

# Running a Local Municipal Ethics Board: Is Ethics Advice Confidential?

By Steven G. Leventhal and Susan Ulrich

The laws regulating government ethics are designed to encourage high standards of conduct among public officials, and to promote public confidence in government. To help achieve these purposes, section 808 of New York's General Municipal Law authorizes counties and other local governments to establish their own ethics boards. Among the most important functions of a government ethics board is the rendering of ethics advice to public officials within its jurisdiction.



For example, a corrections officer employed at a local jail might ask the municipal ethics board whether his secondary employment as a private security guard would conflict with his official duties. Or a legislator might ask whether she may vote in matters affecting her relative's employer.

Most officials, like most people, are honest and want to do the right thing. But many ethical issues are ambiguous, and must be decided under intense and competing pressures. A municipal work force typically includes men and women of varied educational backgrounds and work experience. Even the most sophisticated public official may need ethics advice. But many government workers are unsophisticated, and have neither the ability to interpret ambiguous laws, nor the resources to freely consult with a lawyer.

Free and accessible ethics advice helps to guide honest officials, and serves to protect them from unwarranted allegations of misconduct. Courts give great deference to the advisory opinions of government ethics boards.<sup>1</sup>

Logic and experience indicate that public officials are more likely to seek ethics advice when their inquiries are treated as confidential. A degree of privacy is implicit in the advisory function of local municipal ethics boards. The boards may render advice only to government officers and employees, and not to the general public.<sup>2</sup>

In drafting advisory opinions, many local ethics boards omit the identity of the inquiring official. But

this practice may not always preserve the inquiring official's anonymity, particularly in small municipalities where a statement of the facts may be enough to make the identity of the inquiring official self-evident.

There is a clear public policy justification for confidentiality in the exercise of a board's advisory function. By protecting the privacy of inquiring officers and employees, ethics boards encourage officials to seek ethics advice, and further the statutory purpose of fostering high standards of conduct.

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However, there is also a strong and growing policy against secrecy in government. Even the confidential communications between an attorney and a client are less apt to be treated as privileged if they occur in a government setting.<sup>3</sup>

Taken together, the Freedom of Information Law ("FOIL")<sup>4</sup> and the Open Meetings Law ("OML")<sup>5</sup> are a powerful legislative declaration that public policy disfavors government secrecy.

In section 84 of FOIL, the legislature declared that:

the people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.

In section 100 of OML, the legislature declared that:

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.

### **Application of FOIL to the Advisory Function of a Local Ethics Board**

FOIL expressly includes boards and commissions among the agencies that are required to make records available for public inspection.<sup>6</sup> A local municipality may not exempt its ethics board from compliance with FOIL.<sup>7</sup> But not all records must be disclosed. An agency may withhold records when disclosure would result in an unwarranted invasion of personal privacy.<sup>8</sup> Generally, public officials have a reduced expectation of privacy in records that relate to the performance of their official duties, and a greater expectation of privacy in records that do not.<sup>9</sup>

Also, an agency may withhold inter-agency or intra-agency records, except those that are statistical data, staff instructions that affect the public, final agency policy or determinations, or external audits.<sup>10</sup> In particular, an agency may deny access to documents that consist only of “opinions, advice, evaluations, deliberations, proposals, policy formulations, conclusions, or recommendations” because their disclosure would hinder the agency’s deliberative functions.<sup>11</sup> For example, the records of an advisory panel designated to review the unsatisfactory rating of a teacher were deemed to be non-binding recommendations prepared to assist the decision maker, and were exempt from disclosure.<sup>12</sup>

Applying these principles, the New York Committee on Open Government concluded that the advisory opinion of a town ethics board would be exempt from disclosure unless the town board adopted the opinion as its own (thereby making it a final determination), and found that the subject officer or employee engaged in official misconduct.<sup>13</sup>

### **Application of OML to the Advisory Function of a Local Ethics Board**

OML generally applies to a board or commission, even where the entity is advisory and without binding authority.<sup>14</sup> As in the case of FOIL, a local municipality may not exempt its ethics board from compliance with OML.<sup>15</sup> Any local enactment that restricts public access more than OML is expressly superseded by section 110(1) of OML.

OML does not apply to quasi-judicial proceedings.<sup>16</sup> A quasi-judicial proceeding is one in which there is an opportunity to be heard, evidence is presented, and a decision is made.<sup>17</sup> The authority to make a final determination in a controversy is an essential element of a quasi-judicial proceeding.<sup>18</sup> Many ethics boards are empowered to investigate complaints, conduct hearings, make determinations, and impose sanctions. But while the investigatory function of a local ethics board may be quasi-judicial and thus exempt from OML, the advisory function does not normally result in a final determination and thus would not be exempt from OML.

