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May 31, 2017

Sean Madden
64 Tower Hill Loop
Tuxedo Park, NY 10987

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, except as otherwise indicated.

Dear Mr. Madden:

We are in receipt of your request for an advisory opinion relating to the application of the Open Meetings Law (OML) by the Board of Trustees for the Village of Tuxedo Park (Board).

Your primary concern appears to relate to the Board's use of executive session and the sufficiency of the Board's motions to enter into executive session.

Section 105(1) of the OML, relating to executive session, states in relevant part that:

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

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

> "a. matters which will imperil the public safety if disclosed;
> b. any matter which may disclose the identity of a law enforcement agent or informer;
> c. information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;
> d. discussions regarding proposed, pending or current litigation;
> e. collective negotiations pursuant to article fourteen of the civil service law;
> f. the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;
> g. the preparation, grading or administration of examinations; and
> h. the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof."

With your letter, you included a record "derived from the official minutes of the Board of Trustees detailing the Board's most recent 24 executive sessions over 16 public meetings." You also state that the "language excerpted from the minutes is verbatim." The opinions offered below are based on an assumption that the minutes accurately reflect the language of the motion made during the public meeting. Examples of the reasons for entering into executive session reflected in the minutes include:

"to discuss collective bargaining, an employment issue, and a financial issue"
"to discuss litigation and contracts"
"to discuss contract matters"
"to discuss a past litigation judgment"
"to discuss water payment arrears in specific accounts"
"for the purpose of discussing medical benefits offered to non-union employees
"to discuss a spreadsheet on personnel payroll"

First, in my view, discussions relating to "financial issues," "contract matters," and "water payment arrears" do not appear to be subjects that would be appropriately considered in executive session. On the face of the motions, they are not subjects specified in §105(1) of the OML. As the statute states, "a public body may conduct an executive session for the below enumerated purposes only." (emphasis mine)

Next, I note that in several instances, the Board moved to enter executive session to discuss an "employment issue" or a "specific personnel issue." The provision concerning the possibility of discussing that subject in executive session is §105(1)(f), which 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..." (emphasis added).

Due to the presence of the term "particular" in §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 in relation to one or more of the qualifiers found in that provision. 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 believe that there is a proper basis for entry into an executive session.

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 an "employment 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.

Further, a motion to enter into executive session to discuss "medical benefits offered to non-union employees" and "to discuss a spreadsheet on personnel payroll" does not appear to meet the requirement that the public body be considering "the medical, financial, credit or employment history of a particular person" but rather would be intended to consider more general personnel policy issues. 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 the benefits to be offered to a class of employees (i.e., non-union), because it does not relate to an individual person, it is our opinion that the case law outlined above would require that the board should have had such discussion in public.

Your executive session summary document also states that the Board went into a closed session to discuss "litigation and contracts," "possible litigation" and "a past litigation judgment." Section 105(1)(d) of the OML states that a public body may move to enter executive session for "discussions regarding proposed, pending or current litigation."

Based on judicial decisions, the scope of the so-called litigation exception is narrow. 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))

Based on 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, who may be present with other members of the public at the meeting. In our view, this exception is not intended to permit a permit a public body to discuss any matter that may currently be the subject of ongoing litigation, if the discussion does not involve litigation strategy. Nor, in our opinion, would this exception permit a public body to discuss a "past litigation judgment."

In addition to executive session, there is one other vehicle which allows a public body to exclude the public from its meetings. This vehicle involves "exemptions." Section 108 includes three exemptions, and when an exemption applies, the OML does not; it is as though the OML does not exist.

One of the exemptions, section 108(3), pertains to "matters made confidential by federal or state law." Judicial decisions have for decades indicated that legal advice given to a government board by its attorney is subject to the attorney-client privilege and is, therefore, confidential. Therefore, when a village attorney offers legal advice to his or her client, such as a village board, and the advice is given to or shared with the board during a gathering of the board, the attorney-client privilege applies, and the OML does not. A communication of that nature would, in our view, be exempt from the coverage of the OML. In a technical sense, a matter of that sort would not be an executive session, but rather a matter falling outside the scope of the OML.

