at that time." The resolution also states that "The Pre-Meeting Conference is advisory in the same manner as committee meetings."

If I am interpreting the information described in the preceding paragraphs accurately, it appears that City officials may believe that a committee of the Common Council is not required to comply with the Open Meetings Law. If that is their understanding, it is, in our view, inaccurate. In this regard, I offer the following comments.

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

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

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

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members of a city council, constitutes a "public body" that falls within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993); County of

Lewis v. O'Connor, Supreme Court, Lewis County, January 21, 1997; Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)].

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

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

Based on the provision quoted above, a meeting of a public body occurs when a majority of its total membership, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Moreover, only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties.

In the context of the situations that you described, since the Common Council consists of nine members, its quorum is five. If the Council designates a committee consisting of four of its members, that entity would constitute a public body, and a quorum of that public body would be three. That being so, if three members of that committee gather to discuss the business of the committee, the gathering would constitute a meeting that falls within the coverage of the Open Meetings Law.

In short, a committee consisting of two or more members of the Common Council is itself a public body required to comply with the Open Meetings Law in the same manner as the Council with respect to notice, the preparation of minutes, openness and the ability to conduct executive sessions in accordance with the grounds for entry into executive session appearing in paragraphs (a) through (h) of §105(1) of that statute.

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

RJF:sb

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DEPARTMENT OF STATE
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OML AO 5311

July 31, 2012

E-Mail

TO: Thomas Nimick
FROM: Robert J. Freeman, Executive Director
BY: Deirdre Barthel, 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. Nimick:

This is in response to your request for an advisory opinion concerning application of the Open Meetings Law to certain meetings and actions of the Clarkstown Town Board. Board members responded to your requests for minutes involving decisions made in executive sessions by indicating that they were instead "discussions" and not "decisions". You wrote that when the Town Attorney, Amy Mele, was contacted regarding those executive sessions, she said:

> "I would also like to point out for clarification that in addition to being able to discuss personnel matters in Executive Session the advice of counsel is not even a topic of the Open Meetings Law. In other words if this Board is convening to get the advice of our attorney it is exempt from the Open Meetings Law process. That said, when we retire to enter into Executive Session with some reasoning it is an absolute exemption to the entire Open Meetings Law process." (Letter dated April 15, 2012, pg. 5).

It has been asserted that you have discussed § 106 of Open Meetings Law regarding the requirements for minutes with Board members and that OML-AO-4028 has been reviewed. However, you asked whether there is a blanket exemption or shield from the Open Meetings Law for all conversations between the Town Attorney and the Town Board. Another question is

whether there are grounds for concern about a possible "violation" of the Open Meetings Law. You also sought clarification concerning classifying some meetings as "workshops" and not producing minutes from those gatherings.

In this regard, we offer the following comments.

While the Committee on Open Government is authorized to issue advisory opinions concerning application of the Open Meetings Law, this office has no authority to enforce the law or compel an entity to comply with the statutory provisions. It is our hope that these opinions are educational and persuasive, and that they serve to resolve problems and promote understanding of and compliance with the law.

First, 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. The other vehicle for excluding the public from a meeting involves "exemptions." Section 108 of the Open Meetings Law contains three such 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.

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

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

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

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

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

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

Insofar as a public body seeks legal advice from its attorney and the attorney renders legal advice, we believe that the attorney-client privilege may validly be asserted and that communications made within the scope of the privilege would be outside the coverage of the Open Meetings Law.

When a discussion turns to matters that are not within the scope of the attorney-client privilege, the Board is under an obligation to return to public session, or to reserve further discussion to occur during an open meeting.

It has been advised by this office and held judicially that the authority to assert the attorney-client privilege as an exemption from the coverage of the Open Meetings Law is narrow. In a decision that cited an advisory opinion of the Committee, the court in White v. Kimball (Supreme Court, Chautauqua County, January 27, 1997) found that:

> "While there is no question that Executive Sessions can be conducted for proper reasons and that an exception exists under the Open Meetings Law for attorney-client privileged communications, the scope of that privilege is limited. Once the legal advice is offered, discussions with regard to substance (e.g.) the closing date of a bus system, do not fall within the privilege of the exception. See Exhibit C, April 8, 1996 Open Meetings Law Advisory Opinion #2595, Robert J. Freeman, Executive Director of Committee on Open government at page 4:
>
> "I note that the mere presence of an attorney does not signify the existence of an attorney-client relationship; in order to assert the attorney-client privilege, the attorney must in my view be providing services in which the expertise of an attorney is needed and sought. Further, if at some point in a discussion, the attorney stops giving legal advice and a public body may begin discussing or deliberating independent of the attorney. When that

point is reached, I believe that the attorney-client privilege has ended and that the body should return to an open meeting."

Second, we note the use of "personnel" as one of the topics for consideration in executive session. The term "personnel" does not appear in the grounds for entry into executive session, paragraphs (a) through (h) of § 105(1). Moreover, the exception cited most frequently to discuss personnel matters often does not deal with personnel. Section 105(1)(f) permits a public to conduct an executive session to discuss:

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

Based on judicial decisions, a motion to enter into executive session should be based on the specific language of §105(1)(f), as you said you previously discussed with the Board. 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 perhaps even members of the Board, to know whether the subject at hand may properly be considered during an executive session.

In sum, based on the foregoing, while a discussion concerning the grounds for termination of an employee or a professional contractor, or the employment history of candidates applying for a professional service contract would be appropriate for discussion in executive session, a discussion regarding the cost effectiveness of retaining an outside firm would be required to be held in public.

Third, with respect to the Board's responsibility to keep minutes and make them available upon request, we note initially that there is no legal distinction between a "meeting" and a "workshop."

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)].

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

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

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

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

On occasion, public bodies have taken action by what has been characterized as "consensus." If a public body reaches a consensus upon which it relies, we believe that minutes reflective of decisions reached must be prepared and made available. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], the issue involved access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid

publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

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

If the Board reached a "consensus" that is reflective of its final determination of an issue during an executive session, we believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted.

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

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

Based upon the foregoing, it is clear in our view that minutes need not consist of a verbatim account of what was said at a meeting; similarly, there is no requirement that minutes refer to every topic discussed or identify those who may have spoken. Although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are

taken. If those kinds of actions, such as motions or votes, do not occur during workshops, technically we do not believe that minutes must be prepared.

We hope that we have been of assistance.

