The Ethics of Transparency and the Transparency of Ethics: Reconciling the Ethical Duty of Confidentiality Under Article 18 of the GML With the Duty to Disclose Under FOIL and the OML

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Logic and experience demonstrate that most government officers and employees are honest, and truly wish to do the right thing. Yet, honesty alone may not always offer sufficient protection from inadvertent misconduct. In particular, the different and sometimes contrary standards of conduct applicable in the public and private sectors can sometimes make prohibited conduct appear innocent.

One obvious example of a standard of conduct applicable in the public sector that differs markedly from the practices prevalent in the private sector is the rule restricting the solicitation or acceptance of gifts and favors by municipal officers or employees. In the private sector, gifts are freely exchanged to promote business. The practice is so widely accepted that the Internal Revenue Service recognizes business entertainment as an ordinary and necessary business expense.[1] However, the solicitation or acceptance of gifts and favors by government officers or employees tends to create an improper appearance at the least, and may be a corrupting influence. In some cases, this private sector norm may amount to a public sector crime.[2]

Another area of distinct difference between the cultures of the private and public sectors is in the extent to which information may be withheld as "confidential."

Private sector firms devote considerable resources to the protection of proprietary information, customer lists, formulas, and trade secrets. But, beginning in the 1960s with the enactment by Congress of the Freedom of Information Act (FOIA),[3] and continuing in the post-Watergate era, we have come to view openness and transparency in government as a fundamental public policy, essential to keep government accountable, and to foster public confidence in government. In New York, this fundamental public policy is expressed in the form of the Freedom of Information Law (FOIL)[4] which makes most government records available for public inspection and copying, and the Open Meetings Law (OML)[5] which makes most government meetings open to attendance by the public.

New York General Municipal Law §805-a provides, in pertinent part, that no municipal officer or employee shall disclose confidential information acquired by him or her in the course of his or her official duties or use such information to further his personal interests. However, the term "confidential information" is neither defined in the General Municipal Law (GML), nor in a similar provision of the Public Officers Law applicable to state employees.[6] Moreover, there appears to be no consensus as to the meaning of "confidential information" as that term is used by GML Article 18.

In this article, we will explore the meaning of the term "confidential information" as applied in various government contexts, including the confidentiality of matters discussed in executive session, the confidentiality of proceedings before a local municipal board of ethics, the scope of the attorney-client privilege in the government setting, and the broader duty of confidentiality owed by government attorneys under the New York Rules of Professional Conduct.

May a Local Law Prohibit Disclosure of Matters Discussed in Executive Session?

In the year 2000, the Attorney General was asked whether a municipality has the statutory authority under GML §806 to adopt a code of ethics that prohibits members of the legislative body from disclosing matters discussed in executive session, and whether such a prohibition would be consistent with the Open Meetings Law and the Freedom of Information Law. The Attorney General opined that a local municipality has the statutory authority to prohibit members of its legislative body from disclosing matters discussed in executive session, and that such a prohibition would be

consistent with the Freedom of Information Law and the Open Meetings Law.[7] The Attorney General noted that "any such restriction on speech would, of course, be subject to further state and federal constitutional requirements."

The Attorney General reasoned that the purpose of an executive session is to permit members of public bodies to discuss sensitive matters in private, and that the matters that are permitted to be discussed in executive session are matters which, if disclosed, could jeopardize sensitive negotiations, personal privacy, law enforcement and public safety.[8] The Attorney General cited a 1997 decision of the Third Department,[9] finding that disclosure of matters discussed in executive session would defeat the parallel legislative purposes of the Open Meetings Law and the Freedom of Information Law, and effectively applying the statutory grounds for meeting in executive session as exceptions to mandatory disclosure under the Freedom of Information Law. The Attorney General concluded that the GML §806(1)(a) authorization to adopt municipal codes of ethics that prohibit disclosure of information is consistent with and reinforces the fact that records of discussions properly taking place in executive session may be withheld from public disclosure.

In a series of staff advisory opinions,[10] the Executive Director of the Department of State Committee on Open Government reached a different conclusion. In response to a 2007 inquiry from a local school board member who received a memo from the school district citing GML §805-a and Board Policy to prohibit the disclosure of information acquired in executive session, the Executive Director opined that:

> … [I]n most instances, even when records may be withheld under the Freedom of Information Law or when a public body…may conduct an executive session, there is no obligation to do so. The only instances, in my view, in which members of a public body are prohibited from disclosing information would involve matters that are indeed confidential. When a public body has the discretionary authority to disclose records or to discuss a matter in public or in private, I do not believe that the matter can properly be characterized as "confidential."[11]

Citing a 1986 decision by the New York Court of Appeals,[12] the Executive Director observed that the characterization of records as "confidential" must be based on statutory language that specifically confers or requires confidentiality; and that to confer or require confidentiality, a statute must leave no discretion to an agency (*i.e.,* the agency *must* withhold the records). Because the exemptions from mandatory disclosure set forth in the Freedom of Information Law are permissive (*i.e.,* the agency *may* withhold the records), the Executive Director concluded that the only situations in which an agency must withhold records would involve instances in which a statute other than the Freedom of Information Law prohibits disclosure. The Executive Director concluded that "[s]ince 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.'"

New York State Attorney General Opinion—A Closer Look

The Attorney General's Office issued its April 6, 2000 opinion in response to an inquiry from the Corporation Counsel of the City of Rome. There, the Attorney General opined that a local legislative body has the statutory authority by local law or in its code of ethics to prohibit a legislator from disclosing matters discussed in executive session.[13] The Attorney General noted that "while nothing in the New York Public Officers Law directly prohibits such disclosure, such a prohibition is entirely consistent with provisions of the Open Meetings Law and the Freedom of Information Law."

