SB

317

#2

MEMORANDUM State of Alaska

TO: Norman C. Gorsuch
Attorney General

DATE: May 19, 1983

FILE NO: 366-664-83

TELEPHONE NO: 465-3600

FROM: Joe Geldhof
Assistant Attorney General

SUBJECT: Various "open meeting" opinions

You're scheduled to participate in a panel discussion concerning state government as a part of Alaska Journalism Week. The press has informed us that they are most interested in your views and opinions concerning the public meeting and public information statutes (AS 44.62.310 et seq. and AS .25.110 et seq.). The following is a summary of available Attorney General's opinions concerning open meetings and public information. I understand the press will be discussing the open meeting statute and may ask you questions about each specific opinion. The opinions are in reverse chronological order.

February 16, 1983 opinion regarding applicability of open meeting/public info requirements to Water/Waste Water Advisory Board. Concluded that board is state agency requiring open meetings for public. Also suggests that board members with conflict of interest recuse themselves from voting and discussing certain topics.

September 20, 1982 decision regarding improper executive sessions for Fish and Game Advisory Committee. Concludes that Fish and Game Advisory Committee is subject to provisions of Open Meeting Act. Also concludes Dept. of Fish and Game can reimburse members of Fish and Game Advisory Committee for travel and per diem.

February 17, 1982 opinion regarding applicability of open meeting statute to Alaska Seafood Marketing Institute. Concludes that Board may not meet in executive session for an advertising agency presentation. Concludes further that purpose for calling executive session must fall within one of the enumerated exceptions to the public meeting requirement.

February 8, 1982 opinion regarding procedure for public notice of teleconference meetings. Concludes that Council on Domestic Violence and Sexual Assault (and by

implication other agencies) must provide reasonable public notice for all meetings. While statute does not enumerate specific guidelines, the public should be provided with date, time and place of meeting and the topics which will be discussed or considered at the meeting.

August 21, 1981 opinion regarding Board of Psychologists meeting. Concluded that Board and Youth executive session may have violated open meeting law due largely to lack of guidelines for board members to follow.

August 21, 1981 opinion regarding conduct and records of board meetings. Outlines principles and guidelines for future conduct of Board of Psychologists. Strongly supports open meetings available to public and holds that executive sessions limited to very specific situations.

May 11, 1981 regarding application of open meeting law to informal meetings. Concludes that Alaska's open meeting law is extremely broad. However, law does not apply to "meetings" between any two state or municipal officials or employees. In sum, Open Meetings Act only applies to multi-member bodies which have a fixed membership, which are supported in whole or in part by public monies and which have power pursuant to law to exercise governmental power or provide advice through a vote. The open meeting law does not apply to meetings of individuals who are public officers or employees, such as cabinet members, but who are not empowered collectively to exercise power or advice as a body (commom sense application, J.W.G.)

February 11, 1981 opinion regarding applicability of open meeting statute to Rural Development Council. Concludes that all fundamental policy decisions should be made in meeting open to public.

February 3, 1981 opinion regarding closed deliberations by Public Employees Retirement System (PERS) Board. Concludes that Board deliberation may be made in closed session when hearing an appeal from a decision by the administrator. Conclusion supported by explicit exemption to public meeting requirements or "judicial or quasi-judicial bodies when holding a meeting to make decision in adjudicatory proceedings".

January 2, 1981 opinion regarding Alaska Energy Center bylaws. Concludes that open meeting (or Sunshine) law applies to Alaska Energy Center. Further concludes that Center's bylaws need not reiterate public meeting statute.

December 4, 1979 opinion regarding private meeting between governor and Board of Fisheries and fishermen's groups. Concludes that as a practical matter, the meeting which the Governor proposes does not constitute a meeting between boards of fishery, and therefore, the requirements for open meeting do not apply. Further suggests that private or closed meetings cannot be used by board members to consider or arrive at tentative decision on regulation of salmon fishery (by implication public decision).

October 15, 1979 opinion regarding public meetings by conference call. Suggests that public decision could be made by conference call. However, urges caution and adequate public notice regarding procedures for making decision.

August 22, 1979 opinion regarding Public Offices Commission secret ballot procedure. Concludes that Public Offices Commission may use secret ballot for election of officers without violating Alaska's public meeting law.

March 15, 1979 opinion regarding use of executive session to discuss hiring, firing or transfer of any employee. Concludes that closed session may be used to discuss matters that would prejudice reputation and character of any person, provided person may request a public discussion. Must afford person being considered with advance notice.

