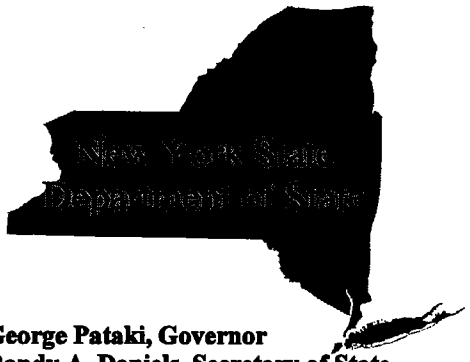


George Pataki, Governor
Randy A. Daniels, Secretary of State

Conducting Meetings & Hearings

What is a Meeting?

- **A convening of a public body for the purpose of conducting public business**
  - ★ **Quorum**
  - ★ **Intent**
  - ★ **Discussion**

The Importance of Quorums

In order to conduct business, a "quorum" must be present.

Quorum: Must be at least a majority of the full membership of the board, including any absences or vacancies.

No votes can be taken without a quorum present

No hearings can be held without a quorum present

Quorum Problems

If you occasionally have problems getting a quorum together, or getting a quorum of your members to agree on a motion, you may want to consider the appointment of alternate members to the planning board or ZBA.

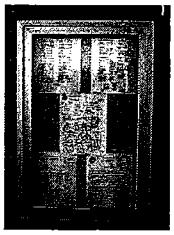
- Conflicts of Interest -create position by local law or ordinance
- Absences - supercede by local law
- Samples available from the Department of State

If it is a Meeting, what does that mean?

- **The public body must comply with the state Open Meetings Law**

★ **Notice to the Media**
★ **Posted Notice**
★ **Access by the Public**

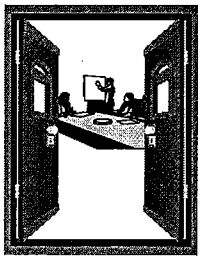
Letting the Press & Public Know About Meetings



If the meeting is scheduled more than one week in advance, you must provide at least three days notice to the news media and post a notice in a conspicuous place

If the meeting is scheduled less than one week in advance, notice must be given to the media to the extent practicable, and must be posted in a conspicuous place.

Intent: A Meeting is a Meeting .....



- **Concept Review**
- **Agenda Meetings**
- **Site Visits**

It is not a meeting if the purpose of the gathering is to receive legal advice from the Board's attorney

CM-1

Organizing for the Meeting

- Prepare an Agenda
- Invite Experts and Public Officials
- Reserve a Room for the Meeting
- Arrange for Equipment
- Assemble & Distribute Background Material
- Confirm that Members will Attend

Beginning the Meeting

Make all who are present aware of the ground rules

- What is the expected format of the meeting and any presentations?
- Have time limits been established for any agenda items?
- Will public questions or comments be allowed?
- Are there any rules that specify additional procedures?

Tape Recording

Who may attend a Meeting?

- Members of the General Public
- The Media

The public body may, but is not required to permit public participation.

When may the Public be Excluded?

An "Executive Session" may only be held for one of the eight permissible reasons under the Open Meetings Law.

- Public Safety
- Protect Identity
- Criminal Investigations
- Actual Litigation
- Collective Negotiations
- History of Person
- Exams
- Property Value

CM5

How do you go into Executive Session?

- Convene an open meeting
- Pass a motion to go into executive session for a stated purpose
- Close the executive session and go back into open meeting
- File minutes of actions taken in executive session within one week

See Public Officers Law §106

Hearings

A hearing is a session at which public comment is allowed on a particular issue.

For example, the adoption of a local law, granting of a land use approval, or adoption of a comprehensive plan.

Quorum??

Scheduling a Hearing

- **Publishing notice in the newspaper**

Content of the Notice

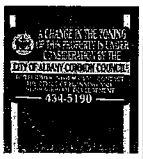
- Date, time & place of the hearing
- Nature of the proposed action
- If applicable, the location of the subject property

Notifying Neighbors

State Law does **not** require that neighboring property owners be notified by mail when a public hearing is scheduled. (Except certain public agencies.)

By local law, a municipality could require:

- Notification by mail
- Posting of a sign



CM2

Board Hearing Procedures

- **Maintaining order**
- **Recording sessions**
- **Non-owner applicants**

Procedures can be outlined in Board Rules

Taking Public Comments

Establish a Procedure for Accepting Public Input

- **Registration?**
- **Order of Speakers?**
  - ★ **Applicant, Experts, Organizations, Individuals?**
  - ★ **First Come, First Serve?**
  - ★ **Time slots?**

Who can speak?

Hearing Tips

- Have speakers identify themselves
- Beware of papers rustling near sensitive microphones
- Ask for clarification when it is unclear to whom the speaker is referring ("they", "he", etc.)
- Require visual references to be described or "read" into the record
- Let the public know what's next

Closing the Hearing

A public hearing is usually over when all who wish to speak have been heard.

Even after a hearing is closed, the board may choose to keep the RECORD open for the acceptance of written comments.

CM4

Hearings may be adjourned & continued at a later date

If the board adjourns to an UNSPECIFIED TIME and PLACE, then notice must be given in the same matter as the original notice.

If PRIOR to ADJOURNING, the board ANNOUNCES the time and place of the continuing session, then the public notice need not be given again.

NYS DOS 2000

CM3

Conducting Public Meetings and Public Hearings

JAMES A. COON LOCAL GOVERNMENT TECHNICAL SERIES

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Governor

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9/95

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"Local Government Topics" is a series of papers giving technical guidance on steps to be followed for a variety of problems, issues, and concerns that small local governments in New York State typically face. Other papers in the series are available from the Tug Hill Commission at the above address and phone number.

Table Of Contents

Introduction 1

Part One: Public Meetings 1

The Open Meetings Law 1
What is an Open Meeting 1
Who May Participate 2
Executive Sessions 2
Preparing a Public Notice 3
Planning a Public Meeting 4
Organizing for the Meeting 4
At the Meeting 5

Part Two: Public Hearings 6

Hearings Required by Law 6
What Are Public Hearings 7
Special Requirements Applicable to Villages 7
Special Requirements Applicable to Towns 7
Contents of a Public Notice 8
Conducting a Public Hearing 8

Conclusion 12

If You Need More Information 13

Resolution for Public Hearing 14

Sample Public Notice - Towns 15

Endnotes 16

INTRODUCTION

Nearly all of a municipal board's work is performed in meetings or hearings open to the public. Such meetings are subject to several state and local procedural requirements, as well as the political climate of the locality. Taken together, these elements can confuse, intimidate and stymie even the most experienced of boards. For this reason, it is the intent of this paper to educate and refresh municipal officials on several of the procedures governing public meetings and hearings. Only with a working knowledge of state procedural requirements will municipal officials be free to focus on the current issues and political needs of their communities.

The Tug Hill Commission wishes to express its gratitude to the New York State Committee on Open Government and its Executive Director, Robert Freeman, for their assistance in the preparation of this paper.

PART ONE: PUBLIC MEETINGS

THE OPEN MEETINGS LAW

> *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 attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it.* (Public Officers Law, Sec. 100)

This legislative declaration clearly sets forth the intent of the Open Meetings law, and the State's idealistic goals for local government. The Open Meetings Law was designed to accommodate public observance of the workings of government and to prevent the deliberate exclusion of the public from the governmental process. To local governments, this means the need to examine their processes in order to determine whether the public is unduly excluded. This self-examination may also need to address perceptions of public exclusion, in addition to exclusions in fact.

