Coming on Board: How to Advise New Municipal Officials

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Lawyer-Client Privilege & Who is the Client

New York State Rules of Professional Conduct

RULE 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

(e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.

(f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

(g) A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

Rule 1.7. Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

1. the representation will involve the lawyer in representing differing interests; or
2. there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2. the representation is not prohibited by law;
3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

4. each affected client gives informed consent, confirmed in writing.

RULE 1.13. Organization As Client

(a) When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include, among others:

1. asking reconsideration of the matter;
2. advising that a separate legal opinion on the matter be sought for presentation to an appropriate authority in the organization; and
3. referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly in violation of law and is likely to result in a substantial injury to the organization, the lawyer may reveal confidential information only if permitted by Rule 1.6, and may resign in accordance with Rule 1.16.

(d) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the concurrent representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Commentary to Rule 1.13 - Government Agency

[9] The duties defined in this Rule apply to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau

is a part or the relevant branch of government may be the client for purposes of this Rule. Defining or identifying the client of a lawyer representing a government entity depends on applicable federal, state and local law and is a matter beyond the scope of these Rules. See Scope [9]. Moreover, in a matter involving the conduct of government officials, a government lawyer may have greater authority under applicable law to question such conduct than would a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope [10].

Proposed Federal Rules of Evidence

Rule 503 - Lawyer-Client Privilege.

The commentary provides that "'client' includes governmental bodies," *citing Connecticut Mutual Life Ins. Co. v. Shields*, 18 F.R.D. 448 (S.D.N.Y.1955); *Department of Public Works v. Glen Arms Estate, Inc.*, 230 Cal.App.2d 841 (1965); and *Rowley v. Ferguson*, 48 N.E.2d 243 (Ohio App.1942).

Cases

In re Grand Jury Investigation, 399 F.3d 527 (2d Cir. 2005)

The Court reasoned that "the traditional rationale for the privilege applies with special force in the government context" because

- it "is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice."
- "Upholding the privilege furthers a culture in which consultation with government lawyers is accepted as a normal, desirable, and even indispensable part of conducting public business."
- "Abrogating the privilege undermines that culture and thereby impairs the public interest." citing 1 Paul R. Rice, *Attorney-Client Privilege in the United States* § 4:28, at 4 (2d ed. 1999) ("If the government attorney is required to disclose [internal communications with counsel] upon grand jury request, it is sheer fantasy to suggest that it will not make internal governmental investigations more difficult, to the point of being impossible.... To the extent that the protection of the privilege is justified in any corporate context, the need within the government is equal, if not greater.")

However, the Court acknowledged that the "relationship between a government attorney and a government official or employee is not the same as that between a private attorney and his client" because:

- "in the government context, the individual consulting with his official attorney may not control waiver of the privilege."
- "Even if he does control waiver during his time in government, the possibility remains that a subsequent administration might purport to waive the privilege exercised by a predecessor."

The Court concluded that the arguments against privilege in lawyer-government client relationship are "little more than speculation over the way in which the privilege functions in the government context" and thus are "insufficient to jettison a principle as entrenched in our legal tradition as that underlying the attorney-client privilege." In reaching this conclusion, the 2nd Circuit reasoned that government

attorneys require "candid, unvarnished information from those employed by the office he serves so that he may better discharge his duty to that office."

The Court disagreed with the contention that "'the public interest' in disclosure is readily apparent, and that a public official's willingness to consult with counsel will be only 'marginally' affected by the abrogation of the privilege in the face of a grand jury subpoena" and thus declined "to abandon the attorney-client privilege in a context in which its protections arguably are needed most."

Brown & Williamson Tobacco Corp. v. Pataki, 152 F. Supp. 2d 276 (S.D.N.Y. 2001)

The law firm representing a tobacco company that was suing the State of New York had, for the previous 25 years, represented various New York State interests with respect to the State's social welfare programs. The contract was between the law firm and the Division of Budget ("DOB") for the firm to provide legal advice and assistance, including representation in litigation, on behalf of the State on issues of federal funding, rate structures and revenue maximization for the State's public assistance programs, including Medicaid, cash assistance, foster care, and child support. The work involved the law firm interacting with several State agencies, including the Office of Mental Retardation and Developmental Disabilities, the Office of Mental Health, the Office of Temporary and Disability Assistance, the Department of Social Services, and the Department of Health.

The State moved to disqualify the tobacco company's counsel as having a conflict of interest. The District Court held that:

1. counsel's representation of various state agencies, pursuant to contract with Division of Budget (DOB), did not establish that counsel represented all of state government, for conflict of interest purposes;
2. in any event, differences in issues involved in suit and in counsel's representation of state agencies precluded finding of conflict requiring disqualification; and
3. even if counsel was deemed to represent all of state government, disqualification was not warranted.

The *B & W* Court began its analysis of determining who the client is by citing *Gray v. Rhode Island Department of Children, Youth and Families*, 937 F.Supp. 153, 157-58 (D.R.I.1996), which noted that ascertaining "who the client really is can be a complex affair when a governmental entity is involved. The definition of 'client' may differ depending on whether the lawyer is representing an individual or an agency, and whose interests are being served by the legal advice."

The District Court then referenced the 2nd Circuit's decision in *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746 (2d Cir.1981), in which the Court of Appeals noted that, in determining whether an attorney-client relationship exists, the issue is "whether there exist sufficient aspects of an attorney-client relationship for purposes of triggering inquiry into the potential conflict involved in [the firm's] role as [the employee's] counsel in this action." *Glueck*, 653 F.2d at 748-49.

The Court acknowledged that the question of client depends upon the degree to which a relationship exists. Specifically, a "substantial relationship" must exist for Canon 5 to apply. Citing *Glueck*, 653 F.2d at 750, which reasoned:

> Disqualification will ordinarily be required whenever the subject matter of a suit is sufficiently related to the scope of the matters on which a firm represents an

association as to create a realistic risk either that the plaintiff will not be represented with vigor or that unfair advantage will be taken of the defendant.

The question revolves around whether the two representations "substantially similar" and involve "risks that information gained from one representation could be used to the disadvantage of the client in the other representation."

The District Court then acknowledged two sources of legal authority promoted by the law firm in support of its position:

1. The *Gray* decision cited a position taken by the New York State Bar Association in holding that "the appropriate rule should be that a lawyer representing a governmental agency only represents that agency and not the government as a whole." *Gray*, 937 F.Supp. at 158; and
2. A formal opinion issued by the New York City Bar Association's Committee on Professional and Judicial Ethics which held that "treating different governmental departments or agencies as separate clients for the application of conflicts rules is in keeping with recent opinions treating separate corporate entities in the private sector as distinct clients for conflicts purposes." Formal Op. No.1999-06.