February 8, 1979 opinion regarding applicability of public meeting statute to tariff filings and protest procedures by rate-making or regulatory commissions. Concludes that rate-making hearings be conducted, to the greatest extent possible, according to open meeting provisions.

April 7, 1978 opinion regarding board meeting by telephone. Concludes that board meetings via telephone should be cases necessitating emergency decisions, not general practice. Still need to provide notice to public if decisions are made.

July 19, 1976 opinion regarding release of corrections escape report. Concludes that there are three applicable exceptions to the general rule which provides that state records are open for public inspection. The exceptions are:

1) matters relating to personnel evaluation;
2) matters relating to a personnel grievance;
3) statements by potential prosecution witnesses in criminal matters.

April 9, 1976 decision related to applicability of open meeting statutes to the Association of Alaska School Boards. Concludes that Association is not an agency or other organization "of the state or any of its political subdivisions".

February 13, 1976 opinion regarding applicability of open meeting statute to secret ballot by a public body. Concludes that statute is ambiguous and a secret ballot conducted at a "public meeting" may or may not be avoidable.

September 24, 1975 opinion regarding confidentiality of Parole Board proceedings. Concludes that Parole Board may conduct closed meetings but board's disposition is public information.

JWG:ml

MEMORANDUM State of Alaska

TO: Mil Zahn, Executive Director
Boards of Fisheries & Game

DATE: September 20, 1982

FILE NO: 366-162-83

TELEPHONE NO: 465-3600

FROM: WILSON L. CONDON
ATTORNEY GENERAL

By: JR
Jonathan Rubini
Assistant Attorney General

SUBJECT: Improper Executive Session for Fish & Game Advisory Committee

You have asked whether it is permissible for the Boards of Fisheries and Game to reimburse members of a fish and game advisory committee for travel and per diem expenses in instances where a committee meeting is conducted, at least in part, in violation of both the Open Meeting Act, AS 44.62.310-.312, and applicable regulatory provisions, 5 AAC 96.010-.920.

Fish and game advisory committees are established "to provide a local forum for the collection and expression of opinions and recommendations on matters relating to the management of fish and wildlife resources." 5 AAC 96.010. Committees have a designated geographic area, and are comprised of between five and fifteen members who are elected by community vote at a committee meeting, though subject to confirmation by the boards. Committees conduct regular meetings at least four times annually, and special meetings when warranted. The boards may authorize reimbursement to all approved committee members for travel and per diem expenses incurred in conjunction with attendance at a committee meeting. 5 AAC 96.460.

A fish and game advisory committee is a governmental body subject to the provisions of the Open Meeting Act, AS 44.62.310-.312, which states in broad terms that all meetings of a governmental body are open to the public. The statutory mandate is buttressed by an explicit regulatory provision. 5 AAC 96.060 provides in pertinent part:

> Formation and operation of local fish and game advisory committees must comply with the following uniform rules of operation:
>
> . . . .
>
> (13) (C) All meetings of the committee are open to the public and must be advertised in the locality where the committee is organized;

Indeed, the ultimate purpose of the advisory committees, to afford local residents a forum to offer the boards their opinions and recommendations on matters concerning fisheries and wildlife management in the area surrounding their homes, would be substantially impaired were the public denied a full opportunity to participate in committee meetings.

The Open Meeting Act does allow a governmental body, such as a fish and game advisory committee, to determine by majority vote to hold an executive session in order to discuss certain narrowly circumscribed subjects. AS 44.62.310(c). We do not have a sufficient factual basis to determine whether it would have been appropriate to conduct an executive session in the three identified instances where at least some members of the public were excluded from committee meetings. However, regardless of whether public participation was improperly restricted, no statutory or regulatory provision requires the boards to decline to provide state reimbursement for travel expenses to committee members who participated in a meeting not open to the public as required by law. The only sanction set forth in the Open Meeting Act is that any action taken by a governing body in a manner inconsistant with open meeting requirements is void. AS 44.62.310.(f). We therefore conclude that the boards may reimburse committee members' travel expenses.

We note that the boards have available an alternative sanction to redress the repeated restriction of public access to committee meetings. 5 AAC 96.900 provides that the boards may remove a member of a local fish and game advisory committee for cause. Conduct by a committee member which intentionally furthers the repeated violation of 5 AAC 96.060(13)(C) constitutes sufficient "cause" to warrant removal. In the same vein, the boards may dissolve a local advisory committee for failure to act in accordance with [applicable regulations]." 5 AAC 96.450. Again, the failure to substantially comply with open meeting requirements renders a local committee vulnerable to dissolution at the discretion of the boards.