What is an Open Meeting — The definition of a "meeting" is, "the official convening of a public body for the purpose of conducting public business."[1] A public body, as referred to above, is "any public 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 ... or committee or subcommittee or other similar body of such public body."[2]

For towns and villages, these definitions mean that any group organized to serve a public purpose, other than charity organizations, must make all its meetings open to the public and must give notice of such meetings, unless the meeting will qualify as an executive session.[3]

As a result, the following organizations in towns and villages are subject to the requirements of the "Open Meetings Law:" Town Boards, Village Boards, Planning Boards, Zoning Boards of Appeal, Volunteer Fire Companies, Boards of Fire Commissioners, Boards of Trustees of volunteer fire companies, Municipal Water Boards, School Boards, and the committees and subcommittees consisting of members of the above organizations.[4]

The Open Meetings Law applies to all official meetings of a public body. Any time a public body gathers for the purpose of conducting public business, the meeting must be convened open to the public, regardless of whether the public body intends to take action.[5] Characterizing meetings as "study sessions" or other similar wording does not change the essential nature of the gathering, nor does it remove the requirement for the meeting to be open to the public.[6] The Open Meetings Law does not apply to social gatherings or chance meetings, even where some item of public business may be mentioned in passing. It also does not apply whenever less than a quorum of the members of a public body get together, since no substantive public business may be done under those circumstances.[7]

Who May Participate — An "open meeting" is a meeting of a public body for which adequate notice has been given to the news media and to the members of the general public, and at which the media and the members of the general public are permitted to attend, observe, and listen as the public body conducts public business.[8] An "open meeting" is not a meeting where the local public body is required to listen to public fact, opinion, or debate.[9] The right to participate at an "open meeting" may be limited to members of the public body. However, a public body may permit public participation and may provide rules for participants to follow at public meetings.[10] Included among the requirements for a meeting to be open to the public is the necessity that "all reasonable efforts" be made to ensure that the meeting hall is accessible to the physically handicapped.[11]

Executive Sessions — An "Executive Session" is a portion of an open meeting during which the public may be excluded.[12] Although public bodies have the authority to exclude the public from some meetings, this authority is limited to those purposes enumerated in the Open Meetings Law.[13] A public body may only go into executive session if the matters to be discussed:

- will imperil public safety if disclosed;
- may disclose the identity of a law enforcement agent or informer;
- relate to a current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;
- regard proposed, pending, or current litigation;
- regard collective negotiations pursuant to Article 14 of the Civil Service Law;
- involve 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;

- pertain to the preparation, grading, or administration of examinations; and
- relate to the proposed acquisition, sale, or release of real property, or the proposed acquisition, sale, or exchange of securities held by a public body, but only when publicity would substantially affect the value thereof.[14]

"These are the only subjects that may be discussed behind closed doors; all other deliberations must be conducted during open meetings."[15] A public body may only go into executive session following a "majority vote of its total membership, taken in an open meeting."[16] Any motion made calling for an executive session must be made at an open meeting, must identify the subject matter to be discussed and must be adopted by a majority of a public body's total membership.[17]

Since most of the purposes above do not pertain to municipal boards or will only arise on rare occasions, town and village boards should seldom need to go into executive session.

Where a public body makes an official decision or action during an executive session, it must record or summarize that action and "the date and vote thereon" in its minutes.[18] If no votes are taken during an executive session, no minutes need be prepared.

When a public board lets citizens know when they are meeting and the issues to be addressed, they take an important first step in establishing a climate of government based on respect for constituents' judgment. By facilitating public attendance at board meetings, the board can ensure the circulation of firsthand information about why it acted as it did, and prevent the spread of misinformation. Although concerned citizens may not have been permitted to participate in the debate of a particular issue, nor agree with the board's decision, they will however have had the opportunity to witness the decision-making process, and to hear the true rationale behind the decision.

PREPARING A PUBLIC NOTICE

The Open Meetings Law requires that notice of the time and place of all meetings of a public body be given prior to every meeting. The content of such notice must include reference to the time and location of the meeting.[19] It is recommended that the notice include the name of the public body that will be meeting, and a name of a contact person if additional information is needed. A notice need not include an agenda,[20] nor does it have to be published as a legal notice.[21]

The main variable among notice requirements, is the length of time the notice must precede the meeting. Following is a list of notice time length requirements for various meetings:

1. Meetings scheduled a week or more in advance must be preceded by notice given the public and the news media not less than 72 hours prior to the meeting;[22]

2. Meetings scheduled less than a week in advance be given to the "extent practicable" at a reasonable time prior to such meeting;[23]
3. Notice of town and village hearings on a preliminary budget must be published at least five days in advance of the scheduled hearing;[24]
4. Notice of village hearings, not otherwise prescribed in the law, must be published at least 7 days in advance of the hearing;[25]
5. Special notice requirements may be necessary for specific town and village subjects, those requirements can be found in that section of law pertaining to the proposed action.[26]

If inadequate notice is given, the municipality risks the chance that an aggrieved person will challenge its validity in court. This raises the possibility that any or all actions taken by the public body at the meeting or hearing may be invalidated.[27] The enforcement provision of the Open Meetings Law does not permit a judge to automatically throw out a decision made at an inadequately noticed meeting. Rather it protects against invalidating decisions solely on the grounds of an unintentional failure to comply with the notice requirement.[28]

PLANNING A PUBLIC MEETING

Public meetings are more effective if they are planned properly and organized several days in advance. The following questions should be considered in advance when planning for meetings.

- Is a meeting necessary? Why meet?
- Who should be involved in the meeting?
- What subjects must be covered? Should other subjects be considered at this meeting?
- What resources will be necessary for conducting this meeting?
- What kind of ground rules will be needed?
- Is a public hearing required to discuss any of the subjects which must be covered?

NOTE: Adoption or amendment of village laws and town ordinances, rules, and regulations require a public hearing. [Turn to the "Public Hearing" section of this paper.]

ORGANIZING FOR THE MEETING

Time spent organizing in advance of meetings can improve the quality of the meeting, and facilitate the proper conveyance of information to the public. Discussions at well planned meetings are usually more focused, resulting in shorter meetings. In addition, fewer meetings may be needed to finish business because the right information and the right people are brought together the first time. Following are a few steps and questions to consider when organizing a meeting:

1. Preparing an Agenda — Making a list of topics for discussion, planning a specific amount of time for each item, and distributing the agenda in advance of the day of the meeting helps board members to think about matters in advance.

2. Inviting Experts and Public Officials — What outside experts need to be invited for assistance on the scheduled topics? An attorney? An engineer? County or state planners? Should public officials from other units of government be invited to attend?

3. Preparing Background Information — What information must be prepared before the meeting? Who will prepare it for the board?

4. Distributing Information in Advance — Distribute needed information to members in advance of the meeting so they can become familiar with the matters they will need to decide on.

5. Space for the Meeting — What kind of meeting space is required? Who will arrange for the facility, open and set it up in advance?

6. Special Equipment — Arrange for equipment such as microphones, amplifier/speaker systems, tape recorders, projectors, power cords, equipment stands, charts, markers, and other items to be available as needed. Where are the electrical outlets needed to operate power equipment?

7. Other Needs — Permission to use the meeting space? Key to open the meeting room? Anything else?

8. Confirm that Members Will Attend — Call board members to confirm they will attend the meeting.

9. Review Ground Rules — Board members each review the ground rules needed to run the meeting.[29] The board's by-laws should be checked and the procedures required therein should be followed during the meeting. Familiarity by all participants with these rules makes business go faster.

