Boards of Ethics: Public Disclosure?

By Robert J. Freeman

This is an interesting time for government in New York, and boards of ethics are being called upon more frequently, and in some instances, for the first time in years, to review matters involving the conduct of public officers and employees. Often the activities of those boards will lead to questions involving access to their records under the Freedom of Information Law (FOIL)[1] and to their meetings under the Open Meetings Law (OML).[2]

Section 806(1)(a) of the General Municipal Law provides that the governing body of every county, city, town, village, school district and fire district *shall* and the governing body of any other municipality *may* by local law, ordinance or resolution adopt a code of ethics. Section 808(1) states that the governing body of a county may establish a county board of ethics, and subdivision (2) indicates that it "shall render advisory opinions to officers and employees of municipalities wholly or partly within the county. . . ." Subdivision (3) authorizes any municipality other than a county to establish a local board of ethics, which has the same powers and duties with respect to that municipality as the county board of ethics. In short, although thousands of municipalities other than counties are required to adopt codes of ethics, while many choose to do so, they are not required to create ethics boards.

Ethics at the State Agency Level

Before considering the application of open government laws, it is emphasized that the statutory guidance concerning the Commission on Public Integrity—the state agency that recently supplanted the State Ethics Commission—is largely irrelevant. The Commission functions in accordance with § 4 of the Executive Law. Paragraph (a) of subdivision (17) of § 4 specifies that the records of the Commission are not subject to FOIL, and that only certain records listed in that provision are accessible to the public; similarly, paragraph (b) states that the meetings of the Commission are not subject to the OML. There are no similar statutes that deal with the records and meetings of municipal ethics boards. Therefore, their records and meetings are subject to FOIL and the OML respectively.

Boards of Ethics Under the Open Meetings Law

As indicated earlier, the General Municipal Law states that a board of ethics renders advisory opinions, and questions frequently arise concerning the status of advisory bodies under the Open Meetings Law. However, since boards of ethics are creations of and carry out their functions based on statutory direction, they clearly constitute "public bodies" required to comply with the Open Meetings Law. A "meeting" is a gathering of a majority of the members of a public body, and every meeting must be preceded by notice of the time and place given in accordance with § 104. When a meeting is convened, the OML is based on a presumption of openness: meetings must be conducted and open to the public, except to the extent that an executive session may be held. Section 102(3) defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded, and § 105(1) prescribes a procedure that must be accomplished during an open meeting before an executive session may be held. In brief, a motion to enter into executive session must be made in public; the motion must indicate the subject or subjects to be considered; and the motion must be carried by a majority of the total membership of the body. Most importantly, paragraphs (a) through (h) specify and limit the grounds for entry into executive session.

The most pertinent basis for conducting an executive session relative to the functions of boards of ethics is also the most commonly cited, and perhaps the most misunderstood. A term heard constantly as a basis for entry into executive sessions is "personnel," even though it appears nowhere in the OML. To be sure, some personnel-related issues may clearly be considered during an executive session. Nevertheless, others cannot. Moreover, often the so-called "personnel" exception has nothing to do with personnel matters. That provision permits a public body to enter into an executive session to discuss: "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation. . . ." If, for example, the issue before a board of ethics involves a policy concerning outside employment, the issue would be a personnel matter, but there would be no basis for closing the doors. On the other hand, when an issue involves a particular person in conjunction with one or more of the subjects listed in

§ 105(1)(f), an executive session could appropriately be held. For instance, if the issue deals with the "financial history" of a particular person or perhaps matters leading to the discipline of a particular person, § 105(1)(f) may be cited for the purpose of entering into an executive session.

It is emphasized that a motion indicating the issue to be discussed involving "personnel," without more, is inadequate, for it does not provide sufficient information to enable the public to know whether the subject matter is appropriate for consideration in executive session. It has been advised and confirmed judicially that a motion under § 105(1)(f) should include two elements: first, the inclusion of the key word "particular," so that the public can know the focus is on a specific individual; and second, one of the qualifying terms appearing in that provision. For example, a proper motion might be: "I move to enter into executive session to discuss the financial history of a particular person." Although the identity of the subject of the discussion need not be given, a motion of that nature demonstrates a recognition of the scope of the exception and the topic may properly be considered in executive session.[3]

The executive session is one of two vehicles that potentially permits a public body to confer or meet in private. The other involves "exemptions," and § 108 of the OML contains three. When an exemption applies, the OML does not, and the requirements that would operate with respect to executive sessions are not in effect. Stated differently, to discuss a matter exempted from the OML, a public body need not follow the procedure imposed by § 105(1) that relates to entry into an executive session. Further, although executive sessions may be held only for particular purposes, there is no such limitation that relates to matters that are exempt from the coverage of the OML.