To assist in your efforts to assure that all future fish and game advisory committee meetings are open to the public without restriction, we have drafted a brief memorandum which you may wish to distribute to the chairmen of each local advisory committee. If you have any questions, do not hesitate to contact me.

JR/jb
cc: John G. Glissberg

MEMORANDUM State of Alaska

TO William R. Nix
Commissioner
Department of Public Safety

DATE: February 8, 1982

FILE NO: J66-427-82

TELEPHONE NO: 465-3603

FROM: WILSON L. CONDON
ATTORNEY GENERAL

By: W.F.C.
William F. Cummings
Assistant Attorney General

SUBJECT: Procedure for Notice of Teleconference Meetings

Please refer to your memorandum of December 17, 1981 in which you requested guidance concerning public notice requirements of AS 44.62.310 as they relate to the proposed meeting scheduled for the Council on Domestic Violence and Sexual Assault and other aspects of that statute which relate to use of modern telecommunication devices for the conduct of public meetings.

AS 44.62.310(e) requires that reasonable public notice be given for all meetings required to be open. You indicated in your memorandum that the council wishes to meet frequently so that it may come to policy decisions quickly. You have proposed advertising once every three months that the meetings would occur by conference calls on the first and third Thursdays of the month from 12 noon to 1:30 p.m. Pacific Standard Time. Upon analysis it does not appear that this proposed advertising plan would meet the requirements for adequate public notice.

There are no specific guidelines in AS 44.62.310 et seq. which establish guidelines for what constitutes adequate public notice. However, public notice should provide the date, time, and place of the meeting and the topics which will be discussed or considered at the meeting. See Benson v. McCormick, 578 P.2d 651 (Colo. 1978) (particularly Carrigan, J. in dissent at 653) and Hyde v. Banking Board, 552 P.2d 32 (Colo. 1976).

If the council desires to make policy decisions during these teleconferencing meetings, then the public has a right to know what topics will be considered as well as the date and time of the meeting and the manner in which it can have access to the meetings. If this type of notice is not given, it is likely that any decisions which the council would make during these teleconferencing meetings could be subject to judicial challenge. The probability for success

in defending the action taken after defective notice is fairly remote. See, Cooper v. Arizona Western College District Governing Board, 610 P.2d 465 (Ariz. 1980) and Hyde v. Banking Board, supra, where the agencies' decisions were reversed for failure to provide adequate notice.

You also inquired whether the requirements for open meetings would be met if the teleconference meetings occurred over communication devices which allow the public to provide input. I assume that the devices would allow full participation in the meetings, i.e. the opportunity to hear everything transpiring at the meeting as well as the opportunity to speak. If these two standards are met, then the requirements for an open meeting would be met, provided that all materials discussed or considered are available at all the various locations of the participants.

You also inquired concerning the advertising requirements when the Department of Education teleconferencing facilities are used for statewide public input. The advertising scheme you proposed would be adequate if the date, time, place of access to the facilities and the topics proposed for discussion are provided.

WFC:cdd

MEMORANDUM State of Alaska

TO: Eric Eckholm, Exec. Director
AK Seafood Marketing Institute

DATE: February 17, 1982

FILE NO: J66-379-82

TELEPHONE NO: 465-3600

FROM: WILSON L. CONDON
ATTORNEY GENERAL

SUBJECT: Open meetings of Alaska Seafood Marketing Inst.

By: Kenneth E. Vassar
Assistant Attorney General

You have asked whether the board of directors of the Alaska Seafood Marketing Institute may convene in executive session to hear the presentations of advertising agencies being considered by the board for a contract for professional services. We conclude that the board may not meet in executive session for that purpose.

The mandate that meetings of a public body be open to the public is strongly and clearly stated in AS 44.62.310. That mandate permits only three exceptions, which are expressed in AS 44.62.310(c). Those exceptions allow executive sessions to discuss the following subjects:

(1) matters, the immediate knowledge of which, would clearly have an adverse effect upon the finances of the government unit;

(2) subjects that tend to prejudice the reputation and character of any person, if the person does not request a public discussion;

(3) matters which by law, municipal charter, or ordinance are required to be confidential.

Unless the purpose for calling the executive session can fairly and reasonably be said to fall within one of the above enumerated exceptions to the public meeting requirement, the executive session cannot be held. It is unlikely that the presentations of the advertising agencies to which you have referred could reasonably or fairly be considered as subjects described in the exceptions noted above.