AT THE MEETING

Many of the steps outlined below are probably well known to the experienced board member, but may not be known to newer members. This section was designed to help this latter group become familiar with the order of a typical meeting.

1. Setting Up — The chairman or someone designated by him should plan to arrive at the meeting place a few minutes ahead of time to open the meeting room and to (re)arrange the furniture, set up special equipment, welcome experts, and greet members of the public.

2. Roll Call and Quorum — When the members of the public body have arrived and the time has come to open the meeting, the chairman should call the meeting to order. Roll call of the members is taken, and quorum is confirmed.[30] The number of members necessary to have a quorum is a majority of the total membership notwithstanding absences or vacancies. If a quorum is not present, no official business can be done until more members arrive.[31] However, informal discussion can take

place, or the meeting can be adjourned until a specific future date if a quorum of the members is not present.

3. Opening Statement — If a quorum is present, the chairman makes an opening statement, welcoming the public and any invited guests to the meeting, and explains the rules to be followed during the meeting.

4. Order of Business — The chairman guides the meeting through the order of business prescribed by the organization's by-laws. A typical order of business might be:

- reading of the minutes of the previous meeting;[32] amendment and approval;
- hearing the reports of standing committees;
- reports of select committees;
- consideration of unfinished business;
- consideration of new business;
- approval of bills for payment;
- setting the time and place for the next meeting;
- setting the preliminary agenda for the next meeting;
- adjournment.

5. Follow up — After the meeting, minutes will need to be prepared and a draft distributed for comments and corrections. A final agenda should be set up for the next meeting. Assignments to get information or to follow up on action agreed to at the meeting should also be made. The cycle of giving notice and setting up the next meeting begins anew.

PART TWO: PUBLIC HEARINGS

HEARINGS REQUIRED BY LAW

New York State Law recognizes that towns and villages have home rule powers to enact local laws and ordinances governing their own property and affairs. This power is limited to certain functions. When local governments must enact laws and ordinances in areas not considered a part of home rule power, state law controls and guides the functioning of town and village governments. For this reason, legal requirements for public hearings may be found in General Municipal Law, Municipal Home Rule Law, Local Government Finance Law, Town Law, and Village Law, as well as in local laws and ordinances adopted by individual towns and villages. If there is any doubt about public hearing and notice requirements associated with town or village business, public officials should contact the municipal attorney for advice.

Section 20 of the Municipal Home Rule Law regarding the procedures for the adoption of local laws by a legislative body requires municipalities, including towns and villages, to hold a public hearing on every proposed local law prior to its adoption.[33] This section applies where a town or village has the authority to proceed under home rule powers to adopt laws or ordinances.[34]

A municipality may enact a local law prescribing at least a three-day minimum notice period to be given of public hearings on subsequent local laws.[35] If no such law has been enacted, a five-day minimum notice period is required, a longer notice requirement may be adopted if a municipality chooses to do so.[36] This notice period is long enough to meet the requirements of the state's open meeting laws as discussed in the ***Guide to Land Development***.[37]

What Are Public Hearings? — Public hearings are open meetings conducted by local boards to gather information from the public, and to survey public opinion as part of a local law-making or rule-making process.[38] Unlike public meetings at which the citizenry may only observe the members of the municipal body as they conduct business, at a public hearing the citizens are encouraged to speak and comment on the specific subjects addressed at the hearing. Usually such public discussion focuses on public support for or opposition to a particular action considered by the board. Participation by the public is governed by rules of procedure established by the board prior to holding the hearing.

Special Requirements Applicable to Villages — Where a village is adopting local laws under powers granted to it by the state (through the Village Law, the Local Government Finance Law, or the General Municipal Law, for example), it must follow those notice of hearing requirements set forth in that specific law.[39] Where notice of hearing requirements are not specified in state or local laws governing the subject of the proposed local law, Section 21-200 of the Village Law provides that a public hearing be held subject to the following requirements:

- A notice of the public hearing must be published in the official village newspaper, or if there is none, in a general circulation newspaper in the village; and
- Such notice must be given at least seven days in advance of the public hearing.[40]

Section 21-2102 of the Village Law makes specific requirements for holding hearings by the board of trustees where other sections of state or local law do not govern the type of hearing being held.[41] Below are the requirements of Village Law §21-2102 for conducting a hearing:

- the hearing shall be held at the time and place designated in the notice;
- the board conducting the hearing shall have minutes taken of the proceedings;
- the hearing may be adjourned by the board conducting the hearing provided that the adjourned date is announced at the hearing (if this is done, a new public notice need not be prepared to announce the continuation);
- decisions based on the hearing must be made within 62 days after the hearing is concluded; and
- the original copy of the decision, copies of the notice and hearing, affidavits of publication of the notice, written objections received at the hearing, signed testimony and minutes of the proceedings taken on the hearings must be filed by the board of trustees with the village clerk within five days after the decision is rendered.[42]

Special Requirements Applicable to Towns — Although the notice of hearing requirements for Towns are similar to those required of villages under Village Law section 21-2100, there are

some slight differences that must be observed. Where a town is enacting, amending, or repealing ordinances, rules, and regulations outside the scope of its home rule power, and where specific notice and hearing requirements are not found in state statutes or in local ordinances governing the subject of its ordinance, rule, or regulation, the provisions of Section 130 of the Town Law apply.[43] Town Law section 130 provides that a public hearing be held subject to the following requirements:

- A notice of the public hearing must be published in at least one newspaper circulating in the town; and
- Such notice must be given at least once, ten days in advance of the public hearing.[44]

Unlike Village Law, Town Law does not have specific requirements for conducting hearings where no other laws govern the type of hearing held. Towns should look to the specific state or local law addressing the issue at the hearing for the requirements for conducting a hearing.

Contents of a Public Notice — A notice for a public hearing on the adoption of a local law or ordinance must include:

- the time and place of the meeting; and
- a brief statement of the subject or purpose of the law (this statement does not have to include the full text of the proposed local law).[45]

It may be helpful to also include with such notice:

- the name and telephone number of the person who can provide additional information about the hearing;
- where a copy of the full text of the proposed law can be obtained;
- information on how individuals may testify at this hearing;
- a suggestion or request that persons testifying at the hearing provide written copies of their testimony.

CONDUCTING A PUBLIC HEARING

Following is a list of steps and suggestions to help in preparing for a public hearing. These items relate to the adoption of a resolution proposing a law, ordinance, rule or regulation.

1. Determine Hearing and Notice Requirements — The board should check with its municipal attorney in order to determine what hearing and notice requirements must be satisfied, as well as the possible necessity of sending special notices to specific individuals, other municipalities, boards or other levels of government affected by the proposed action.

2. Adopt a Resolution — The board should adopt a resolution proposing the law, ordinance, rule or regulation in question. The resolution should appear in the minutes of the meeting, and should

state the date, time, place and subject of the hearing. The board should also instruct the clerk to prepare and place the required public notice.[46]

3. <u>Give Public and Special Notice</u> — Legal notice of the hearing should be published in the official newspaper, if there is one, or in a newspaper having general circulation within the town or village, as required by law.[47] A public notice should be posted on the official town or village bulletin board and in other local places as required by the Open Meetings Law, or applicable local laws and ordinances. It is advisable that the clerk file an affidavit of publication after publishing the notice, in order to prove that the request for publication was made. The news media should be notified of the public hearing as required by the Open Meetings Law, and special notice should be given to affected individuals and governmental bodies.[48]

4. <u>Collect Information</u> — The board should designate the clerk or someone else to serve as a contact person for the collection of further information about the public hearing. That person collects information, maps, records, and other items for public examination prior to the hearing.