RJF:DB:sb

cc: Alex Gromack, Supervisor
Amy Mele, Town Attorney

FOI-AO-18931
DML-AO-05312

Jobin-Davis, Camille (DOS)

From: Jobin-Davis, Camille (DOS)
Sent: Monday, August 06, 2012 9:28 AM
To: 'Robert Cox'
Subject: Request for opinion
Attachments: Scan001.pdf

Dear Mr. Cox,

This will confirm that there would be no basis to deny access to that part of a record that was read aloud by the Superintendent during a public meeting. It is our opinion that an agency essentially waives its ability to deny access when a record is read aloud at a public meeting, effectively allowing the public to learn the content of the record. See http://docs.dos.ny.gov/coog/otext/o5239.doc

The requirement for posting records online contained within Open Meetings Law section 103(e), pertains only to records that are scheduled to be discussed during the course of an open meeting. It does not include a requirement for posting records online after a meeting.

I hope that this is helpful.

Camille

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

Tel: 518-474-2518
Fax: 518-474-1927
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OML-AO-05313

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Tuesday, August 07, 2012 9:07 AM
To: 'Andrew Reeves'
Subject: RE: Executive session Town of Lysander Clerk

The one ground for entry into executive session that might have applied is limited in its application because the clerk is an elected official, not an employee of the town. Specifically, section 105(1)(f) of the Open Meetings Law 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..."

Because the clerk is elected, I do not believe that she can be characterized as an "employee." Similarly, with respect to the possibility of taking some sort of action, I am unaware of the means by which an elected official may be the subject of "demotion, discipline, suspension, [or] dismissal." It is possible that an elected official may be removed from office under section 36 of the Public Officers Law, but I know of no circumstance in which that has occurred.

Insofar as the discussion involved making the position of town clerk appointed rather than elected, in my view, there would be no basis for entry into executive session.

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OML AO 5314

August 9, 2012

Ms. Rhea Vogel
[redacted]

Mr. Warren E. Berbit, General Counsel
Clarkstown Central School District
Lexow, Berbit & Associates, P.C.
56 Park Avenue, PO Box 239
Suffern, NY 10901

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. Vogel and Mr. Berbit:

I have received materials from both of you relating to the implementation of the Open Meetings Law by the Clarkstown Central School District Board of Education. I recognize that this response is late in coming, but note that the materials sent to this office are voluminous, that the Committee staff consists of two, and that it has become all but impossible to respond promptly to all of those who seek guidance and opinions. It is admitted, too, that I did not review the entirety of the exhibits sent by Ms. Vogel. In short, there is simply is insufficient time to read or watch the voluminous material provided.

It is noted that the versions of events that you have described are, in some instances, inconsistent. While I am not questioning the veracity of either of you, it is clear that perceptions regarding the same events are different. Descriptions of events disseminated to the public at large in which those events are characterized as "violations" might not have involved violations of law, and Mr. Berbit has sought to offer clarification, albeit in defense of his client, the District.

For purposes of structural and chronological clarity, reference will be made to a letter of November 10 that includes information largely repetitive of the material included in Ms. Vogel's letter of December 8.

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

The first alleged violation relates to a meeting of the Board of Education on October 24. The meeting was held in the main board room where most board meetings are conducted, and the room has a capacity of 120 persons. Ms. Vogel wrote that the agenda for the meeting included "the much anticipated presentation of a consultant" who was being considered to evaluate the District's special education program, that the presentation was reported by the news media, and that the president of the Teachers Association sent an email to some 800 members of the Association encouraging them to attend. She expressed the belief that the publicity relating to the meeting, "upon information and belief," was known to Douglas Katz, the Board President. She also noted that the agenda included reference to "the expected vote of the majority members of the Board of Education to hire a firm to begin the search for a new Superintendent of Schools." She referred to other issues that would likely be addressed and contended that it was or could have been known that the main board room would not be large enough to accommodate those interested in attending and wrote that "People were standing in the back of the room and crushed into the doorway, effectively blocking the exit" and that an "ineffective attempt was made at providing a video feed into another conference room…"

Section 103(d) of the Open Meetings Law states in part 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." Further, even before the provision quoted above was enacted, it advised by this office and confirmed judicially that "if it known in advance of a meeting that a larger crowd is likely to attend than the usual meeting location will accommodate, and if a larger facility is available, it would be reasonable and consistent with the intent of the Law to hold the meeting in the larger facility" (see also, Crain v. Reynolds, Supreme Court, New York County, NYLJ, August 12, 1998, which includes the quoted language in this sentence).

In response to Ms. Vogel's contentions, Mr. Berbit wrote that "neither the Board nor District has an exact way to gauge the number of people who might attend a meeting", and that they "do the best they can….understanding the 'all reasonable effort' standard." With respect to the meeting at issue, he wrote that the President and Vice President of the Board met with the Superintendent prior to the meeting, and the officers indicated that they heard nothing regarding the number of those who might attend. Nevertheless, at the Superintendent's suggestion, "as a precaution", a video feed was arranged to operate in a room "down the hall from the main board room." Mr. Berbit added that he was present at the meeting and confirmed that there were standees at the start of the meeting, that the main meeting room was filled, that "about 20 or 25 people" were present in the room with the video feed, and that some people continued to stand

after "the crowd thinned" and seats were available in the meeting room. He expressed the belief that "everyone was able to hear and everyone had the opportunity to ask questions…" and pointed out that "Board officers indicated that they were not privy to…information [regarding the notification given by the union to its members], nor, apparently was the Superintendent."

Mr. Berbit noted that the experience gained from that meeting resulted in future actions intended to guarantee that the "all reasonable effort" requirement would be met. He referred, for example to an ensuing meeting that included an agenda item of significant public concern and moving the meeting to an auditorium with a capacity of 900. Although that step was taken in anticipation of substantial public interest, "approximately 30 people attended." In short, he wrote that Board officers "do the best they can in anticipating public interest and in reacting to information…"

The next alleged violation relates to a special meeting held on November 3 at 10:15 a.m. The purpose of the meeting, according to Ms. Vogel, involved action "to cover the legal costs" of the present and former Board presidents for their defense in relation to three petitions filed with the Commissioner of Education for their removal. A snowstorm on October 29 resulted in road closings, loss of power and the displacement of many residents, and the contentions are that many who would have attended were unaware of the meeting or unable to attend, and that "this meeting was willfully and intentionally scheduled at this time….in an effort to minimize the number attendees." She also wrote that Board policies were violated by "refusing to videotape and webcast the meeting" and "denying the public the right to comment at the meeting."

In this regard, it is noted that the Open Meetings Law is silent with respect to any obligation imposed upon a public body to record or webcast its meetings. Similarly, although that law clearly provides the public with the right to attend open meetings of public bodies, there is nothing in the law that pertains to the right of the public to comment or otherwise participate during meetings. A public body may choose to authorize recording or webcasting its meetings and to permit public participation during meetings. When that is so, it has been recommended that a public body adopt reasonable rules that treat members of the public equally.

With respect to the timing of the meeting, Mr. Berbit wrote that the Board President informed him that the meeting was scheduled in consideration of "board member availability", that Education Law, §3811, required that the meeting be scheduled "within a narrow time frame", and that the Board President "had no control over the service of removal petitions, nor that such were served in a time frame proximate to a storm", which occurred five days prior to the meeting.