However, the *B & W* court concluded that neither the State's position nor the law firms adequately reflected the attorney-client relationship at issue or "directly addresses the indicia of the attorney-client relationship to determine, for conflict of interest purposes, whether the State as a whole is [the law firm's] client."

In making its findings, the District Court prescribed Glueck "traditional indicia of an attorney-client relationship" test, concluding:

1. In examining the *contract specifics*, although the law firm's contract was with the State's Division of the Budget, the law firm represented relatively narrow State interests, and as such "the agency with which the firm contracts is not determinative of the identity of the client;"
2. The nature of the consultation, specifically that there was no evidence of privileged communications between the law firm and the Governor or Governor's counsel, that there wasn't any evidence of a risk of having common witnesses, and the fact that the Division of the Budget is an arm of the executive branch did not mean that the entire executive branch was a client of the law firm, did not rise to the level of having a prohibited conflict;
3. The fact that the law firm bills the State directly and is paid with State funds was entitled to "little, if any, weight" to support a finding that the State as a whole is the client; and
4. There was no "substantial relationship" between the State and the law firm.

As a result, the *B & W* Court ruled that there was no prohibited conflict of interest.

In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 919 (8th Cir. 1997)

In a case involving the Whitewater investigation of President Clinton, the 8th Circuit addressed the question of the disclosure of notes taken by an Associate and a Special Counsel to the President during meetings with the First Lady, the First Lady's personal attorney, and Counsel to the President . In addressing the question of governmental attorney-client privilege in civil actions, the Court recognized the relatively dearth of jurisprudence on the issue before reasoning, "Even if we were to conclude that the governmental attorney-client privilege ordinarily applies in civil litigation pitting the federal

government against private parties, a question that we need not and do not decide, we believe the criminal context of the instant case, in which an entity of the federal government seeks to withhold information from a federal criminal investigation, presents a rather different issue."

The Court then cited *United States v. Nixon* which "recognized that the need for confidential presidential communication 'can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties'" and "that the privilege for presidential communications 'is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution'" but nonetheless "concluded that it had to give way to the special prosecutor's subpoena:

> A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

In re Grand Jury Subpoena Duces Tecum, 112 F.3d at 919, *citing* US v. Nixon, at 712–13, 94 S.Ct. at 3110.

The 8th Circuit acknowledged that the claim of presidential privilege in *Nixon* was not the same as the issue attorney-client privilege before and thus not controlling, but nevertheless found that reasoning persuasive and the *Nixon* rationale "is indicative of the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes."

The 8th Circuit went on to flesh out important differences between private individuals and public servants, notable that "executive branch employees, including attorneys, are under a statutory duty to report criminal wrongdoing by other employees to the Attorney General. See 28 U.S.C. § 535(b) (1994). Even more importantly, however, the general duty of public service calls upon government employees and agencies to favor disclosure over concealment."

The Court analogized public servants to accountants, for whom the Supreme Court had rejected the concept of work product immunity because they assume a "public responsibility transcending any employment relationship with the client" and thus owe ultimate allegiance to many stakeholders, including investing public. *Citing United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984)

The implication is that a public officer's responsibility to the public weakens the normally inviolable lawyer-client privilege.

The Municipal Attorney

Overview

The "municipal attorney" is generally the primary attorney for the local government, although each municipality must refer to its own local laws or resolutions to determine if the position of "municipal

attorney" has been created explicitly and, if so, what the duties and responsibilities of the "municipal attorney" are. The role of any municipal attorney is the source of much discussion among municipal lawyers and bar associations across the country. Because the chief executive officer and the local legislative body maintain separate responsibilities, they can have independent interests and needs when seeking legal advice. Consequently, there are three clients which a municipal attorney may be called on to serve: the local government as a corporate entity, the chief executive officer, and the local legislative body. The relationship of the municipal attorney with these various clients is directly impacted by the ethical rules that govern lawyers.

Retaining the Municipal Attorney

If the local government has established the position of municipal attorney as a public officer with a term of office or as an employee, the local government would follow same process appointing (or hiring) the municipal attorney as it does other municipal offices/positions of employment. Civil Service Law § 22 must be followed to create the position of municipal attorney as either an employee or a public office. In addition, appellate courts have held that a public officer exercises some of the sovereign power of the municipality.[1] Few municipal attorneys have the authority to exercise a municipal sovereign power, however. As a result, the overwhelming majority of municipal attorneys who are on a municipal payroll are public employees who do not serve a term of office and thus are not subject to reappointment, but whose termination from employment is subject to Civil Service procedures. As a general rule, municipal attorneys are classified as an exempt class, but local officials should consult with county Civil Service to confirm the classification.

Many local government retain their lawyer not as an employee or as an appointed officer, but rather as an independent contractor to serve as counsel to the village. Thus the local government would need to enter into the contract like it would for any other professional contract. For example, pursuant to Village Law § 4-412, all contracts must be approved by the village board. Generally, contracts entered into by the village require only a majority vote of the fully constituted board of trustees, without the approval of the mayor. Consequently, retaining a village attorney as an independent contractor has the potential to create a situation in which the village board hires a "village attorney" that the mayor does not approve. However, care must be exercised in retaining an attorney as a contractor. The Internal Revenue Service (IRS) and other governmental agencies review decisions to retain a worker as a contractor as opposed to placing the individual on a municipal payroll. For issues related to payroll and taxation, the IRS will determine whether a worker is a contractor or is properly placed on the payroll. Villages may complete IRS Form SS-8 to obtain such a determination without charge.

The "village attorney" is generally responsible for advising and representing the mayor in carrying out his or her statutorily-imposed responsibilities and duties. Thus, even if a village retains a village attorney as an independent contractor approved by the board, the village mayor should also approve the individual hired. A village board of trustees that would force the mayor to use an attorney whom (s)he does not approve of or consent to use would be unworkable, creating a conflict between the mayor and the attorney. Such an outcome would appear to violate Rules 1.2 and 1.7 of the Rules of Professional Conduct for Lawyers in New York State. Consequently, if the mayor and the board of trustees cannot agree on hiring the "village attorney" as an independent contractor, it is the opinion of

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[1] Haller v. Carlson, 42 A.D.2d 829 (4th Dep't. 1973).

the staff of the New York State Conference of Mayors that the mayor and the board of trustees should consider retaining separate legal counsel.