The Attorney General observed that §806 of the New York General Municipal Law requires that each local government and school district must adopt a code of ethics setting forth the standards of conduct reasonably expected of its officers and employees, and that §806(1)(a) expressly provides that such codes of ethics may prohibit disclosure of information.[14]

The Attorney General further noted that a local government is also authorized by §10 of the Municipal Home Rule Law to enact local laws relating to the powers, duties and other terms and conditions of employment of its employees; its property, affairs or government; and the public health, safety and welfare.[15]

The Attorney General reasoned that a restriction on disclosure of information discussed in an executive session would further the statutory purposes of executive sessions, as set forth in the Public Officers Law. A local legislative body may only conduct an executive session upon a majority vote of its total membership taken in an open meeting in accordance with a motion identifying the area or areas of subjects to be considered. The underlying rationale for an executive session is to permit members of public bodies to discuss sensitive matters in private. A review of the statutorily enumerated subjects that may be discussed in executive session, set forth in Public Officers Law §§105 (1)(a)-(h), clearly recognizes that there are matters, which if disclosed, could jeopardize sensitive negotiations, personal privacy, law enforcement and public safety:

1. Matters which will imperil the public safety if disclosed;
2. Any matter which may disclose the identity of a law enforcement agent or informer;
3. Information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;
4. Discussions regarding proposed pending or current litigation;
5. Collective negotiations under the Taylor Law;
6. The medical, financial, credit or employment history of a particular person or corporation or matters leading to the appointment, employment, promotion or discipline of a person;
7. Preparation, grading or administration of examinations;
8. Acquisition, sale, or lease of real property or the proposed acquisition of securities or sale or exchange of securities held by such public body but only when publicity would substantially affect the value thereof.[16]

The Attorney General further reasoned that disclosure of matters discussed in executive session would defeat the apparent legislative intent of authorizing local legislative bodies to discuss these matters in private and that disclosure would be contrary to the public welfare.[17] A locally enacted provision prohibiting disclosure would thus further the statutory purpose of executive sessions and would promote the public interest. The Attorney General cited a 1997 Appellate Division, Third Department decision in *Kline v. County of Hamilton*, 235 AD2d 44 (3d Dep't 1997), holding that a legislative body may withhold from public disclosure tape recordings, transcripts and minutes of discussions conducted in executive session. The Attorney General quoted the Third Department:

> It makes little sense to permit government bodies to meet in private under clearly defined circumstances only to subsequently allow the minutes of those private meetings to be publicly accessed under FOIL. Only in the event that action is taken by a formal vote at an executive session do both FOIL and the Open Meetings Law require a public record of the manner in which each Board member voted.[18]

The Attorney General further quoted the Court in stating that:

> In our view, memorialized discussions at duly convened executive sessions, which do not result in a formal vote, whether consisting of privileged attorney-client communications or otherwise (*see*, Public Officers Law §105), are not the type of governmental records to which the public has to be given access. While the purpose of FOIL is to lift the "cloak of secrecy or confidentiality" (Public Officers Law §84) from governmental records which are part of the governmental process, where, as here, confidentiality has been specifically sanctioned by Public Officers Law §§105 and 106, the records at issue fall within the exemption of Public Officers Law §87(2)(a) and should be shielded from public disclosure.[19]

It is the Attorney General's view that since a governing body of a municipality may withhold any records of discussion properly taking place in an executive session, §806(1)(a) of the General Municipal Law, authorizing municipal codes of ethics that prohibit disclosure of information is consistent with and reinforces this fact, and thus a local legislative body has the statutory authority to prohibit a legislator from disclosing matters discussed in executive session. The Attorney General noted, however, that the decision to enter into executive session is discretionary and that any prohibition on speech would be subject to State and Federal Constitutional requirements.[20]

New York State Committee on Open Government Opinions—A Closer Look

As a result of the opinion received by its Corporation Counsel from the Attorney General, the City of Rome adopted an ordinance prohibiting City officers or employees from disclosing "by any means" certain information "discussed or deliberated during a properly convened executive session," and further provided that a violation "shall be punishable pursuant to the general penalty provision of the Code of Ordinances." The Mayor of Rome also issued an executive order prohibiting the disclosure of "any sensitive matter or information that if disclosed would disrupt the efficient and effective operations of the City government or would impair the public officer's close working relationship with the Mayor."

A member of the City of Rome's government then sought an advisory opinion from the Committee on Open Government concerning the propriety of those actions.

In FOIL-AO-12558, Executive Director Robert Freeman opined that the actions were of questionable legality, and offered the following analysis as set forth herein.

Giving "due respect" to the Appellate Division and the Attorney General, Executive Director Freeman stated that the conclusion they reached with regard to the notion of "confidentiality" and the scope of §87(2)(a) is inconsistent with more detailed analyses by the New York of Appeals in *Capital Newspapers v. Burns*, 67 NY2d 562 (1986) and by federal courts in construing the Freedom of Information Act (FOIA). The Executive Director opined that a record is not "confidential" under FOIL, unless the record is specifically exempted from disclosure by state or federal statute in accordance with §87(a) of the Public Officers Law. Similarly, §108(3) of the Open Meetings Law refers to matters made confidential by state or federal statute as "exempt" from the provisions of that statute.

According to Executive Director Freeman, both the New York Court of Appeals and federal courts in construing access statutes have determined that the characterization of records as "confidential" or "exempted from disclosure by statute" must be based on federal or state statutory language that explicitly confers or requires confidentiality.[21]

In *Capital Newspapers v. Burns*, the Court of Appeals declared that: "Although we never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a clear legislative intent to establish and preserve that confidentiality which one resisting disclosure claims as protection."[22]

In construing the equivalent exception to the right of access conferred by the FOIA (the federal Freedom of Information Act), Executive Director Freeman observed that it has been found that:

> Exemption 3 excludes from its coverage only matters that are: specifically exempted from disclosure by statute (other than section 552b of this title) provided that such statute (A) **requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue**, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. 5 U.S.C. § 552(b)(3) (emphasis in original).[23]

Records sought to be withheld under the authority of another statute thus escape the release requirements of FOIA if—and only if—that statute meets the requirements of Exemption "3," including the threshold requirement that the statute specifically exempt matters from disclosure. In other words, a statute that is claimed to qualify as an Exemption "3" withholding statute must, on its face, exempt matters from disclosure.[24] In the words of the Executive Director of the Committee on Open Government, to be "exempted from disclosure by statute, both state and federal courts have determined that a statute must leave no discretion to an agency: it must withhold such records."[25]