Although the Open Meetings Law pertains to all meetings of public bodies, it does not distinguish between "regular" or "special" meetings, or between "formal" meetings and "workshops" or "work sessions", terms that are frequently used. When a majority of a public

body gathers to conduct public business, collectively, as a body, the gathering constitutes a "meeting" subject to the Open Meetings Law, irrespective of its characterization.

Mr. Berbit, however, wrote that the Board in its policy distinguishes "regular" and "special" meetings, and that its policy relative to special meetings indicates that those meetings need not be recorded or webcast and that public comment need not be accepted. He noted that a vote to permit public comment at the meeting in question was defeated, even though the Board President voted in favor of the motion.

Next, Ms. Vogel wrote that the Board President "intentionally discouraged the public from attending" the meeting of November 22, that the "listing for the meeting did not adequately communicate the purpose for an Executive Session", and that an executive session could not have properly been held.

I point out that the requirements concerning notice of meetings require only that the notice include the time and place of a meeting (see §104); there is no requirement that the topics to be considered be included in the notice; so doing is, in my view, a courtesy. Similarly, the Open Meetings Law makes no reference to an agenda. A public body may prepare an agenda, but it is not required by law to do so. If an agenda is prepared, a public body may choose to follow it, or on the other hand, the agenda may be ignored. A public body may adopt rules or policies regarding those two matters, but I am unaware of whether the Clarkstown Board has done so.

The focus of the November 22 meeting involved discussion with a firm retained to assist in the search for a new superintendent. Mr. Berbit wrote that the Board President indicated that he announced at that meeting that "every aspect of developing search credentials would occur in public", except for discussion of "characteristics that some board members perceived as deficient in the current Superintendent which they would wish improved in a new Superintendent", and that "there was the belief that Board could not divorce from the discussion the issues which some board members had with the current Superintendent." He added that the executive session was held "to avoid embarrassing the Superintendent, thus avoiding an unwarranted invasion of privacy."

The provision dealing with an unwarranted invasion of personal privacy is §87(2)(b) of the Freedom of Information Law, a statute pertaining to public access to government records that is separate from the Open Meetings Law. Moreover, a comparison of the exceptions to rights of access to records appearing in §87(2) of the Freedom of Information Law and the grounds for entry into executive session in the Open Meetings Law appearing in §105(1) of that statute indicates inconsistencies between the two; in some instances, consideration records or portions of records that may be withheld under the former would not necessarily result in a proper executive session under the Open Meetings Law.

One of the grounds for entry into executive session is comparable in effect in some circumstances to the exception concerning unwarranted invasions of privacy. Specifically, §105(1)(f) permits a public body to conduct an executive session to discuss:

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

To the extent that discussion of the matter could have been segmented via consideration of the search process or procedure, as opposed to consideration of attributes, strengths, weaknesses or performance of the Superintendent, I believe that the Board should have done so. The latter, in my view, would likely have involved "the employment history of a particular person." To that extent, I believe that an executive session could appropriately have been held. The remainder of the discussion that did not focus on the Superintendent or any particular candidate or applicant for the position should have occurred in public.

I recognize that the foregoing does not deal with every aspect of the views expressed by both of you. In consideration of the passage of time and the occurrence of events after the meetings to which you referred, it is likely unnecessary to offer an opinion regarding those matters. The preceding paragraphs are intended to deal with the key issues raised in your correspondence and offer guidance in as reasonable and balanced a manner as possible, and I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:sb
cc: Board of Education

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OML AO 5315

August 10, 2012

E-Mail

TO: Hon. Robert Alexander
FROM: Robert J. Freeman, Executive Director
BY: Deirdre Barthel, 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, unless otherwise indicated.

Dear Judge Alexander:

This is in response to your request for an advisory opinion regarding application of the Open Meetings and the Freedom of Information Laws to certain gatherings and records of the Corfu Village Board of Trustees. Based on our review of the materials that you and the Deputy Mayor submitted (copies attached) , we offer the following comments.

Initially, we emphasize that only a court can make a determination whether a meeting was "illegal" or there has been a "violation" of the 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. Accordingly, in an effort to attempt to resolve problems and promote understanding of and compliance with law, we offer the following comments.

First, with the exception of a court order, we know of no authority on which a public body could rely to prohibit any person from attending a meeting of a public body, such as a village board of trustees. Moreover, allegations that you were prohibited from entering meetings stand in marked contrast to minutes of such meetings, and it is not possible, without more, to understand what transpired.

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 agendas, public participation, or participation by elected officials. Consequently, by means of example, if a public body, such as a village board, does not want to answer questions or permit the public to speak or otherwise participate at its meetings, it is not 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., 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 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.

Third, it is emphasized that a public body cannot conduct an executive session prior to or outside of an open 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.

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

In consideration of the length of this opinion, we enclose an advisory opinion regarding enforcement of the Open Meetings Law (OML-AO-4829) and direct your attention to §107, which includes recent amendments.

Turning to issues related to the Freedom of Information Law, and in particular, access to records reflecting payment to legal counsel, we note as a general matter, that it 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.

It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In our view, the phrase quoted in the preceding sentence evidences recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, we believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

For further analysis with respect to issue that you raised, we have enclosed a copy of FOIL-AO-14270.

We hope that we have been of assistance.

RJF:DB:sb
Enclosure: 4829, 14270

cc: Albert Graham
Mark Boylan
Mayor Skeet
Village of Corfu Trustee Board Members

FOI-AO-18935
OML-AO-05316

Jobin-Davis, Camille (DOS)

From: Jobin-Davis, Camille (DOS)
Sent: Friday, August 10, 2012 12:24 PM
To: [redacted]
Subject: Freedom of Information Law - Queens Library

Dear Ms. O'Connell,

This is in response to yours of July 10, 2012. Please accept my apology for the delay.

This will confirm that it remains our opinion that the Queens Borough Public Library is subject to both the Freedom of Information Law and the Open Meetings Law, and is therefore required to prepare and maintain minutes, and make them available to the public upon request.

The following opinion, rendered in 1993, sets forth our logic specifically with respect to the Queens Borough Public Library: http://docs.dos.ny.gov/coog/ftext/f7852.htm

This will also confirm that it remains our opinion that association libraries are not subject to the Freedom of Information Law, as set forth in the opinion cited by the Queens Library, and available at the following link: http://docs.dos.ny.gov/coog/ftext/f11535.htm

Should the Queens Borough Public Library produce any evidence that it was established as an association library, we would be willing to review the opinion issued in 1993.

Finally, if the Queens Borough Public Library is at some point determined to be an association library, subject to the Open Meetings Law and not the Freedom of Information Law, it would remain our opinion that it would be required to prepare and maintain minutes of all of its public meetings, and make such minutes available to the public. Open Meetings Law section 106 would require no less, as follows:

"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."