Retaining Separate Counsel

To the extent that the mayor and a majority of the board of trustees cannot agree on the hiring, appointing, or contracting of one lawyer to represent both the mayor and the board, separate counsel could be retained. Moreover, even for the vast majority of villages that retain one attorney to serve as "village attorney" who is then responsible for representing the village and advising both the mayor and the board, a conflict of interest may arise, requiring the board of trustees and the mayor to retain separate lawyers to represent them in the performance of their statutory responsibilities.

Several cases address the need and propriety of retaining separate counsel. As the Court of Appeals has noted,

> *Notwithstanding lack of specific statutory authority*, a municipal board or officer possesses implied authority to employ counsel in the good faith prosecution or defense of an action undertaken in the public interest, and in conjunction with its or his official duties where the municipal attorney refused to act, or was incapable of, or was disqualified from, acting.[2] [emphasis added]

Perhaps the most illustrative case on this issue involved a situation where a city council in a Second Class City sought to retain its own counsel. Pursuant to Second Class Cities Law § 12, the corporation counsel is appointed solely by the mayor. However, pursuant to Second Class Cities Law § 201, the corporation counsel is the "legal adviser of the common council and of the several officers, boards and departments of the city" including the mayor. The court acknowledged, "How can [the corporation counsel] be expected to serve two masters?" before concluding,

> It is further clear that the courts in this state have recognized an implied authority in municipalities for various boards or branches to appoint independent counsel in cases where there is a clear conflict of interest *despite the fact that applicable statutes make no such provision.*[3] [emphasis added]

Municipal officials must use caution, however, when retaining legal counsel without prior board approval, because doing so runs the risk of incurring an expense which the board may not approve of as an appropriate municipal expense and which a court may disallow as reimbursable from the village.

In addition, villages frequently hire other lawyers to provide specific legal services to the village, such as bond or labor counsel or to provide counsel to the zoning board of appeals (ZBA) or the planning board. The retention of these other attorneys via an independent contract may or may not warrant mayoral approval. When the responsibility of a lawyer is to advise the mayor with respect to one of his or her statutory responsibilities, the mayor's approval is generally warranted.

Factors to consider when deciding whether to retain separate lawyers are the added cost of paying two lawyers versus the confusion, conflict, and uncertainty that could arise if a single attorney becomes enmeshed in a disagreement between the mayor and the board of trustees. If a single attorney is

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2 Cahn v. Town of Huntington, 29 N.Y.2d 451, 455 (1972).

3 Hanna v. Rewkowski, 81 Misc.2d 498 (Sup. Ct. Oneida Co. 1975).

retained to represent the mayor and the board, it is recommended that village officials have frank and open discussions about the process for retaining separate counsel should the need arise. Mayors and boards that are unable to agree on whether separate lawyers will be hired and on the scope of those legal services, run the risk of having to resolve the dispute in court; a proposition that is generally not inexpensive and which could potentially defeat the cost-savings of using only one attorney. Failure to do so can result in confusion about the ability to retain counsel without board approval and appropriation, an issue that was addressed in greater detail in the article, **"A Legal Conundrum: When Can a Municipal Official Retain Outside Counsel at the Expense of the Municipality Without Prior Approval?,"** ***NYCOM Municipal Bulletin*****, March-April 2009, pp 25-26, also available to download from the members only section of the NYCOM website.** In addition, defense and indemnification of employees is a separate but related issue (see Chapter 13, **Error! Reference source not found.** on page **Error! Bookmark not defined.** for a detailed understanding of this issue).

Defining Scope of Legal Services

To avoid confusion and the accumulation of unnecessary legal fees, village officials should address the scope of the services to be provided by the "village attorney" or separately retained lawyers at the outset of retaining legal counsel. Questions to address when defining a lawyer's scope of services are: who is the client, who may contact the lawyer, how may contact with the lawyer be initiated (e.g., via phone, email, and/or in writing), what topics may be covered in the correspondence, what is the extent of the services provided (e.g., attending meetings, drafting proposed laws and resolutions, legal advice, litigating cases, prosecuting cases, etc.), and what are the maximum number of hours that may be billed per month without additional prior approval? It is essential to address these issues at the outset of legal representation to avoid confusion, conflict, and higher-than-expected legal bills.

The duties of the village attorney are not specifically set forth in statute, but the attorney usually works closely with most village departments, officers, and bodies, especially the board of trustees. The specific services which a village attorney performs are assigned by the board and may include:

- Attending regular and special board meetings;
- Preparing legal notices, contracts, and opinions;
- Acting as local or general bonding counsel;
- Providing services in connection with the acquisition of easements and title to real property, including negotiations with property owners;
- Preparing local laws, ordinances, and resolutions;
- Representing the village in eminent domain, assessment, and other court proceedings, including appeals;
- Consulting with village officials, employees, and members of the public regarding matters involving the village;
- Attending meetings of the ZBA, planning board, and other village boards and commissions and preparing legal notices and opinions for them;
- Reviewing insurance coverage; and
- Giving legal advice in contract negotiations with employee groups or acting as chief negotiator if requested to do so by the board of trustees.

Alternatively, the county district attorney is responsible for prosecuting criminal cases, district attorneys rarely involve themselves with prosecutions in village justice courts. Thus, the village

attorney may, with the district attorney's permission, prosecute violators of village laws or any person accused of committing an offense, infraction, or criminal act within the village. Additionally, the village may retain additional counsel to prosecute these cases. The board of trustees may pay reasonable compensation to either the village attorney or outside counsel for prosecuting criminal cases.

Qualifications of Village Attorney

Regardless of how a village attorney is retained, whether as an employee, a public officer, or an independent contractor, the village board of trustees, should expressly address (via local law or resolution) whether the "village attorney" or any other lawyer retained must reside in the village. If a village does not expressly provide that an attorney position is a public officer of the village who serves a term of office, it is likely to be considered a position of employment.[4]

[4] Senecal v. City of Cohoes, 27 A.D.2d 773 (3d Dep't. 1967); Rappel v. Roberts, 79 Misc.2d 201 (Sup. Ct. Nassau Co. 1973); see also Fisher v. City of Mechanicville, 225 N.Y. 210 (1919).

Being a Public Officer: What Does that Mean?

Qualifications of Office Holders

Public Officers Law § 3(1), to be eligible to hold an elective or appointive village office, an individual must be:

- Eighteen years of age or older;
- A citizen of the United States; and
- A resident of the village.

The Oath of Office

Public Officers Law § 10 requires all public officials, both elected and appointed, to take and file an oath of office within 30 days of the commencement of their term of office. Failure to take and file an oath within the time required by law creates a vacancy in the office. Each time an official is reelected or reappointed, a new oath of office must be filed.