When records are not exempted from disclosure by a separate statute, both FOIL and FOIA are permissive. Although an agency may withhold records in accordance with the grounds for denial set forth in §87(2) of the Public Officers Law, the Court of Appeals in *Capital Newspapers* held that the agency is not obliged to do so and may choose to disclose—it has the discretion to do either.[26]

The only situations in which an agency would be required to refrain from disclosure would involve matters in which a statute other than FOIL prohibits disclosure (the same is true under FOIA). There is nothing inherently confidential about records that an agency may choose to withhold or disclose; only when an agency has no discretion and must deny access would records be confidential or "specifically exempted from disclosure by statute" in accordance with §87(2)(a).[27]

The Committee on Open Government employs the same analysis in the context of the Open Meetings Law. While that statute authorizes public bodies to conduct executive sessions in §105(1)(a)-(h) of the Public Officers Law, there is no requirement that an executive session be held even though the public body has the right to do so. 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." To be "confidential," a federal or state statute must prohibit disclosure and leave no discretion to an agency or official regarding the ability to disclose.[28]

For example, if a discussion by a board of education concerns a record pertaining to a particular student *(e.g.* disciplinary action), the matter must be discussed in private and the record must be withheld to the extent that public discussion or disclosure would identify the student. The Family Educational Rights and Privacy Act, a federal statute, 20 USC §1232(g), generally prohibits an educational agency from disclosing educational records or information derived from those records that are identifiable to a student, absent parental consent. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from disclosure by statute (OML §108(3)). Similarly, in the context of FOIL, an

education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both instances, a board of education would be prohibited from disclosing same, because a statute requires confidentiality.[29]

The published opinions of the Committee on Open Government recognize that the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. In a similar fashion, the grounds for withholding records under FOIL relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. Moreover, a unilateral disclosure by a member of the public body might serve to defeat or circumvent the principles under which those bodies are intended to operate.[30]

Further, disclosures made contrary to, or in the absence of consent by the majority of the members of a deliberative body, could, in some cases, result in an unwarranted invasion of personal privacy, impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and to the functioning of government and disclosures should, in the view of the Executive Director, be cautious, thoughtful and based on an exercise of reasonable discretion.[31]

Opinions of the New York State Commissioner of Education

In a 2007 opinion,[32] the Executive Director expressed his disagreement with opinions of the Commissioner of Education finding that disclosures by school board members of "confidential information" obtained at an executive session of a board meeting violated §805-a-(1)(b) of the General Municipal Law. One decision in particular, the *Application of Patrick A. Nett and Ronald R. Raby for the Removal of Tina Marie Weeks as a Member of the Board of Education of the Patchogue-Medford Union Free School District*, issued on October 24, 2005, is of interest in examining the difference of opinion between the Committee on Open Government and the Department of Education as to the confidentiality of discussions properly held in executive session.[33]

In 2003, the School District began an investigation into allegations of misconduct against a school district employee. The district brought disciplinary charges against the employee and a hearing was conducted pursuant to §75 of the Civil Service Law. At the conclusion of the hearing, the employee was found guilty of 17 charges of misconduct and termination of his employment was recommended. By a 4-3 vote, the board adopted the hearing officer's findings and recommendations, and terminated the employee. Board member Tina Weeks voted against it. The terminated employee commenced a federal civil action challenging his termination and seeking, among other things, damages, reinstatement, back pay and benefits. The board members voting in favoring of the termination, the school district and others were named as defendants in the lawsuit.

During the deposition of the terminated employee in his civil suit, it was revealed that board Member Tina Weeks provided the terminated employee with recordings of four or five executive sessions at which his possible termination was discussed. The other board members did not know that Weeks surreptitiously recorded the sessions and did not consent to the recording. The school district did not have its own policy prohibiting the disclosure of confidential information.

The other board members maintained that the statements made in executive session were confidential and that Weeks violated the fiduciary duty that she owed to the District as a board member, her oath of office, and the prohibition against unauthorized disclosure of confidential information set forth in GML §805-a. They asserted that Weeks should be removed from the Board.

Board member Weeks admitted that she recorded the executive sessions without the knowledge of her fellow board members and gave the recordings to the employee, but denied that she willfully violated the law, likened herself to a whistleblower, and asserted that she acted in good faith based on the advice of counsel.

Citing previous Departmental opinions, the Commissioner of Education found that Weeks' unilateral taping and disclosure of the executive session material was a violation of her fiduciary duty as a board member, her oath of office and the GML. The Commissioner observed that while the term "confidential information" is not defined in the GML, notably absent from GML §805-a (1)(b) is any express statement that the basis for confidentiality be statutory, and thus it is reasonable to assume that the State legislature intentionally meant to omit such a requirement. The Commissioner concluded that in the absence of a clear statutory definition, and given the importance of ensuring a uniform application in the educational system, the interpretation of "confidential information" in the school context is a matter best left to the Commissioner.[34]

However, the Commissioner stated that he was constrained from removing Board member Weeks,

in part, due to her reliance upon opinions from the Committee on Open Government. The Commissioner opined:

> While I respectfully disagree with the Executive Director's narrow interpretation, I find that his advisory opinions gave Weeks a reasonable basis to believe that her actions were legal. Therefore, on the record before me, I cannot find the requisite willfulness to justify Weeks' removal from office.[35]

Can "Confidential Information" Have a Different Meaning for Purposes of GML Article 18 Than It Does for Purposes of FOIL and the OML?

GML §805-a is redundant if it merely prohibits the disclosure of information already prohibited from disclosure by federal or state law. Presumably, however, the Legislature intended to impose some duty in enacting the statute. To reconcile the ethical duty of confidentiality under GML Article 18 with the duty to disclose under FOIL and the OML, we must conclude that the term "confidential information" has a different meaning for purposes of the GML than it does for purposes of FOIL and the OML; and that GML §805-a would be violated if a municipal officer or employee made an unauthorized disclosure of information that the municipality withheld from public disclosure in the lawful exercise of the discretion afforded to the municipality by FOIL or the OML.