Please let me know if you have further questions.

Camille

Camille S. Jobin-Davis, Esq.
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FOI-AO-18950
OML-AO-05317

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August 22, 2012

MEMORANDUM

TO: Hon. John A. Salisbury, Supervisor, Town of Lysander
Hon. Lisa Dell, Clerk, Town of Lysander
Dennis Stimson and Carol Baumgartner
Rebecca Stock

FROM: Robert J. Freeman, Executive Director RJF

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

Having received correspondence from all of you relating to a series of issues arising in the Town of Lysander, I am taking this opportunity to address the issues in a single response.

By way of background, it is clear that there are differences of opinion between the Supervisor and others and the Town Clerk. The questions largely involve the status of certain records, and I point out that I have neither seen nor heard the content of any such materials, and my goal, as in all instances in which advisory opinions are prepared, involves offering a correct response based on the language of the law and its interpretation by the courts. This office is not empowered to gain access to records that may the subjects of controversy in order to determine whether or the extent to which they must be disclosed to comply with law; it is not a court, and it has no judicial authority. We have no way of ascertaining which among conflicting points of view or factual statements are accurate.

I note that I have been informed by the Clerk that she has been the target of hostility by a particular individual whose identity is unknown to me, that she has obtained a court order prohibiting that person from being within a certain distance of her, and that she is fearful that the

individual may want to harm her. Her discomfort and fears were apparently made known to Town officials, including the Supervisor.

The initial area of controversy involves a tape recording of a conversation between the Clerk and Supervisor of June 27 that was requested by Mr. Stimson and Ms. Baumgartner. The request was denied by the clerk, her denial was appealed to the Supervisor, who "ordered" that the tape recording be disclosed. In their letter to me, Mr. Stimson and Ms. Baumgartner referred to a meeting between the Clerk and Supervisor "to discuss ongoing issues with the town clerk's office", and that the Clerk "insisted on having one town councilor present as her 'witness'". Consequently, the Supervisor invited another councilor as his witness. That being so, three of five members of the Town Board, a quorum, were present. The Clerk indicated that she would be recording the meeting.

Mr. Stimson and Ms. Baumgartner wrote that "The town clerk was acting in her official capacity as secretary to the town board," that "As secretary to the town board, the town clerk is responsible for recording meeting minutes", and they concluded that "any recordings made by the town clerk of this meeting are public records and should be made available to the public."

The Clerk, however, in a letter to me, indicated that she listened to the recording, that it "clearly does not pertain to Town business or to any of my duties as Town Clerk", and that it captured "a personal incident that occurred" between herself and the Supervisor on the previous day. She added that the Supervisor asked her to meet with him and "said that this was just a personal conversation between him and I regarding the personal incident that occurred the day before." Ms. Dell also wrote that the Supervisor told two persons present in his office "that they could not participate in our conversation and they did not."

From my perspective, two questions arise in consideration of the foregoing: first, is the tape recording a "record" that falls within the coverage of the Freedom of Information Law [FOIL]; and second, was the gathering during which three of five members of the Town Board a "meeting" that fell within the coverage of the Open Meetings Law?

FOIL is applicable to all agency records, and §86(4) of that statute defines the term "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..." If, as contended by Mr. Stimson and Ms Baumgartner, the tape recording involved Town business, such as "issues with the town clerk's office", I would agree that that tape would constitute a "record" falling within the scope of FOIL that is subject to rights of access. If, on the other hand, as contended by the Town Clerk, the tape recording involves a personal matter rather than Town business, and if the only copy of the recording is not maintained by or for the Town, but rather at her private residence, it would not likely constitute a "record" as defined by FOIL, and that statute would not apply.

Again, I have not heard the recording, and I am unaware of its specific content. To learn more of its content, I contacted the only person who has possession of the recording, the Clerk. She indicated that, before being elected as Town Clerk, she was a police officer employed by the Village of Baldwinsville. In that role, she arrested the individual who is the subject of the order of protection. His activities and hostility toward her let to the issuance of an order of protection by a court. She said that a citizen contacted the Supervisor to inform him that the subject of the order was across the street from Town Hall with a camera. He later provided the same account to the Clerk, who asked the Supervisor why he chose not to inform her of the presence of the subject of the order, and that she was upset by his lack of concern. The Supervisor, according to the Clerk, objected to her reaction to his absence of concern, and he said that she should "expect no cooperation" from him. Due to her fear of the subject of the order, she contacted the police the next morning, and soon after, the order of protection was extended until December.

The gathering the next day that was recorded involved the incident described in the preceding paragraph. If the description of the matter by the Clerk is accurate, it involves her personal safety relating to an arrest of an individual that is unrelated to her functions as Town Clerk. The hostility on the part of the subject of the order appears to relate to her due to her former position, and that her current position as Town Clerk is largely irrelevant to his actions. It does not appear, as suggested by Mr. Stimson and Ms. Baumgartner, that the Town Clerk "was acting in her official capacity as secretary to the town board."

If the recording is not a "record" subject to FOIL because it does not involve or pertain to Town business, the gathering involving the Supervisor, the Clerk and two Town Board members would not have fallen within the coverage of the Open Meetings Law. If, however, the gathering involved Town business, I believe that the gathering would have constituted a "meeting" as that term has been interpreted, that it should have been preceded by notice given in accordance with §104 that statute, as well as §62 of the Town Law, convened open to the public, and conducted open to the public, except to the extent that an executive session could properly have been convened.

The remaining issue relates to a request made pursuant to the Freedom of Information Law by Ms. Stock in which she requested "a copy of a letter dated July 6, 2012, from the town clerk to town supervisor, copying the four other members of the town board regarding a meeting between the clerk and the supervisor held in town hall on or about June 27, along with other town matters." The Clerk denied the request, stating that the record, in Ms. Stock's words, "would be intra-agency material, would constitute an unwarranted invasion of personal privacy and would endanger the life or safety of another person..."

In this instance, I believe that the letter in question is an agency "record" that falls within the coverage of the Freedom of Information Law. That statute, in brief, is based on a presumption of access. Stated differently, agency records are accessible, except those records or

portions of records that fall within one or more of the grounds for denial of access appearing in §87(2). The Clerk has referenced three of the exceptions to rights of access.

I have not seen the record, nor has any portion of the record been read aloud to me. In order to learn more of the matter, I contacted the Clerk. She informed me that the substance of the letter consists of her opinion that the unfortunate relationship between her and the Supervisor and perhaps others involves discrimination due to her political affiliation, which has, in her view, resulted in a hostile work environment. She also referred to her personal feelings relative to the situation concerning the subject of the order of protection.