Pursuant to Election Law § 15-128, the village clerk must, within three days of the conclusion of the election, notify the winners of the village election that they must file an oath of office and an undertaking, if required, to qualify for office. The notice must set forth that the oath and undertaking must be filed with the village clerk. It should be noted that in addition to the ceremonial swearing-in which generally takes place at the village's organizational meeting, village officials must file a written oath of office with the village clerk within 30 days of taking office.

While the oath of office is generally administered at the organizational meeting, the oral recitation of the oath of office is for ceremonial purposes only. For the oath of office to be effective, a written signed oath of office must be filed with the village clerk. A village justice must also file an oath of office with the county clerk and the Office of Court Administration.[5] The registrar of vital statistics, deputy registrars and sub-registrars must also file their oaths of office with the county clerk.[6]

Pursuant to New York State Constitution Article 13, § 1, the oath of office reads as follows:

> I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of_, according to the best of my ability.

Public Officers Law § 10 sets forth that the oath of office may be administered by:

- A judge of the Court of Appeals;
- The New York State Attorney General;
- Any officer authorized to take, within the State, the acknowledgment of the execution of a deed of real property (this includes a notary public);[7]
- An officer in whose office the oath is required to be filed (i.e., the village clerk) or by his or her duly designated assistant; and

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5 Uniform Justice Court Act § 104.

6 Public Health Law § 4123.

7 See Real Property Law § 298.

- In the case of a member of a body of officers (e.g., the board of trustees), by the presiding officer (e.g., the mayor) or clerk of the body of officers who has already taken an oath of office.

In addition, Village Law § 4-402(h) specifically authorizes village clerks to administer the oath of office to all village officers.

Real Property Law § 298 provides that certain other persons are permitted to administer the oath of office:

- Within the entire State of New York:
  - Justices of the Supreme Court;
  - Official examiners of title;
  - Official referees; and
  - Notaries public.
- Within the district in which the officer is authorized to perform his or her official duties:
  - Judges and clerks of a court of record;
  - Commissioners of deeds outside the City of New York;
  - Mayors and recorders of a city;
  - Surrogates, special surrogates, and special county judges; and
  - County clerks and other recording officers of a county.
- Additional officers:
  - Town justices;
  - Town council members;
  - Village justices; and
  - Judges of any court of inferior local jurisdiction anywhere within the county containing the town, village or city in which he or she is authorized to perform official duties.

Vacancies in Office

Causes of Vacancies

Pursuant to Public Officers Law § 30, a vacancy in elective or appointive office that is not due to the expiration of the term of office occurs when any of the following events take place:

- Death of the incumbent;
- Resignation;
- Removal from office;
- Ceasing to satisfy the applicable residency requirements;
- Conviction of a felony, or a crime involving a violation of their oath of office;
- Declaration of incompetency by a court of law;
- A court judgment declaring their election or appointment void; and
- Failure to file the oath of office within 30 days of the commencement of their term of office.

Public Officer or Employee?

Local officials are frequently faced with the question of whether a particular position is a public office. Individuals may serve a local government in one of three ways: they may be public officers, employees, or independent contractors. Each type of service is governed by its own set of rules. Adding confusion to this issue, however, is that some public officers are employees whose employment is governed by

civil service rules, while other public officers serve a term of office and are exempt under civil service rules.

To understand this issue fully, one must first understand how a public officer is defined. New York State's courts have described public officers as those governmental positions whose duties involve the exercise of some sovereign power or powers of the municipality. Stated differently, "A position is a public office when it is created by law with duties cast on the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned and which is continuing in its nature and not occasional or intermittent."[8]

Even courts have had difficulty distinguishing between public officers and those employees who are not public officers. The table below compares the similarities and differences between (a) public officers who serve a term of office, (b) public officers who do not serve a term of office, and (c) employees who are not public officers:

Public Officer Serves a Term of Office	Public Officer Does Not Serve a Term of Office	Employee is Not a Public Officer
• Must Be a Citizen of the United States;	• Must Be a Citizen of the United States;	• Is Not Required to Be a Citizen of the United States;
• Must Be at Least 18 Years Old;	• Must Be at Least 18 Years Old;	• Must Meet Minimum Age Requirements Under Labor Laws;
• Must Be a Resident of the City or Village, Unless a Local Law Has Expanded the Residency Requirement;[9]	• Must Be a Resident of the City or Village, Unless a Local Law Has Expanded the Residency Requirement;[10]	• Is Not Required to Reside in the Village Unless the Municipality Has Passed a Local Law Requiring Residency;
• Is Entitled to the Salary as an Emolument of the Office;	• Compensation is Set by Local Governing Board, Subject to State's Civil Service and Labor Laws and Any Applicable Labor Contract;	• Compensation is Set by Local Governing Board, Subject to State's Civil Service and Labor Laws and Any Applicable Labor Contract;

8 Smith v. Jansen, 85 Misc. 2d 81, 83 (Sup. Ct. Suffolk Co. 1975).

9 See Public Officers Law § 3 and Village Law § 3-300.

10 See Public Officers Law § 3 and Village Law § 3-300.

Public Officer Serves a Term of Office	Public Officer Does Not Serve a Term of Office	Employee is Not a Public Officer
• Is Required to File an Oath of Office Within 30 Days of Appointment;	• Is Required to File an Oath of Office Within 30 Days of Appointment;	• Is Not Required to Take or File an Oath of Office;
• Serves a Specific Term of Office (e.g., 1, 2 or 4-Year Term);	• May Have an Employment Contract for a Specific Period or May Be Covered by Civil Service Law Regarding Termination of Service;	• May Have an Employment Contract for a Specific Period or May Be Covered by Civil Service Law Regarding Termination of Service;
• May Hold Over in Office After the Expiration of the Term of Office;	• Hold Over in Office is Inapplicable;	• Hold Over in Office is Inapplicable;
• May Vacate the Office if One of the Events Identified in Public Officers Law § 30 Occurs; and	• May Vacate the Office if One of the Events Identified in Public Officers Law § 30 Occurs; and	• Is Not Subject to Public Officer's Law § 30; Serves Until Either Voluntarily or Involuntarily Separated From Service; and
• May Be Removed From Office During the Term Pursuant to Public Officers Law § 36, Unless a Local Law Providing for the Discipline of a Public Officer Has Been Adopted.	• May Be Removed From Office Pursuant to Public Officers Law § 36, Unless a Local Law Providing for the Discipline of a Public Officer Has Been Adopted.	• Serves at the Pleasure of the Appointing Authority, Subject to the Protections Potentially Provided by Statute (i.e., Civil Service Law) or a Labor Contract.
• Examples include: • Mayor/Supervisor • City/Town Council Member • Legislator • Village Trustee • Clerk • Treasurer	• Examples include: • Police Officer • Code Enforcement Officer • Building Inspector • Parking Enforcement Officer	• Examples include: • DPW Staff • Clerical/ Administrative Staff

Public Officer Serves a Term of Office	Public Officer Does Not Serve a Term of Office	Employee is Not a Public Officer
• Deputy Clerk • Deputy Treasurer • Comptroller/Controller		

The Open Meetings Law

The Open Meetings Law, Article 7 of the Public Officers Law (§§ 100-111), is a powerful tool which outlines basic requirements for the conduct of meetings by public bodies.