Thus, we propose the following definition of the term "confidential information" as used by GML §805-a:

> **Confidential Information**. Information in any format that is either: (i) prohibited from disclosure to the public by federal or state law; or (ii) withheld from public disclosure in the lawful exercise of the discretion afforded to the municipality by FOIL or the OML.[36]

The open question remains whether the discretion to withhold information from public disclosure may be exercised by categorical legislative fiat as the Attorney General's opinion suggests, or whether it must be exercised by the municipal information officer or government body on a case by case, document by document and meeting by meeting basis consistent with Executive Director Freeman's interpretation of *Capital Newspapers v. Burns, supra.* Under this approach, each discretionary denial of access would be subject to Article 78 review to determine whether the municipality abused its discretion.[37] As we will see, recent trial level rulings suggest the latter.

"Confidential Government Information": New York Rules of Professional Conduct

While there appears to be no consensus as to the meaning of "confidential information" as that term is used by Article 18 in regulating the conduct of municipal officers and employees, government information is presumptively subject to public disclosure.[38] However, the same information may be presumptively confidential if the custodian of that information is a government attorney.

Government attorneys must adhere not only to the standards of conduct applicable to their conduct as government officers or employees, they must also adhere to the standards of conduct applicable to attorneys engaged in the practice of law.

The Appellate Divisions of the New York Supreme Court promulgated joint Rules of Professional Conduct[39] effective April 1, 2009, in which they adopted a definition of "confidential government information" for the purpose of regulating the professional conduct of current and former government attorneys.[40] Unlike the meaning given to the term "confidential information" by the Committee on Open Government for purposes of the Freedom of Information Law, the Rules of Professional Conduct require current and former government attorneys to refrain from disclosing government information that a municipality "may" withhold from public disclosure unless it is otherwise available to the public.

Rule 1.11 of the Rules of Professional Conduct applicable to current and former government attorneys defines "confidential government information" as "information that has been obtained under governmental authority and that, at the time the Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public."

May a Local Law Prohibit Disclosure of Records of Proceedings Before the Local Board of Ethics?

In 2011, the Board of Ethics of the City of White Plains dismissed as moot a *sua sponte* complaint alleging non-compliance by the then Mayor with certain provisions of GML Article 18 and the City Code of Ethics. After a preliminary investigation, the Board of Ethics served the Mayor with formal charges. The Mayor resigned his office before a hearing was conducted. After the complaint was dismissed, the *Journal News* submitted a FOIL request for the entire record

of proceedings before the Board of Ethics. The FOIL request was granted in part and denied in part. The *Journal News* then filed a proceeding pursuant to CPLR Article 78 seeking disclosure of the record including, among other things, the statement of formal charges. The Westchester Supreme Court (Hubert, J.) granted the petition in part, and denied it in part.

Before discussing the 2012 decision *In the Matter of the Application of the Journal News v. City of White Plains*,[41] it is useful to consider the competing policies favoring confidentiality and transparency in an ethics investigation.

Why Confidentiality?

Confidentiality at the preliminary stages of an ethics investigation serves to protect the privacy and reputation of a presumptively innocent municipal officer or employee who is the subject of an ethics complaint that has not yet resulted, and may never result, in the filing of formal charges. It encourages the reporting of suspected ethical violations by protecting the identity of whistleblowers in the preliminary stages of an investigation; it avoids subornation of perjury, witness tampering and spoliation of evidence; and it fosters freedom of deliberation among an ethics board without fear that the board's preliminary view of a matter will be made public before formal charges are filed and a due process hearing is conducted.

Confidentiality is no less important in the rendering of ethics advice by a local municipal ethics board. Municipal officers and employees are more likely to seek ethics advice when they are assured that the inquiry and the answer will be held in confidence.

Why Transparency?

In the post-Watergate era, it is the settled consensus that open government is a fundamental value in a democratic society, and that to hold government officials accountable, the public must know what they are doing. This is no less applicable to a local municipal ethics board than it is to any other government agency.

Application of Exceptions under FOIL and OML

Under FOIL, government records are presumed to be open to public inspection and copying, except to the extent that records or portions thereof are properly the subject of one or more of the limited exemptions that are set forth in §§87(2)(a)-(j) of the Public Officers Law.

In *Journal News* v. *City of White Plains*, the Board of Ethics relied on two distinct statutory exceptions to mandatory disclosure under FOIL in partly denying the newspaper's request for access to the entire record of its preliminary investigation. The Board of Ethics withheld documents that it determined would, if disclosed, result in an unwarranted invasion of personal privacy, and documents that were intra-agency and inter-agency materials which were not statistical or factual tabulations or data, instructions to staff that affect the public, or final agency policy or determinations.

The City of White Plains Board of Ethics is vested with the power and duty, among others, to investigate complaints involving alleged violations of the City Code of Ethics and Article 18 of the General Municipal Law. However, the Board of Ethics is authorized only to make recommended findings and conclusions of law for consideration by the governing body. The Board has no authority to make a final determination.

In 2010, the Board of Ethics initiated an inquiry into the alleged non-compliance of then Mayor Adam Bradley with certain provisions of the City Code of Ethics and Article 18 of the General Municipal Law. The investigation concerned allegations that the Mayor rented an apartment at below market cost from a developer who was actively engaged in business with the City of White Plains.[42]

After a preliminary review of documents, the Board made a finding of probable cause that the Mayor had violated the City Code of Ethics and GML Article 18, and initiated a full investigation. The Board's investigation consisted of reviewing documents obtained from the City departments and agencies, the Mayor and from other sources through voluntary disclosure and through subpoena, and conducting sworn interviews, including interviews of the Mayor, City employees, and others.

The purpose of the investigation by the Board of Ethics was to determine whether formal charges were warranted, in which case a public hearing would be conducted under §2-5-112 of the Code of Ethics. At a public hearing after formal charges are filed, the Board would have had the burden of proving the charges by clear and convincing evidence. The Mayor would have been entitled to the assistance of counsel, and to copies of all documents introduced at the hearing, written documents of witnesses who would be called to testify, and any exculpatory evidence known. After the hearing, the Board would have issued recommended findings of fact and conclusions of law to the Common Council and its report would have been filed with the City Clerk for public review.