Often relevant to the functions of boards of ethics is § 108(3), which exempts from the OML: "any matter made confidential by federal or state law." When an attorney-client relationship has been invoked, it is considered confidential under § 4503 of the Civil Practice Law and Rules. Therefore, if an attorney and client establish a privileged relationship, the communications made pursuant to that relationship would be confidential under state law and, therefore, exempt from the OML.

In terms of background, it has long been held that a municipal board may establish a privileged relationship with its attorney.[4] However, such a relationship is operable only when a municipal board or official seeks the legal advice of an attorney acting in his or her capacity as an attorney, and where there is no waiver of the privilege by the client.

Insofar as a board of ethics seeks legal advice from its attorney and the attorney renders legal advice, the attorney-client privilege may validly be asserted and communications made within the scope of the privilege would be outside the coverage of the OML. Therefore, even though there may be no basis for conducting an executive session pursuant to § 105 of the OML, a private discussion might validly be held based on the proper assertion of the attorney-client privilege pursuant to § 108, and legal advice may be requested even though litigation or possible litigation is not an issue. In that case, while the litigation exception for entry into executive session[5] would not apply, there may be a proper assertion of the attorney-client privilege.

Following a meeting, minutes must be prepared, and § 106 provides what might be viewed as minimum requirements pertaining to their contents, stating that:

> 1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
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> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
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> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session.

In view of the foregoing, as a general rule a public body may take action during a properly convened executive session.[6] If action is taken during an executive session, minutes reflective of the action, the date and the vote must generally be recorded in minutes pursuant to § 106(2) of the OML. If no action is taken, there is no requirement that minutes of the executive session be prepared.

Minutes of executive sessions need not include information that may be withheld under FOIL, which may be more significant in many ways than the OML.

FOIL

An initial key point regarding FOIL involves its breadth, for it pertains to all government agency records and defines the term "record" in § 86(4) to mean:

> any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.

In consideration of the definition, information "in any physical form" maintained by or for a municipality, irrespective of its function, origin, or the means by which it is stored or transmitted, constitutes a "record" falling within the scope of FOIL.

Like the OML, FOIL is based on a presumption of access, directing that all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in § 87(2)(a) through (j) of FOIL.

In consideration of the functions and the kinds of records likely maintained by or for boards of ethics, it is likely that two of the grounds for denial are particularly relevant.

Section 87(2)(b) authorizes an agency to withhold records when disclosure would result in an unwarranted invasion of personal privacy. Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers and employees. It is clear public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that they are required to be more accountable than others. The courts have found, as a general rule, that records that are relevant to the performance of the duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy.[7] Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy.[8]

Several of the decisions referenced above dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available.[9] However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may be withheld, for disclosure would result in an unwarranted invasion of personal privacy.[10] Further, to the extent that charges are dismissed or allegations are found to be without merit, they may be withheld.

There may also be privacy considerations concerning persons other than employees who may be subjects of a board's inquiries. For instance, the name of a complainant or witness could be withheld in appropriate circumstances as an unwarranted invasion of personal privacy. Ordinarily, the identity of a complainant is irrelevant to the board; what is relevant is whether the complaint has merit. Moreover, if the identities of complainants or whistleblowers are made known, they are less likely to complain or blow the whistle. In that event, the government would not learn what it needs to know to carry out its duties effectively and accountably.

The other provision of relevance, § 87(2)(g), states that an agency may withhold records that:

> are inter-agency or intra-agency materials which are not:
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> i. statistical or factual tabulations or data;
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> ii. instructions to staff that affect the public;
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> iii. final agency policy or determinations; or
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> iv. external audits, including but not limited to audits performed by the comptroller and the federal government . . .

The language quoted above contains what is in effect a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like may be withheld.

Records prepared in conjunction with an inquiry or investigation by a board of ethics would constitute intra-agency materials. Insofar as they consist of opinions, advice, conjecture, recommendations and the like, they may be withheld. Factual information would be available, except to the extent, under the circumstances, that disclosure would result in an unwarranted invasion of personal privacy.