You also raise concerns regarding a recently adopted Village resolution that, according to your letter, provides, in relevant part:

> "Whereas, The disclosure of confidential information acquired during an Executive Session of the Village Board of Trustees constitutes a violation of New York State General Municipal Law §805-a and may warrant removal from office where such disclosure was intentional and knowingly made... The Village Board hereby affirms and states that when a Village Board Member is determined, by the Village Board,...to have disclosed any confidential information acquired during an executive session of a public body, such Village Board Member's act or omission shall be deemed outside the scope of public duties of such Village Board Member for the purposes of Chapter 15 of the Village Code (Defense and Indemnification).

As you are aware, the Committee on Open Government has previously prepared advisory opinions in response to similar inquiries. Enclosed for both your and the Village's reference are OML Advisory Opinion 4530 and OML Advisory Opinion 4649.

I hope I have been of assistance.

Sincerely,

Kristin O'Neill
Assistant Director

Enclosures (Two OML Advisory Opinions)

cc: Village of Tuxedo Park, Board of Trustees

**State of New York**
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OML-AO-4530

December 12, 2007

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 wrote that you "have had several former members of [y]our local school board approach [you] and state they have information, but they cannot divulge it as it was discussed in executive session." You expressed an understanding, however, that "once an individual is no longer a member of the board, they are no longer bound by confidentiality in terms of executive session and are free to discuss it if they so choose."

You have asked that I confirm that to be so. In brief, in my opinion, the only instances in which members of a public body, such as a board of education, are prohibited from disclosing information would involve matters that are indeed "confidential." When a public body has the discretionary authority to discuss a matter in public or in private, I do not believe that the matter can properly be characterized as "confidential." Further, when an individual no longer serves as a board member, as you have suggested, with one exception, I believe that he/she is free to discuss any topic.

I note that the Commissioner of Education has rendered a decision indicating that board members may be removed from office if they divulge information acquired during an executive session. Notwithstanding my disagreement with that decision, I do not believe that it would apply to a former board member.

The Commissioner's decision in Application of Nett and Raby (No. 15315, October 24, 2005) states as follows:

> "In addition to a board member's general duties and responsibilities, General Municipal Law §805-a(1)(b) provides that no municipal officer or employee (including a school board member) shall 'disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests.' It is well settled that a board member's disclosure of confidential information obtained at an executive session of a board meeting violates §805-a(1)(b) (see Applications of Balen, 40 Ed Dept Rep 250, Decision No. 14,474; Application of the Bd. of Educ.of the Middle Country Central School Dist., 33 id. 511, Decision No. 13,132; Appeal of Henning and Rohrer, 33 id, 232, Decision No. 13,035).
>
> "Less clear is what constitutes 'confidential' information. The term 'confidential' is not defined in the General Municipal Law and the legislative history of §805-a does not provide any additional guidance into the meaning of that word...
>
> "Absent a clear statutory definition, and given the importance of ensuring a uniform application in the educational system, the interpretation of 'confidential' in the school context is a matter best left to the Commissioner (see Komyathy v. Bd. of Educ. Wappinger Central School District No. 1, 75 Misc. 2d 859). Information that is meant to be kept secret is by general definition considered to be 'confidential' (see Black's Law Dictionary [8th Ed. 2004])."

While some interpretations of law might be "best left to the Commissioner", I point out that each of the precedents cited in the excerpt of the decision quoted above involve the Commissioner's own decisions. Not referenced, however, are judicial decisions that are contrary to his conclusion.

Many judicial decisions have focused on access to and the ability to disclose records, and this office has considered the New York Freedom of Information Law, the federal Freedom of Information Act, and the Open Meetings Law in its

analyses of what may be "confidential." To be confidential under the Freedom of Information Law, I believe that records must be "specifically exempted from disclosure by state or federal statute" in accordance with §87(2)(a). Similarly, §108(3) of the Open Meetings Law refers to matters made confidential by state or federal law as "exempt" from the provisions of that statute.