A communication between the Clerk and Town officials would clearly constitute intra-agency material falling within the scope of §87(2)(g). That provision potentially serves as a basis for denying access, but due to its structure, it may also require disclosure. Specifically, §87(2)(g) states that an agency may withhold records that:

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

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

In short, to the extent that the record at issue consists of the Clerk's opinions or recommendations, for example, I believe that it may properly be withheld. Insofar as it consists of statistical or factual information, it would be accessible, again, unless a different ground for denial may be asserted.

One of those grounds for denial, §87(2)(b), authorizes an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy." If, for example, factual information is of a personal nature, i.e., concerning the Clerk's private relationships, her status or characteristics as a woman, or perhaps concerning the subject of the order of protection, that exception might properly be asserted.

The other ground for denial referenced, §87(2)(f), permits an agency to withhold records to the extent that disclosure "could endanger the life or safety of any person." In consideration of the circumstances pertinent to the meeting and the preparation of the letter sought by Ms. Stock, as well as the Clerk's former status as a police officer and the focus of the subject of the order of protection, it is possible that this exception may be applicable, depending on the content of the letter.

I hope that the foregoing serves to resolve the controversy and clarify the application of the Open Meetings and Freedom of Information Laws, and that I have been of assistance.

RJF:sb

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OML AO 5318

August 22, 2012

Diane Cirillo
[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. Cirillo:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to certain meetings of the Seaford Union Free School District Board of Education. Specifically, you mentioned §§103(a) and 105(1)(h), and the Board's motions to enter into executive session. The materials that you provided show that the Board has entered into executive session for purposes of discussing "contract negotiations," "a specific contract," "specific personnel matter," "personnel of former staff," "sale of Seaford School," and variations on those phrases.

You asked that we "validate the need for the Seaford Board of Education *to use sufficiently descriptive language when motioning to enter into executive session, and... that you cite the applicable court decisions so they can see that it absolutely carries the force of law*." You expressed interest in sharing information about the Committee's training sessions with the Board.

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

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

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

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

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

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

As you note, it has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). That section reads:

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

Based on the foregoing, an example of 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.).
>
> "Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

Based on the foregoing, a proper motion might be: '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 [see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, Supreme Court, Chemung County, April 1, 1983]. By means of the kind of motion suggested above,

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

Another provision on which the Board relied on to enter into executive session is §105(1)(h). That provision permits a public body to enter into executive session to discuss:

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

Based on the foregoing, it is clear that §105(1)(h) does not permit public bodies to conduct executive sessions to discuss all matters that may relate to the transaction of real property; only to the extent that publicity would "substantially affect the value of the property" can that provision validly be asserted.

In our opinion, §105(1)(h) is designed to shield discussions regarding a governmental entity's sale or acquisition of real property when disclosure would affect the government's interest in the value of such property. The rationale underlying that provision, in our opinion, does not involve protection of the interests of private parties in the sale of real property, but rather the government's ability to engage in an agreement or transaction optimal to the taxpayers and in their best interest. In short, it is our opinion that this provision does not apply when the government is not the seller or purchaser of a parcel.

One of the grounds for entry into executive session authorizes a public body to conduct a closed session to discuss or engage in collective bargaining negotiations with a public employee union. Although the Open Meetings Law imposes no requirement that an executive session must be held, it has been found, based on past practice and the provisions of the Taylor Law, which deals with the relationship between public employers and public employee organizations, that collective bargaining negotiations must be conducted in private [County of Saratoga v. Newman, 476 NYS2d 1020 (1984)]. Although we disagree with the determination, it is the only judicial decision that addresses the issue that you raised and, therefore, has precedential effect.

Further, although certain "contractual 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 appears to be inapplicable in the context of the situation that you described.

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 City of Geneva."

Perhaps more importantly, earlier this year the Appellate Division confirmed that a school board violated the Open Meetings Law by merely reciting statutory categories for entering executive session, and ordered the members to attend training at our office. Zehner v Board of Education of Jordan-Elbridge Central School District, Appellate Division, 4th Dept, January 31, 2012. For an analysis of the judicial determination, please see the enclosed article. In short, public bodies are required to articulate "specific and particularized" justifications for entry into executive session.

Finally, although there are only two of us in the office, upon receipt of an invitation from a public body or a local advocacy group such as a League of Women Voters, or the local newspaper, we will travel to various locations to conduct training for awareness and guidance towards compliance with the Open Meetings Law.

I hope that we have been of assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb
Enclosure
cc: Brian Fagan, President
Brian Conboy, Superintendent

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OML AO 5319

August 22, 2012

E-Mail

TO: Michael Bowman

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. Bowman:

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to certain gatherings of the Board of Trustees of the Village of Cold Spring. Specifically, you raised issues regarding the Board's ability to modify a budget subsequent to a public hearing and a discussion at a Board meeting, including whether a second public hearing was necessary prior to such modification.

The Village Attorney submitted correspondence, copy attached, addressing various of the issues that you raised.

In this regard, I note that the matters at issue are not governed by the Open Meetings Law and, therefore, we are unable to provide assistance. Should you require advice regarding application of Village Law with respect to the proper procedure for the adoption of budgets, we recommend that you review Village Law provisions or seek advice and counsel from an attorney.

I regret that we cannot be of further assistance.

CSJ:sb
cc: Stephen Gaba, Village Attorney
Attachment

FOI-AO-18953
OML-AO-05320

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Thursday, August 23, 2012 9:05 AM
To: 'wbruchis'
Subject: RE: New Provision of the Open Meetings Law Goes Into Effect February 2, 2012

It's an interesting question. If you're referring to the committee that we discussed, the Open Meetings Law simply doesn't apply. If, however, you're referring to the System's Board, which is subject to the Open Meetings Law due to the direction given in §260-a of the Education Law, you may recall that we've advised that not-for-profit library entities are not subject to the Freedom of Information Law.

Based on a close reading of the new provision, §103(e) of the Open Meetings Law, it generally requires the disclosure of two categories of records scheduled to be discussed during open meetings. One involves records that are accessible under the Freedom of Information Law, and the other pertains to "any proposed resolution, law, rule regulation, policy or any amendment thereto." Therefore, I believe that the latter group of records, i.e., proposed resolutions, policies and the like, should be made available in advance of meetings to comply with §103(e) when those records are scheduled to be discussed in public by a non-governmental library board of trustees. The former, concerning records that are accessible under the Freedom of Information Law would not apply, for a non-governmental entity falls outside the scope of that law.

This is not intended to suggest that records cannot be disclosed by a non-governmental entity when the Freedom of Information Law does not apply, but rather that there is no obligation to do so.

I hope that I have been of assistance. If you would like to discuss the matter, please feel free to contact me.

Robert J. Freeman
Executive Director
Committee on Open Government
Department of State
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Suite 650
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[redacted]

FOI-AO-18957
OML-AO-05321

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Monday, August 27, 2012 9:47 AM
To: 'Colden Supervisor'
Subject: RE: Town of Colden

Dear Supervisor Hoffman:

I have received your correspondence in which you explained in writing the issues that we discussed, and I offer the following comments.

