State of New York
Department of State
Committee on Open Government

One Commerce Plaza
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Albany, New York 12231
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http://www.dos.ny.gov/cooq/

March 1, 1994

Mr. Charles J. Tiano
116 Chayo Mountain Road
Woodstock, NY 12498

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. Tiano:

I have received your letter of January 25. Please accept my apologies for the delay in response.

You have asked whether a town board or other governmental entity "has the authority to withhold from the public the names of persons who have filed an application to fill a vacancy on the Town Board." You added that there is a vacancy on the Woodstock Town Board and that it "is known through reliable sources that the board has interviewed, in executive session, eight (8) aspirants to fill the vacancy."

In this regard, I offer the following comments.

First, 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 (i) of the Law. In my view, a record or records identifying persons seeking to fill a vacancy in an elective office must be disclosed. Section 87(2)(b) of the Freedom of Information Law enables an agency to withhold "an unwarranted invasion of personal privacy". However, in more 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 my view be an anomaly. I am not suggesting that personal details of individuals' lives must be disclosed. Nevertheless, in my 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 a position on a town board would not be a prospective employee seeking employment.

Second, a recent judicial decision dealt in part with a discussion in executive session concerning those under consideration to fill a vacant elective position on a public body. In holding that an executive session could not properly have been held, the court stated that:

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

Based on the foregoing, it is clear in my view the names of candidates who seek to fill vacant elective positions must be disclosed.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Woodstock Town Board

OML-AO-o2313a
2313

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February 6, 1996

Mr. Daniel R. Sanders
2128 Sterling Station Road
Sterling, NY 13156

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

Dear Mr. Sanders:

I have received your letter of January 19. You described a situation in which the Sterling Town Board entered into executive session to discuss the selection of a person to fill the unexpired term of the town clerk, even though you read aloud a passage from a decision in which it was held that such a subject must be discussed in public.

You have asked that this office investigate the incident, and you asked what steps can be taken in relation to the matter.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Open Meetings Law. The Committee, whose staff consists of three employees, has neither the resources nor the authority to investigate or compel a public body to comply with law. It is my hope that advisory opinions rendered by the Committee educate, persuade and enhance compliance with the Open Meetings Law, and that judicial decisions provide precedent and guidance. However, if efforts to influence of that nature fail, the remedy involves the initiation of litigation by a member of the public or a group of persons under §107(1) of the Open Meetings Law. That provision states in part that:

"Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part." In addition, §107(2) authorizes a court to award reasonable attorney fees to the successful party.

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

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

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

Under the language quoted above, it would appear that a discussion focusing on the individual candidates could validly be considered in an executive session, for it would involve a matter leading to the appointment of a particular person. Nevertheless, in the only decision of which I am aware that dealt directly with the propriety of holding an executive to discuss filling a vacancy in an elective office, the court found that there was no basis for entry into executive session. As you indicated to the Town Board, in determining that an executive session could not properly have been held, the court stated that:

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Hon. Nadia Niniowsky, Supervisor
Town Board

OML-AO-o2565
2565

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July 10, 1997

Ms. Patricia Meyers
HCR 75 Ohio City Road
Cold Brook, NY 13324

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

Dear Ms. Meyers:

As you are aware, I have received your letter of June 17. Please accept my apologies for the delay in response.

In brief, as I understand the matter, following the death of a member of the Town Board of the Town of Ohio, three of the five Board members met informally, without notice to the other members or the public, and essentially chose the individual to fill the vacant position on the Board. You wrote that it is your understanding "that we have strict laws that are meant to prevent this sort of thing from happening", and you asked whether some kind of action can be taken.

From my perspective, if indeed three members of the Town Board met to discuss the issue that you described, any such gathering would have constituted a meeting that should have been held in accordance with the Open Meetings Law. In this regard, I offer the following comments.

