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May 31, 2017

*Via Facsimile (518) 474-1927
and First Class Mail*

NYS Committee on Open Government
Department of State
One Commerce Plaza
99 Washington Avenue, Suite 650
Albany, New York 12231

Attention: Robert J. Freeman, Esq.
Executive Director

Re: Sean Madden Request for Advisory Opinion on Open Meetings Law

Dear Mr. Freeman:

Our Office serves as Special Counsel to the Village of Tuxedo Park. We are receipt of a May 29, 2017 letter from Sean Madden, a Village resident, addressed to your office requesting an advisory opinion on matters concerning the Open Meetings Law. Enclosed is a copy of said letter for your quick reference. Being aware that your office will typically forward such communications to the Village for a response, we are providing the following response to the letter.

First, while the political climate surrounding inquiries concerning Open Meetings Law does not change the principles or the law that are applicable, we believe that some background perspective is helpful in understanding Mr. Madden's May 29, 2017 letter raising issues as far back as early 2016. The Village election is approximately three (3) weeks away (June 20, 2017) and includes a contested race for the position of Mayor, among other positions. Mr. Madden has not only sent his letter to your office, but has also sent a copy of the letter, along with an accompanying email, to many Village residents. Accordingly, his characterizations of the

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Mayor's "penchant for secrecy" and "abuse of the use of executive sessions" noticeably omit the remainder of the Village Board (who are actually empowered to make the decisions) and erroneously focus on the Mayor as somehow having the sole power to enter into Executive Sessions and/or pass Village Board Resolutions. As your office knows well, the conduct of Executive Sessions and passage of Resolutions require approval of the majority of the Village Board.

Second, we can assure you that the "gloom and doom" picture painted by Mr. Madden concerning open meetings and open government in the Village is simply inaccurate in many respects as set forth herein. Notably, Mr. Madden did not provide copies of the relevant approved minutes that he had access to, but rather provided his own summary characterizing the Executive Sessions and asserting a verbatim (yet edited) summary of the motions to enter into Executive Session. While the Village can conduct an in-depth review and comparison of the minutes and available recordings of the meetings, we do not believe such efforts are necessary at this time to respond to Mr. Madden's letter.

Lastly, we note that since taking office in 2015, the current Mayor has pursued numerous actions, with the support of the majority of the Village Board aimed at ensuring that the Village of Tuxedo Park acts properly and in compliance with law. By way of example, she has undertaken efforts to ensure that Village employees are properly holding employment positions in compliance with Civil Service Law and with the rules of the County Department of Human Resources. The Mayor has learned that, for more than a decade, the Village has not been in compliance with Civil Service requirements. In addition, she has supported efforts to eliminate practices that were unethical or improper, including gifts being given to municipal employees. We do not provide this information to tout accomplishments of the Mayor and the majority of the Village Board that supported those efforts, but only to contrast the assertions of Mr. Madden that the Mayor acts in contravention of law, acts alone or has a "penchant for secrecy." Unfortunately, seeking to change such longstanding practices (even when those practices are unethical or improper) inevitably ruffles some feathers. However, the public support or lack thereof of such governmental efforts is a matter for the residents when they reach the voting booth.

Below are the Village's preliminary responses to the substantive assertions in Mr. Madden's letter:

Inappropriate and Excessive Use of Executive Sessions:

Mr. Madden, without any legal source or reliance on any authority, asserts that there is some circumstance in which the number or frequency of Executive Sessions would contravene the provisions of the Opening Meetings Law. However, Mr. Madden's assertion is simply wrong. There is no provision of the Open Meetings Law that limits the number, duration, or frequency of Executive Sessions by a public body. Further, even assuming the correctness of Mr. Madden's summary that he attached to his letter, the conduct of (at most) two (2) Executive Sessions during a regular Village Board meeting hardly reflects an excess or abuse of the use of Executive Sessions.

Although not discussed in Mr. Madden's letter, the typical monthly Village Board meeting runs approximately four (4) or more hours. Typically, the Executive Session, as necessary, is entered into toward the end of the regular meeting. There are cases, however, here a municipal body conducts an Executive Session early in a meeting because, for example, a person may be present that may be properly invited into the Executive Session and the Village Board wishes to avoid having that person have to remain for the entire meeting. In other cases, a topic may arise during a regular meeting which leads the Village Board to a discussion that is appropriate for Executive Session and/or an attorney-client privilege discussion. In any event, there is simply no restriction on the number of Executive Sessions conducted, and even if there was any applicable standard relevant to "abusing" the use of Executive Session, the information provided by Mr. Madden would hardly constitute an abuse of the Executive Session.

