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By Electronic Mail Only

November 4, 2021

By E-mail Only: pelhamexaminer@gmail.com

Mr. Rich Zahradnik, President
Pelham Examiner, Inc.

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

Dear Mr. Zahradnik:

The Committee on Open Government (“Committee”) received your request for an advisory opinion regarding executive sessions. Specifically, you seek an opinion on two issues. The first issue is whether a public body may enter an executive session when “there is no ‘majority vote of its total membership, taken in *open meeting* pursuant to a motion identifying the general areas or area of subjects to be considered,’ and the board is *not* in a place where the public can witness the opening of the meeting, the motion and the vote.” The second issue is whether a board must specify the litigation to be discussed when holding an executive session for the purpose of “discussions regarding proposed, pending or current litigation.”

Proper Entry Into Executive Session

Section 100 of Open Meetings Law provides the foundation for public meetings:

It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it.

Section 103 requires that all meetings of a public body be open to the public, “except that an executive session of such body may be called and business transacted thereat in accordance with section one hundred five of this article.” As you correctly cite in your request, Section 105 allows a public body to enter into executive session only “upon a majority vote of its total membership, taken in an open

meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered” and only for one or more of the enumerated purposes specified in paragraphs (a) through (h).

Therefore, Section 105 clearly states that a valid executive session requires (i) *a public meeting*, (ii) a motion identifying one or more of the enumerated purposes, and (iii) majority approval of the motion. This Committee has long opined that executive sessions are not separate and distinct meetings but are instead part of a public meeting. It is the opinion of the Committee that entering an executive session when any of these three procedural requirements is missing is inconsistent with the requirements of the Open Meetings Law. See [2212](#), [2276](#), [3618](#) for past consistent opinions. Although the Pelham Union Free School District’s public meeting notice informs the public that it anticipates entering an executive session before the public meeting, it is our view that the Law requires that it must actually open the public meeting and allow the public to observe the motion and vote to adopt the motion before entering into an executive session in order to comply with § 105 of the Law.

Specificity of Motion to Enter Executive Session

As referenced above, the subjects that may be properly considered in executive session are specified in paragraphs (a) through (h) of § 105(1) of the Open Meetings Law. Because those subjects are limited, a public body cannot conduct an executive session to discuss the subject of its choice. Section 105(1)(d) allows discussions regarding “proposed, pending or current litigation.” The motion to enter an executive session must be sufficiently specific to inform the public that the topic or topics for discussion fall under one of the enumerated grounds for entry into an executive session. Use of the statutory terms alone do not provide enough information to for those in attendance to know whether a proposed executive session will indeed be properly held.

In construing the language of Section 105(1)(d), the Appellate Division, Second Department held that:

The purpose of paragraph d is “to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings’ The belief of the town’s attorney that a decision adverse to petitioner ‘would almost certainly lead to litigation’ does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply by expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception

Weatherwax v. Town of Stony Point, 97 A.D.2d 840, 841 (2d Dept. 1983) (internal citations omitted).

It is the opinion of the Committee that the litigation exception is intended to permit a public body to discuss its *litigation strategy* and *pending or threatened* litigation behind closed doors, rather than issues that might *possibly* result in litigation. As legal matters or possible (as opposed to pending or threatened) litigation could be the subject or result of nearly any topic discussed by a public body, an executive session could not in our view be held to discuss an issue merely because there is a possibility of litigation, or because it involves a legal matter.

Regarding the sufficiency of a motion to discuss litigation, courts held that:

It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity *the* pending, proposed or current litigation to be discussed during the executive session

Daily Gazette Co. , Inc. v. Town Board, Town of Cobleskill, 444 N.Y.S.2d 44, 46 (Supreme Court, Schoharie County, 1981). The emphasis in this passage on the word "*the*" indicates that when the discussion relates to litigation that has been initiated, the motion must name the litigation. For example, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ v. the Pelham Union Free School District." If the Board seeks to discuss its litigation strategy in relation to a person or entity that it intends to sue, and if premature identification of that person or entity could adversely affect the interests of the Board, the motion might not need to identify that person or entity, but it should clearly indicate that the discussion will involve the litigation strategy. Only by means of that kind of description can the public know that the subject matter may justifiably be considered during an executive session. See [2212](#), [4214](#), [4616](#), [4814](#) for past consistent opinions.

In sum, based upon the language of the Open Meetings Law and judicial interpretation discussed herein, it is our view that motions to conduct executive sessions to discuss "litigation" without additional detail are inadequate.

I hope this information is helpful.

Sincerely,

Christen L. Smith
Senior Attorney

cc: Pelham Board of Education