

Legal Alert

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Tape Recording Board Executive Sessions

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From time to time, Keane & Beane, P.C., issues Legal Alerts pertaining to new legislation or recent cases of interest.

On December 27, 2013, the New York State Committee on Open Government issued an Advisory Opinion in response to an inquiry as to whether it would be permissible for a board of education to implement a rule prohibiting a board member from tape recording discussions held in executive session. The inquiry resulted from a board of education member who had begun taping executive sessions “to ensure compliance with the laws governing executive sessions” and as his method of taking notes. The Committee on Open Government (the “Committee”) found that it would be reasonable for a board of education to adopt a policy prohibiting a member from using a tape recorder at an executive session.

Although the Committee on Open Government (the “Committee”) admitted that the recording of an executive session does not appear to be prohibited by law, the Committee cited a number of concerns regarding the tape recording of executive sessions. First, the Committee cited the Freedom of Information Law (“FOIL”), the operation of which might make the tape recordings accessible “records,” depending on the content. Second, the Committee found that tape recordings of executive sessions might be subject to subpoena or discovery in the litigation context. In addition, the Committee cited a disciplinary decision of the Commissioner of Education, which, in effect, warned board of education members that surreptitious recording of executive sessions could result in removal from the board, as well as a decision of the Appellate Division which affirmed that, under Education Law §1709, a board of education may establish *reasonable* rules governing the use of tape recorders at executive session.

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Finally, the Committee plainly stated that the purpose of an executive session, which is intended to allow board members to discuss protected matters of personal privacy and to speak freely throughout the deliberative process, might be defeated if the tape recording of executive sessions is permitted. The Committee warned that the tape recording of executive sessions could have “unforeseen” and “potentially damaging consequences.”

As such, the Committee found that “it would be reasonable for a board of education, based upon its authority to adopt rules to govern its own proceedings conferred by §1709 of the Education Law, to prohibit a member from using a tape recorder at an executive session absent the consent of a majority of the board.”

We suggest that each board consider this issue and determine whether a policy of this sort would be beneficial in your district. If it is the consensus of your board that the tape recording of executive sessions would be detrimental to the deliberative process, it might be best to adopt such a policy before tape recording is undertaken by a board member.

This Office has developed a draft policy for your consideration which if passed, would prohibit a board member from tape recording executive sessions without the consent of a majority of the board. A copy of which is attached to this memorandum.

Should you have any questions or need anything further, please do not hesitate to contact Suzanne E. Volpe, Esq. or Ronald A. Longo, Esq. of this Office.

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Please visit www.kblaw.com and feel free to contact any of our attorneys. If you need immediate assistance, please contact our Office Manager, Barbara Durkin, at (914) 946-4777 or bdurkin@kblaw.com

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