Reasons for Entering Executive Session

Mr. Madden, in his letter, does not contest or assert that there was any failure of the majority of the Village Board to make a proper motion and vote on an entry into Executive Session. While his letter erroneously takes that view that the Mayor is the sole person responsible for the number of Executive Sessions, clearly if the majority of the Village Board deemed an Executive Session unnecessary or excessive, the Mayor would have no power to contravene the will of the majority in that case.

With respect to the summary of the reasons for entering into Executive Session, the Village would need to review the minutes as well as the available audio recordings of those

meetings to determine if the summary provided is accurate. It is possible that Mr. Madden's summary is inaccurate and/or the typed minutes are not consistent with what was actually stated prior to entering into the Executive Session. Notwithstanding the above, the Village is familiar with the requirements of the Open Meetings Law, the relevant Opinions of the Committee on Open Government ("Committee"), as well as applicable decisional law relating to these matters. To the extent that the particularized description of the reasons for entering into an Executive Session could be deemed insufficient by a court or the Committee, the Village acknowledges that the standard for entering into an Executive Session is one that requires sufficient particularity. While the Open Meetings Law is lacking in the sense that it does not provide any guideline, standard or otherwise indicate what constitutes sufficient particularity, various court decisions and opinions from the Committee have opined that such reasons should be stated with sufficient particularity. Thus, while stating that the Board is going into Executive Session to discuss a "personnel matter" may be deemed insufficient, stating that the Board is going into Executive Session to discuss the employment history of a particular person (without stating the employee's name or title) is generally deemed acceptable.

Mr. Madden also suggests that the "Mayor's adjournment to executive session" for reasons that were not permissible for Executive Sessions is inaccurate. As discussed above, Mr. Madden's assertion is incorrect as the Mayor does not adjourn the Village Board into Executive Session, but rather the majority of the Village Board, by approved motion, enters into an Executive Session. With respect to the proposed acquisition or purchase of real estate, the Village Board is aware that it would be required to show that publicity of the purchase/acquisition would substantially affect the value of the property. However, the statutorily permitted Executive Session for the proposed acquisition of real property under NY Public Officers Law 105(1)(h) only authorizes such Executive Session where the publicity of the purchase/acquisition would substantially affect the value of the property.

Thus, there would no valid reason to enter into an Executive Session for such purpose, unless the publicity would substantially affect the value of the property. However, the Village has no objections to adding the entirety of the statutory language to such motions. We note that, as with all of the Executive Sessions raised by Mr. Madden, there was no allegation or claim that any Executive Session was for an improper subject or actually included a discussion of an improper topic, but rather concerns Mr. Madden's retroactive review of nine (9) months of Village Board minutes and asserts only that the stated reasons for entering Executive Sessions were not sufficiently particularized. He provides no factual support for his allegations of "secrecy" since even adding the accepted "correct" language for a motion would not identify the subject matter, but would merely confirm a proper reason for entering the Executive Session. In

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other words, whether the Village Board stated it was discussing a “personnel matter” or “the employment history of a particular employee” - the public would not be left with any more identifiable information about the underlying issue, so by Mr. Madden’s standards, the matter would still be a secret.

The Village of Tuxedo Park, over the course of the last year, has been involved in collective bargaining negotiations with two (2) unions in the Village. In the case of one of the unions, there have been impact negotiations in addition to the collective bargaining negotiations. The Village has entered into numerous Executive Session to discuss collective bargaining matters pursuant to New York Public Officers Law § 105(1)(e). While it is certainly possible that there may have been motions that were not particularized as to the union “contract” being discussed the Executive Sessions for such purposes were entirely proper.

As you are aware, even if a motion to enter into Executive Session was determined not to be sufficiently particular by a court, the validity of any actions taken by the Village Board arising from any such Executive Session would not be invalidated, except upon a showing of good cause. See, Matthes v Town of E. Fishkill, 785 F2d 43 (2d Cir 1986); Oakwood Prop. Mgt., LLC v Town of Brunswick, 103 AD3d 1067 (3d Dept 2013); Oakwood Prop. Mgt., LLC v Town of Brunswick, 103 AD3d 1067, 1067 (3d Dept 2013). In the instant case, there are no assertions by Mr. Madden of any improper discussion or action arising from any of the Executive Sessions he references.

