

The legislature's Roll with the BOE

By Kenneth Walter

1 Good morning.

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3 A week ago, on Thursday, April 9 at approximately 9 AM, the Government Services Committee met. The
4 agenda included a report from the Board of Elections, but they were not present.

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6 About twenty-eight minutes into the meeting, legislator Brian McPhillips mentioned that he saw on
7 Facebook, and so did I, that election district 6 voters from the White Sulfur Springs area were being
8 moved to two other voting locations. During the discussion, it was emphasized that the Board of Elections
9 has autonomy. Some legislators questioned the extent of this autonomy and what role the legislature
10 plays.

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12 I researched those issues, and here's what I found:

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14 - Under the Open Meetings Law of 1996, opinion OML-AO-o2646, Robert Freeman, Executive Director,
15 opined that the Board of Elections is a public body based on election law §3-200. It is created by the
16 state, consists of two or more members (the commissioners), and performs governmental functions. It
17 must act by a quorum. Therefore, their decision-making process must occur in a public meeting.

18 - When there are changes or policy changes, these are official acts. A properly noticed public meeting is
19 required, allowing the public to attend, unless it's an executive session. They must keep minutes of the
20 motions, votes, and actions. This directly affects how the BOE conducts its internal workflow. It means
21 advanced notice of meetings, public access, and, when feasible, online posting of minutes within two
22 weeks.

23 - The BOE cannot quietly change procedures, alter polling sites, or adopt new operational practices
24 without a public meeting. This forces the BOE to build transparency in their operations. It prohibits
25 informal or staff-only decision-making. Decisions should not, I repeat, should not be made by
26 commissioners in staff meetings, conduct serial meetings or email chains to avoid a quorum, or adopt new
27 practices without a public vote. This is to prevent operations from shifting behind closed doors and
28 ensures that policy-level changes occur in public view.

29 - The Open Meetings Law protects legislative oversight. Because BOE meetings must be public and

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30 minutes must be produced, the legislature gains a record of the BOE's decisions, transparency in
31 operations, and a basis for budget, compliance, and administrative oversight. Open Meeting Law is not
32 just a transparency law; it is a structural accountability mechanism for the legislature.

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34 The Open Meetings Law applies when the BOE practices changes. This becomes critical if the BOE
35 changes how it designates polling sites, conducts canvassing, trains inspectors, processes daily absentees,
36 handles public access, or office hours. These changes must be discussed and adopted at a public meeting
37 with minutes. This prevents quiet operational shifts that could affect voters, parties, or the legislature.

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39 To summarize, the Open Meetings Law governs the BOE's operations because the BOE is a public body
40 whose decisions must be made transparently. Anytime commissioners meet to conduct public business,
41 they must do so in a publicly noticed meeting, keep minutes, and make those minutes available. This
42 ensures that changes in BOE proceedings, polling place decisions, and election administration practices
43 occur in public view, providing accountability to voters and the county legislators.

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45 Now, let's look at the election law and the responsibility of who the Board of Election reports to or not.

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47 - Under election law §3-200 and §3-204, there is reporting to the NYS Board of Elections and some state
48 and federal agencies. There is nothing in the law that requires them to report to the county.

49 - Oversight arises through the legislative powers, not through reporting statutes. The legislature controls
50 the BOE's annual budget, staffing levels, and funding for equipment, poll sites, training, and operations.

51 Because you approve these items, the Board of Elections must make budget justifications, expenditure
52 explanations, staffing rationales, and capital equipment requests. This is a mandatory administrative
53 interaction.

54 - As the appointing authority, you may request performance information, administrative updates,
55 compliance documentation. You control the office space. You provide HR and payroll, procurement, legal
56 compliance, countywide administrative policies. This creates a de facto reporting of compliance
57 certification, procurement documentation, and personnel actions requiring approval. They are not
58 autonomous when it comes to oversight.

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60 Best practices, as was practiced before, include information about polling place changes, major equipment
61 failures, redistricting impacts, anticipated overtime or cost overruns, any legal challenges affecting county
62 operations, staffing shortages, security incidents, or cybersecurity needs. These are customary, not
63 statutory.

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65 So what does that mean today? This all started over and based upon comments on Facebook after the
66 posting, which I refer to as the Chowder War.

67

68 In the Town of Liberty, Election District Number 6, commonly referred to as White Sulfur Springs area,
69 they used to sell chowders on Election Day and made a lot of money for the not-for-profit to help them
70 operate. For some reason, a kerfuffle happened, and the Board of Elections has decided, without any input
71 from anybody and quietly on their own in the background, to ban that operation from the polling place.

72

73 This is not a new situation. The Hasbrouck House in Hasbrouck used to have a bake sale in the old stone
74 house where the election was held, not in the same room. They had to stop, and voting was moved to
75 Woodbourne Fire House. The youth center in Callicoon used to have a soup sale of some sort, and they
76 had to stop.