OML section 105(1) specifies the grounds on which a government body may exclude the public by entering into executive session. The grounds for conducting an executive session under OML are limited, however, and they are not identical to the justifications for withholding documents from disclosure under FOIL.

The grounds for conducting an executive session are “narrowly scrutinized.”<sup>19</sup> Among the matters that may be considered in executive session are those that relate to a current or future investigation or criminal prosecution; “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. . . .”<sup>20</sup> If the inquiry before the board of ethics involves a particular person and relates to one or more of these issues, the board may consider the matter in executive session.<sup>21</sup> While many inquiries will certainly present such issues, some may not.

The confidentiality of an ethics board’s advisory function may ultimately depend on how the board frames the issue under consideration. If the issue is framed narrowly, and the advice applies only to the inquiring official, the board’s opinion is more likely to be exempt from disclosure under FOIL; and it is more likely that the board’s deliberations may be conducted in executive session under OML. But issues that are framed in broad policy terms may result in determinations that must be disclosed under FOIL, and proceedings that must be conducted in public under OML. Because public officials are more likely to seek ethics advice when their inquiries are treated as confidential, local municipal ethics boards should conduct their advisory function in a manner that is likely to preserve the privacy of inquiring officials.

## Endnotes

1. *Byer v. Town of Poestenkill*, 232 A.D.2d 851, 853, 648 N.Y.S.2d 768 (3d Dep't 1996).
2. N.Y. Gen. Mun. Law § 808; Op. State Compt. 74-583; 24 Op. State Compt. 125, 1968.
3. See Salkin, *The Erosion of Government Lawyer-Client Confidentiality*, THE URBAN LAWYER, Spring 2003.
4. N.Y. Pub. Off. Law, art. 6.
5. N.Y. Pub. Off. Law, art. 7.
6. N.Y. Pub. Off. Law § 86(3).
7. N.Y. Comm. on Open Gov't, FOIL Adv. Op. 8922 (1995); OML Adv. Ops. 2269 (1993), 2805 (1997).
8. N.Y. Pub. Off. Law § 87(2)(b).
9. *Id.* (Adv. Op. 8922), citing, *inter alia*, *Farrell v. Village Bd. of Trustees of Village of Johnson City*, 83 Misc. 2d 125, 372 N.Y.S.2d 905 (Sup. Ct., Broome Co. 1975); *Gannett Co., Inc. v. Monroe County*, 59 A.D.2d 309, 399 N.Y.S.2d 534 (4th Dep't 1977), *aff'd*, 45 N.Y.2d 954, 411 N.Y.S.2d 557 (1978); *Sinicropi v. County of Nassau*, 76 A.D.2d 832, 428 N.Y.S.2d 312 (2d Dep't 1980); *In re Wool*, Sup. Ct., Nassau Co., N.Y.L.J., Nov. 22, 1977.
10. N.Y. Pub. Off. Law § 87(2)(g)(i)-(v).
11. *Town of Oyster Bay v. Williams*, 134 A.D.2d 267, 520 N.Y.S.2d 599 (2d Dep't 1987). *But see Syracuse United Neighbors v. City of Syracuse*, 80 A.D.2d 984, 437 N.Y.S.2d 466 (4th Dep't 1981), *app. dismissed*, 55 N.Y.2d 995, 449 N.Y.S.2d 201 (1982) (granting access to the documents of two advisory committees where the records were kept and held by the municipality).
12. *McAulay v. Bd. of Education of City of New York*, 61 A.D.2d 1048, 403 N.Y.S.2d 116, *aff'd*, 48 N.Y. 2d 659, 421 N.Y.S.2d 560 (1978).
13. N.Y. Comm. on Open Gov't, FOIL Adv. Op. 8922 (1995).
14. N.Y. Comm. on Pub. Acc. Rec., Adv. Op. 836.
15. N.Y. Comm. on Open Gov't, OML Adv. Ops. 2269 (1993); 2805 (1997).
16. N.Y. Pub. Off. Law § 108(a).
17. *Hammer v. Veteran*, 86 Misc. 2d 1056, 1058, 306 N.Y.S.2d 170, 171 (Sup. Ct., Westchester Co. 1975), *aff'd*, 53 A.D.2d 629, 385 N.Y.S.2d 1017 (2d Dep't 1976).
18. N.Y. Comm. on Open Gov't, FOIL Adv. Op. 2917.
19. *Weatherwax v. Town of Stony Point*, 97 A.D.2d 840, 468 N.Y.S.2d 914 (2d Dep't 1983).
20. N.Y. Pub. Off. Law §§ 105(1)(c), 105(1)(f).
21. N.Y. Comm. on Open Gov't, OML Adv. Ops. 2269 (1993); 2805 (1997).

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