You have indicated that the reason for calling the executive session would be to prevent one of the agencies from obtaining an advantage over another by being able to hear the other agency's presentation. While this is a reasonable concern, it does not fall within the exceptions to the public meeting law. The concern might be met, however, by requesting

the representatives of the advertising agencies to wait in a separate room while the presentation of another advertising agency is being made and otherwise leaving the meeting open to interested members of the public. Alternatively, the board might consider allowing a short second presentation by each advertising agency after all of the presentations have been made. This would allow each agency to take whatever advantage has been gained from listening to the other agencies' presentations.

KEV/pjg

Harry Treager, Director
Division of Occupational Licensing
Department of Commerce & Economic Development

August 21, 1981

J-66-138-82

465-3600 ex 56

WILSON L. CONDON
ATTORNEY GENERAL

By:
Sarah T. Kavasharov
Assistant Attorney General

Record of Meetings of Board of Psychologist and Psychological Associate Examiners

You have asked for our opinion of the recommendations regarding board meeting minutes and use of executive session made by the Division of Legislative Audit in its letter of June 9, 1981 to Dr. Pam Delys-Baglien. It is our view that the reports contained in Prior Audit Recommendation No. 3, and pages 8-10 of the letter indicate that the board may have been in violation of 44.62.310 and 44.62.312 (the "Open Meeting Law"). We believe this may be due largely to lack of guidelines having been developed for board members to follow. Therefore, we have written the attached memorandum for the board's guidance. We believe the memorandum should be presented substantially as written to other boards as well, or at least incorporated into educational materials for newly appointed members of state boards and commissions.

STK/jb

Attachment

Dr. Pam Delys-Baglien
Chairperson
Board of Psychologist &
Psychological Associate
Examiners

August 21, 1981

J-66-138-82

465-3600 ex 56

THRU: Harry Treager, Director
Division of Occupational Licensing
Department of Commerce & Economic
Development

Conduct and Records of
Board Meetings to Assur
Compliance with AS 44.6
and AS 44.62.312

WILSON L. CONDON
ATTORNEY GENERAL

By:
Sarah T. Kavasharov
Assistant Attorney General

In light of the recommendations made by the Division of Legislative Audit in its letter of June 9, 1981, we offer the following principles and guidelines for future conduct of board meetings.

There are two chief principles which every board member should keep in mind and which must guide his or her conduct as a board member. First, appointment to a state board such as yours makes one an officer of the state. As members of the board, you do not represent a profession; you represent the people of the state. Your duty is always to the people; it is the public interest that you are appointed to serve, and not the interest of the profession. You may have been appointed because you have particular expertise in a profession, but you do not serve as members of that profession. Although all of you are undoubtedly already aware of this fact, it can hardly be emphasized enough as the first principle that should guide your actions and the conduct of board business.

Secondly, the people of the state have made absolutely clear in the wording of AS 44.62.310 and 44.62.312 that meetings of boards such as yours must be open meetings and that use of executive session is limited to very specific situations. (A copy of these statutory sections is attached.) Only if you are certain that a topic clearly fits into one of the exceptions spelled out in AS 44.62.310(c) should you enter into executive session. Also, you may not take action while in executive session.

You must return to the record before taking official action and the record should clearly show not only what action was taken, but state some reasonable grounds for taking the action.

It will be useful for you also to keep in mind the balancing rules which we follow to help answer the question of when confidentiality must be protected by government officials. Two specific rules of law are observed and balanced. The first rule is that expressed both in AS 44.62.312 and in AS 09.25.110. 1/ These statutes both require that state action and state records be public, with only narrow exceptions. The second rule is that expressed in Art I, § 22 of the Alaska Constitution, which guarantees the right to privacy. If no specific exception in AS 44.62.310 or any other statute requires that a matter be kept confidential, then it is necessarily a matter of public record unless it would violate a person's consitutional right to privacy to disclose it. In other words, first we look to see whether a specific statute requires confidentiality. Then, if there is no such specific statute, we also consider whether Art. I, § 22 of the Constitution (which is our highest statute) may require confidentiality.

If there is a clear conflict between the public right to know and a person's right to privacy, we rule in favor of the right to privacy, but only if there is a clear conflict. The attached memorandum by Assistant Attorney General Susan Burke, while it deals with another subject, expresses the principles which we follow and may be useful to you in dealing with the problems involved.

1/ AS 09.25.110 provides:

> Inspection and copies of public records. Unless specifically provided otherwise the books, records, papers, files, accounts, writings, and transactions of all agencies and departments are public records and are open to inspection by the public under reasonable rules during regular office hours. The public officer having the custody of public records shall give on request and payment of costs a certified copy of the public record.

Following are some guidelines to help you deal with the specific situations mentioned in the Legislative Audit report.