Confidential Information

Mr. Madden, at the outset, clearly does not dispute that the Village Board Resolution he cited concerning confidential information was proper and valid. There is no doubt that information that is, in fact, confidential that is disclosed by a Board member would be improper and may be contrary to law, including General Municipal Law § 805-a. The Committee has opined and agreed that disclosure of information that is indeed confidential is prohibited. (*“In brief, in my opinion, the only instances in which members of a public body, such as a board of education, are prohibited from disclosing information would involve matters that are indeed ‘confidential’” OML-AO-4530 (December 12, 2007).*)

However, Mr. Madden attempts to attribute a new edict to the Mayor by indicating that “he understands” that the Mayor has taken the position that all information discussed during Executive Session of the Board of Trustees is considered confidential information. Notably, Mr. Madden provides no source of that understanding, nor does he identify the unknown

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“Trustees” that have had their willingness to discuss issues with the public “chilled.” It would be inappropriate for the Committee to render an opinion on an unsupported “understanding” rather than the actual Resolution language that was provided. While “confidential” is not a defined term in the relevant statutes, it is generally understood to be information that is protected by federal or state statute. However, it is possible that decisional law, going forward, could modify that interpretation and the Resolution therefore limits itself to “confidential information.” If a Trustee wishes to disclose information that he/she believes is not confidential that was discussed during Executive Session, he or she may do so at their own risk (as they act individually in such case and not as a member of the Board). Some municipal board members prefer not to take that risk as they may not be familiar with statutory provisions which could protect the confidential information they are disclosing. In any event, the Village Board Resolution does not indicate that Board members are prohibited from disclosing any information obtained during an Executive session, but rather from disclosing “confidential information.” Therefore, Mr. Madden’s suggestion that there is a blanket prohibition is simply erroneous.

We need not provide any legal response to Mr. Madden’s last paragraph that wrongly attributes various powers to the Mayor that she simply does not possess and sounds more akin to campaign literature than concerns with the principles of open meetings in the Village of Tuxedo Park.

Our office remains available to discuss any of the above issues at your convenience.

Very truly yours,

A handwritten signature in black ink, appearing to read 'B. D. Nugent', with a long horizontal flourish extending to the right.

Brian D. Nugent

BDN/etm
Enclosure

Sean Madden
64 Tower Hill Loop
Tuxedo Park, NY 10987

May 29, 2017

Robert J. Freeman, Esq.
Executive Director
Committee on Open Government
99 Washington Avenue
Albany, NY 12231-0001

Re: Request for Advisory Opinion

Dear Mr. Freeman:

I am a resident of the Village of Tuxedo Park in Orange County. I would appreciate if your office could provide guidance on two separate issues regarding New York's Open Meetings Law (OML): (1) whether the Village is complying with the OML with its liberal use of executive sessions and whether its motions to convene executive sessions comply with the requirements of the OML; and (2) whether the mayor's approach to confidential information acquired by trustees during executive sessions comports with the OML.

Many residents of Tuxedo Park share my concern regarding the mayor's penchant for secrecy, including what I believe is an abuse of the use of executive sessions in contravention of the OML. For example, in the past year, the mayor has effected an almost complete change in the composition of the Village Board of Architectural Review (BAR) with virtually no public notice or discussion; four of the five members of the BAR have been replaced, and virtually the entirety of the Board of Trustees' discussion of this matter has occurred in executive session. The BAR is an especially important public board in our historic Village, and many residents are concerned by the secrecy and lack of community participation in such important decisions. Similarly, the mayor has reorganized the police department and recently fired a 22-year Village employee with virtually no public discussion or input.

Inappropriate and Excessive Use of Executive Sessions

Attached hereto is a schedule derived from the official minutes of the Board of Trustees detailing the Board's most recent 24 executive sessions over 16 public meetings. As an aside, the most recent meeting on the schedule is January 18, 2017, which was the most recent approved minutes of the Board available to the public as of May 17 when I compiled this schedule. The Board of Trustees does not seem to be complying with its obligation under New York law to make minutes available within two weeks. The language excerpted from the minutes is verbatim.

I believe there are two problems with the Board's frequent adjournment to executive session. First, the mayor typically regurgitates the statutory language as the basis for convening an executive session, with no particularized description of the matter to be discussed whatsoever. For example, she has convened executive sessions "to discuss personnel matters" and "to discuss litigation." These bare-bones recitations of the statutory basis for an executive session provide the public with no information with which to judge the appropriateness of such an executive session and do not comply with the requirements of the

OML.¹

Second, and even more problematic, is the mayor's adjournment to executive session for reasons that are on their face not in compliance with the OML: e.g., the executive sessions convened May 12, June 28, and October 19 to discuss "possible litigation;"² or the executive session convened May 12 to discuss "the potential purchase or acquisition of real estate" without any indication that publicity would substantially affect the value thereof;³ or the multiple executive sessions convened to discuss unspecified "contracts" without any further information provided.

Overly Broad Approach to "Confidential Information"

In January 2017, the Village Board of Trustees approved a resolution that provides, in relevant part:

WHEREAS. The disclosure of confidential information acquired during an Executive Session of the Village Board of Trustees constitutes a violation of New York State General Municipal Law § 805-a and may warrant removal from office where such disclosure was intentional and knowingly made;....