While the investigation was pending, Mayor Bradley was found guilty of the attempted assault and harassment of his wife, and criminal contempt following a non-jury trial.[43]

In late January 2011, after conducting a full investigation, the Board served a statement of formal charges

on Mayor Bradley. The charges alleged that the Mayor had solicited and accepted an improper gift in the form of his discounted rent in violation of the City Code of Ethics and GML §805-a. On February 18, 2011, less than 30 days after being served, and prior to any answer or public hearing on the charges, the Mayor resigned from office. In a written decision dated March 1, 2011, the Board dismissed the complaint on the grounds that it no longer had jurisdiction over former Mayor Bradley.

The Board's investigation was closely followed by the *Journal News*, which published several articles about the investigation. The *Journal News* submitted a FOIL request to the Board seeking, among other things, any and all documents related to the ethics probe of the former Mayor, including any written complaint, legal analysis of the complaint, any formal charges and any answers to formal charges, and any information and documentation including photographs, e-mails, subpoenas and transcripts of testimony from Mayor Bradley and witnesses. The *Journal News* also requested a copy of any paperwork relating to the dismissal of the investigation and a breakdown of payments made to outside counsel in connection with the matter.

The Board of Ethics granted in part and denied in part the FOIL request. The *Journal News* was provided with a copy of the Board's Dismissal for Lack of Jurisdiction which by then had been filed with the City Clerk, and was also provided copies of all bills for legal services rendered by the Board's special counsel with the appropriate attorney-client redactions. The request for the remaining documents was denied, based on the unwarranted invasion of personal privacy and the inter-intra agency exceptions under FOIL. The Board argued that the City's Common Council had exercised the discretion afforded to the City under FOIL to withhold from public disclosure the "pre-decisional" materials developed by the Board of Ethics in a investigation resulting in a dismissal when the Common Council enacted §2-5-111(a)(14) of the Code of Ethics, which provides that "the complaint, records and other proceedings related thereto prior to the filing of charges or dismissal of the complaint for lack of jurisdiction are deemed confidential."

The *Journal News* filed an appeal of the partial denial to the Corporation Counsel, the City's records access appeals officer under FOIL. The Corporation Counsel upheld the Board's determination based on a review of Article 6 of the Public Officers Law, advisory opinions from the Committee on Open Government, the advisory role of the Board and the plain language of the Code of Ethics provision deeming pre-decisional material in the context of a proceeding confidential.

The *Journal News* then filed an Article 78 proceeding against the City, the Board of Ethics and the Corporation Counsel seeking disclosure of all of the documents that it requested, including the statement of the formal charges. The City respondents voluntarily provided the documents to the Court for *in camera* review. In a decision dated March 20, 2012, the Hon. James Hubert of the Westchester County Supreme Court granted the Article 78 petition in part and denied it in part.

Decision of the State Supreme Court, Westchester County

In its ruling, the Court found that FOIL's statutory requirements preempt any conflicting confidentiality requirements in a local ordinance such as the one at issue in White Plains, citing Public Officers Law §87(2)(a), which provides that agencies may deny access to records or portions thereof that "are specifically exempted from disclosure by state or federal statute." Because a local agency cannot immunize a document from disclosure by designating it as confidential, the Court concluded that, to the extent that the City Code created a confidentiality exemption that did not exist under the Public Officers Law, it was unenforceable.[44]

Next, the Court looked to see whether the particular documents requested by the *Journal News* fell within one of the enumerated exemptions set forth in FOIL. Based upon its *in camera* review, the Court grouped the documents into three categories:

> (1) the Mayor's calendar, cancelled checks, invoices from Con Ed, a deed for real property, correspondence and e-mails to and from the Mayor, correspondence among City employees, and print-outs from publicly available sources, such as multiple listing service reports and the Department of State;
>
> (2) sworn interviews conducted by the Board with the Mayor and the landlord;
>
> (3) the statement of formal charges, a document issued by the Board dismissing the investigation for lack of jurisdiction, and correspondence among the members of the board.[45]

As to the first category, the Court found that some of the documents were exempt because their disclosure would result in an unwarranted invasion of personal privacy. These documents included cancelled checks, financial records and other bills of the Mayor. "[Even assuming these documents fell within the statutory

definition of] records, the public interest in these records… [did] not outweigh the privacy interest of the former mayor."[46] These documents were not co-mingled within the Mayor's public office but rather were produced by the Mayor personally, pursuant to the investigation by the Board of Ethics. Correspondence to and from the Mayor, the Mayor's calendar, and correspondence from and between City employees were subject to disclosure, and the fact that they were now in the possession of the Board did not render them immune from disclosure.[47]

As to the second category of documents, including sworn testimony from the Mayor, the landlord and others, because these documents were relied upon the Board in the course of its decision-making process, and were an integral part of the deliberative process of the Board, they were entitled to the protection offered by the deliberative process privilege and could be withheld from disclosure.[48]

As to the third category of documents, all correspondence among the Board members was exempt from disclosure as intra-inter agency deliberative materials.[49] However, the statement of formal charges was not found to be exempt under the intra-inter agency theory. Despite the fact that the sole object of an investigation by the Board of Ethics is to provide advice to the Common Council, the Court rejected the City's argument that the statement of formal charges was pre-decisional, intra-agency or deliberative, finding that it reflected the determination of the Board following a full investigation.[50] Moreover, the Court pointed to a provision in the City Code of Ethics providing that "thirty (30) days after charges have been served, the charges and answer, if any, shall be made public, unless otherwise stipulated by the parties or extended by an order of the court of competent jurisdiction" as the basis for a presumption that the formal statement of charges would become public after 30 days.[51]

This case stands for the proposition that, unless the State legislature acts to provide otherwise (as it has done in exempting the New York State Joint Commission on Public Ethics from the disclosure requirements of FOIL), a local government may not categorically protect the confidentiality of an ethics board's proceedings, but may only exercise its discretion to withhold particular documents pursuant to the FOIL exceptions upon a case-by-case, document-by-document basis.

Investigation into the Conduct of the Suffolk County Ethics Commission

In 2010, it was widely reported that the then Suffolk County Executive had satisfied his County financial disclosure obligation by filing with the County a copy of the State form that he had filed as a member of a State commission, rather than the different form used by the County of Suffolk.[52] Amid allegations that the Suffolk County Ethics Commission was subject to "influence" by the then County Executive, a special Committee of the County Legislature was established to investigate the conduct of the Commission.