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

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

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

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

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

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

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

Viewing the matter from a different vantage point, in order to constitute a valid meeting, I believe that all of the members of a public body must be given reasonable notice of a meeting. Relevant in my view is §41 of the General Construction Law which provides guidance concerning quorum and voting requirements. 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, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based upon the language quoted above, a public body, such as a town board, cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonable notice to all of the members. Therefore, if, for example, three of five members of a public body meet without informing the other two, even though the three represent a majority, I do not believe that they could vote or act as or on behalf of the body as a whole; unless all of the members of the body are given reasonable notice of a meeting, the body in my opinion is incapable of performing or exercising its power, authority or duty.

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

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

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

Under the language quoted above, it would appear that a discussion focusing on the individual candidates could validly be considered in an executive session, for it would involve a matter leading to the appointment of a particular person. Nevertheless, in the only decision of which I am aware that dealt directly with the propriety of holding an executive to discuss filling a vacancy in an elective office, the court found that there was no basis for entry into executive session. As you indicated to the Town Board, in determining that an executive session could not properly have been held, the court stated that:

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

Based on the foregoing, notwithstanding its language, the court in Gordon held that §105(1)(f) could not be asserted to conduct an executive session. I point out that the Appellate Division affirmed the substance of the lower court decision but did not refer to the passage quoted above.

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

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

In addition, §107(2) authorizes a court to award reasonable attorney fees to the successful party.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

OML-AO-o2773
2773

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July 14, 1993

Ms. Kym Vanderbilt
Project Director
Public Education Association
39 West 32nd Street
New York, NY 10001

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. Vanderbilt:

I have received your letter of July 7 in which you requested an advisory opinion concerning a meeting held by New York City Community School Board #9 on July 1.

According to your letter and the minutes of the meeting, the Board held a "Special Executive Session" for the "Election of Officers". It is your view that the election of officers in executive session is inconsistent with the Open Meetings Law. Moreover, since the minutes fail to indicate "how each member voted", you contend that the Board failed to comply with the Freedom of Information Law. You also expressed the belief that "those violations invalidate the elections and that the Board must now reconvene the meeting and vote in public."

In this regard, I offer the following comments.

First, it is emphasized 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. Consequently, an executive session is not separate and distinct from an open meeting; on the contrary, an executive session is a part of an open meeting that must be convened open to the public and preceded by notice given to the news media and by means of posting in accordance with §104 of the Open Meetings Law.

In a related vein, a public body cannot enter into an executive session without accomplishing the procedure described in §105(1) of the Open Meetings Law. That provision states in relevant part that:

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

As indicated in the language quoted above, a motion to enter into an executive session must be made during an open meeting and include reference to the "general area or areas of the subject or subjects to be considered" during the executive session.

In addition, 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].

Second, paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered during an executive session. As such, a public body cannot conduct an executive session to discuss the subject of its choice.

In my opinion, discussions regarding the election of officers would not have fallen within any of the grounds for entry into executive session. The only provision that appears to be relevant to the matter, §105(1)(f), permits a public body to conduct an executive session to discuss:

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

Although the discussion and election of officers involves consideration of particular individuals, it is unlikely that any of the specific subjects included within §105(1)(f) would have been applicable in conjunction with deliberations involving the selection of school board officers. In short, while "matters leading to" certain actions relating to specific persons may be discussed during executive sessions, matters leading to the election of officers is not among them.

Third, with respect to the absence of any record indicating how the members voted, I point out in passing that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. 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 rare circumstances in which a statute permits or requires such a vote, none of which would have been present in the situation in question.

With regard to information "detailing how each member voted", I direct your attention to the Freedom of Information Law. Section 87(3)(a) provides that:

"Each agency shall maintain:

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

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

In terms of the rationale of §87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its representatives may have voted individually with respect to particular issues. Although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I believe that the thrust of §87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration that appears at the beginning of the Open Meetings Law and states that:

"it is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants."

Moreover, in an Appellate Division decision that was affirmed by the Court of Appeals, it was found that "The use of a secret ballot for voting purposes was improper." In so holding, the Court stated that: "When action is taken by formal vote at open or executive sessions, the Freedom of Information Law and the Open Meetings Law both require open voting and a record of the manner in which each member voted [Public Officers Law §87[3][a]; §106[1], [2]" Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987); aff'd 72 NY 2d 1034 (1988)].