The Village Board hereby affirms and states that when a Village Board Member is determined, by the Village Board,...to have disclosed any confidential information acquired during an executive session of a public body, such Village Board Member's act or omission shall be deemed outside the scope of public duties of such Village Board Member for the purposes of Chapter 15 of the Village Code (Defense and Indemnification).

The resolution, standing alone, is not necessarily problematic because it does not define "confidential information." However, I understand that the mayor has taken the position that *all information* discussed during an executive session of the Board of Trustees is considered "confidential information" for purposes of this resolution. I have heard from individual trustees that have expressed the view that this restrictive approach has chilled their willingness to engage in dialogue with the community regarding matters discussed in executive session that they might otherwise have felt comfortable discussing.

I understand that your office has addressed this issue previously and concluded that the view "that information that may be discussed in executive session is confidential is inaccurate and contrary to the weight of judicial authority."⁴ In addition, your office has noted the

¹ See, e.g. *Zehner v. Board of Educ. Of Jordan Elbridge Central Sch. Dist.*, 29 Misc.3d 1206, (Supr. Ct. Onondaga Cty. 2010)(verbatim recitation of statutory language insufficient to convene executive session), *aff'd* 91 A.D.3d 1349 (4th Dept. 2012); *Daily Gazette Co. v. Town Bd., Town of Cobleskill*, 111 Misc.2d 303, 304 (Supr. Ct. Schoharie Cty. 1981)("insufficient to merely regurgitate the statutory language....boilerplate recitation does not comply with the intent of the statute"); Jeff Tremblay et al., *Municipal Ethics in New York: A Primer for Attorneys and Public Officials* 355 (2016)("a motion indicating that the issue to be discussed involves '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").

² See *Weatherwax v. Town of Stony Point*, 97 A.D.2d 840 (2d Dept. 1983)("belief of 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").

³ Committee on Open Government, Advisory Opinion dated March 10, 2003 (OML-AO-3601).

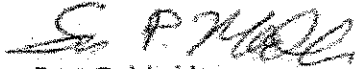
⁴ Committee on Open Government, Advisory Opinion dated Dec. 12, 2007 (OML-AO-4530); see also Committee on Open Government, Advisory Opinion dated June 25, 2008 (OML-AO-4649)("The only instances, in my view, in which members of a public body are

serious constitutional concerns of blanket prohibitions on disclosure of matters discussed during executive sessions.⁵

The Village mayor's predilection for executive sessions, her failure to comply with the OML requirements for convening executive sessions, and her suppression of trustee discussion of matters discussed in executive sessions have stifled community awareness and discussion of myriad matters of public import. Consequently, these actions offend the spirit and principles of both the OML and the First Amendment, which compel strong presumptions of transparency and the free flow of public information.

Thank you for your consideration of this matter. I look forward to your counsel. Please do not hesitate to contact me at maddens1@mac.com or 917-679-5392.

Sincerely,



Sean P. Madden

prohibited from disclosing information would involve matters that are indeed confidential because a statute forbids disclosure."); Committee on Open Government, Advisory Opinion dated Mar. 5, 2001 (FOIL-AO-12558) ("Since a public body may choose to conduct an executive session or discuss an issue in public, information expressed during an executive session is not 'confidential.'").

⁵ Committee on Open Government, Advisory Opinion dated Mar. 5, 2001 (FOIL-AO-12558).

Village of Tuxedo Park Board of Trustees Executive Sessions

<u>Date</u>	<u>Basis for Executive Session</u>
1/18/17	to discuss collective bargaining, an employment issue, and a financial issue
12/21/16	to discuss litigation and contracts
12/5/16	to discuss contract matters
11/30/16	to discuss a past litigation judgment to discuss litigation and contracts to discuss contracts
11/16/16	to discuss water payment arrears in specific accounts
10/19/16	to discuss employment issues, litigation and collective bargaining
10/1/16	to discuss possible litigation and the Pilgrim Pipeline
9/21/16	to discuss personnel matters
9/21/16	to discuss an employee matter, litigation, board appointments, and legal issues regarding the Wee Wah Dam
8/24/16	to discuss an employee matter and litigation
7/26/16	to discuss personnel issues
6/28/16	to discuss security, litigation, and personnel issues to discuss security, possible litigation, a tax certiorari with the possibility of voting when regular session is re-opened to discuss litigation
5/27/16	for the purpose of discussing public safety
5/24/16	to discuss an employment issue and the PILOT program to discuss litigation and an employment issue
5/12/16	for the purpose of discussing security of the main entrance, employee retirement, possible litigation, and the potential purchase and acquisition of real estate
5/5/16	for the purpose of discussing employment issues for the purpose of discussing medical benefits offered to non-union employees
4/26/16	to discuss a specific personnel issue to discuss a spreadsheet on personnel payroll and a specific personnel issue