The Special Legislative Committee's counsel requested that the Ethics Commission produce the following records of the Commission:

(1) all FOIL requests seeking Financial Disclosure reports made to the commission from January 1, 2006 to September 1, 2010,

(2) all ethics complaints made against any public official from January 1, 2006 to the date of the request,

(3) all legal analysis, legal memoranda or advisory opinions, including any and all legal memoranda or analysis provided by the County Attorney's Office, outside counsel or any experts, and any legal determinations made by the Commission prior to May 15, 2007 concerning the issue involving whether the filing of the New York State disclosure forms exempts a county official from filing the county form,

(4) all legal opinions, memoranda or legal analysis provided to the Commission by the County Attorney's Office, outside counsel, or expert consultants after May 15, 2009,

(5) a list of county officers and employees who had filed the State Financial Disclosure form in lieu of the county form, and any related legal memoranda, legal analysis or advisory opinions, and

(6) all advisory opinions, decisions and or determinations made by the Commission regarding potential conflicts of interest issues arising from the county employment of the spouses or other family members of current or former County officials.

The Ethics Commission responded that it would cooperate fully with the investigation by the Special Legislative Committee, and would provide the information and documents requested to the fullest extent permitted by law. The Commission indicated that it would produce the FOIL requests sought by the Special Legislative Committee but, as to the other records requested, the Commission noted that the Suffolk County Legislature had designated the information obtained by the Ethics Commission in the performance of its duties as confidential and had prohibited the Ethics Commission and its staff from disclosing such

confidential information. The Commission noted that the County Legislature had made the disclosure of confidential ethics information punishable as a Class A misdemeanor. The Ethics Commission also responded that the advice that it received from its counsel was protected by the attorney-client privilege.

At that time, the County Code of Ethics provided, in pertinent part, that "[i]t shall be unlawful for a member of the Commission or other individual to disclose any information contained on a [financial] disclosure statement except as authorized by law[,]… [a]ll… proceedings [i.e. investigations by the Commission of alleged Code violations] shall be confidential[,]… and any violation of the confidentiality provisions of this Article [i.e. the Code of Ethics] shall… be punishable as a Class A misdemeanor with a fine of up to $1,000 and a term of imprisonment of up to one year."

In order to protect the privacy interests of the individuals identified in the requests by the Special Legislative Committee and to discharge its duty of confidentiality under the County Charter, the Commission requested that the Special Legislative Committee issue a subpoena for the confidential records, thus enabling the Commission to seek judicial guidance as to which of the documents it could lawfully disclose. Thus, the Commission asked that the Special Legislative Committee subpoena certain of the records so that the Commission could move to quash the subpoena and, in that way, obtain judicial guidance as to its apparently conflicting duties under the County Code of Ethics and pursuant to the subpoena. As requested by the Ethics Commission, the Special Legislative Committee served a subpoena seeking disclosure of the Commission's records, and the Commission moved to quash the subpoena on various grounds, including that the records of the Commission were confidential under the County Code of Ethics.

Decision of the State Supreme Court, Suffolk County

In *Suffolk County Ethics Commission v. Lindsay, et al.*, the Suffolk County Supreme Court granted the Commission's motion to quash the Special Legislative Committee's subpoena on procedural grounds. The Special Legislative Committee had failed to authorize the issuance of the subpoena by a majority vote of its membership as required by the resolution of the County Legislature from which the Special Legislative Committee derived its power to issue subpoenas.

However, the Court rejected the Commission's other arguments, noting that the Commission was prohibited from disclosing information reported on the financial disclosure forms filed with the Commission "except as provided by law." Because the County Charter provided that the disclosure forms would be available for public inspection "except that the categories of value shall remain confidential, as shall any other item of information authorized by the Board to be deleted from an individual's disclosure form," the forms were not confidential under local law except as to the categories of amounts and other information deleted by the Commission.[53]

The Court then found that the County Charter authorized the County Legislature to conduct investigations into any matter within its jurisdiction and to delegate investigations to a committee, and that the Charter also authorized the legislature or any delegated committee to issue subpoenas requiring attendance by the recipient at an examination and the production of books, records, papers and documents. Therefore, the Court concluded that the subpoena issued by the Special Legislative Committee was authorized by law and that compliance with the subpoena would not subject the Ethics Commission and its staff to the criminal penalties for disclosure of matters considered confidential under the Suffolk County Code or other Local Law.[54]

The Court also rejected the Commission's argument that production of ethics complaints and advisory opinions issued by the Commission should be confidential as a matter of public policy. "The… [Commission] failed to demonstrate [that] the public policy of this State precludes the dissemination of documents relating to the internal workings of an ethics commission to the County Legislature, a committee thereof or other public officer or official charged with oversight and investigative powers. Indeed, public policy appears to dictate just the opposite, as the call for transparency in government seemingly sounds everywhere…."

The Court found that the Commission had failed to establish that certain documents sought by the subpoena were protected by the attorney-client privilege, finding that the claims of privilege were not sufficiently particularized.

Further, the Court concluded that any claims of privilege in connection with complaints filed with the Commission "appear [to be] inconsistent with… the Suffolk County Code…which mandates that the… [Commission] prepare annual reports for the County Executive and the County Legislature summarizing the activities of the…[Commission] and recommend changes in the law governing the conduct of local elected officials and others…." The Court reasoned that because the Ethics Commission had a duty to report to the County Executive and the County Legislature, the complaints received by the Commission were not confidential communications.

This same reasoning would not apply to the communications made between the Commission and its counsel, the predominant purpose of which was for the Commissioners to obtain legal advice. The attorney-client privilege is codified by the New York Civil Practice Law and Rules, which provide, in pertinent part, that a client shall not be compelled to disclose confidential communications made between the client and his or her attorney "in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local government agency or by the legislature or any committee or body thereof."[55] Thus, records protected by the attorney-client privilege are exempt from disclosure by state statute and may be withheld from disclosure pursuant to the Freedom of Information Law.[56]

Investigation by the Suffolk County Grand Jury

The Suffolk County District Attorney's Office convened a Grand Jury to take over the investigation of the Special Legislative Committee. A Grand Jury subpoena was served on the Commission for its records, and on the Commissioners and their counsel for testimony before the Grand Jury.