5. <u>Utilize the Municipal Attorney</u> — The municipal attorney should be consulted as to whether an official transcript of the proceedings is required. If so, the board should arrange for a court stenographer to record and transcribe the official proceedings.[49] If the board determines that the hearing will require the services of the municipal attorney, it should arrange for the attorney to attend the hearing. If special legal procedures must be followed at the hearing, the board may want to request the municipal attorney to conduct the hearing.

6. <u>Determine the Need for Expert Witnesses</u> — A determination should be made by the board as to the need for having expert witnesses attend and give testimony at the hearing. If expert witnesses are needed, appropriate arrangements to secure their services should be made.

7. <u>Arranging Space and Equipment</u> — Space, furnishings and equipment needs should be assessed as soon as possible, and arrangements made thereto according to the following needs:

- amount of space;
- number of chairs and tables;
- lectern for the witnesses to testify from (Having a single location for the witnesses is important if the hearing is being tape recorded.);
- special equipment, such as microphones, amplifiers, loudspeakers, power cords, easels, chart paper, slide projectors or tape recorders;
- water, pitchers and cups available and located conveniently for witnesses and board members to ease dry throats; and
- designated person to open the meeting room.

8. <u>Hearing Procedures</u> — Hearing procedures are important for the smooth procession of witnesses and evidence. In advance of the hearing, the board should check with the municipal attorney to determine whether special legal procedures must be followed when conducting the hearing. Those conducting the hearing need to familiarized themselves with those legal procedures and any procedures required by the board's bylaws and those ground rules established for the hearing.

9. Registration of Persons Wishing to Testify — The clerk should take the names of those persons wishing to testify at the hearing. Participants and the public should be invited to sign in as they enter the hearing room. This is especially useful where a record is desired of individuals and groups who are interested in the subject of the hearing. Witnesses should be arranged to testify according to a pre-determined order. It is recommended that expert witnesses and public officials testify first, then persons representing organizations, followed by individuals. An alternative system would follow a first come, first served order, using the sign-in sheet.

10. Opening the Hearing — After the hearing is called to order, the public should be welcomed to the hearing and the members of the board holding the hearing introduced. An opening presentation should be made by or on behalf of the board setting forth the issue at hand, the board's authority for addressing the issue, and why the board is studying the problem. It should also clarify the board's interest in listening to the public's opinion on this issue at the public hearing. The resolution of the board authorizing the public hearing and the affidavit of publication of the official notice should be read into the record of the hearing, and the text of the proposed law, ordinance, rule or regulation should also be entered into the record. This can be done by either reading the full text aloud, or by giving a copy of the text to the person keeping minutes or recording a transcript of the hearing. If read, the content of the law, ordinance, etc. should be summarized for the benefit of the public.

In addition to reading the resolution and the text of the proposed law, the rules of procedure to be followed by the board at the hearing should clearly and simply be stated for the benefit of the public and the witnesses. Such rules should include reference to the order in which witnesses will be called. Explaining the rationale behind the order for calling witnesses helps the public understand and accept the scheduling of witnesses for the hearing process.[50]

11. Accepting Testimony — In addition to accepting oral testimony of witnesses, the board may also want to accept written comments. If written comments will be accepted by the board, it should notify the public as to how many copies will be needed for the board, and if deemed necessary, for distribution to the media and others present at the hearing.

If the board anticipates a large number of witnesses wishing to testify, it may want to limit the time for each witness' testimony. Limiting statements to 3-5 minutes encourages witnesses to be focused and direct, and permits more people to testify. More lengthy comments can be accepted in written form after the hearing is closed. Provisions may be made so that extra time may be given, should the board consider it necessary.

The chairman should call the witnesses in order, and invite them to present written copies of their testimony to the board. When a witness testifies, it is the chairman's responsibility to prevent him/her from straying too far from the subject, to remind the witness to speak clearly or to speak into the microphone and if necessary, to help witnesses overcome nervousness. The chairman should instruct the witness to present his/her testimony to the board, not the public. This will help keep the testimony focused on the issue before the board and prevent the witness from responding to comments from the assembled public. More importantly, the chairman should prevent others from interrupting the testimony.

The board members may want to ask questions of witnesses in order to clarify facts and opinions presented in their testimony. In addition to questioning witnesses, the board may permit members of the public to question witnesses at the hearing. If it does so, the board should be careful not to turn the hearing into a debate. Open debates of public issues tend to raise people's emotional levels, diminish the board's control over the hearing, and tend to discourage some witnesses from testifying.

If witnesses are being called from a witness list, the board will find that some witnesses will elect not to testify on the grounds that their views were expressed by a previous witness. Also, some prospective witnesses will leave the hearing early.

When the list of witnesses is exhausted, the chairman should ask if anyone remaining wishes to be heard, then as time permits, these persons may be invited to speak.

In hearings where certain facts must be established, the chairman may need to ask for further testimony if those facts are not presented. This situation is most likely to arise with a planning board hearing, a zoning board hearing, or other hearings involving a permit.

13. <u>Adjournment</u> — The chairman may adjourn the hearing until a specified future day, place and time. This is most likely to happen if the board lacks the facts it needs to reach a decision, or where the hearing is reaching a late hour or more witnesses desire to be heard. Where the time, place and date of the continued hearing is clearly announced at the first hearing, no additional notice is required for the continuation of the hearing. An example of a statement adjourning a hearing is:

"This hearing stands adjourned until Wednesday, January 10th at 7:30, when the board will reconvene at the town offices."

14. <u>Closing the Hearing</u> — A public hearing is usually over when all who wish to speak have been heard or when all the facts needed to reach a decision have been assembled. The hearing should be closed by thanking the public and the witnesses for attending and explaining the steps the board will take to use the information gathered to make a decision. The hearing is closed following a motion and a vote thereupon by the board to close the hearing.

The following issues should be considered in advance of the hearing with regard to its closing:

- who will make the concluding remarks on behalf of the board;
- how the information collected at the hearing will be used in reaching a decision;
- when the board will meet to make its decision;
- what are the legal time constraints on making a decision.

15. <u>After the Hearing</u> — After the hearing, the information received from witnesses must be assembled and minutes prepared. The board will then make its decision based upon the information before it. After the decision is made, the board should notify all involved parties, including any applicants and other concerned municipalities and agencies of the actions taken at or as a result of the hearing.[51]

Village boards must file with the village clerk within five days of its decision the following:

- the original copy of the decision;
- copies of the hearing resolution and notice;
- affidavits of publication of the notice;
- copies of signed testimony;
- the minutes of the proceedings, and
- written objections.[52]

Unlike Village Law, Town Law does not have specific requirements for conducting hearings where no other laws govern the type of hearing held. Towns should look to the specific state or local law addressing the issue at the hearing for the requirements for conducting a hearing.

CONCLUSION

From a legal standpoint, actions taken at meetings where open meeting procedures are not followed as required may not be valid, and those laws and ordinances so enacted may be overturned in court. Fortunately, the goal of most local governments' is service to the community, not the mere avoidance of legal hassles. For this reason, municipal officials should regard open meeting procedures as serving more than just the state's objective for keeping local governments open to the public. They give the public the full opportunity to observe and participate in its own governance; they help to confirm local government's accountability to its constituents; and they assist in the complete airing of public opinion on community issues.

Hopefully this step-by-step guide has clarified the procedures required of the state's Open Meetings Law, the organization of public meetings and hearings, and the reasons why these procedures should be followed.