The Open Meetings Law (OML) defines a "public body" as any entity consisting of two or more members who perform a governmental function and for which a quorum is required to conduct public business.[11] This definition encompasses local legislative bodies[12] such as village boards of trustees, as well as planning boards[13] and zoning boards of appeals.[14]

Pursuant to Public Officers Law § 108 [1] and [2], courts, public bodies holding quasi judicial proceedings such as disciplinary hearings, and political caucuses are specifically exempted from the definition of "public body."

Also exempt from the OML are matters made confidential by federal or State law.[15] For villages, perhaps the most important matter made confidential by State law are meetings with an attorney, which are covered by attorney-client privilege.[16] While a village board may establish a privileged relationship with its attorney, this relationship is operable only when the village board or official seeks the attorney's legal advice acting in his or her capacity as their attorney, and the client does not waive the privilege.[17]

Public Officers Law § 102[1] defines a "meeting" as "the official convening of a public body for the purpose of conducting public business." Any time a quorum of a public body gathers for the purpose of discussing public business, the meeting must be open to the public, whether or not the body intends to take action.[18] This includes "workshops," "work sessions," and "agenda sessions."[19] Chance meetings or social gatherings are not covered by the law since these are not official meetings; however, public officials should not discuss public business at chance meetings or social gatherings.[20]

Notice of Meetings

Public Officers Law § 104 requires public bodies to notify the public of the time and place of every meeting. The OML requires notice of every meeting to be:

1. Conspicuously posted in one or more public locations;
2. Given to the news media (television, radio and newspaper); and
5. Conspicuously posted on the village's website, if it has the ability to do so.

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11 Public Officers Law § 102(2).
12 N.Y. St. Comm. Open Gov't. OML-AO-3026.
13 N.Y. St. Comm. Open Gov't. OML-AO-3048.
14 N.Y. St. Comm. Open Gov't. OML-AO-2982.
15 Public Officers Law § 108(3).
16 CPLR § 4503.
17 N.Y. St. Comm. Open Gov't. OML-AO-2448.
18 Orange Co. Publications v. City of Newburgh, 60 A.D.2d 409 (2d Dep't. 1978), aff'd. 45 N.Y.2d 947.
19 N.Y. St. Comm. Open Gov't. OML-AO-4506.
20 Kissel v. D'Amato, 97 Misc.2d 675 (Sup. Ct. Nassau Co. 1979), mod on other grounds, 72 A.D.2d 790 (2d Dep't. 1979).

The OML does NOT require public bodies to pay for an official advertisement in a newspaper. Rather, the OML merely requires that the news media be notified. NYCOM recommends that public bodies fax or email the meeting notice to the news media.

The timing for the notice requirement in Public Officers Law § 104 is written in a rather confusing way. In essence, the OML provides that, if notice of a public body's meeting is given at least 72 hours prior to the meeting, then the meeting may be held for any reason.[21] However, if notice of a meeting can only be given less than 72 hours in advance of that meeting, then it may be held only if there is an exigent/emergency need for conducting the meeting on less than 72 hours' notice.[22] What constitutes an emergency in purposes of the OML is not defined in law.

Documents Scheduled for Discussion at a Meeting

Public records which are subject to disclosures under the Freedom of Information Law (FOIL), in addition to any proposed resolution, law, rule, regulation, policy or any amendment, that a public body is scheduled to discuss at an open meeting, must be made available – upon request – to the public prior to or at the meeting to the extent that the public body determines it is practicable. Municipalities have the option of charging fees consistent with FOIL for copies of the records. In addition, villages that maintain a "regularly and routinely updated website and that utilize a high speed internet connection" must post the documents on the municipal website prior to the meeting to the extent that it is practicable.[23]

Minutes

Minutes must be taken of every meeting of a public body.[24] The minutes must indicate which members of the public body were present at the meeting.[25] Additionally, the minutes must contain a summary of all motions, proposals, resolutions, and any other matters voted upon, and the actual votes.[26] The minutes of an open meeting, as opposed to an executive session, must be made available to the public within two weeks of the meeting.[27] The minutes of an open meeting during which the public body entered into executive session must indicate who made the motion to enter into executive session, the reason given for entering into the executive session, and which members of the body were present when the body entered into executive session.[28] Minutes of an executive session must be made available to the public within one week of the executive session.[29] Meeting minutes must be made available to the public within the specified period regardless of whether the board requires

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21 Public Officers Law § 104(1).

22 Public Officers Law § 104(2).

23 Public Officers Law § 103(e). Enacted by Chapter 603 of the Laws of 2011.

24 Public Officers Law § 106(1).

25 Op. State Comp. No. 90-52, which concerns a provision of the Town Law specifically requiring entry of the names of those present. Although there is no comparable provision of law applicable to villages generally, NYCOM would recommend that all villages do the same as a best practice.

26 Public Officers Law § 106(1).

27 Public Officers Law § 106(3).

28 N.Y. St. Comm. Open Gov't. OML-AO-1197.

29 Public Officers Law § 106(3).

minutes to be "approved." Approval of meeting minutes by the members of a public body at a subsequent meeting is a local procedure and not required by State law.

The State's OML requires minutes to include an accurate and complete record or summary of all:

1. Motions,
2. Proposals,
3. Resolutions, and
4. Any other matter formally voted upon by the board as well as the actual vote of each member of the public body.[30] It is a recommendation of NYCOM that a copy of any resolution or local law acted on should be appended to the minutes.

