



**State of New York
Department of State
Committee on Open Government**



**FIRE COMPANY
PUBLIC BODY
PUBLIC OFFICERS LAW
OPEN MEETINGS LAW
FREEDOM OF INFORMATION LAW**

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OML-AO-3904

December 22, 2004

E-MAIL

TO:

FROM: Robert J. Freeman, Executive Director

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

Dear

I have received your letter in which you asked whether a volunteer department is subject to the Open Meetings and Freedom of Information Laws.

In this regard, the Open Meetings Law is applicable to meetings of public bodies. Section 102(2) of the Law defines "public body" to mean:

"...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

By reviewing the components in the definition of "public body", I believe that each is present with respect to the board of a volunteer fire company. The board of a volunteer fire company is clearly an entity consisting of two or more members. I believe that it is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law. Further, in my view, **a volunteer fire company at its meetings conducts public business and performs a governmental function.** Such a function is carried out for a public corporation, which is defined to include a municipality, such as a town or village, for example. **Since each of the elements in the definition of "public body" pertains to the board of a volunteer fire company, it appears that the board of such a company is a "public body" subject to the Open Meetings Law.**

I point out that the status of volunteer fire companies had long been unclear. Those companies are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was questionable whether or not they conducted public business and performed a governmental function. Nevertheless, in a case brought under the Freedom of Information Law dealing with the coverage of that statute **with respect to volunteer fire companies, the state's highest court, the Court of Appeals, found that a volunteer fire company is an "agency" that falls within the provisions of the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY2d 575 (1980)]. In its decision, the Court clearly indicated that a volunteer fire company performs a governmental function and that its records are subject to rights of access granted by the Freedom of Information Law.**

In view of the decision rendered in Westchester Rockland, I believe that the board of a volunteer fire company falls within the definition of "public body" and would be required to comply with the Open Meetings Law.

With respect to the scope of the Freedom of Information Law, as indicated above, that statute applies to agency records, and §86(3) defines the term **"agency"** to mean:

"any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, the Freedom of Information Law generally pertains to records maintained by entities of state and local government.

In Westchester-Rockland, the case involved access to records relating to a lottery conducted by a volunteer fire company, and it was determined that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

"We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).

"True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579).

Moreover, although it was contended that documents concerning the lottery were not subject to the Freedom of Information Law because they did not pertain to the performance of the company's fire fighting duties, the Court held that the documents constituted "records" subject to the Freedom of Information Law [see §86(4)].

More recently, another decision confirmed in an expansive manner that volunteer fire companies are required to comply with the Freedom of Information Law. That decision, *S.W. Pitts Hose Company et al. v. Capital Newspapers* (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court states that:

"Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:

'...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'

"These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.

"It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '[...]It is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).

"This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

Based upon the foregoing, it is clear that volunteer fire companies are subject to the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, 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 (i) of the Law. Similarly, the Open Meetings Law requires that meetings be conducted in public, except to the extent that there is a basis for entry in to an executive session. Paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be discussed during an executive session.

The text of the Freedom of Information and Open Meetings Laws, as well as "Your Right to Know", which describes both laws, are available on our website.



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January 7, 2014

FOIL-AO-19099
OML-AO-5387

Dear

I have received your letter, which pertains to an opinion prepared by a legal intern, Andrew Howard, and you asked initially that we "provide the legal authority for a non-lawyer to issue such advisory opinions." In this regard, both the Freedom of Information Law (FOIL), §89(1), and the Open Meetings Law (OML), §109, refer to the ability of the Committee on Open Government to render advisory opinions. The capacity to do so was conferred upon staff of the Committee by resolution more than thirty years ago. I point out that there is nothing in either statute specifying that advisory opinions must be rendered by attorneys. Further, I review every opinion sent by a legal intern.

It is your view, based on the holding in Hayes v. Chestertown Volunteer Fire Company, Inc. [93 AD3d 1117 (2010)] that a volunteer fire company's meetings are not subject to the Open Meetings Law, and that minutes of those meetings are not subject to the Freedom of Information Law. You contend that there is a distinction between a fire department and a fire company, citing the Appellate Division in Westchester-Rockland Newspapers v. Kimball, 72 AD2d 706 (1979), aff'd, 50 NY2d 575(1980)].

From my perspective, there is no distinction in the application of FOIL to fire departments and fire companies. In the Court of Appeals decision in Westchester News, the Court referred to requests to the "chief of the volunteer fire department of the Village of Ossining and the heads of its fire companies for access to the records of a public lottery sponsored by the department" (*id.*, 578). The Court then began its analysis:

"...by rejecting respondents' contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand an organic arm of government, when that is the channel through which such services are delivered" (*id.*, 579).

I believe that a "volunteer organization" in the context of the decision includes a volunteer fire company; an "organic arm of government" would include a town, a village or a fire district, for example, all of which are public corporations.

That conclusion was reached in an unreported decision, S.W. Pitts Hose Company v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988). The decision referenced Westchester News and determined that:

"The language of the state's highest court is clear. It would be mere speculation to surmise that the Court of Appeals did not mean for that statement [the statement quoted above] to apply to all volunteer fire department, regardless of their organizational structure...

Even assuming, arguendo that Westchester News is not controlling in this matter, this Court still expressly determines that volunteer fire companies serving fire protection districts are governmental entities as that term is used under the FOIL....

This Court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is their existence inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

You wrote that meetings of the entity at issue, and presumably records that relate to discussions, "frequently relate to internal affairs and the social, recreational and benevolent activities that the Fire Company undertakes in furtherance of its charitable purpose." That may be so. Nevertheless, when an entity is subject to FOIL, the nature of the records that it maintains, all of which fall within the scope of rights conferred by that statute, is irrelevant. As stated by the Court of Appeals in Westchester News:

"The statutory definition of 'record' makes nothing turn on the purpose for which a document was produced or the function to which it relates...The present case provides its own illustration. If we were to assume that a lottery and fire fighting were generically separate and distinct activities, at what point, if at all, do we divorce the impact of the fact that the lottery is sponsored by the fire department from its success in soliciting subscriptions from the public? How often does the taxpayer-lottery participant view his purchase as his 'tax' for the voluntary public service of safeguarding his or her home from fire? And what of the effect on confidence in government when this fund-raising effort, though seemingly an extracurricular event, ran afoul of our penal law?" (supra, 581).

In the decision that you cited, Hayes, the Appellate Division reached the same conclusion, stating that "We agree with petitioners that, to the extent Supreme Court's FOIL determination differentiated between records concerning public or 'firematic,' and private functions of CVFC, this was error", and in fact, the CVFC, a volunteer fire company, conceded that it is an agency required to give effect to FOIL.

In consideration of the Hayes' Court's reliance on Westchester News and several other decisions of the Court of Appeals, and assuming that the decision in that case applied to volunteer fire companies, which we believe to be so, it has never been understood here how the Hayes Court could have determined that the governing body of a volunteer fire company is not a public body subject to the OML. In our view, each of the conditions necessary to find that such a body constitutes a "public body" as defined in §102(2) of the OML is present. Its board consists of more than two members; it can conduct its business only pursuant to quorum requirements imposed by the not-for-profit corporation law; and most importantly, based on the precedents cited above, it conducts public business and performs a governmental function.

We view the holding in Hayes to be inconsistent with those precedents and something of an aberration. Further, your suggestion that there is a distinction between a fire department and a fire company is, in our opinion, contrary to the direction provided by the Court of Appeals and other judicial guidance.

While we respect your views, we respectfully disagree.

Sincerely,

Robert J. Freeman
Executive Director

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