First, I believe that the Town Clerk has been designated as "records access officer." In that capacity, it is her duty to coordinate the Town's response to requests for records made pursuant to the Freedom of Information Law (see Committee on Open Government regulations, 21 NYCRR §1401.2, available on the Committee's website). In that role, the Clerk may, in my view, ensure that records in your physical custody or the physical custody of other Town officers or employees be made available in accordance with law.

Second, an applicant is not empowered to direct a government officer or employee to make records available at the location of his/her choice. Rather, particularly in situations in which staff is limited, it has been advised that an agency contact the person seeking records for the purpose of establishing a mutually convenient time during which records may be inspected. Further, the applicant does not have the right to specify where he or she wants to inspect records. As part of the function of coordinating responses to requests, the records access officer may, in my view, specify where records may be inspected.

Third, an agency may have an officer or employee present while records are being records are being inspected. That is often so if there is a possibility that records may be misfiled or otherwise taken out of order, misused, etc.

And fourth, section 89(3)(a) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Stated differently, sufficient detail must be included in a request to enable agency officials to locate and identify the records of interest.

The remaining issue relates to a meeting of the Planning Board during which a majority of the Town Board is present, and whether their presence would constitute a meeting of the Town Board that must be preceded by notice given in accordance with section 104 of the Open Meetings Law. In this regard, the term "meeting" has been construed by the courts to mean a gathering of a majority of a public body for the purpose of conducting public business. If, for example, the Planning Board and the Town Board seek to discuss an issue or issues together, it has been held that a "joint meeting" is falls within the coverage of the Open Meetings Law and that both public bodies participating must provide notice and comply with that law. On the other hand, if members of a public body attend a meeting, essentially as interested citizens, and do not function or participate collectively, as a body, it has been advised that their presence would not constitute a "meeting" or, therefore, that the Open Meetings Law would apply. There have been many instances in which I have given presentations during which a majority of the membership of a public body is present in the audience. In those instances, assuming that those persons are present to observe as interested citizens, to obtain training or education, etc., and not to conduct business as a body, their presence would not trigger the application of the Open Meetings Law.

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OML AO 5322

August 29, 2012

Hon. Anthony J. Garramone
Office of the City Clerk
City of Utica
1 Kennedy Plaza
Utica NY 13502

Dear Judge Garramone:

I have received your memorandum and the Rules of Order adopted by the City of Utica Common Council. You referred to "misinformation" concerning meeting procedures, and I offer the following brief remarks based on our conversation concerning those procedures as they relate to the Open Meetings Law.

First, we agreed that the "pre-meeting conference" referenced in the Rules constitutes a "meeting" that falls within the coverage of the Open Meetings Law that must be and, in fact, is preceded by notice given in accordance with that statute.

Second, we agreed, and it was confirmed that committees of the Common Council constitute "public bodies" required to comply with the Open Meetings Law. The Rules so specify, stating that "Committee meetings shall be open to all members of the Common Council, the public and the media and so shall all be informed of meetings." You added that "all committee meetings of the council are on notice to the public and media with an announced agenda."

Third, issues have arisen concerning the placement of videotaping equipment, and Rules indicate that the Council has "dedicated space at the rear of the caucus room and beyond the Council barrier in the Common Council Chambers so as not to interfere with the conducting of business by the members of the Council." The Rule further states that "all videotaping of Council proceeding[s] by members of the media, councilpersons or any other persons, shall be

conducted in the designated area…" It is my understanding that one Council member has sought to place his video recorder on the Council table or physically near Council members, rather than in the designated area. Another Council member has indicated that the placement of the device so near to her and other members is distracting and creates difficulty in relation to her ability to fully concentrate or participate in Council proceedings. That being so, in my opinion, the Council member seeking to record the proceedings must abide by the Rule requiring that video recording be accomplished in a designated area, so long as that area reasonably enables video equipment to record the proceedings.

Lastly, the Rule involving the Public Comment Period and "Sign-up" requires that those who want to address the Council must identify themselves by name. In this regard, it has been advised that if members of the public are given the opportunity to speak during meetings, they cannot be required to provide their names or addresses as a condition precedent to speaking. As you know, the Open Meetings Law states that meetings of public bodies are open to the "general public." That being so, whether those who wish to attend are residents of the City of Utica or otherwise, they have the same right to attend. Similarly, when a public body authorizes public participation, we believe that those who attend must have an equal opportunity to do so. When a person speaks, ordinarily his or her identity is largely irrelevant; what is important is the nature of that person's comments. Perhaps most importantly, in a variety of circumstances, those who want to speak are reluctant to identify themselves for personal reasons, often reasons involving their safety. For instance, victims of batterers or other violence have sought to avoid indicating their names based on their desire for safety. In other instances, parents have sought to avoid identifying themselves in consideration of issues involving the privacy of their children.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:sb

OML-AO-05323

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Friday, August 31, 2012 12:56 PM
To: 'Diane Addesso'
Subject: RE: question on Open Meeting Law
Attachments: o3717.wpd

Hi Diane - -

It's unusual for a board to have an even number of members. Nevertheless, if the Board of Trustees consists of 8 at full strength, its quorum would be a majority of its total membership, notwithstanding absences or vacancies, and the quorum would remain at 5. The applicable provision of law regarding quorum requirements is section 41 of the General Construction Law.

Under the Open Meetings Law, members can conduct a valid meeting by means of physical presence, or via videoconferencing that enables those in attendance at two locations to hear and observe each other. Use of a telephone does not enable the public to "observe the performance" of members as is required in the statute's statement of intent. That being so, members cannot vote or be counted toward a quorum if connected by phone, and proxy voting would be inconsistent with law. I believe that a court would determine that a vote cast by means of a proxy would be deemed a nullity.

Attached is an advisory opinion that deals with both issues that you raised more fully.

I hope that I have been of assistance and that you and yours will enjoy the long weekend.

[redacted]

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OML-AO-5324

September 12, 2012

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 :

This is in response to your request for an advisory opinion concerning the manner in which a resolution was passed by the Town Board of Fremont at a regularly scheduled monthly meeting. Specifically, you requested clarification regarding the Board's responsibility to make a copy of the resolution available prior to the meeting, to what degree "pro-active openness is required of, or can be expected", public participation allowed only after a vote, and when, if ever, a formal hearing can be required prior to a vote.

In this regard, 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."
>
> 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 thereby 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.

Second, members of the public have on many occasions complained that they cannot fully understand discussions among members of public bodies, even though the discussions occur in public. For example, a board member might refer to the second paragraph of page 3 of a record without disclosing its content prior to the meeting. Although the public has the right to be present, the ability to understand or contribute to the decision-making process may be minimal and frustrating.

