To:  David Fried  
Re:  Request to Town Attorney Office re Publishing Drafts Before Meetings  
Date:  August 13, 2009

The Board of Ethics has in the past published drafts of proposed actions prior to its meetings so as to allow the public to make informed comments for consideration by the Board of Ethics in reaching its final action. Unless prohibited by law, the Board of Ethics intends to continue such practice in those instances where, in its judgment, it feels that pre-meeting public exposure of a draft of an action it may take would be helpful or appropriate.

Freedom of Information Law

Nothing in the Freedom of Information Law (NYS Public Officers Law, Art. 6, Sections 84 - 90) prevents a public body from publishing drafts prior to meetings. The Legislative Declaration of the Freedom of Information Law (Sec. 84) states: "The people's right to . . . review the documents . . . leading to determinations is basic to our society."

"Records" as defined in the Freedom of Information Law (Section 86(4)) "means any information . . . produced or reproduced by, with or for an agency." The NY Court of Appeals has held that the Freedom of Information law is permissive and, even if a document comes within a category (or a portion of a document comes within a category of information) as to which a public body may withhold pursuant to Section 87(b)(2), "it is within the agency's discretion to disclosure such records . . . if it so chooses." Capital Newspapers v. Burns, 67 NYS2d 562, 567 (1986). Based on the ruling of the State's highest court, the NYS Dept. of State Committee on Open Government has issued several opinions drawing the distinction between a public body's discretionary right to disclose under the Freedom of Information Law and other explicit mandatory statutory restrictions on a public body's right to disclose: Opinion AO-4091 ("an agency may choose to disclose records even though [under the Freedom of Information Law] the authority to withhold exists") (Dec. 2, 2005); Opinion AO-16321 ("only situations in which an agency cannot disclose would involve those instances in which a [state or federal] statute other than the Freedom of Information Law prohibits disclosure") (Dec. 7, 2006).

The concept in the Legislative Declaration "leading to determinations" would include drafts of internal documents which a public body may adopt, in tact or with modifications. The NYS Dept. of State Committee on Open Government has issued several opinions stating that drafts may be disclosed. See, e.g., Opinion Jan. 5, 1999 (delay in disclosure of a draft lease until final would be "inconsistent with law"); Opinion AO-15359 ("characterization of a record as a 'draft' or 'preliminary' is not determinative of rights of access") (July 11, 2005). "[T]hat an internal communication does not represent or relate to a final agency determination does not remove it from the scope of rights of access." Freeman, Executive Director, Committee on Open Government "Email: Food for Thought", www.dos.state.ny.us/coog/foodelmail.html . And, under the above ruling of the NYS highest court, if a right of access exists, then a public body may disclose it to the public.

In Opinion AO-15857 (Mar. 17, 2006), the Committee on Open Government considered a proposed local law that would have prevented town board members from disclosing a record to the public without obtaining a FOIL request. Finding that proposed local law inconsistent with the Freedom of Information Law, the Committee on Open Government stated that: "[W]hen a Board member obtains records . . . , no provision that would preclude that person from redisclosing the records to a third party." It further stated: "If [a board member] wants to reproduce and distribute records available under the Freedom of Information Law, . . . he or she may do so without any restriction or limitation . . . ." So, a fortiori, a public body could disclose a document in its discretion without a FOIL request if it wishes to do so.

The Town of Greenburgh has a local FOIL (Article 360 of the Town Code). As it must be, our local law is consistent with the NYS Freedom of Information Law. Local FOIL provides (Section 360-7) that the grounds for denial of access to records "shall be governed by the provisions of Article 6 of the Public Officers Law of the State of New York (Freedom of Information Law)." The section pertaining to requests for records (Section 360-8) leads-in with the qualifying phrase "[w]here a request for records is required". So, there is nothing in local law that would, or could, prevent a public body from publishing a draft of an action it may take.

Open Meetings Law

Nothing in the Open Meetings Law (NYS Public Officers Law, Art. 7, Sections 100 - 110) prevents a public body from publishing internal drafts of actions it might take.
Drafts of proposed actions may, in part, be a product of email and/or telephone conferring among individual members of a public body. “There is nothing in the Open Meetings Law that would preclude members of a public body . . . from conferring individually, by e-mail or telephone”, as long as no “collective decision” is made. Freeman, Executive Director, Committee on Open Government "Email: Food for Thought", [www.dos.state.ny.us/coog/fooodemail.html](http://www.dos.state.ny.us/coog/fooodemail.html).

The rules of the Board of Ethics state that "it is the intent of the BOE, subject to reasonable rules as it may impose, to allow the public to speak." In keeping with its rules, agenda of meetings of the Board of Ethics state that public comment is allowed. The Board of Ethics purpose in from time to time publishing drafts prior to its meetings is to be able to receive informed public comment as a part of its deliberations prior to reaching a final action of the Board of Ethics.

Local law can be less, but not more, restrictive with respect to public access than provided in state law. See Open Meetings Law Section 110. We are not aware of any local law which would, or could, prevent pre-meeting publication of drafts.

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The Board of Ethics discussed this issue at its July meeting, and determined to seek the views of the Town Attorney Office. If the Town Attorney Office has views different from the above, the Board of Ethics would appreciate receiving a written statement from the Town Attorney Office specifying where its views are different and the legal basis therefor.

Thank you.