While not expressly required by the OML, it is implied that minutes must begin by noting the time, date, and location of the meeting and which members of the public body are present.[31] Although the minutes must reflect which of the public body's members are present, there is no requirement to identify all of the individuals present.[32]

Minutes are not required to be and should not be a verbatim account of the meeting. Nor should the minutes include a reference to each comment made during the meeting. However, the public body may require that an audio or video tape be made of its meetings to ensure accuracy and to resolve any disputes. Furthermore, the public body may, *by a majority vote of its membership*, require that a specific statement, text of a resolution or agreement, etc., be included verbatim in the minutes.[33]

State Law does not require the clerk to record an individual's remarks made during an open meeting or an executive session merely because the speaker so requests.[34] Without a resolution or board directive requiring the clerk to include more information in the minutes, a trustee may not require the clerk to correct or amend the minutes to include any more detailed information.[35] Boards interested in expanding the scope of what is included in the minutes should amend their rules of procedure to outline the clerk's additional responsibilities.

There is no specific statutory procedure for amending meeting minutes. **Minutes may never include a statement that was not made at the meeting nor may it include record of an action that was not taken at the meeting, as this is tantamount to creating a false record.**

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30 Public Officers Law § 106(1).

31 Op. State Comp. No. 90-52; note that this opinion discusses provisions of the Town Law that are not applicable to villages. However, the principles expressed therein apply to villages as well.

32 Id.

33 N.Y. St. Comm. Open Gov't. OML-AO-3886 and 3658.

34 N.Y. St. Comm. Open Gov't. OML-AO-1176.

35 "There is, however, no statutory requirement for the town clerk to record in the minutes the names of persons attending the meeting, other than the members of the town board." Op. State Comp. No. 90-52. Although that Opinion deals specifically with town boards. The same conclusion would apply to village board meetings.

Executive Session

Although the OML requires that all meetings of public bodies be open to the public,[36] the law also authorizes municipal boards to enter into executive session, which is defined as "that portion of a meeting not open to the general public."[37] Public bodies may only enter into executive sessions for very specific reasons, which are set forth below.

The Procedure for Entering into Executive Session

All meetings of a public body must begin as open meetings. Executive sessions may only be entered into from a properly noticed open meeting. A motion to enter into an executive session must be made during an open meeting.[38] The person making the motion must specify the subject area or areas for which the public body is entering into the executive session. The subject matters which are grounds for entering into executive session are set forth in Public Officers Law § 105(1)(a)-(h) (listed below). Any motion to enter into executive session must be carried by a majority vote of the total membership of the body.[39] At its discretion, the public body may, via a majority vote of the board, allow any person or persons to attend an executive session.[40]

The following constitutes a complete list of the subject areas for which a public body may enter into an executive session:

- Matters which, if disclosed, will imperil the public safety;
- Matters which may disclose the identity of a law enforcement agent or informer;
- Information regarding current or future investigations or prosecutions of a criminal offense which would imperil effective law enforcement if disclosed;
- Discussions of proposed, pending or current litigation;
- Collective negotiations pursuant to the Taylor Law;
- 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;
- The preparation, grading, or administration of examinations; and
- The proposed acquisition, sale, or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by the public body, but only when publicity would substantially affect the value thereof.[41]

Voting on Matters in Executive Session

A public body may vote in executive session on any of the above-referenced matters. However, a public body may never vote to appropriate public funds in executive session.[42] A public body may not discuss or vote on any matter that is not the subject of the motion which is the basis for entering into the executive session.

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36 Public Officers Law § 103(a).
37 Public Officers Law § 105(1).
38 Daily Gazette Co., Inc. v. Town of Cobleskill, 111 Misc.2d 303 (Sup. Ct., Schoharie Co. 1981).
39 Public Officers Law § 105(1).
40 Public Officers Law § 105(2).
41 Public Officers Law § 105.
42 Public Officers Law § 105(1).

Executive Session Minutes

If a public body takes any action by formal vote while in executive session, minutes must be taken.[43] Executive session minutes need not contain the contents of the discussion during the executive session, but must include a record, including the date and vote, of any final determinations. If no action is taken while in executive session, minutes are not required, although public officials may wish to note in the minutes that no action was taken in the executive session. Unlike minutes of regular open meetings, executive session minutes must be made available to the public within one week of the executive session.[44] Executive session minutes may be taken by a member of the public body, or the body may choose to allow the clerk to be present to take minutes.

Use of Recording Devices by the Public

Pursuant to Public Officers Law § 103(d),[45] any meeting of a public body may be recorded, broadcast, webcast, and/or photographed, provided that it is done in a way that does not disrupt the meeting. Each public body may adopt rules governing the location of equipment and personnel for such purposes, so that the meeting may be conducted in an orderly manner. Previously, several courts have ruled that the public may use recording devices as long as the use does not disrupt the meeting.[46] Thus, public bodies may not impose blanket prohibitions against the use of recording devices. However, if the use of a recording device becomes disruptive, the public body may take reasonable action to end the disruption. A member of the public body or a member of the public attending the meeting being uncomfortable with being recorded does not constitute a disruption.[47]

Public Participation

Although the OML requires that the public be allowed to attend meetings, it is silent with respect to public participation at meetings. Therefore, the public body may, at its discretion, allow the public to speak, but State law does not require that the public be allowed to do so.[48] Whatever rule a public body imposes regarding public participation, the rule must be applied equitably, with all attendees being afforded the same opportunity to participate.

Reasonable Accommodations and Program Accessibility

As the Committee on Open Government has observed, "the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies. [Accordingly,] . . . meetings should be held in locations in which those likely interested in attending have a reasonable opportunity to do so."[49] In line with that

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43 Public Officers Law § 106(2).

44 Public Officers Law § 106(3).

45 As added by L. 2010, c.43, effective on April 1, 2011.

46 Csorny v. Shoreham Wading River Central School District, 305 A.D.2d 83 (2d Dep't. 2003); Peloquin v. Arsenault, 162 Misc.2d 306 (Sup. Ct., Franklin Co. 1994); and People v. Ystuela, 99 Misc.2d 1105 (Sup. Ct., Suffolk Co. 1979).

47 Peloquin v. Arsenault, supra.

48 DeSantis v. City of Jamestown, 193 Misc.2d 197 (Sup. Ct., Chautauqua Co. 2002); see also, N.Y. St. Comm. Open Gov't. OML-AO-2894.

49 N.Y. St. Comm. Open Gov't. OML-AO-3111.

Opinion and others like it, the OML now requires[50] public bodies to make a "reasonable effort" to hold public meetings in a room which can accommodate members of the public who wish to attend.

