STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

Committee Members

Carla Chiaro
Ruth Noemí Colón
Robert J. Duffy
Robert L. Megna
Clifford Richner
David A. Schulz
Robert T. Simmelkjaer II, Chair

Executive Director

Robert J. Freeman

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

March 18, 2011

E-Mail

TO:

FROM: Camille S. Jobin-Davis, Assistant Director

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

Dear:

We are in receipt of your request for an advisory opinion regarding application of the Open Meetings Law to a committee of the Board of Education of the Massena Central School District. Specifically, you indicated you are "concerned that decisions are being made in secret in Finance Committee meetings and there is no record of them nor is there any record of these decisions in Board of Education Minutes." You asked that we advise "as to the legality of closed door Board of Education Finance Committee meetings."

On behalf of the School Board, Attorney Miller wrote that the committee at issue is an "advisory committee consisting of three Board members and at least two or more members of the school administration. The purpose of this committee is to provide recommendations to the Board of Education in regard to matters relating to the budget and finance of the School District." A copy of Mr. Miller's submission is attached.

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 two or three members of a public body plus an equal or lesser 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, however, 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, we believe that the Open Meetings Law is applicable.

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 Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted.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

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

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

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

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

In view of the amendments to the definition of "public body", we believe that any entity consisting of two or more members of a public body, such as a committee, a subcommittee or "similar body" consisting of 3 members of the Board of Education, would fall within the requirements of the Open Meetings Law when such an entity discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, 437 NYS 2d 466, (4th Dept. 1981), appeal dismissed 55 NY 2d 995, 449 NYS 2d 201 (1982)].

Additionally, with respect to the general intent of the Open Meetings Law, the first sentence of its legislative declaration, §100, states that:

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

In an early decision that focused largely on the intent of the Open Meetings Law that was unanimously affirmed by the Court of Appeals, it was asserted that:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" [Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, 415, affirmed 45 NY2d 947 (1978)].

It is therefore our opinion that committees are "public bodies" required to comply with the Open Meetings Law. Again, the amendments to the definition of "public body" suggest a clear intention on the part of the State Legislature to ensure that entities consisting of two or more

members of a governing body (committees, subcommittees or similar bodies) are themselves public bodies falling with the coverage of the Law.

Does the applicability of the Open Meetings Law change if a committee consists of three members of a governing body, and in addition, a fourth or fifth person, not a member of the governing body, is designated to serve on the committee? What if each committee of the Board consisted solely of its own members, plus the Superintendent as an ex officio member? Although that is not exactly the case here, what if additions of that nature were made to evade the applicability and intent of the Open Meetings Law? From our perspective, when the core membership of an entity consists of members of a governing body, the kinds of additions or actions described in those questions would not change the essential character of the entity. In this case, the core membership of such a committee includes three Board members, plus "at least two or more members of the school administration." The core members, typically having been designated by means of a resolution approved by the Board, presumably may be removed only by action taken by the Board. Their status on the committee is likely permanent, unless and until the Board as a whole takes action to remove them or until they no longer serve on the Board.

Whether a committee's authority is limited to advice only, in our opinion, would not be determinative in these types of cases. Most, if not all standing committees of public bodies, which are typically made up solely of member of the public body, are similarly limited in their authority.

Based on the foregoing, it is our opinion that the committee described is essentially a committee of the Board and, therefore, constitutes a public body required to comply with the Open Meetings Law when a majority of the members of the committee gathers for the purpose of discussing matters within the area of its activity.

We hope that this is helpful.

CSJ:sb

cc: Frank Miller, Esq.