

MUNICIPALITY OF ANCHORAGE



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Acting Mayor Austin Quinn-Davidson

March 9, 2021

Via Email Only

Senate Community & Regional Affairs Committee
Senate.Community.And.Regional.Affairs@akleg.gov

**Re: Written Testimony from the Anchorage Municipal Attorney's Office
Regarding SB 15**

Dear Chair and Members:

This testimony is offered on behalf of the Anchorage Municipal Attorney's Office. This office opposes SB 15 because its proposed revisions to the Alaska Open Meetings Act would generate harm to the central purposes of the Open Meetings Act, municipalities, and all Alaskans.

1. This legislation is premised on a false narrative.

As indicated by the sponsor's statement, this legislation is premised on the false assumption that the Anchorage Assembly violated the Open Meetings Act in August 2020, and that such conduct needs stiffer penalties. But the Anchorage Assembly's COVID-19 precautions were lawful and nearly identical precautions are on display at the Capitol right now.

In August 2020, in the midst of a pandemic, the Anchorage Assembly held open meetings that were accessible to the public on television and live-streamed over the internet. The public was able to testify in writing or by phone. Some assembly members and members of the administration attended by phone, others were in assembly chambers in front of the cameras and press. In other words, the public meetings were held with many of the same pandemic precautions the Legislature is currently adopting for itself. SB 15 is motivated by a group that wants to penalize the Municipality of Anchorage by any method possible for the manner in which the August 2020 Assembly meetings were held, likely because they disagree with the outcome of Assembly votes during that month.

A court has already preliminarily rejected arguments that the Anchorage Assembly violated the Open Meetings Act by conducting mostly-remote meetings during the pandemic. In *Alaskans for Open Meetings Act v. Municipality of Anchorage, et al*, 3AN-20-08822CI, a state superior court

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judge denied the plaintiffs' request for a preliminary injunction, rejecting their argument that their claim was likely to succeed on the merits. After reviewing Plaintiffs' arguments, the judge was simply not convinced that the definition of "open meeting" required the public to "occupy the same physical space" as assembly members.

The fact that some individuals considered the Assembly's conduct to be an Open Meetings Act violation while others—including the majority of the Assembly and legal counsel—thought it was not, is an independent reason not to add financial penalties to the law.

2. The Open Meetings Act currently appropriately prioritizes and incentivizes openness in government.

The Alaska Open Meetings Act promotes sunshine and openness in government by requiring that government meetings be visible and open to the public so that citizens can observe and participate in democratic government.

Currently the central focus of the Act is on ensuring that government actions comply with the openness requirements, not on punishing violators or needlessly invalidating government actions. Both the legislature and the Alaska Supreme Court have made clear that the preferable remedy for Open Meetings Act violations is to give the government body the opportunity to fix the problem by revisiting and re-enacting any infirm legislation in an open-to-the-public session. This is the correct focus of the law because the point is to ensure the orderly and efficient administration of open government on an ongoing basis—not to punish or penalize individuals or bodies that make fleeting mistakes.

A focus on process rather than penalty also appropriately reduces the incentives for individuals on the losing side of a robust political debate to use the Open Meetings Act to score political points. When the legislature enacted the Open Meetings Act it deliberately rejected the option to impose a fine for violations. That remains the right decision.

3. The proposed fines would have unintended negative consequences.

Increase Use of Open Meetings Act to Target Political Opponents. By creating fines for public officials who attend meetings that are found to violate the Open Meetings Act, SB 15 would dramatically alter the scope, effect, and focus of the law, transforming the Open Meetings Act into a blunt instrument for political opponents to penalize individuals for perceived misconduct, rather than a tool to promote and ensure open government. This focus shift would be bad for officials and municipalities alike. Existing processes—like litigation and recall—are sufficient to address purposeful misconduct in the rare cases where a public official's conduct related to open meetings is culpable. The Open Meetings Act should continue to be focused on its core aim of improving government.

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Decrease Incentive to Take Corrective Action. Worse, SB 15 would create a monetary incentive to continue litigation regarding whether a violation occurred and prevent preemptive correction. Its penalty provision would encourage governmental bodies to ignore or deny their Open Meetings Act errors, since any acknowledgement of an error could lead to personal liability. SB 15 would thwart the early and voluntary remedy currently favored in the law, creating a disservice to all Alaskans and vitiating the goals of accountable government.

Incentivize Absenteeism. At the moment of an ambiguous Open Meetings Act issue, SB 15 would also incentivize public officials to skip public meetings even though they have important business to conduct. For example, Anchorage Assembly Meetings this summer did not violate the Open Meetings Act according to legal advice provided to the Assembly and so far upheld in the preliminary holding of the superior court. But a monetary fine for attendance would have left the two assembly members that objected to the closing of in-person testimony with the difficult decision of removing themselves from the meeting on the belief that it was unlawful or participating and communicating their dissenting point of view on the record. This is because the bill would create a \$1000.00 fine for any official who knowingly “attends a meeting of the governmental body” where the Open Meetings Act is violated—even if that official is not personally responsible for the Open Meetings Act violation and is just attending and doing their job. Open Meetings Act violations are not always clear-cut. Should SB 15 pass, public officials would have strong incentives to be absent at government meetings if they believe there could be any Open Meetings Act-related issue, to be sure they would not be personally fined. It is poor policy to create disincentives for public officials to show up and do their jobs diligently.

4. SB 15 would make it harder to recruit public servants for smaller boards.

The Alaska Legislature has exempted itself and its own proceedings from the Open Meetings Act. But the Open Meetings Act applies to a wide variety of municipal and other bodies across the state, including both major legislative bodies like the Anchorage Assembly, and small, volunteer bodies such as local service area boards and small commissions.

The risk of personal liability has the significant potential to dissuade people from entering public service. SB 15’s definition for “public official” will apply to all governmental bodies, not just the Municipal Assembly in Anchorage or other large municipalities. The definition sweeps in such entities as unpaid service area board members. It is difficult to find persons willing to serve on these boards in an unpaid capacity. If there is a threat that an unpaid board member could be personally liable for an act of the board, it will be even more difficult to find anyone to serve on these boards. Likewise, if a board member is afraid, reasonably or unreasonably, that a violation could occur, the board member is unlikely to participate in any board meeting, which unduly disrupts the democratic process.

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For all these reasons, the Anchorage Municipal Attorney's Office urges that SB 15 not be passed.

Sincerely,

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Municipal Attorney

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