1. If a motion is made to enter into executive session, do not do so without a careful study of the exceptions contained in AS 44.62.310. If you decide that executive session is appropriate, state on the record what exception in AS 44.62.310(c) you are following, or whether your concern is the protection of a person's privacy under Art. I, § 22 of the Alaska Constitution. If you cannot state clearly for the record a reason to enter into executive session, do not do so. (And do not do so for purposes of the discussion.)

2. Have all proceedings electronically recorded. Further, instruct the person responsible for taking minutes that the record must always show both the specifics of board action and the grounds for taking the action.

3. Applications; applicant qualifications or examination results. AS 44.62.310(c)(2) provides that only if a matter will "tend to prejudice the reputation and character" of a person should you enter into executive session regarding an applicant. General discussion regarding applicants, their qualifications, or the fact of passing or failing an examination will not ordinarily fall into this category. If there is some question about a specific candidate, discussion of which would tend to prejudice that person's character or reputation, however, you should invoke this exception. Also, if you have a genuine doubt whether you may adversely affect a person's right to privacy, it is best to err on the side of confidentiality. Such a decision can thereafter be reversed if incorrect, but a wrong decision which adversely affects a person's constitutional or other rights can hardly be undone.

4. Status of investigations. Since investigative reports by the Division of Occupational Licensing do not name the person who is the subject of an investigation, you need not as a general rule enter into executive session to receive these reports. There may be occasional exceptions to this, such as if investigative facts would themselves tend to reveal the identity of the person under investigation. You may generally trust the division investigators in this regard, as they are aware of the limitations on revealing information even to board members.

5. Examinations, grading procedures. Only the specific content of examinations may appropriately be kept from public knowledge. This serves the public interest by helping to assure that unqualified persons may not unfairly pass an examination. However, the public is entitled to know what procedures are followed in grading an examination. To the extent that it is possible to separate content from grading procedures, this should be done and procedures disclosed. It is not only useful but necessary to the public and to applicants to know, also, what principles the board follows in determining qualifications for practice of a profession. Procedures and principles followed by state boards are matters of public policy and an effort should always be made to keep the public informed regarding such matters.

Obviously, the questions in this area can be difficult ones and if you have further questions regarding situations not covered here, please contact us further.

SEK/jb

Attachment

MEMORANDUM State of Alaska

TO: Hon. W.R. Hudson, Commissioner
Department of Administration

DATE: January 2, 1981

FILE NO: J-66-445-81

TELEPHONE NO: 465-3666

FROM: WILSON L. CONDON
ATTORNEY GENERAL

SUBJECT: By-laws of Alaska Energy Center

By:
Rodger W. Pegues
Assistant Attorney General

This responds to your request for advice on this subject.

It is not necessary for the center to file as a tax-exempt, nonprofit corporation with the Internal Revenue Service. As a state agency it is not taxed by the United States. Nevertheless, it causes no harm for the center to file; it is a belt-and-suspenders matter.

With respect to accounting systems, you should advise the center's executive director that you wish it to comply with State of Alaska accounting practices. It is virtually impossible, as you know, to reconcile a different accounting system with the state's budgeting and auditing procedures. You should simply explain that and furnish the executive director whatever materials are necessary. There is every reason for the center to cooperate on this point, and no reason not to.

With respect to meetings, the center is a state agency, and its meetings are subject to the sunshine law. AS 44.62.310 - 44.62.312. The by-laws are not required to repeat what is already required by law. Of course, to the extent that they may conflict with the law, they are a nullity. For example, section 5 of the by-laws would be a nullity should the legislature enact a law with which it conflicts. It is not up to state agencies, even so-called independent corporations, to decide how money is to be appropriated or spent except to the extent that the legislature gives them discretion to do so. Unlike the University of Alaska, which is a creature of the constitution, statutorily established independent corporations are creatures of the legislature and totally subject to its otherwise valid enactments.

The provisions of AS 44.62.310 - 44.62.312 apply to the center, and the reasons prescribed by section 7 of the by-laws for holding closed meetings must be applied in a manner which does not bring them into conflict with the statute.

LAW-1A(Rev.10/79)

It appears that the first two reasons given do not come within the coverage of the statute. The center needs to have AS 46.-12 amended to authorize closed meetings for those purposes as well as to obtain an exception for the same purposes from the provisions of AS 09.25.110 - 09.25.120 (public documents).

With respect to contractual services, because the center has not been expressly authorized by law to retain counsel or to sue or be sued in its own name, it must obtain the attorney general's approval to retain counsel. We see no need, however, to place that requirement in the by-laws. It is already a matter of law. AS 44.23.010 - 44.23.020. Public Defender Agency v. Superior Court, Third Jud. Dist., 434 P.2d 947 (Alaska 1975). That creates no problem, however, because the attorney general routinely approves such requests whenever the need arises.