The OML also requires that public bodies make reasonable efforts to ensure that meetings are held in facilities that permit barrier free physical access to physically disabled persons.[51] In addition, the Americans with Disabilities Act (ADA)[52] requires that when programs, services, or activities are located in facilities that existed prior to January 26, 1992, the municipality must make sure that they are also available to persons with disabilities, unless to do so would fundamentally alter a program, service, or activity or result in undue financial or administrative burdens. This requirement is called "program accessibility." When a service, program, or activity is located in a building that is not accessible, a village may achieve program accessibility in several ways.[53]

It may:

- Relocate the program or activity to an accessible facility;
- Provide the activity, service, or benefit in another manner that meets ADA requirements; or
- Make modifications to the building or facility itself to provide accessibility.

Thus, to achieve program accessibility, a village need not make every existing facility accessible.[54] It may relocate some programs to accessible facilities and modify other facilities, avoiding expensive physical modifications to village facilities. **More information on ADA requirements is available at www.ada.gov.**

Violating the Open Meetings Law

If a public body holds a meeting without complying with the OML's notice requirement or without allowing the public to attend and observe the meeting, any actions taken at the meeting or as a result of that meeting may be nullified by a court. Additionally, if a public body enters into executive session for an unauthorized purpose or if, having properly entered into an executive session, the public body discusses issues or takes action on issues that are not proper for executive session, the action taken may be nullified by a court.[55] Any successful legal challenge to an OML violation may result in the court directing the offending village to pay the petitioner's costs and reasonable attorney's fees.[56]

Moreover, if a court finds a violation of the OML, it may also require that members of the public body participate in a training session to be conducted by staff of the Committee on Open Government, concerning the "obligations" imposed by the OML.[57]

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50 Public Officers Law § 103(d), as added by L. 2010, c. 40, effective April 14, 2010.

51 Public Officers Law § 103(b), see also, Public Officers Law § 74-a , and Public Buildings Law § 50(5), the latter defining "physically handicapped."

52 42 USC, Chap. 126, and 47 USC, Chap. 5.

53 Fenton v. Randolph, 92 Misc.2d 514 (Sup. Ct., Suffolk Co. 1977).

54 N.Y. St. Comm. Open Gov't. OML-AO-2865.

55 Public Officers Law § 107(1).

56 Public Officers Law § 107(2).

57 Public Officers Law § 107(1), as amended by L. 2010, c. 44.

The Committee on Open Government

The Committee on Open Government is responsible for issuing advisory opinions to agencies, the public, and the news media; issuing regulations; and annually reporting its observations and recommendations regarding the operation of the OML to the Governor and the State Legislature.[58] The Committee provides written and oral advice on questions arising under the OML or FOIL. Additionally, the Committee mediates controversies in which rights may be unclear. Municipal officers and employees needing advice regarding the OML or FOIL may, in addition to contacting NYCOM, contact the Committee at: **Committee on Open Government, NYS Department of State, One Commerce Plaza, Suite 650, 99 Washington Avenue, Albany, NY 12231, Ph (518) 474-2518, Fax (518) 474-1927, www.dos.ny.gov/coog/.**

Most of the Committee's publications are available online, including ***Your Right to Know, FOIL FAQs,*** and ***Open Meetings Law FAQs,*** as well as the actual statutory language of the FOIL and the OML. The Committee's Advisory Opinions are available online, with the opinions listed alphabetically by key phrase. If you have a question about a specific issue, such as whether building plans are subject to FOIL (which they are)[59] or whether members of a public body may vote by telephone (they may not),[60] chances are that an advisory opinion has already been written on the subject and is available online.

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58 Public Officers Law § 109.

59 N.Y. St. Comm. Open Gov't. FOIL-AO-7821.

60 N.Y. St. Comm. Open Gov't. OML-AO-4306.

Records Management

While certain local officials are specifically tasked with the responsibility of (a) handling requests for copies of public records (the records access officer), and (b) managing the retention and destruction of local public records (the records management officer), ***every public officer and employee*** is mandated by New York State Law to properly handle public records that are in their custody and control.

An Overview of "The Local Government Records Law"

The State of New York has established comprehensive rules regarding the retention and disposition of local government records. The regulations, codified in "The Local Government Records Law," NYS Arts and Cultural Affairs Law Article 57-A, not only set forth the minimum requirements for retaining and disposing of local government records, but also mandate every local government's governing body (e.g., city council, village board of trustees, town council, county legislature) and chief executive officer to have a local government records management program.

The Local Government Records Management Program

Pursuant to Arts & Cultural Affairs Law § 57.19, every local government must have a "program for the orderly and efficient management of records, including the identification and appropriate administration of records with enduring value for historical or other research." While there is no one-size-fits-all local government records management program, the New York State Archives has identified seven attributes of effective records management programs:

1. **Creates the records it needs, but none that it doesn't** - "Records are efficiently created in the normal course of business for all functions sufficient to satisfy legal, fiscal, administrative, and other recordkeeping requirements;"
2. **Retains records that are necessary and disposes of obsolete records** - "Records are retained and usable for as long as required for legal or business purposes, and then efficiently disposed of or preserved as archives to support secondary uses;"
3. **Safely and securely stores its records (especially archival records)** - "Records are stored and maintained in a safe, secure, cost-effective fashion to support retention, access, and archival preservation where applicable;"
4. **Retrieves information quickly through efficient access and retrieval systems** - "Records systems provide effective and efficient retrieval and access to records, to support use by the creating organization and by the public as appropriate under law;"
5. **Uses the right information technology for the right reasons** - "Appropriate uses are made of information technology to store, retrieve, make available, and use records;"
6. **Promotes and supports archival records as a community resource** - "Appropriate secondary use of records by public and other entities is supported and promoted;" and
7. **Recognizes, through policy and procedure, that records management is everyone's job** - "Ongoing records management goals and priorities are integrated through the organization and its operations as part of the normal course of business."

The New York State Archives' full report on effective records management programs, which fleshes out these attributes in greater detail, can be found online at www.archives.nysed.gov/a/records/mr_pub61.pdf.

The Records Management Officer

In addition to the Local Government Records Management Program, Arts & Cultural Affairs Law § 57.19 requires every local government to have a records management officer who is responsible for coordinating the legal disposition of records, including the destruction of obsolete records.

The records management officer has an independent, statutorily-mandated responsibility to oversee the municipality's records management program. This responsibility includes initiating, coordinating, and promoting the systematic management of the municipality's records in conjunction with other local officers, and may include providing training to the municipality's other officials and employees about properly handling of records. The records management officer needs to work with the mayor, manager (if applicable), and local legislative body to insure that the necessary resources are dedicated to implementing local government's records management program.