The extent to which a government attorney may be compelled to testify before a grand jury about conversations with a client has been the subject of several significant decisions by Federal Circuit Courts of Appeal. The majority view was expressed in a decision that arose out of a subpoena issued by Special Prosecutor Ken Starr to White House Counsel Bruce Lindsay in the investigation leading to the impeachment of President Bill Clinton. The White House asserted that the testimony was protected by the attorney-client privilege, and moved to quash the subpoena. The D.C. Circuit Court of Appeals concluded that:

> When an executive branch attorney is called before a federal grand jury to give evidence about alleged crimes within the executive branch, reason and experience, duty and tradition dictate that the attorney shall provide that evidence…. The proper allegiance of the government attorney is contemplated by the public's interest in uncovering illegality among its elected and appointed officials….[57]

The Second Circuit reached a different conclusion in a case arising out of a subpoena issued to the counsel for former Connecticut Governor John Rowland in an investigation leading to the Governor's resignation and conviction on charges of public corruption. The Second Circuit opined:

> …[I]f anything, the traditional rationale for the privilege applies with special force in the government context. It is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice.[58]

Just as the attorney-client privilege only protects conversations between an attorney and a client, so too the privilege is limited to communications had for the purpose of obtaining legal advice. However, a government lawyer sometimes gives more than legal advice. On occasion, the government lawyer may provide policy, political, or strategic advice. Does the attorney-client privilege protect communications between a government lawyer having no policymaking authority and a public official, where those communications assess the legality of a policy and propose alternative policies in that light? In the Second Circuit, the answer is yes, provided that the "predominant purpose" of the conversation is to obtain legal advice.[59]

Here, the Suffolk County District Attorney respected the attorney-client privilege and limited the scope of its examination questions to counsel, and thus it was not necessary for counsel to assert the privilege in the Grand Jury.

The Grand Jury investigation resulted in a report, but no indictments.

Audit by the Suffolk County Comptroller

As this controversy was stirring, the Suffolk County Comptroller undertook an audit of bills rendered by the Commission's special counsel, pursuant to the Comptroller's authority under Article 14 of the County Law and applicable provisions of the County Charter, and demanded that the Commission's counsel produce all documents referenced in counsel's invoices, including correspondence, notes, research and attorney work product. In response, counsel informed the Comptroller that he could not comply with the request because the Suffolk County Code prohibited disclosure of confidential matters pending before the Commission; the attorney-client privilege prohibited disclosure of the confidential communications made between an attorney and a client, absent a waiver by the client; and Rule 1.6 of the New York Rules of Professional Conduct prohibited an attorney from revealing confidential information gained during or relating to the representation of a client, whatever its source, that is protected by the attorney-client privilege or that the client has requested be kept confidential.[60]

The Comptroller responded stating, in part, that:

> In your letter, you also cite attorney client privilege as another reason why the requested information could not be provided. However, your services were retained by the County to represent the Ethics Commission which is a county Commission. Therefore, as the County's Chief Fiscal Officer, the county Comptroller is waiving the client confidentiality and directing you to provide the previously requested information by October 1, 2010. The requested information is necessary so that we can determine the regularity, legality and correctness of the claimed expenses as required by the County Charter….
>
> The County Comptroller has a fiduciary responsibility to the taxpayers of Suffolk County to ensure the propriety of County expenses; therefore, no future vouchers from…[your firm] will be processed until such time the Comptroller's Office is satisfied that services were billed in accordance with the terms of the agreement. Failure to comply with this request may result in the demand for repayment of services previously billed and paid.

This purported waiver by the Comptroller of the attorney-client privilege raised the familiar and often thorny question of "who is the client of a municipal attorney?" A careful analysis and accurate determination of this question is essential, because only communications between an attorney and a "client" are subject to the attorney-client privilege. Commentators have identified five possible clients of the government lawyer: (1) the responsible official, (2) the government agency, (3) the branch of government (executive or legislative), (4) the government as a whole, and (5) the public.[61]

Rule 1.13 (Organization as Client) of the Rules of the New York Rules of Professional Responsibility provides, in pertinent part, that:

> When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

But what if the interests of one government agency (here, the County Ethics Commission) appear to conflict with the interest of another agency or official (here, the County Comptroller)?

Comment 9 (Government Agency) to Rule 1.13 provides, in pertinent part, that:

> The duties defined in this Rule apply to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Defining or identifying the client of a lawyer representing a government entity depends on applicable federal, state and local law and is a matter beyond the scope of these Rules. Moreover, in a matter involving the conduct of government officials, a government lawyer may have greater authority under applicable law to question such conduct than would a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified….

Here, special counsel was engaged solely to represent the Ethics Commission. On these facts, the Ethics Commission was the "client," and the purported waiver of the attorney-client privilege by the Comptroller was ineffective. After the passage of time, the Comptroller approved the payment of counsel's bills in their entirety, and closed the audit without pressing his demand for the disclosure of confidential client information, thus avoiding a judicial resolution of the apparent conflict between the Comptroller's authority to audit bills rendered to the Ethics Commission and the attorney-client privilege enjoyed by the Commission.

Conclusion

It is high time that GML Article 18 be revised, and that the standards of conduct related to the personal

use or unauthorized disclosure of confidential information be clarified. Until this happens, local municipalities should exercise the authority granted to them by GML §806 to adopt their own clear standards of conduct in the form of a local ethics code, including the two prong definition of "confidential information" recommended in this article.[62] Further, the State Legislature should act to exempt the records of local boards of ethics from the disclosure requirements of FOIL to the same extent, and to achieve the same policy goals, as in the case of the New York State Joint Commission on Public Ethics. For now, municipal officers and employees must continue to navigate their way between the Scylla and Charybdis of transparency and confidentiality.

Municipal attorneys must carefully identify their clients and be mindful that the attorney-client privilege will only protect conversations between an attorney and a client, the "predominant purpose" of which is to obtain legal advice.