Further, there is case law dealing with the notion 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 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).

As such, if a public body reaches a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate the manner in which each member voted. I

recognize that the public bodies often attempt to present themselves as being unanimous and that a ratification of a vote is often carried out in public. Nevertheless, if a unanimous ratification does not indicate how the members actually voted behind closed doors, the public may be unaware of the members' views on a given issue. If indeed a consensus represents action upon which the a public body relies in carrying out its duties, I believe that the minutes should reflect the actual votes of the members.

Lastly, although it appears that the Board has failed to comply with the Freedom of Information Law and the Open Meetings Law, I believe that its actions may be voidable, but that they are not automatically void. With respect to the enforcement of the Open Meetings Law, §107(1) states in relevant part that:

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Community School Board #9
Felton Johnson, Superintendent

OML-AO-o2245
2245

State of New York
Department of State
Committee on Open Government

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OML-AO-3902

December 21, 2004

E-MAIL

TO:

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

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

"Can a group move into executive session to discuss non performance of an ELECTED official in the performance of their job duties if the group has a prescribed manner to deal with the elected official in the non-performance of his/her job duties. Doesn't the electorate have a right to know that the official may not be performing his/her duties?"

In this regard, first, the Open Meetings Law is based on a presumption of openness and requires that meetings of public bodies (i.e., municipal boards) be conducted open to the public, except to the extent that there is a basis for entry into an executive session. Paragraphs (a) through (h) of §105(1) specify and limit the grounds for entry into executive session.

Pertinent in the context of your inquiry is paragraph (f), which states that a public body may conduct an executive session to discuss:

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

If, as you indicated, the public body has the ability to discipline or impose sanctions against one of its members, it would appear that a discussion concerning the possibility of doing so could be conducted during an executive session. Such a discussion would apparently involve a matter leading to the discipline of a particular person.

In a situation in which action is taken to impose some sort sanction or discipline upon a public officer or employee, I believe that the action must be memorialized in minutes prepared in accordance with §106 of the Open Meetings Law. That provision states that:

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

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

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

Whether action is taken in public or during an executive session, minutes must be prepared indicating the nature of the action. Further, I believe that the record indicating the nature of such action must be disclosed as required by the Freedom of Information Law.

Like the Open Meetings Law, 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 (i) of the Law.

I note that there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law. Two of the grounds for denial are relevant to an analysis of the matter; neither, however, could in my view serve to justify a denial of access.

Perhaps of greatest significance is§87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In addition, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne

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

The other ground for denial of significance, §87(2)(g), states that an agency may withhold records that:

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

I. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.
In terms of the judicial interpretation of the Freedom of Information Law, I point out that in situations in which there has been a written reprimand, disciplinary action, or findings that public offices or employees have failed to carry out their duties or perhaps engaged in misconduct, records reflective of those kinds of determinations have been found to be available, including the names of those who are the subjects of disciplinary action [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell, Geneva Printing, Scaccia and Sinicropi, supra].

In the context of your inquiry, if indeed there is a determination to impose discipline or a sanction, I believe that the record so indicating would be accessible to the public. Based on the preceding analysis, disclosure would constitute a permissible invasion of privacy. Further, it would reflect a final agency determination accessible under subparagraph (iii) of §87(2)(g).

I hope that I have been of assistance.

RJF:tt

OML-AO-o3902
3902

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February 11, 1993

Mr. Barry Loeb
14 Jeanette Drive
Port Washington, N.Y. 11050

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

Dear Mr. Loeb:

I have received your letter of January 26. You have sought my comments concerning "the practices of the Port Washington Police District and their responsibilities under the Open Meetings Law".

You wrote that the "Police District feels that a single posting on the door to the meeting room satisfies the intent of the law", but that it is your view "that since only 52 of the almost 200 meetings held in 1992 were regularly scheduled, the public would have to make a special effort to enter Police Headquarters on an almost daily basis to be properly advised as to the meeting schedule". Further, you suggested that "many of the 'special' meetings...could and should have been held on a scheduled basis", for they related to issues of public interest and concern, and because those meetings do not "fit into the definition of 'special' or 'emergency'".