Based on complaints such as these, the Legislature added §103(e) to the Open Meetings Law, effective February 2012. The purpose of the legislation is simple: those interested in the work of public bodies should have the ability, within reasonable limitations, to see the records scheduled to be discussed during open meetings prior to the meetings and concurrently with the public discussion involving those records.

The amendment addresses two types of records: first, those that are required to be made available pursuant to FOIL; and second, proposed resolutions, law, rules, regulations, policies or amendments thereto. When either is scheduled to be discussed during an open meeting, the law requires that copies of records must be made available to the public prior to or at the meeting, upon request upon payment of a reasonable fee, and, when practicable, online prior to the meeting. The amendment authorizes an agency to determine when and what may be "practicable" in making records available.

It is important to stress that the amendment involves an effort to take advantage of today's information technology to promote transparency and citizens' participation in

government, and to reduce waste. If the agency in which a public body functions (i.e., a state department, a county, city, town, village or school district) "maintains a regularly and routinely updated website and utilizes a high speed internet connection," the records described above that are scheduled to be discussed in public "shall be posted on the website to the extent practicable as determined by the agency…". It is not incumbent upon the public to make a request that such records be posted online, it is the agency's responsibility to do so.

With respect to public participation, we note that although the Open Meetings Law 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.

Furthermore, 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. Whether it is logical to entertain public comments on an issue after a vote has already been taken, in our opinion, is a question best raised before the Board, and/or may be an issue for voters in the next election.

Finally, the Open Meetings Law does not address when a public hearing is required or may be demanded. Whether a public hearing is mandatory would depend on the nature of the resolution. For example, based on Town Law §108, town boards are required to hold a public hearing on the preliminary budget on or before the Thursday immediately following the general election. Similarly, town boards are required to hold public hearings prior to the adoption of a local law. There is no law that we know of that would require a board to hold a public hearing prior to the adoption of a resolution such as the one described in the materials that you submitted; however, that would not prohibit the town board from doing so.

I hope that we have been of assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb
cc: George Conklin, Supervisor, Town of Fremont

OML-AO-5325

Freeman, Robert (DOS)

From: dos.sm.Coog.InetCoog
Sent: Friday, September 14, 2012 4:57 PM
To: 'Chronicle Newsroom'
Subject: RE: I'd like to see your comment...

In short, the Open Meetings Law gives the public the right to attend, listen and observe; it is silent regarding the ability to speak or otherwise participate. That being so, a board need not authorize the public to speak at all. Most boards, however, permit limited public participation, and it has been advised that if they choose to do, they should adopt reasonable rules that treat members of the public equally. For example, it would be unreasonable to permit those in favor of hydrofracking to speak while prohibiting those who are against from speaking. My belief is that a board may adopt a rule precluding any comments, whether in favor or opposed, dealing with a particular subject.

Notwithstanding the adoption of a rule or policy prohibiting comments regarding hydrofracking during meetings of a board, any member of the public may speak on an issue on the steps of town hall, with friends, relatives or others. Certainly they may express their views to members of the news media, and what they (you) choose to share would involve a matter of editorial judgment.

I hope that I have been of assistance.

[redacted]

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML AO 5326

September 27, 2012

Rona Klopman
[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. Klopman,

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to certain gatherings of the East Hampton Town Board during which the Board enters into executive session. Specifically, you raised concerns regarding the Board's apparent failure to vote to enter executive session, failure to articulate grounds for entry into executive session, and the scheduling of executive sessions through the Board's agenda.

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

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

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

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

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

Second, from our perspective, every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. Based on that presumption, we believe that minutes must be sufficiently descriptive to enable the public and others (i.e., future 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 Town Board. Most importantly, minutes must be accurate.

We note that §106(1) of the Open Meetings Law provides that:

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

Accordingly, minutes of meetings should indicate, at a minimum, a record of motions and how each member voted. This provision clearly requires that motions for entry into executive session be recorded in the minutes, with an indication of how each member voted.

We emphasize that 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. In addition, the motion must be specific enough so that the public is informed that the topic or topics for discussion fall under one of the permitted options.

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

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

Based upon the foregoing, we believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Under a broader construction, as the court points out, almost every issue could be discussed in executive session, which would be contrary to the intent of the law.

On one occasion, meeting minutes that you submitted indicate "The Town Board went into Executive Session to discuss State owned parkland called Fort Pond House, a town property in Montauk. Members of the public requested that this issue be discussed openly because there was talk that the Town Supervisor was considering putting this parkland up for sale."

The authority to discuss matters related to the sale of real property under particular circumstances exists within §105(1)(h). That provision permits a public body to enter into executive session to discuss:

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

Based on the foregoing, it is clear that §105(1)(h) does not permit public bodies to conduct executive sessions to discuss all matters that may relate to the transaction of real property; only to the extent that publicity would "substantially affect the value of the property" can that provision validly be asserted.

In our opinion, §105(1)(h) is designed to shield discussions regarding a governmental entity's sale or acquisition of real property when disclosure would affect the government's interest in the value of such property. The rationale underlying that provision, in our opinion, does not involve protection of the interests of private parties in the sale of real property, but rather the government's ability to engage in an agreement or transaction optimal to the taxpayers and in their best interest. In short, it is our opinion that this provision does not apply when the government is not the seller or purchaser of a parcel.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:sb
cc: William Wilkinson, Town Supervisor

DML-AO-05327

Jobin-Davis, Camille (DOS)

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, November 13, 2012 9:22 AM
To: [redacted]
Subject: RE: RE: Public meting Laws

Dear Trustee Peterson,

Please accept my apology for the delay in responding.

This will confirm that when a quorum of the town board gathers to discuss the business of the town, the meeting must be held open to the public, with appropriate notice to the public of the time and place of the meeting.

There are certain gatherings, however, that are exempt from the Open Meetings Law pursuant to Section 108. Matters that are made confidential by state or federal law, and judicial or quasi-judicial proceedings, for example. Although it is not clear from your description, if the parties were involved in litigation and a court ordered a negotiation of some sort, then in my mind that would qualify as a judicial proceeding exempt from Open Meetings Law. See online opinions through our OML Advisory Opinion Index, under "J" for "Judicial Proceedings" and "E" for "Exemptions".

There are occasions when municipal boards receive training and/or education that is generic to all municipal boards, in which case the Open Meetings Law would not apply, as the board would not be discussing the business of the particular town, but issues that are generic to all municipalities. This may or may not apply in your case. See online opinions through our OML Advisory Opinion Index, under "T" for "Training Session."

Again, I am sorry for the delay. Hope that this is helpful.