Because the center is new, it is bound to have some problems getting started. Its problems will probably be exacerbated by its concern for its independence. There is no way, however, in which its independence can be threatened by compliance with the applicable law and financial procedures. Its real independence lies in the exercise of its discretion in exercising its substantive powers under AS 46.12.110 - 46.12.120 and not in choosing accounting systems.

RWP/pjg

cc: Walter Parker
Alaska Energy Center

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K—STATE CAPITOL
JUNEAU, ALASKA 99811
465-3665

February 3, 1981

Mr. C.R. "Steve" Hafling
Chairman, PERS Board
[illegible] 'G' Street
Anchorage, AK 99501

Re: Closed deliberations by
PERS Board
Our file: J-66-339-81

Dear Mr. Hafling:

At your October meeting in Fairbanks, the Public Employees' Retirement System (PERS) Board requested our opinion regarding the board's authority to deliberate in closed session. It is our opinion that you are authorized to do so when hearing an appeal from a decision of the administrator.

The statute which established PERS provides that the powers and duties of the board include both the holding of meetings, which are to be open to the public, and the hearing of appeals. AS 39.35.040(1), (4). The statute does not specify whether appeals hearings are to be public. Under the ordinary rules of statutory construction, the express requirement that meetings be public, and the omission of any such requirement with regard to appeals hearings, suggests that hearings are not required to be public. However, any ambiguity on this point is resolved by the Alaska Administrative Procedures Act (APA) provision regarding public meetings, which is applicable to all administrative bodies of the state and its political subdivisions. AS 44.62.310. That section provides an explicit exemption to the public meeting requirement for "judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding." AS 44.62.310(d)(1).

Neither the PERS Act nor the APA require the deliberative portion of your appeals hearings to be held in public. However, the public meetings requirement is based upon the premise that public bodies should conduct their business in public unless privacy is necessary for specific legitimate purposes. It is our view that the spirit of the law requires

that exemptions to the public meetings requirement be construed narrowly. Under regulation 80-6 adopted at your October meeting, your hearings will be public and your deliberations will be open unless a majority of the board votes in an individual case to close them. Your decision to deliberate in closed session should not be made capriciously, but, should be based upon a determination that deliberating in private will facilitate your ability to render a fair and impartial decision, for example, by allowing you to evaluate the credibility of conflicting testimony without the psychological pressure created by the physical presence of the witnesses and parties. Since this is a determination which each member must make individually, you may want to consider revising your regulation to allow the deliberations to be closed upon the request of any individual member in order to ensure the full participation of all members in the deliberative process.

The holding of private deliberations following a public adjudicatory hearing is consistent with the traditional practice of private deliberations by a jury or court in civil and criminal proceedings, and is, we believe, consistent with the spirit as well as the letter of the Alaska public meetings law. We caution that, despite the omission of a requirement in the PERS Act that your appeals hearings be public, we believe that the Alaska public meetings law, interpreted in the context of the Anglo-American tradition of open trial (see K. Davis, ADMINISTRATIVE LAW TREATISE § 14.13 (2d ed. 1980), requires that all but the deliberative portions of your appeals hearings be held in public.

Very truly yours,

WILSON L. CONDON
ATTORNEY GENERAL

By: Laura L. Davis
Laura L. Davis
Assistant Attorney General

LLD/pjg

cc: PERS Board members

Paul Arnoldt, Director
Div. of Retirement & Benefits
Department of Administration

MEMORANDUM State of Alaska

TO: Marie Matsuno, Deputy Commissioner
Rural Development Council
Department of Community &
Regional Affairs

DATE: February 11, 1981

FILE NO: J-66-514-81

TELEPHONE NO: 465-3665

FROM: WILSON L. CONDON
ATTORNEY GENERAL

SUBJECT: Rural Development Council by-laws

By:
Laura L. Davis
Assistant Attorney General

Attached is your draft of by-laws for the Rural Development Council, marked with our comments and suggested changes. Generally, we advise you to avoid reiterating the terms of your enabling law, AS 44.47.160 - 44.47.190, in the by-laws, unless necessary for clarity. Necessary references to the statute should include a citation to the section quoted or paraphrased.

We have suggested striking two of your proposed paragraphs for the following reasons. We advise striking the provision for telephone polls of members because of the requirement of Alaska's open meeting law, AS 44.62.310, that your meetings be open to the public. You may meet in executive session for the specific reasons stated in AS 44.62.310(c), but may take no action in the executive session. AS 44.62.-310(b). A telephone poll, even during a conference call between all members of the commission, would not comply with the open meeting law, and any action taken pursuant to such a poll may be void.