Because a board of ethics provides advisory opinions, which may be accepted, rejected or modified by the person or entity making a final decision, those opinions may be withheld under § 87(2)(g). If the decision maker specifies that it has adopted the recommendation of the board as its own, the opinion has become a final agency determination. When that determination reflects a finding of misconduct or imposes a penalty, it is accessible under subparagraph (iii) of § 87(2)(g).[11]

An area of frequent controversy and requests by the public and the news media involves financial disclosure statements. One of the issues relates to a former provision of the statute dealing with statements filed with what had been the State Ethics Commission, which indicated they were available for inspection, but not for copying. Again, that provision pertained only to that state agency; it never applied to a municipality. Consequently, when financial disclosure statements are prepared pursuant to a municipal ethics law, they are subject to FOIL, which requires that agencies prepare copies of records pursuant to § 89(3)(a) and authorizes the assessment of fees for copying in accordance with § 87(1)(b)(iii). When a local law permitting only the inspection of financial disclosure statements was challenged, it was held that FOIL applied and required the agency to produce photocopies.[12]

In terms of access to those statements, they are typically available to the public, except those portions indicating the value of an asset or liability of a public officer or employee, or other portions which are demonstrated to be irrelevant to the performance of that person's duties.

In short, although municipal boards of ethics are required to comply with both FOIL and the OML, those statutes generally offer those boards the flexibility and the capacity to withhold records or to conduct their meetings in private to enable them to carry out their duties effectively.

Endnotes

1. Public Officers Law, Article 6, §§ 84–90.
2. Public Officers Law, Article 7, §§ 100–11.
3. *Gordon v. Village of Monticello*, August 5, 1993 (Supreme Court, Ulster Co.), *modified*, 620 N.Y.S.2d 573, 207 A.D.2d 55 (3d Dep't 1994), *reversed on other grounds*, 87 N.Y.2d 124 (1995).
4. *People ex rel. Updyke v. Gilon*, 9 N.Y.S. 243 (Sup. Ct., N.Y. Co. 1889); *Pennock v. Lane*, 36 Misc. 2d 253, 231 N.Y.S.2d 897, 898 (Sup. Ct., Albany Co. 1962).
5. Public Officers Law § 105(1)(d).
6. Public Officers Law § 105(1).
7. *See, e.g., Farrell v. Village Board of Trustees*, 83 Misc. 2d 125, 372 N.Y.S.2d 905 (Sup. Ct., Broome Co. 1975); *Gannett Co. v. County of Monroe*, 59 A.D.2d 309, 399 N.Y.S.2d 534 (4th Dep't 1977), *aff'd*, 45 N.Y.2d 954 (1978); *Sinicropi v. County of Nassau*, 76 A.D.2d 832, 428 N.Y.S.2d 312 (2d Dep't 1980); *Geneva Printing Co. v. Village of Lyons*, March 25, 1981 (Sup. Ct., Wayne Co.); *Montes v. State*, 94 Misc. 2d 972, 406 N.Y.S.2d 664 (Ct. Cl. 1978); *Powhida v. City of Albany*, 147 A.D.2d 236, 542 N.Y.S.2d 865 (3d Dep't 1989); *Scaccia v. NYS Division of State Police*, 138 A.D.2d 50, 530 N.Y.S.2d 309 (3d Dep't 1988); *Steinmetz v. Board of Education, East Moriches*, N.Y.L.J., Oct. 30, 1980 (Sup. Ct., Suffolk Co.); *Capital Newspapers v. Burns*, 67 N.Y.2d 562 (1986).
8. *See, e.g., In re Wool*, N.Y.L.J., Nov. 22, 1977 (Sup. Ct., Nassau Co.).
9. *See Farrell, Sinicropi, Geneva Printing Co., Scaccia*, and *Powhida, supra* note 7.
10. *See, e.g., Herald Company v. School District of City of Syracuse*, 104 Misc. 2d 1041, 430 N.Y.S.2d 460 (Sup. Ct., Onondaga Co. 1980).
11. *Miller v. Hewlett-Woodmere Union Free School District #14*, N.Y.L.J., May 16, 1990 (Supreme Court, Nassau Co.).
12. *See, e.g., Herald Company, supra* note 10.

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