IF YOU NEED MORE INFORMATION

OPEN MEETINGS

1. For answers to specific questions about open meetings call: Robert Freeman, Executive Director, Committee on Open Government, (518) 474-2518 or -2791.

2. *Your Right to Know.* Available from: Committee on Open Government, New York State Department of State, 41 State Street, Albany, NY 12231.

PARLIAMENTARY PROCEDURE

1. *Parliamentary Procedure — Teach Yourself*. Written by Chester Freeman, Published by Cooperative Extension. $1.50.

2. *The Meeting Will Come to Order*. Written by Harold Sponberg. Published by Cooperative Extension. $0.75.

Robert's Rules of Order: This is a standard reference of Parliamentary Procedure. However, it does not closely follow New York State law in a number of subject areas, and Robert's Rules is far more complex than local governments need. The two brief guides mentioned above contain adequate summaries to enable the smooth flow of a meeting.

COMMUNITY DECISION-MAKING

1. *Citizens Advisory Committees*. Information Bulletin 142. Published by Cooperative Extension. $1.00.

2. *Leader's Guide to Community Action*. Published by Cooperative Extension. $2.50.

3. *Who Decides? Participants in Community Decisionmaking*. Information Bulletin 53. Published by Cooperative Extension. $0.15.

PUBLIC HEARINGS

1. *Public Hearings: A Guide to Effective Participation.* Information Bulletin 161. Published by Cooperative Extnsion. $0.75.

For publications available from Cooperative Extension write:

Cooperative Extension Distribution Center
7 Research Park, CL
Cornell University
Ithaca, New York 14853

RESOLUTION FOR PUBLIC HEARING

Sample Resolution for Public Hearing on Proposed Ordinance – Towns:

At a regular meeting of the Town Board of the Town of _____, _____ County, New York, held at the Town Hall, _____ Road, in said Town of _____, on the ___ day of _____, 19__, at ____ o'clock __.M., there were:

PRESENT:

ABSENT:

Mr. _____ offered the following resolution and moved its adoption:

W H E R E A S , _____

_____

[State the problem here, e.g., "numerous complaints have been received by this Board with reference to persons trespassing on private property located on the shore of _____ in this Town by riding or driving horses thereon without the consent of and contrary to the expressed wishes of the owners of said property], and

WHEREAS, this Board has been requested to pass an ordinance_____ _____[e.g., prohibiting the said trespassing] for the purpose of protection and preservation of the property of the Town and all its inhabitants and of peace and good order therein,

NOW, THEREFORE, BE IT RESOLVED: That pursuant to Section 130 of the Town Law of the State of New York, a public hearing on a proposed Town Ordinance _____ _____[state purpose and effect of ordinance, e.g., prohibit trespass to private and public property by the riding or driving of horses on the shore or beach of _____ in said Town] be held on the _____ day of _____, 19__ at ___ o'clock __.M. Eastern _____ Time, at the Town Hall, _____ Road in the Town of _____, New York, and that notice of the time and place of such hearing describing in general terms the proposed ordinance, be published once on or before the ____ day of _____, 19__, in the _____, a newspaper circulating in said Town of _____.

Seconded by Mr. _____ and duly put to a vote, which resulted as follows:

_____ AYES

_____ NAYS

SAMPLE PUBLIC NOTICE – TOWNS

NOTICE OF PUBLIC HEARING ON A PROPOSED ORDINANCE OF THE TOWN OF _____, AS SET FORTH HEREIN

LEGAL NOTICE IS HEREBY GIVEN that pursuant to Section 130 of the Town Law of the State of New York, and pursuant to a resolution of the Town Board of the Town of _____, adopted _____ ___, 19__, the said Town Board will hold a public hearing at the Town Hall, _____ Road, Town of _____, on the _____ day of _____, 19___ at _____ o'clock __.M., Eastern _____ Time, to hear all interested parties and citizens for or against the adoption of a proposed ordinance to read as follows:

[INSERT TEXT OF ORDINANCE HERE]

TOWN BOARD OF THE TOWN OF _____

By _____, Town Clerk

ENDNOTES

[1] Public Officers Law §102 (2).

[2] Public Officers Law §102.

[3] *See Infra*, page 3, notes 12-19.

[4] Comm. on Open Govt. OML-Ad. Op. 2154; Comm. on Open Govt.. OML-Ad. Op.2472; Orange County Publications Div. of Ottaway Newspapers, Inc. v. Council of Newburgh, 89 Misc. 847, 393 NYS2d 298 (1977); Comm. on Open Govt. OML-Ad. Op. 2194; Kamlet v. Board of Education, 91 Misc. 2d 1105, 399 NYS2d 366.

[5] ***Your Right to Know: New York's Open Government Laws***, Committee on Open Government, p. 12, 1989.

[6] ***Your Right to Know: New York's Open Government Laws***, Committee on Open Government, p. 12, 1989.

[7] "Absent a quorum, the Open Meetings Law does not apply; however, if a quorum convenes a 'work session' or a 'pre-meeting meeting,' the Open Meetings Law becomes applicable, notice must be given, procedure of entry into executive session must be followed." Committee on Open Government, 1990 Report to the Governor and the Legislature, citing Buffalo Evening News v. Buffalo Municipal Housing Authority, 510 NYS2d 422 (1986).

[8] Public Officers Law §103 (a).

[9] Comm. on Open Govt. OML-AO 1281, 2120.

[10] Comm. on Open Govt. OML-AO 1281, 2120.

[11] "Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty of the public buildings law." Public Officers Law §103 (b).

> "[This section] does not impose obligation on public body to construct new facility or reconstruct or renovate existing facility to permit barrier-free access to physically handicapped persons; however, if public body has capacity to hold its meetings in number of locations, meetings should be held in facility that is most likely to accommodate needs of persons with handicapping conditions." CLS Public Officers Law §103, case note 4, citing Committee on Open Government OML-AO 1185.

[12] Public Officers Law §102 (3).

[13] Public Officers Law §105.

[14] Public Officers Law §105.

[15] ***Your Right to Know: New York's Open Government Laws,*** Committee on Open Government, p. 14, 1989.

[16] Public Officers Law §105. Note that this does not require **attendance** of the total membership but that the motion to go into executive session be carried by a vote that constitutes a majority of the total membership of the board. For example, a seven-person board with five members present could only go into executive session by vote of four (a majority of seven total members) rather than three (a majority of five members present).

[17] "Generalization of matters to be discussed during an executive session such as 'contractual matters' or 'pending litigation' are insufficient." CLS Public Officers Law §105, case note 10 citing OML-AO 2451. An example of a proper motion would be: "I move to enter into executive session to discuss matter leading to discipline of a particular person." The name of the person to be discussed need not be given in the motion. See Gordon v. Village of Monticello, A.D. 3rd Dept., 620 NY 573.

[18] ***Your Right to Know: New York's Open Government Laws,*** Committee on Open Government, p. 14, 1989.

[19] Public Officers Law §104.

[20] Committee on Public Access to Records OML-Ad. Op. 832, OML-Ad. Op. 2071.

[21] Public Officers Law §104.

[22] Public Officers Law §104 (1).

[23] Public Officers Law §104 (2).

[24] Town Law §108; Village Law §5-508 (3).

[25] Village Law §21-2100.

[26] No section of Town Law sets forth the general requirements for notice of hearings. The municipality must consult the specific section of law governing the proposed action.

[27] "...[T]he court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this [Open Meetings Law] void in whole or in part." Public Officers Law, §107 (1).

[28] Public Officers Law §107 (1). "An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body."