The Records Retention Schedule: The Guide to When Local Records May be Disposed

The New York State Education Department has been tasked with the responsibility of creating a schedule outlining when records may be disposed. Consequently, the Education Department has promulgated Records Retention and Disposition Schedule MU-1. Last revised in 2003, Schedule MU-1 is an exhaustive list of the various types of records that are created by, and come into the custody of, local governments.

The schedule identifies each type of local government record and states when it may be disposed of. For example, "[o]fficial minutes and hearing proceedings of governing body or board, commission or committee thereof including all records accepted as part of minutes" must be kept permanently. Other types of records require more extensive analysis to determine when they may be disposed of. For example, correspondence (whether it be via email or paper), may be required to be kept (a) permanently if it is "[d]ocumenting significant policy or decision making or significant events, or dealing with legal precedents or significant legal issues," (b) for six years if the correspondence is "[c]ontaining routine legal, fiscal or administrative information," or (c) not at all if the correspondence is "[o]f no fiscal, legal or administrative value (including letters of transmittal, invitations and cover letters)."

Each municipality is required to review and adopt by resolution Records Retention and Disposition Schedule MU-1, although failure to adopt the resolution does not obviate a municipality's obligation to comply with Schedule MU-1. **A copy of MU-1 is available online at www.archives.nysed.gov/a/records/mr_pub_mu1.shtml.** The records management officer may only dispose of records pursuant to Schedule MU-1, and other municipal officials may only dispose of local government records when authorized to do so by the records management officer and pursuant to the local government's records management program.

Proper Records Management: Every Municipal Official and Employees' Responsibility

The proper handling of local government records is not solely the responsibility of the municipality's records management officer. To the contrary, Arts and Cultural Affairs Law § 57.25 imposes the following responsibilities on ***every local government official and employee***:

- Maintain records to adequately document the transaction of public business and the services and programs for which the officer is responsible;

- Retain and have custody of such records for so long as the records are needed for the conduct of the business of the office;
- Adequately protect such records;
- Cooperate with the records management officer on programs for the orderly and efficient management of records;
- Dispose of records in accordance with legal requirements; and
- Pass on to his or her successor records needed for the continuing conduct of business of the office.

In addition, Arts and Cultural Affairs Law § 57.25(2) provides that "[n]o local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education." Every local official and employee should be trained that they may not destroy any local record, except pursuant to State law, the local government records management program, and the local records management officer.

Moreover, Public Officers Law § 80 requires every public officer to "demand from [his or her] predecessor in office or any person in whose possession they may be, a delivery to such officer of all books and papers, money and property belonging or appertaining to such office. If such demand is refused, such officer may make complaint thereof to any justice of the Supreme Court of the district, or to the county judge of the county in which the person refusing resides." Upon assuming office, every officer or employee should familiarize themselves with the records under their custody and control. If at any point an officer or employee determines that records are missing or have been destroyed, they should report it to the records management officer.

An official or employee's failure to properly handle public records within their custody and control is not merely a violation Arts and Cultural Affairs Law or the Public Officers, but it is also potentially a crime. Tampering with and improperly destroying local government records is a crime as outlined below:

- Pursuant to Penal Law § 175.20, a "person is guilty of tampering with public records in the second degree when, knowing that he does not have the authority of anyone entitled to grant it, he knowingly removes, mutilates, destroys, conceals, makes a false entry in or falsely alters any record or other written instrument filed with, deposited in, or otherwise constituting a record of a public office or public servant." Tampering with public records in the second degree is a Class A misdemeanor.
- Pursuant to Penal Law § 175.25, a "person is guilty of tampering with public records in the first degree when, knowing that [he or she] does not have the authority of anyone entitled to grant it, and with intent to defraud, [he or she] knowingly removes, mutilates, destroys, conceals, makes a false entry in or falsely alters any record or other written instrument filed with, deposited in, or otherwise constituting a record of a public office or public servant." Tampering with public records in the first degree is a class D felony.

Local officials and employees who become aware of improper tampering with or destruction of local public records should report the occurrence to superior officers and local law enforcement.

If a local official or employee is not certain about how they should handle a record, they should consult with the local records management officer.

If there is concern that permanent records have been destroyed, local officials or employees should contact the State Education Department, Archives and Records Administration at (518) 474-6926 or visit the State Archives website at www.archives.nysed.gov/aindex.shtml.

Handling Electronic Records

Email: A Public Record Warranting a Separate Account

Email are records under State law and are subject to both the Freedom of Information Law (FOIL) and New York's records management/retention requirements. In order to more effectively and efficiently handle emails that are local government records, it is highly recommended that local officials and employees be assigned and use official email accounts that are administered and maintained by the local government for official local government business. Using personal email accounts for public business complicates the process of handling FOIL requests and retaining and disposing of emails that are public records.

Separate Accounts and Passwords

Access to electronic records should be protected. Consequently, access to information technology systems, both hardware and software, should be password protected, requiring each municipal official to access the systems with their own unique username and password. Local officials should never share account usernames or passwords. To the extent that multiple municipal officials need access to the same systems and records, each official should be assigned their own user account.

Backups and Archives

Local records management programs should provide for secure, offsite backup and archiving of electronic records. The benefits of digitizing existing hardcopy records and using electronic methods for records management are substantial. However, because electronic records can be destroyed (either deliberately or accidentally), local officials need to implement policies and procedures that protect against the loss of historic and necessary local government records.

Grants

The State has provided funding to assist local governments in managing their records. Local governments may also apply for Local Government Records Management Improvement Fund (LGRMIF) Grants to help finance the cost involved in records management. **For more information on these grants and for other information on records management and retention, contact the State Education Department, State Archives and Records Administration, Albany, NY 12230; (518) 474-6926.**

Local Government Records Checklist

The following are some questions local government officials can ask to implement effective local records management:

- Has the local government adopted a local records management plan and does the municipality review it on an annual basis to determine if it is meeting the municipality's needs?
- Does the municipality periodically review and adopt the Records Retention and Disposition Schedule MU-1?

- Has the municipality empowered the records management officer to develop and administer a local government records training program for the municipal officers?
- Does the municipality train officials and employees when they take office and then periodically thereafter?
- When a local official or employee leaves service, does the municipality conduct an exit interview to insure that the official or employee understands their obligations to turn over all local government records within their custody and control?
- Has the municipality established a reporting program so that officers and employees may report when local government records have been improperly disposed of or destroyed?

Local government records are integral for running a local government. Consequently, local government officials need to make establishing and implementing an effective local government records management program a priority that is regularly reviewed to insure that it is meeting not only the requirements of State law, but also the needs of the municipality.