However, since your duties are primarily to advise and make recommendations to the governor and legislature, this sanction may not apply. Since a recommendation is not binding or enforceable, it is probably not voidable in practice. You may authorize one or more of your members to make recommendations or advocate ideas consistent with policies adopted at your meetings. Your proposed Article Three authorizes the chairperson to make such statements. You may wish to add to Article Three a specific reference to approval of such statements by telephone call. However, you should make all your fundamental policy decisions in a meeting which is open to the public.

Secondly, we advise striking the proposed disclaimer of liability because it would be of no effect. The liability of public officers and employees is a matter of law, which may not be altered by such an exculpatory clause. Generally, officers and employees of the state are immune from liability

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for acts in the scope of their official duties which involve a mistake in judgment or discretion, or are due to an erroneous interpretation of law. Bridges v. Alaska Housing Authority, 375 P.2d 696 (Alaska 1962). However, this immunity does not apply to the negligent performance of acts not involving such discretionary decisions. State v. Stanley, 506 P.2d 1284, reh. denied, 509 P.2d 279 (Alaska 1973). Because your duties primarily involve the formulation of public policy, your exposure to liability is small. You may be further comforted by knowing that the state's policy is to indemnify its officers and employees for liability incurred in the good faith execution of their duties. (E.g., the individual defendants in Bridges v. Alaska Housing Authority, supra, were all dismissed on the state's motion, although the state was found liable due to the negligent failure of its employees to take reasonable care to secure a vessel which they had seized for a fish and game violation.)

Except for the problems noted above, your proposed by-laws appear to be consistent with the law. Please let us know if we can be of further assistance in this matter.

LLD/pjg

Enc.

cc: Hon. Charles Webber, Commissioner
Department of Commerce and
Economic Development

CAMERON - SUITH 452-9308

MEMORANDUM State of Alaska

TO: Hon. Charles R. Webber
Commissioner
Department of Commerce &
Economic Development

DATE: May 11, 1981

FILE NO: J-66-655-81

TELEPHONE NO: 465-3600

FROM: WILSON L. CONDON
ATTORNEY GENERAL

By:
Rodger W. Pegues
Assistant Attorney General

SUBJECT: Application of Open Meetings Law to informal meetings

You have asked whether the Open Meetings Act, AS 44.-62.310 - 44.62.312, applies to informal meetings.

A major decision on the application of the Open Meetings Act is now pending before the Alaska Supreme Court. Rather than issue a formal opinion, therefore, we are issuing this memorandum of advice for your guidance and the guidance of other public officials until the court makes its ruling on the matter. It is our belief that the court will follow the majority of courts on the question and hold that the Act applies to informal as well as formal meetings of public bodies. See Sacramento Newspaper Guild v. Sacramento Bd. of County Supervisors, 69 Cal. Rptr. 480 (Cal. App. 1968); City of Miami Beach v. Berns, 245 So.2d 28 (Fla. 1971). The law will apply even if no "action" is taken so long as information is exchanged which relates to any matter on which foreseeable action may be taken.

The threshold question is what bodies are covered by the Open Meetings Act. On its face, the Act is extremely broad. */ It is required reading for those who would understand this law:

> All meetings of a legislative body, of a board of regents, or of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of its political subdivisions, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, di-

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*/ The section title is "Agency meetings public." Section titles are, however, not a part of the law, AS 01.05.006, and should not, therefore, be used in its interpretation.

02-001 A(Rev. 10/79)
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> visions, bureaus, commissions or organizations, advisory or otherwise, of the state or local government supported in whole or in part by public money or authorized to spend public money, are open to the public except as otherwise provided by this section. Except when voice votes are authorized, the vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote. This section does not apply to any votes required to be taken to organize the afore mentioned bodies.

AS 44.62.310(a)(emphasis added). Despite the use of the words "agency" and "agencies," we believe, as will be shown below, that the law does not apply to the meeting together of persons who merely occupy positions within an agency or within two or more agencies. If it meant that, it would say so. That is, it would say "any meeting of two or more state or municipal officials or employees." It does not say that or anything like that. Something more is needed. There must be some "body."

The statute goes on to say:

> If excepted subjects are to be discussed at a meeting, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss matters that come within the exceptions . . . shall be determined by a majority vote of the body. . . .

AS 44.62.310(b)(emphasis added).

