



STATE OF NEW YORK  
DEPARTMENT OF STATE  
COMMITTEE ON OPEN GOVERNMENT

---

**Committee Members**

Laura L. Anglin  
Tedra L. Cobb  
Lorraine A. Cortés-Vázquez  
John C. Egan  
Stewart F. Hancock III  
David A. Paterson  
Michelle K. Rea  
Dominick Tocci

Executive Director

Robert J. Freeman

One Commerce Plaza, 99 Washington Ave., Suite 650, Albany, New York 12231  
(518) 474-2518  
Fax (518) 474-1927  
Website Address: <http://www.dos.state.ny.us/coog/coogwww.html>

February 22, 2008

Hon. Harry B. Bronson  
Hon. Willie J. Lightfoot  
Monroe County Legislature  
96 Mt. Vernon Avenue  
Rochester, NY 14620

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 Legislators Bronson and Lightfoot:

I have received your letter and the materials relating to it. You have requested an advisory opinion concerning “the manner in which a committee of the Monroe County Legislature entered into an executive session and the propriety of the topics discussed therein.”

According to your letter:

“On January 17, 2008 a special meeting of the Public Safety Committee of the Monroe County Legislature was convened to discuss the appointment process of the county’s next public defender. At this meeting a motion was made to enter into executive session, at the advice of the County Attorney, to discuss the first item on the special meeting’s agenda, ‘Establish the Questions and Process by which we will interview the applicants.’”

You expressed the belief that:

“...this motion violates Section 105 of Open Meetings Law as the maker of the motion did not include statutory language addressing the confidentiality of information to be discussed and the matter as presented in the agenda does not meet the requirements for executive session.”

During the meeting, there was “disruption by members of the public”, and the Committee “exited chambers.” Following the disruption, a quorum of the Committee returned “where the chair recessed the meeting until January 26, 2008.” You added that:

“On January 22, 2008, the Public Safety Committee convened their regularly scheduled meeting with an entirely different agenda. This meeting was held and adjourned with no discussion of the agenda items of the January 17 special meeting. We question whether the chair has the authority to convene a new meeting of the Public Safety committee while a prior meeting is still in recess.”

Notwithstanding the reference to continuation of the meeting of January 17 to January 26, “to [y]our knowledge, no meeting was held on the 26<sup>th</sup>.” However, Committee members were notified on February 7 that the meeting would be reconvened on February 9, and you expressed the opinion that the Committee Chair lacks the authority “to hold a meeting in recess for a three-week period.” When the meeting was held on February 9:

“...no public forum was held at the beginning of this meeting. Immediately at the opening of the February 9 meeting, a committee member made a motion to enter into executive session. He did not state the justification for entering into executive session when making the motion, which was seconded and adopted.”

In conjunction with the foregoing, you sought an opinion concerning the following questions:

- 1.) Is it appropriate to discuss the process in which public defender applicants will be interviewed in executive session. Also, please clarify what justification should be given in a motion to enter into executive session.
- 2.) Was the chair of the committee required to give public notice that the January 26 meeting was canceled or further postponed.
- 3.) Did the February 9 meeting require a public forum as it had a different agenda and the items on the previous agenda were not discussed.
- 4.) Is it appropriate for the committee chair to hold a meeting in recess for a three-week period.”

In this regard, I offer the following comments.

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

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

In consideration of the last clause quoted above, it is clear that a committee consisting of two or more members of the County Legislature constitutes a "public body" required to comply with the Open Meetings Law.

Second, 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..."

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

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

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department or perhaps the creation or elimination of positions, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". For example, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In the circumstance that you referenced, a discussion of the process in which applicants for a position would be interviewed, the focus would not involve "particular person." However, when the discussion involves the qualification of particular candidate for the position, I believe that an executive session could properly be held.

It has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. 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 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; 207 AD 2d 55 (1994)].

Next, you asked whether a public vote of the cancellation or postponement of a scheduled meeting was required to have been given. In short, the Open Meetings Law contains no such requirement. However, it has been advised, based on considerations involving reasonableness and courtesy, that notice of a cancellation or postponement be given to the members of a public body and the recipients of the initial notice of meeting, and that notice of the cancellation or postponement be posted at the location or locations designated by a public body for posting of notice of its meetings.

You asked whether the meeting of February 9 required a "public forum." If I understand the question correctly, it is whether the public must have been given the opportunity to speak at that meeting. In this regard, while the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100), the Law is silent with respect to public participation. Consequently, by means of example, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally.

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

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

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

The court in Schuloff determined that a "compelling state interest" involved the ability to protect students' privacy in an effort to comply with a federal law requiring that information identifiable to students be kept confidential, but that expressions of opinions concerning "the shortcomings" of a law school professor could not be restrained.

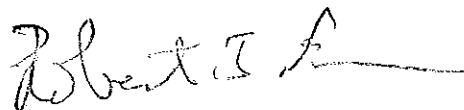
Since you referred to the agenda, I point out that the Open Meetings Law contains no provision concerning agendas or whether they must be followed if prepared. It is suggested that you ascertain whether the County Legislature has adopted rules pertaining to agendas.

Lastly, you questioned the propriety of a Committee chair holding a meeting "in recess for a three week period." There is no reference in the Open Meetings Law to a "recess." However, a delay in reconvening for a period of days or weeks could not, in my opinion, be equated with or considered to be a continuation of a single meeting. Rather, I believe that any new convening would constitute a new meeting that must be preceded by notice given pursuant to §104 of the Open Meetings Law.

Hon. Harry B. Bronson  
Hon. Willie J. Lightfoot  
February 22, 2008  
Page - 7 -

I hope that I have been of assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert J. Freeman", with a long horizontal flourish extending to the right.

Robert J. Freeman  
Executive Director

RJF:jm  
cc: County Legislature