Camille

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By EMAIL

OML-AO-5328

From: Jobin-Davis, Camille (DOS)
Sent: Tuesday, November 13, 2012 10:01 AM
To:
Subject: RE: Request for opinion

Dear ,

By now, I hope that things in New Rochelle are getting back to something that approximates normalcy. The severity of the Hurricane and then the snowstorm soon thereafter took many of us by surprise, and I hope that you and your loved ones are well.

In response to your question, I've not seen any case law that is directly on point, and although it may be unfair, there isn't anything that I know of that would prevent them from meeting. There are times, in emergencies, when boards have to meet quickly, or have to address issues. We have advised that holidays and weekends are not necessarily contrary to law either – even when many would choose not to attend.

Camille

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November 13, 2012

OML AO 5329

E-Mail

TO: Kerry Achilli

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. Achilli,

This is in response to your request for an advisory opinion regarding application of the Open Meetings Law to certain actions of the Board of Trustees and the Historic Preservation Commission/Planning Commission in the Village of Lewiston. Specifically, you raised concerns regarding minutes of both public bodies, including their existence, accuracy, and publication. In response, the Village Clerk provided the attached correspondence.

Initially, we note that the Open Meetings Law is applicable to meetings of all public bodies. Section 102(2) of the Law defines "public body" to mean:

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

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. Accordingly, both the Village Board and the Historic Preservation Commission/Planning Commission are public bodies subject to the Open Meetings Law.

Section 106 of the Open Meetings Law deals directly with minutes of meetings and states that:

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

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

Based upon the foregoing, it is clear that minutes must be prepared and made available within two weeks by all public bodies, including the Village Board and the Commission. In our opinion, inherent in law is intent that the requirements be carried out reasonably, fairly, with consistency, and that above all minutes be accurate.

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

If a clerk does not prepare minutes within two weeks of the meeting, as required by law, s/he would have failed to carry out her/his statutory duties. A legal remedy addressing any such failure would involve the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules to compel the clerk to carry out her/his duties in a manner consistent with law. However, and we recognize that on occasion it is not possible for a clerk to prepare minutes, a clerk is not the only person who is "allowed" to prepare minutes. A record of a meeting may be taken by anyone in attendance and, we note that, there is no strict format regarding the format of minutes. As long as the information required by §106 is included and it is accurate, the requirements of the Open Meetings Law have been met.

While minutes of meetings must be prepared and made available on request within two weeks of the meetings to which they pertain, there is no requirement as yet that minutes of meetings be posted on a website. An agency such as the Village may choose to do so, and we applaud those that do, but there is currently no such obligation in law.

Similarly, there is nothing in the Open Meetings Law or any other law of which we are aware that deals specifically with agendas. While many public bodies prepare agendas, the Open Meetings Law does not require that they do so. A public body on its own initiative may adopt rules or procedures concerning the preparation and use of agendas. Insofar as an agenda is created, we believe it would constitute a "record" subject to disclosure under the Freedom of Information Law.

Finally, and with respect to the Freedom of Information Law, this will confirm that an agency has the authority to require that a request for records be made in writing, pursuant to §89(3).

We hope that this is helpful.

cc: Mayor Terry Collesano, Village of Lewiston

Planning Board Chair, Village of Lewiston

OML-AO-5330

Freeman, Robert (DOS)

From: Freeman, Robert (DOS)
Sent: Thursday, November 29, 2012 10:06 AM
To: [redacted]
Subject: Time of Town Board Meeting

Dear Ms. Dannhauser:

Your letter of November 18 has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice and opinions concerning the state's Open Meetings Law.

You asked whether it is legal for a town board to approve a tax increase during a meeting held at 2 p.m. "when everyone is working." In this regard, the Open Meetings Law does not specify the time of day during which public bodies, such as the Islip Town Board, may conduct meetings. Nevertheless, it has been advised on many occasions that the law should be implemented in a manner that gives reasonable effect to its intent. For example, in a case in which a board of education held its meetings at 7 a.m., it was determined by a court that meetings held so early would be unreasonable. In few, if any, of those interested in attending would have a reasonable opportunity to do so. However, when a meeting is held during regular business hours, i.e., 2 p.m., or early evening, I do not believe that a court would conclude that the time of the meeting is inappropriate or that it would constitute a failure to comply with law.

When those interested in attending are unable to do, it has been suggested that a person who can attend might record the meeting. The Open Meetings Law as recently amended permits any person to audio record, video record or broadcast an open meeting, so long as the use of the equipment is not obtrusive or disruptive. Additionally, often meetings of municipal boards are recorded and can be viewed on public access television. In short, it may be possible in many instances to be aware of information discussed and disclosed during meetings, even though an individual may not be able to attend.

I hope that I have been of assistance.

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OML-AO-5331

BY EMAIL

From: Freeman, Robert (DOS)
Sent: Tuesday, December 11, 2012 10:27 AM
To:
Cc:
Subject: Executive Committee
Attachments: o3989.wpd; o3926.wpd

Dear :

This to confirm the advice offered during our conversations that the Executive Committee to which you referred constitutes a "public body" required to comply with the Open Meetings Law.

As indicated in the attached opinions previously rendered, the legislative history of that statute clearly indicates that a committee or subcommittee consisting solely of members of a governing body is itself a public body. Further, even though there may be no specific reference to a quorum, §41 of the General Construction Law has for more than a century imposed quorum requirements on any entity that carries out a governmental duty that consists of three or more members. In brief, based on §41, a quorum is a majority of the total membership of a public body, notwithstanding absences or vacancies. If, for example, a community board consists of 51 members, its quorum would be 26. If a committee of a community board consists of 7, its quorum would be 4, and a gathering of 4 or more members of the committee in their capacities as committee members would constitute a meeting of the committee.

In the event that the attached opinions cannot be opened, they will be sent to you separately as well.

I hope that I have been of assistance.

Robert J. Freeman
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OML-AO-5332

December 11, 2012

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.:

In response to your request, this will confirm that in our opinion it is likely to be reasonable to designate one general location from which those who are recording public meetings may record.

It has long been our advice that recording meetings was permissible, so long as the recording was carried out unobtrusively and in a manner that did not detract from the deliberative process. See attached OML-AO-4767.

In 2011, §103(d) the Open Meetings Law was amended and now permits as follows:

> "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."

Accordingly, it is our advice that a public body may adopt a rule that limits the location of equipment and personnel used to record public meetings so as to conduct its

proceedings in an orderly manner. In order for a designated location to be reasonable, it would be important, as you point out, that it not impair the public's ability to record the images or sounds of the proceedings. In the event that it is not possible or reasonable to record from the back of the room, in my opinion, the Town would be required to make reasonable accommodations.

The Town has designated one corner in the back of the meeting room as the location from which recordings may be made. While it could be argued that the amendment was intended to permit the recording of both the members of the public body and those in attendance, we believe that the primary intent of the amendment is to enable the public body to limit the disruptions associated with recording.

We hope that this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director