In this regard, I offer the following comments.

First, since I am unfamiliar with the legal status of a "police district" and had never received questions about such a district, I contacted the Police District. Having spoken with Commissioner Frank Scabbo, I was informed that the Port Washington Police District was created by a special act of the State Legislature and that it is the only district of its kind in New York and perhaps the nation. Commissioner Scabbo indicated that the District has three commissioners.

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

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

Since the Board of Commissioners consists of three members and performs a governmental function for a public corporation (the Police District), I believe that it is a "public body" required to comply with the Open Meetings Law.

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

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

2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

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

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

Further, notice must be "conspicuously posted in one or more designated public locations." Consequently, I believe that a public body must designate, presumably by resolution, the location or locations where it will routinely post notice of meetings. To meet the requirement that notice be "conspicuously posted", notice must in my view be placed at a location that is visible to the public.

Lastly, 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, merely posting a single notice would fail to comply with the Open Meetings Law, for the Law requires that notice be given to the news media and posted "conspicuously" in one or more "designated public locations" prior to meetings. Further, absent an emergency or urgency, the Court in Previdi suggested that it would be unreasonable to conduct meetings on short notice, unless there is some necessity to do so.

In an effort to provide guidance and enhance compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the District.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb cc: Commissioner Frank Scabbo, Port Washington Police District

OML-AO-o2186
2186

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April 29, 2014

OML-AO-05400

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 certain gatherings of the Board of the City of Lockport Housing Authority. Specifically, you questioned the Board's practice of holding the meeting in a locked room, requiring persons to identify themselves before being told of the time and place of an upcoming meeting, and notice of Board meetings generally. You included a photograph of a notice stating "City of Lockport Housing Authority Board Meeting Scheduled for 3:00 p.m.".

In a January 29, 2014 response to a related FOIL request, the Executive Director of the Authority indicated as follows: "…we have always posted the meeting day and time on the day of the meeting, at our administration building located at 301 Michigan Street. Otherwise there have been no measures taken to publicize meetings of the Board of Commissioners of the City of Lockport Housing Authority during 2013."

By correspondence to this office dated February 21, 2014 (copy attached), and subsequent to our notification to the Authority of your request for an advisory opinion, the Executive Director indicated that the Authority is taking measures to comply with Open Meetings Law, including posting meeting notices on bulletin boards, in future newsletters, and sending notice to the local newspaper one week prior to each meeting.

Later in February, you attended a Board meeting, although you were not permitted to enter the locked room until after the meeting was underway, and you were made to leave the room after the Chairman of the Board indicated "We have employee-negotiations to discuss. We are going into Executive Session." You were then told that you could not have access to meeting minutes for at least a month because "they have to be approved at the next meeting".

In this regard and as we discussed, it is our opinion that the Board has not acted in compliance with the Open Meetings Law.

First, with respect to the requirements for posting notice of meetings of the Board, we point out §104 of the Open Meetings Law which states that:

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

Accordingly, the photograph of the notice that you included is insufficient to comply with law for it does not indicate the location or the date of the meeting. As the Executive Director indicated, notice must be posted in locations designated for such purposes, sent to the news media, and posted online in advance of all meetings of the Board.

With respect to executive sessions, and the conversation that you relayed, it is emphasized that one member of a board, or the chairman of a board cannot unilaterally conduct an executive session, nor can a public body such as the Board prohibit the public from attending an open meeting by locking the door. 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, 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.

Finally, with respect to meeting minutes, there is no provision of law of which we are aware that requires that minutes of meetings of public bodies be approved or accepted.

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

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

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

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

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

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

In an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this response will be sent to the Board, along with copies of our pamphlet "Your Right to Know" which includes the grounds for entry into executive session on pages 15-16.

We hope this is helpful.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:mm
Enclosures

c:

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5400