[29] Ground rules that should be reviewed are: the need for a quorum (the number of members needed to do business), the order of business, the rules for discussion, public participation, and voting.

[30] A quorum is the minimum number of members of a board that are necessary for that board to act in its official capacity.

[31] A quorum cannot be satisfied by the participation of a board member by phone. Public Officers Law §102, case note 2, citing Public Officers Law §97. Committee on Public Access to Records OML-Ad. Op. 588.

[32] The reading of the minutes of the prior meeting can be, and usually is, dispensed with by a motion and a majority vote of the board to such effect.

[33] Municipal Home Rule Law §20 (5). Paragraph 5 of section 20 distinguishes between the public hearing requirements for local governments with "elective chief executive officers" and those that do not. Both types of local governments are required to hold public hearings prior to the passage of a local law. Local governments without an "elective chief executive officer" must hold a public hearing before the legislative body. Where a local government has an "elective chief executive officer," that officer shall not approve a local law until a public hearing has been held before him/her.

An "elective chief executive officer" is defined in section 2 of Municipal Home Rule Law as "...the mayor of a city or village or the supervisor of a town, where such officer is vested with power to approve or veto local laws or ordinances."

[34] Municipal Home Rule Law §§10 and 20.

[35] Municipal Home Rule Law §20 (5). "Such a public hearing [on establishing a local law that prescribes at least a three-day minimum notice period for public hearings on subsequent local laws] held before the legislative body or before the chief executive officer, as the case may be, pursuant to this subdivision shall be on such public notice as has been or hereafter may be prescribed by this section upon five days' notice...."

[36] Municipal Home Rule Law §20 (5).

[37] See *Supra*, page 4, note 22. References to when public notices are required and what constitutes a sufficient notice period are scattered throughout Part II of the ***Guide to Land Development***.

[38] The legal requirements discussed in this section do not reflect the requirements imposed by state law for adjudicative type hearings conducted by zoning boards of appeal and similar public bodies. *Contra*, Town Law §267 (5) and Village Law §7-712.

[39] Village Law §21-2100.

[40] Village Law §21-2100. It should be noted that many state statutes affecting village business require the village to give at least ten days notice on a public hearing on a local law.

[41] Village Law §21-2102.

[42] Village Law §21-2102.

[43] Town Law §130.

[44] Town Law §130.

[45] "The notice of hearing on a proposed local law need not contain the full text of the proposed local law." 1965 St. Compt. Opinion #911.

[46] See sample resolution and sample hearing notice at pages 19 and 20.

[47] See special requirements applicable to villages and special requirements applicable to towns on page 10.

[48] General Municipal Law §239-m and other statutes require in certain circumstances for municipalities to notify other governmental entities. A municipality should consult its attorney regarding any such requirements.

[49] If only minutes of the proceedings are required, the board may have the clerk or secretary to the board record the minutes.

[50] Some persons who attend meetings want to speak first for reasons which are shared by others at the hearing (need to get home for the sitter, etc.). To be fair to everyone, the board should avoid deviating from a pre-established order for calling witnesses.

[51] Some sections of law require that a board notify the applicant and/or involved agencies and other municipalities. The board should consult with its attorney in order to determine whether it is legally required to notify these parties.

[52] Village Law §21-2102.

Your right to know

New York State's Open Government Laws

George E. Pataki, Governor
Randy A. Daniels, Secretary of State

Committee on Open Government

- **Freedom of Information Law**
- **Open Meetings Law**
- **Personal Privacy Protection Law**

Randy A. Daniels, Secretary of State
Mary O. Donohue, Lieutenant Governor
Stephen W. Hendershott
Gary Lewi
Warren J. Mitofsky
Michelle K. Rea
Kenneth J. Ringler, Jr.
David A. Schulz
Carole E. Stone

Robert J. Freeman, Executive Director

The Committee

The Committee on Open Government is responsible for overseeing the implementation of the Freedom of Information Law (Public Officers Law, sections 84-90) and the Open Meetings Law (Public Officers Law, sections 100- 111). The Freedom of Information Law governs rights of access to government records, while the Open Meetings Law concerns the conduct of meetings of public bodies and the right to attend those meetings. The committee also administers the Personal Privacy Protection Law.

The committee is composed of 11 members, 5 from government and 6 from the public. The five government members are the Lieutenant Governor, the Secretary of State, whose office acts as secretariat for the committee, the Commissioner of General Services, the Director of the Budget, and one elected local government official appointed by the Governor. Of the six public members, at least two must be or have been representatives of the news media.

The Freedom of Information Law directs the committee to furnish advice to agencies, the public and the news media, issue regulations and report its observations and recommendations to the Governor and the Legislature annually. Similarly, under the Open Meetings Law, the committee issues advisory opinions, reviews the operation of the law and reports its findings and recommendations annually to the Legislature.

When questions arise under either the Freedom of Information Law or the Open Meetings Law, the committee can provide written or oral advice and mediate in controversies in which rights may be unclear. Since its creation in 1974, more than 13,000 written advisory opinions have been prepared by the committee at the request of government, the public and the news media. In addition, several thousand oral opinions have been provided by telephone.

If you need advice regarding either the Freedom of Information Law or the Open Meetings Law, feel free to write to:

Committee on Open Government
NYS Department of State
41 State Street
Albany, NY 12231
or call (518) 474-2518
Fax (518) 474-1927

In addition, the opinions prepared since early 1993 that have educational or precedential value are identified by means of a series of key phrases in separate indices created in relation to the Freedom of Information Law and the Open Meetings Law. The full text of those opinions is now available through the Department of State's website. To gain direct access to the text of the opinions and open government statutes, you can use the following Internet address:

http://www.dos.state.ny.us/coog/coogwww.html

Each index to advisory opinions will be updated periodically to ensure that interested persons and government agencies will have the ability to obtain opinions recently rendered.

In addition to advisory opinions and the indices to opinions, the website also includes:

- the text of the Freedom of Information, Open Meetings and Personal Privacy Protection laws;
- the rules and regulations promulgated by the committee (21 NYCRR Part 1401);
- *Your right to know*, this guide to the Freedom of Information and Open Meetings Laws;
- *You should know*, which describes the Personal Privacy Protection Law;
- responses to “FAQs” (frequently asked questions); and
- The Impact of technology on The Freedom of Information Law, a/k/a the “Foil”
- *Food for Thought*, issues relating to e-mail

Freedom of Information

The Freedom of Information Law, effective January 1, 1978, reaffirms your right to know how your government operates. It provides rights of access to records reflective of governmental decisions and policies that affect the lives of every New Yorker. The law preserves the Committee on Open Government, which was created by enactment of the original Freedom of Information Law in 1974.

Scope of the law

The law defines "agency" to include all units of state and local government in New York State, including state agencies, public corporations and authorities, as well as any other governmental entities performing a governmental function for the state or for one or more units of local government in the state (section 86(3)).

The term "agency" does not include the State Legislature or the courts. As such, for purposes of clarity, "agency" will be used hereinafter to include all entities of government in New York, except the State Legislature and the courts, both of which will be discussed later.

What is a record?

The law defines "record" as "any information kept, held, filed, produced or reproduced by, with or for an agency or the State Legislature, in any physical form whatsoever. . ." (section 86(4)). Thus it is clear that items such as tape recordings, microfilm and computer discs fall within the definition of "record."

Accessible records

The original statute granted rights of access to nine specified categories of records to the exclusion of all others. Therefore, unless a record conformed to one of the categories of accessible records, it was presumed deniable.