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

> "Although we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting disclosure claims as protection" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

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

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

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

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

> "...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records...if it so chooses" (Capital Newspapers, supra, 567).

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

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

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

By means of example, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. As you may be aware, the Family Educational Rights and Privacy Act (20 USC §1232g) generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable

to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing, because a statute requires confidentiality.

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

Based on the foregoing, I believe that the Commissioner's conclusion that information that may be withheld or that information that may be discussed in executive session is confidential is inaccurate and contrary to the weight of judicial authority.

I am not suggesting that board members, present or former should intentionally disclose information that could clearly be damaging to an individual or the operation of a governmental entity. However, based on the proceeding analysis, I reiterate my belief that the Commissioner's conclusion is inconsistent with both state and federal judicial decisions.

Lastly, if a person no longer serves as a member of a board of education, I do not believe that he or she could be penalized by the Commissioner of Education or a board of education. Further, I believe that, with one exception, a former board member is free to disclose information as he/she sees fit. The exception, in my opinion, would involve information identifiable to a student acquired in his/her capacity as a member of the board when that information is required to be kept confidential by federal law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

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OML-AO-4649

June 25, 2008

Mr. Barton D. Graham
1322 Mt. Zoar Road
Pine City, NY 14871

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. Graham:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response.

According to your letter, you are a former member of the Elmira City School District Board of Education, and a controversy arose concerning a Board election in 2007 that was discussed during an executive session. The minutes indicate that a motion was made to enter into executive session "for discussions about proposed, pending or current litigation." Following that executive session, you and others were told that "any matters considered or discussed in that meeting is [sic] confidential, cannot be mentioned or disclose in public and can lead to sanctions under GML 805 (otherwise known as the Nett decision), and presumably subject to Sec. 195 of the Penal Code."

You have raised a series of issues relating to the foregoing, and to the extent that they relate to the statutes within the jurisdiction of this office, I offer the following comments.

First, I am unaware of the specific nature of the discussion during the executive session to which you referred. However, I point out that §105(1)(d) of the Open Meetings Law, the so-called litigation exception, has been construed to permit a public body, such as a board of education, to conduct an executive session to discuss its litigation strategy in private, so as not to divulge its strategy to its adversary, who may be present at the meeting. Concurrently, it was held that the mere threat, fear or possibility of litigation, without more, was insufficient to justify holding an executive session [see Weatherwax v. Town of Stony Point, 97 AD2d 840 (1983)].

As you suggested, it has also been held that a verbatim rendition of a ground for entry into executive session fails to comply with the Open Meetings Law. Specifically, in Daily Gazette v. Town Board, Town of Cobleskill, it was 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].

Further, in a decision rendered by the Appellate Division, one of the issues involved the adequacy of a motion to conduct an executive session to discuss what was characterized as "a personnel issue", and it was 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 NY2d 807)" [Gordon v. Village of Monticello, 207 AD 2d 55, 58 (1994)].

Because a motion must name the case that is the subject of a discussion in executive session, I do not believe that disclosure of the index number relating to that case could be construed as a failure to abide by the decision of the Commissioner in Application of Nett and Raby (No. 15,315, October 24, 2005). In short, when the name of a judicial proceeding is made in a motion to enter into executive session, which is required to comply with the Open Meetings Law, I do not believe that the index number relating to the proceeding could be characterized as "confidential."

Second, I disagree with the Commissioner's decision in Nett.

Even when there was a basis for entry into executive session, there is no obligation to convene in private. Section 105 (1) prescribes a procedure that must be accomplished in public before an executive session may be held. That provision states that:

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

If no motion is made to enter into executive session, or if a motion to conduct an executive session is not approved, a public body is generally free to discuss issues in public.

The only instances, in my view, in which members of a public body are prohibited from disclosing information would involve matters that are indeed confidential because a statute forbids disclosure. When a public body has the discretionary authority to discuss a matter in public or in private, I do not believe that the matter can properly be characterized as "confidential."