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78 It is important to maintain the integrity of an election place. I will grant you that. But all things can be
79 mitigated, so all are happy. The BOE chose to not mitigate, but inconvenience and possibly suppress voter
80 turn out.

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82 As a result, a decision was made by the Board of Elections in private to have half of the people in the
83 election district go one way towards Liberty and the other half go towards Youngsville area to vote.
84 Again, in violation of the Open Meetings Law. Interestingly, this information was posted on Facebook
85 after the closeout date of notifying the New York State Board of Elections.

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87 To me, the only way this could be rectified right now is through the courts, through an Article seventy-

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88 eight proceeding by those aggrieved in Election District Number six by filing an Article seventy-eight.
89 The court, I believe, has the power and authority to overturn the BOE's decision and revert back to the old
90 voting district.

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92 Thank you very much for listening, and I hope I informed you as to your powers as a legislature for
93 oversight of the Board of Elections, and hopefully the Board of Elections in the future will act in a more
94 open and transparent manner.

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August 9, 1996

Mr. Peter W. Sluys
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Pearl River, NY 10965

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. Sluys:

I have received your letter of August 8. You indicated that the Rockland County Commissioners of Elections "are unsure whether the filing of rulings and the hearings that precede them fall under the Open Meetings Law."

In this regard, in good faith, I must admit to an absence of expertise concerning the means by which county boards of elections carry out their duties. It appears that you are referring to proceedings conducted in relation to objections to nominations and designations filed pursuant to §6-154 of the Election Law. Based on that assumption, I offer the following comments.

First, the Open Meetings Law pertains to public bodies, and §102(2) of that statute defines the phrase "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."

Based on the terms of the definition, as well as §3-200 of the Election Law, I believe that a county board of elections constitutes a "public body" subject to the Open Meetings Law.

Second, as a general matter, meetings of public bodies must be conducted open to the public. However, there are two vehicles under which a meeting may be closed. One involves executive sessions. Section 102(3) of the Open Meetings Law defines the term "executive session" to mean a portion of an open meeting during which the public may be excluded. Section 105(1) prescribes a procedure that must be accomplished in public before an executive session may be held, and it specifies and limits the subjects that may properly be considered in an executive session. From my perspective, it is unlikely that any of the grounds for entry into executive session would be applicable. The other vehicle involves "exemptions" from the Open Meetings Law; if an exemption applies, the Open Meetings Law does not.

Potentially relevant to the matter is §108(1), which exempts "judicial or quasi-judicial proceedings" from the coverage of the Open Meetings Law. Often it is questionable where the line of demarcation may be drawn between what might be characterized as quasi-judicial and administrative or perhaps quasi-legislative kinds of functions. In a decision rendered by Judge Cooke, who later served as Chief Judge of the Court of Appeals, it was found that:

"It is difficult at times to distinguish judicial acts from those which are merely legislative, executive or administrative and that act of an administrative or ministerial officer does not become judicial and therefore subject to review by certiorari merely because it is necessary to use discretion and judgement its performance...The test may be stated to be that action is judicial or quasi-judicial when, and only when, the body or officer is authorized and required to take

evidence and all the parties interested are entitled to notice and a hearing and, thus, the act of an administrative or ministerial officer becomes judicial and subject to review by certiorari only where there is an opportunity to be heard, evidence presented and a decision had thereon...Here, there is nothing in the laws in question directing or authorizing the Superintendent of Public Works to conduct such a hearing or to give the parties interested an opportunity to be heard, nor is there any allegation in the petition that such a hearing was conducted, and the determinations of Superintendent would not be judicial or quasi-judicial in nature" [City of Albany v. McMorran, 230 NYS 2d 434, 436-437 (1962); see also Schettino v. Alter, 510 NYS 2d 806, 809 (1986)].

While hearings or oral arguments, for example, as well as administrative matters must be conducted in public, following those public proceedings, it would appear that a board's deliberations might be quasi-judicial in nature if they include the ingredients described above and, therefore, outside the coverage of the Open Meetings Law. It is emphasized, however, that even when the deliberations of such a board may be outside the coverage of the Open Meetings Law, its vote and other matters would not be exempt. As stated in Orange County Publications v. City of Newburgh:

"there is a distinction between that portion of a meeting...wherein the members collectively weigh evidence taken during a public hearing, apply the law and reach a conclusion and that part of its proceedings in which its decision is announced, the vote of its members taken and all of its other regular business is conducted. The latter is clearly non-judicial and must be open to the public, while the former is indeed judicial in nature, as it affects the rights and liabilities of individuals" [60 AD 2d 409,418 (1978)].

Therefore, although a board of elections might deliberate in private, based upon the decision cited above, the act of voting or taking action must in my view occur during an open a meeting.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Elections

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