The current law, reversing that presumption, states that all records are accessible, except records or portions of records that fall within one of nine categories of deniable records (section 87(2)).

Deniable records include records or portions thereof that:

(a) are specifically exempted from disclosure by state or federal statute;

(b) would if disclosed result in an unwarranted invasion of personal privacy;

(c) would if disclosed impair present or imminent contract awards or collective bargaining negotiations;

(d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;

(e) are compiled for law enforcement purposes and which if disclosed would:

i. interfere with law enforcement investigations or judicial proceedings;

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relative to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;

(f) would if disclosed endanger the life or safety of any person;

(g) are inter-agency or intra-agency communications, except to the extent that such materials consist of:

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;

(h) are examination questions or answers that are requested prior to the final administration of such questions; or

(i) if disclosed, would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or

(j) are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law.

The categories of deniable records are generally directed to the effects of disclosure. They are based in great measure upon the notion that disclosure would in some instances "impair," "cause substantial injury," "interfere," "deprive," "endanger," etc. This represents a significant change from the thrust of the original enactment.

One category of deniable records that does not deal directly with the effects of disclosure is exception (g), which deals with inter-agency and intra-agency materials. The intent of the exception is twofold. Memoranda or letters transmitted from an official of one agency to an official of another or between officials within an agency may be denied, so long as the communications (or portions thereof) are advisory in nature and do not contain information upon which the agency relies in carrying out its duties. For example, an opinion prepared by staff which may be rejected or accepted by the head of an agency need not be made available. However, the facts, policies and determinations upon which an agency relies in carrying out its duties should be made available.

There are also special provisions in the law regarding the protection of trade secrets. Those provisions pertain only to state agencies and enable a person submitting records to state agencies to request that records be kept separate and apart from all other agency records on the ground that they constitute trade secrets. In addition, when a request is made for records characterized as trade secrets, the submitter of such records is given notice and an opportunity to justify a claim that the records would if disclosed result in substantial injury to his or her competitive position. A member of the public requesting records characterized as trade secrets or a state agency at any time may challenge a claim that records constitute trade secrets.

Generally, the law provides access to existing records. Therefore, an agency need not create a record in response to a request. Nevertheless, each agency must compile the following records (section 87(3)):

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

(b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency; and

(c) reasonably detailed current list by subject matter of all records in possession of an agency, whether or not the records are accessible.

Protection of privacy

One of the exceptions to rights of access, referred to earlier, states that records may be withheld when disclosure would result in “an unwarranted invasion of personal privacy” (section 87(2)(b)).

Unless otherwise deniable, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy when identifying details are deleted, when the person to whom a record pertains consents in writing to disclosure, or when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him or her.

How to Obtain Records

Subject matter list

As noted earlier, each agency must maintain a “subject matter list.” The list is not a compilation of every record an agency has in its possession, but rather is a list of the subjects or file categories under which records are kept. It must make reference to all records in possession of an agency, whether or not the records are available. You have a right to know the kinds of records agencies maintain.

The subject matter list must be compiled in sufficient detail to permit you to identify the file category of the records sought.

Regulations

Each agency must adopt standards based upon general regulations issued by the committee. These procedures describe how you can inspect and copy records. The committee will provide a copy of its regulations on request.

Designation of records access officer

Under the regulations, a records access officer (or officers) must be appointed to coordinate an agency's response to public requests for records.

The records access officer is responsible for keeping the subject matter list up to date, assisting you in identifying records sought, making the records promptly available or denying access, providing copies of records or permitting you to make copies, certifying that a copy is a true copy and, if the records cannot be found, certifying either that the agency does not have possession of the requested records or that the agency does have the records, but they cannot be found after diligent search.

The regulations also state that the public shall continue to have access to records through officials who have been authorized previously to make information available.

Requests for records

An agency may ask you to make your request in writing. The law merely requires you to "reasonably describe" the record in which you are interested (section 89(3)). The responsibility of identifying and locating records sought rests to an extent upon the agency. However, if possible, you should supply dates, titles, file designations, or any other information that will help to find requested records.

Within five business days of the receipt of a written request for a record reasonably described, the agency must make the record available, deny access in writing giving the reasons for denial, or furnish a written acknowledgment of receipt of the request and a statement of the approximate date when the request will be granted or denied.

Fees

Copies of records must be made available on request. Except when a different fee is prescribed by statute, an agency may not charge for inspection, certification or search for records, or charge in excess of 25 cents per photocopy up to 9 by 14 inches (section 87(1)(b)(iii)). Fees for copies of other records may be charged based upon the actual cost of reproduction.

If an agency has no photocopying equipment, a transcript of records must be made on request. However, you may be charged for the clerical time involved.

Denial of access and appeal

A denial of access must be in writing, stating the reason for the denial and advising you of your right to appeal to the head or governing body of the agency or the person designated to hear appeals by the head or governing body of the agency. You may appeal within 30 days of a denial.

Upon receipt of the appeal, the agency head, governing body or appeals officer has 10 business days to fully explain in writing the reasons for further denial of access or to provide access to the records. Copies of all appeals and the determinations thereon must be sent by the agency to the Committee on Open Government (section 89(4)(a)). This requirement will enable the committee to monitor compliance with law and intercede when a denial of access may be improper.

You may seek judicial review of a final agency denial by means of a proceeding initiated under Article 78 of the Civil Practice Law and Rules. When a denial is based upon one of the exceptions to rights of access that were discussed earlier, the agency has the burden of proving that the record sought falls within one or more of the exceptions (section 89(4)(b)).

A new provision in the Freedom of Information Law permits a court, in its discretion, to award reasonable attorney's fees when a person challenging a denial of access to records in court substantially prevails. To award attorney's fees, a court must find that the record was of "clearly significant interest to the general public" and that the agency "lacked a reasonable basis at law for withholding the record." While a court may award attorney's fees, such an award is not mandatory.

Public notice

The regulations require that each agency post conspicuously and/or publicize in a local newspaper:

—locations where records are made available;

—the name, title, business address and telephone number of the records access officer; and

—the right to appeal a denial of access and the name and business address of the person or body to whom appeals should be directed.

Access to Legislative Records

Section 88 of the Freedom of Information Law applies only to the State Legislature and provides access to the following records in its possession:

(a) bills, fiscal notes, introducers' bill memoranda, resolutions and index records;

(b) messages received from the Governor or the other house of the Legislature, as well as home rule messages;

(c) legislative notification of the proposed adoption of rules by an agency;

(d) transcripts, minutes, journal records of public sessions, including meetings of committees, subcommittees and public hearings, as well as the records of attendance and any votes taken;

(e) internal or external audits and statistical or factual tabulations of, or with respect to, material otherwise available for public inspection and copying pursuant to this section or any other applicable provision of law;

(f) administrative staff manuals and instructions to staff that affect the public;

(g) final reports and formal opinions submitted to the Legislature;

(h) final reports or recommendations and minority or dissenting reports and opinions of members of committees, subcommittees, or commissions of the Legislature; and

(i) any other records made available by any other provision of law.

In addition, each house of the Legislature must maintain and make available:

(a) a record of votes of each member in each session, committee and subcommittee meeting in which the member votes;

(b) a payroll record setting forth the name, public office address, title and salary of every officer or employee; and

(c) a current list, reasonably detailed, by subject matter of any record required to be made available by section 88.

Each house is required to issue regulations pertaining to the procedural aspects of the law. Requests should be directed to the public information officers of the respective houses.

Access to Court Records

Although the courts are not subject to the Freedom of Information Law, section 255 of the Judiciary Law has long required the clerk of a court to “diligently search the files, papers, records and dockets in his office” and upon payment of a fee make copies of such items.