The Commissioner's decision states as follows:

> "In addition to a board member's general duties and responsibilities, General Municipal Law §805-a(1)(b) provides that no municipal officer or employee (including a school board member) shall 'disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests.' It is well settled that a board member's disclosure of confidential information obtained at an executive session of a board meeting violates §805-a(1)(b) (see Applications of Balen, 40 Ed Dept Rep 250, Decision No. 14,474; Application of the Bd. of Educ. of the Middle Country Central School Dist., 33 id. 511, Decision No. 13,132; Appeal of Henning and Rohrer, 33 id. 232, Decision No. 13,035).
>
> "Less clear is what constitutes 'confidential' information. The term 'confidential' is not defined in the General Municipal Law and the legislative history of §805-a does not provide any additional guidance into the meaning of that word...
>
> "Absent a clear statutory definition, and given the importance of ensuring a uniform application in the educational system, the interpretation of 'confidential' in the school context is a matter best left to the Commissioner (see Komyathy v. Bd. of Educ. Wappinger Central School District No. 1, 75 Misc. 2d 859). Information that is meant to be kept secret is by general definition considered to be 'confidential' (see Black's Law Dictionary [8th Ed. 2004])."

While some interpretations of law might be "best left to the Commissioner", I point out that each of the precedents cited in the excerpt of the decision quoted above involve the Commissioner's own decisions. Avoided, however, are judicial decisions that are contrary to his conclusion.

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

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

> "Although we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting disclosure claims as protection" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

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

> "Exemption 3 excludes from its coverage only matters that are:
>
> > *specifically* exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) **requires that the matters be withheld from the public in**

**such a manner as to leave no discretion on the issue**, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

"5 U.S.C. § 552(b)(3) (1982) (emphasis added). Records sought to be withheld under authority of another statute thus escape the release requirements of FOIA if - and only if - that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure. The Supreme Court has equated 'specifically' with 'explicitly.' *Baldridge v. Shapiro*, 455 U.S. 345, 355, 102 S. Ct. 1103, 1109, 71 L.Ed.2d 199 (1982). '[O]nly *explicitly* non-disclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption.' *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C.Cir.1979) (emphasis added). In other words, a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure"[Reporters Committee for Freedom of the Press v. U.S. Department of Justice, 816 F.2d 730, 735 (1987); modified on other grounds,831 F.2d 1184 (1987); reversed on other grounds, 489 U.S. 789 (1989); see also British Airports Authority v. C.A.B., D.C.D.C.1982, 531 F.Supp. 408; Inglesias v. Central Intelligence Agency, D.C.D.C.1981, 525 F.Supp, 547; Hunt v. Commodity Futures Trading Commission, D.C.D.C.1979, 484 F.Supp. 47; Florida Medical Ass'n, Inc. v. Department of Health, Ed. & Welfare, D.C.Fla.1979, 479 F.Supp. 1291].

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

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

"...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records...if it so chooses" (Capital Newspapers, supra, 567).

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

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

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

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

The Commissioner failed to include reference to the only judicial decision of which I am aware that dealt squarely with the assertion that information acquired during an executive session is confidential. In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987). In the context of most of the duties of most municipal boards, councils or similar bodies, there is no statute that *forbids* disclosure or requires confidentiality. Again, the Freedom of Information Law states that an agency *may* withhold records in certain

circumstances; it has discretion to grant or deny access. The only instances in which records may be characterized as "confidential" would, based on judicial interpretations, involve those situations in which a statute prohibits disclosure and leaves no discretion to a person or body.

Based on the foregoing, I believe that the Commissioner's conclusion that information that *may* be withheld or that information that *may* be discussed in executive session is confidential is inaccurate and contrary to the weight of judicial authority.

Lastly, you asked whether former members of a board of education are bound by Nett. In my view, again, the only instances in which a board member, present or former, is prohibited from disclosing information acquired during a properly held closed session would involve those situations in which a statute, i.e., the Family Educational Rights and Privacy Act, forbids disclosure.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

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