Endnotes

1. *See*, 26 U.S.C. §274 (Disallowance of certain entertainment, etc., expenses).
2. *See*, N.Y. Penal Law, art. 200 (Bribery involving public servants and related offenses), *et seq*.
3. 5 U.S.C. §552 (1966).
4. *See*, N.Y. Pub. Off. Law, art. 6 (Freedom of Information Law).
5. *See*, N.Y. Pub. Off. Law, art. 7 (Open Meetings Law).
6. *See*, N.Y. Pub. Off. Law §74 (Code of Ethics).
7. *See*, 2000 N.Y. Op. (Inf.) Att'y Gen. 1009.
8. *See*, Pub. Off. Law §105 (Conduct of executive sessions).
9. *See,* Wm. J. Kline & Sons v. County of Hamilton, 235 A.D.2d 44 (3d Dep't 1997).
10. *See*, *e.g*., FOIL-AO-16799, FOIL-AO-12558, FOIL-AO-18476.
11. *See*, N.Y. Dep't of State, Comm. Open Govt., FOIL-AO-16799 (Sept. 20, 2007).
12. *See Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 567 (1986).
13. *See,* 2000 N.Y. Op. (Inf.) Att'y Gen. 1009.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* Additionally, it should be noted that Public Officers Law §108(3) exempts from the coverage of the Open Meetings Law (OML) "any matter made confidential by federal or state law" *(e.g.,* information protected by the attorney-client privilege).
18. *Id.*
19. *Id.*
20. *Id.*
21. *See*, FOIL-AO-12558.
22. *See*, FOIL-AO-12558, citing *Capital Newspapers v. Burns*, 67 N.Y.2d 562, 567 (1986).
23. *See*, FOIL-AO-12558.
24. *Id.*
25. *Id.*
26. *Id.*
27. *See,* FOIL-AO-12558.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *See* FOIL-AO-16799.
33. *Application of Patrick A. Nett and Ronald R. Raby for the Removal of Tina Marie Weeks as a Member of the Board of Education of the Patchogue-Medford Union Free School District*, Decision No. 15,315, October 24, 2005.
34. *Id.*
35. *Id.* In *Appeals of Hoefer*, Decision No. 15,263, July 29, 2005, the Commissioner of Education removed a board member who disclosed information concerning an employee and teacher contract negotiations that were discussed in executive session. The school board had its own code of ethics provision prohibiting disclosure of confidential information obtained during executive sessions.
36. This proposed definition of "confidential information" for purposes of General Municipal Law §805-a is similar to the definition of "confidential government information" for purposes of Rule 1.11 of the New York Rules of Professional Conduct. *See infra*.
37. *See Washington Post Co. v. New York State Ins. Dep't*, 61 N.Y.2d 557 (1984).
38. *Id*.
39. *See* 22 N.Y.C.R.R. Part 1200 (Rules of Professional Conduct), *et seq*.
40. *See*, N.Y. Rules of Prof'l Conduct R. 1.11 (2009).
41. *In the Matter of the Application of The Journal News, et al. v. City of White Plains, et al.,* Westchester County Supreme Court (Hon. James Hubert), Index No. 7781/11, March 20, 2012.
42. Mayor Bradley had been the focus of intense media scrutiny, as less than two months in his term as mayor he had been charged in February of 2010 with misdemeanor assault, after his wife filed a domestic violence charge against him. In April of 2010, additional misdemeanor charges and violations were brought against him related to his arrest.
43. On October 17, 2012, former Mayor Adam Bradley's judgment of conviction was reversed by the Second Department and the matter was remitted to the Westchester County Supreme Court for a new trial. On June 21, 2013, after a new trial, a jury acquitted former Mayor Bradley of all charges.
44. *In the Matter of the Application of The Journal News, et al. v. City of White Plains, et al.,* Westchester County Supreme Court (Hon. James Hubert), Index No. 7781/11, March 20, 2012 at 5-6.
45. *Id.* at 9.
46. *Id.* at 11-12.
47. *Id.* at 12.
48. *In the Matter of the Application of The Journal News, et al. v. City of White Plains, et al.,* Westchester County Supreme Court (Hon. James Hubert), Index No. 7781/11, March 20, 2012 at 13-14.
49. *Id.* at 15.
50. *Id.* at 15-16.
51. *Id.* at 16. Executive Director Robert Freeman indicated in a discussion concerning the Court's holding that absent the thirty day provision in the City Code, he would have advised that charges that had never been proven or admitted may be

withheld, both as intra-agency material (neither factual nor a determination), and as an unwarranted invasion of personal privacy.

52. N.Y. Gen. Mun. Law §811(1) mandates that a local municipality accept the State form for filing by officers and employees who are subject to the State financial disclosure requirements.
53. Here, the Court seems to implicitly find that a record may be confidential under Local Law. *See* the discussion, *supra*, of the contrary opinion of the Committee on Open Government.
54. Here again, the Court seems to implicitly find that a record may be confidential under Local Law.
55. *See,* CPLR §4503(a)(1).
56. *See,* Public Officers Law §87(2)(a).
57. *In re Bruce R. Lindsay*, 158 F.3d 1263 (D.C. Cir. 1998).
58. *In re Grand Jury Investigation v. John Doe,* 399 F.3d 527 (2d Cir. 2005).
59. *See Pritchard v. County of Erie (In re The County of Erie)*, 473 F.3d 413 (2d Cir. 2007), *vacated, mandamus granted*, 546 F.3d 222 (2008).
60. The contract pursuant to which special counsel was retained provided that all information obtained by special counsel in the course of the engagement would be and remain confidential, except that special counsel was authorized to make disclosures to the County Attorney's Office.
61. Salkin, *Beware: What You Say to Your [Government] Lawyer May Be Held Against You—The Erosion of the Government Attorney-Client Confidentiality*, 35 Urb. Law 283 (2003).
62. N.Y. Gen. Mun. Law §806-1(a) provides, in pertinent part, that "the governing body of each county, city, town, village, school district and fire district shall and the governing body of any other municipality may by local law, ordinance or resolution adopt a code of ethics setting forth for the guidance of its officers and employees the standards of conduct reasonably expected of them…. Such codes may regulate or prescribe conduct which is not expressly prohibited by this article but may not authorize conduct otherwise prohibited…."

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