Agencies charged with the responsibility of administering the judicial branch are not courts and therefore are treated as agencies subject to the Freedom of Information Law.

Sample Letters

Requesting Records

Records Access Officer
Name of Agency
Address of Agency
City, NY, ZIP code

Re: Freedom of Information Law Request

Records Access Officer:

Under the provisions of the New York Freedom of Information Law, Article 6 of the Public Officers Law, I hereby request records or portions thereof pertaining to _____

(attempt to identify the records in which you are interested as clearly as possible).

If there are any fees for copying the records requested, please inform me before filling the request (or: ... please supply the records without informing me if the fees are not in excess of $____).

As you know, the Freedom of Information Law requires that an agency respond to a request within five business days of receipt of a request. Therefore, I would appreciate a response as soon as possible and look forward to hearing from you shortly. If for any reason any portion of my request is denied, please inform me of the reasons for the denial in writing and provide the name and address of the person or body to whom an appeal should be directed.

Sincerely,

Signature
Name
Address
City, State, ZIP code

Appeal A Denial

Name of Agency Official
Appeals Officer
Name of Agency
Address of Agency
City, NY, ZIP code

Re: Freedom of Information Law Appeal

Dear _____:

I hereby appeal the denial of access regarding my request, which was made on _____ (date) and sent to _____ (records access officer, name and address of agency).

The records that were denied include:_____ (enumerate the records that were denied).

As required by the Freedom of Information Law, the head or governing body of an agency, or whomever is designated to determine appeals, is required to respond within 10 business days of the receipt of an appeal. If the records are denied on appeal, please explain the reasons for the denial fully in writing as required by law.

In addition, please be advised that the Freedom of Information Law directs that all appeals and the determinations that follow be sent to the Committee on Open Government, Department of State, 41 State Street, Albany, New York 12231.

Sincerely,

Signature
Name
Address
City, State, ZIP code

Open Meetings

The Open Meetings or "Sunshine" Law went into effect in New York in 1977. Amendments that clarify and reaffirm your right to hear the deliberations of public bodies became effective on October 1, 1979.

In brief, the law gives the public the right to attend meetings of public bodies, listen to the debates and watch the decisionmaking process in action.

As stated in the legislative declaration in the Open Meetings Law (section 100): "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy."

What is a meeting?

Although the definition of "meeting" was vague as it appeared in the original law, the amendments to the law clarify the definition in conjunction with expansive interpretations of the law given by the courts. "Meeting" is defined to mean "the official convening of a public body for the purpose of conducting public business." As such, any time a quorum of a public body gathers for the purpose of discussing public business, the meeting must be convened open to the public, whether or not there is an intent to take action, and regardless of the manner in which the gathering may be characterized. The definition also authorizes members of public bodies to conduct meetings by videoconference.

Since the law applies to "official" meetings, chance meetings or social gatherings are not covered by the law.

Also, the law is silent with respect to public participation. Therefore, a public body may permit you to speak at open meetings, but is not required to do so.

What is covered by the law?

The law applies to all public bodies. "Public body" is defined to cover entities consisting of two or more people that conduct public business and perform a governmental function for the state, for an agency of the state, or for public corporations, including cities, counties, towns, villages and school districts, for example. In addition, committees and subcommittees consisting solely of members of a governing body are specifically included within the definition. Consequently, city councils, town boards, village boards of trustees, school boards, commissions, legislative bodies and sub/committees of those groups all fall within the framework of the law.

Notice of Meetings

The law requires that notice of the time and place of all meetings be given prior to every meeting.

If a meeting is scheduled at least a week in advance, notice must be given to the public and the news media not less than 72 hours prior to the meeting. Notice to the public must be accomplished by posting in one or more designated public locations.

When a meeting is scheduled less than a week in advance, notice must be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting. Again, notice to the public must be given by means of posting.

If videoconferencing is used to conduct a meeting, the public notice for the meeting must 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.

When can a meeting be closed?

The law provides for closed or "executive" sessions under circumstances prescribed in the law. It is important to emphasize that an executive session is not separate from an open meeting, but rather is defined as a portion of an open meeting during which the public may be excluded.

To close a meeting for executive session, the law requires that a public body take several procedural steps. First, a motion must be made during an open meeting to enter into executive session; second, the motion must identify "the general area or areas of the subject or subjects to be considered;" and third, the motion must be carried by a majority vote of the total membership of a public body.

Further, a public body cannot close its doors to the public to discuss the subject of its choice, for the law specifies and limits the subject matter that may appropriately be discussed in executive session. The eight subjects that may be discussed behind closed doors include:

(a) matters which will imperil the public safety if disclosed;

(b) any matter which may disclose the identity of a law enforcement agency 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 14 of the Civil Service Law (the Taylor 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 exam-inations; 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.

These are the only subjects that may be discussed behind closed doors; all other deliberations must be conducted during open meetings.

It is important to point out that a public body can never vote to appropriate public monies during a closed session. Therefore, although most public bodies may vote during a properly convened executive session, any vote to appropriate public monies must be taken in public.

The law also states that an executive session can be attended by members of the public body and any other persons authorized by the public body.

After the meeting — minutes

If you cannot attend a meeting, you can still find out what actions were taken, because the Open Meetings Law requires that minutes of both open meetings and executive sessions must be compiled and made available.

Minutes of an open meeting must consist of "a record or summary of all motions, proposals, resolutions and any matter formally voted upon and the vote thereon." Minutes of executive sessions must consist of "a record or summary of the final determination" of action that was taken, "and the date and vote thereon." Therefore, if, for example, a public body merely discusses a matter during executive session, but takes no action, minutes of an executive session need not be compiled. However, if action is taken, minutes of the action taken must be compiled and made available.

It is also important to point out that the Freedom of Information Law requires that a voting record must be compiled that identifies how individual members voted in every instance in which a vote is taken. Consequently, minutes that refer to a four to three vote must also indicate who voted in favor, and who voted against.

Enforcement of the law

What can be done if a public body holds a secret meeting? What if a public body makes a decision during an executive session that should have been open?

Any "aggrieved" person can bring a lawsuit. Since the law says that meetings are open to the general public, you would be aggrieved if you feel that you have been improperly excluded from a meeting or if you believe that an executive session was held that should have been open.

Upon the judicial challenge, a court has the power to nullify action taken by a public body in violation of the law "upon good cause shown." In addition, a court also has the authority to award reasonable attorney fees to the successful party. This means that if you go to court and you win, a court may (but need not) reimburse you for your expenditure of legal fees.

It is noted that an unintentional failure to fully comply with the notice requirements "shall not alone be grounds for invalidating action taken at a meeting of a public body."

The site of meetings

As specified earlier, all meetings of a public body are open to the general public. Moreover, the law requires that public bodies make reasonable efforts to ensure that meetings are held in facilities that permit "barrier-free physical access" to physically handicapped persons.

Exemptions from the law

The Open Meetings Law does not apply to:

(1) judicial or quasi-judicial proceedings, except proceedings of zoning boards of appeals;

(2) deliberations of political committees, conferences and caucuses; or

(3) matters made confidential by federal or state law.

Stated differently, the law does not apply to proceedings before a court or before a public body that acts in the capacity of a court, to political caucuses, or to discussions concerning matters that might be made confidential under other provisions of law. For example, federal law requires that records identifying students be kept confidential. As such, a discussion of records by a school board regarding a particular student would constitute a matter made confidential by federal law that would be exempt from the Open Meetings Law.

Revised, January 2002