Now, in contrast to its breadth of coverage, the statute has a fairly particular application as to its objective: It is that "[a]ll meetings . . . are open to the public. . . ." It is meetings with which the law is concerned, and it is meetings of "the afore-mentioned bodies" with which it is precisely and exclusively concerned. It is not concerned with the meetings of staffs -- who do not vote -- but rather with the meetings of "bodies" whose members are "entitled to vote." That is why the law refers to the question of holding an executive session as being "determined by a majority vote." Non-bodies do not determine actions by a vote. The principal employee or official decides, either with or without the advice of subordinates.

The word "agency" is used in the Open Meetings Act in the peculiar sense of the Administrative Procedure Act, of which the Open Meetings Act has always been a part, that is, as meaning a regulatory or quasi-judicial board or commission, for

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specific membership and vest it with specific powers and assign it certain functions to be acted upon by a vote of the committee's membership. If that is done, the law applies. But where the committee, task force, or group has no power to act by a vote of its members, has no fixed functions which constitute its business, and has no fixed membership to exercise its power by vote, then the Open Meetings Act, by its own terms, does not apply.

In sum, it is our view that the Open Meetings Act only applies to multi-member bodies, which have a fixed membership, which are supported in whole or in part by public money, and which are empowered pursuant to law to exercise governmental power or to provide advice through a vote of their membership. It does not apply to meetings of individuals, who are public officers or employees, such as the cabinet, but who are not empowered collectively to exercise power or provide advice as a body by a vote of their members.

With these guidelines as to which bodies the law applies, we now turn to the question as to which meetings of these bodies or of their members the Open Meetings Act applies.

Some courts have permitted informal, closed meetings of public bodies to be held. See Lessel v. Bd. of Supervisors for the County of Nassau, 394 N.Y.S.2d 762 (1977); Reeves v. Orleans Parish Sch. Bd., 264 So.2d 243 (La. App. 1972), revs'd, 281 So.2d 719 (La. 1973). It appears, however, that there is no basis for this practice under the Alaska Open Meetings Act. It states that "[i]t is the policy of the state that" public bodies conduct "their deliberations . . . openly" and that it is not up to them "to decide what is good for the people to know and what is not good for them to know." AS 44.62.312(a)(2), (4).

The courts seem particularly sensitive to a body's meeting informally in an unnoticed, closed session and then meeting subsequently in a noticed, open meeting to act on the subject which was discussed at the informal meeting. A person aggrieved by the action taken at the subsequent meeting can have it voided. Peters v. Bowman Public Sch. Dist., 231 N.W.2d 817 (N.D. 1975). The rationale for voiding the subsequent action taken at the formal meeting was ably expressed in the Sacramento case:

> An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There

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> is rarely any purpose to a nonpublic or pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the [informal] collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices.

Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 69 Cal. Rptr. 480, 487 (1968).

It is, of course, permissible for members of boards to participate in social or other gatherings where their purpose is not, in whole or in part, to discuss or transact the business of the public body of which they are members. Orange County Publications Div. of Ottaway Newspapers, Inc. v. Council of City of Newburgh, 401 N.Y.S.2d 84 (1978). But so-called work sessions, study sessions, staff meetings, or briefing sessions involving two or more of the body's members all appear from the cases to fall under the law and must be noticed and open to the public. Only those gatherings of public bodies (1) which are not intended to circumvent the Open Meetings Act and (2) at which there is no discussion of the business of the public body appear to be exempt from the law's requirements. Otherwise, whenever two or more members of a public body meet to discuss the body's business, the law probably applies.

By requiring that the meeting be open to the public, the law impliedly requires that it be held within the area in which the body has jurisdiction. Quast v. Knutson, 150 N.W.2d 199 (Minn. 1967). See also Horowitz v. Alaska Bar Ass'n, 609 P.2d 39, 42 (Alaska 1980)(Dimond, S.J., dissenting). In Horowitz, the court held that the Administrative Procedures Act, of which the Open Meetings Act is a part, did not, by the terms of the law which established the Alaska Bar Association, apply to the association. There is no reason, however, to believe that the majority disagreed with Senior Justice Dimond's conclusion that the Open Meetings Act required that meetings be held in Alaska. Indeed, by implication, it apparently agreed that the law required meetings to be held in Alaska, otherwise there was no need for it to hold that the law did not apply to the Bar Association. */ Nevertheless, when necessary to its

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*/ Arguably, the majority had to rule on the law's application to the bar because there was a lack of formal public notice. However, the bar's Hawaii meeting was a matter of some public controversy and actual notice was, therefore, made.

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business, a board or commission (or subcommittee) and its staff can make duly noticed field trips outside the board's geographic jurisdiction. In doing so, however, the body must limit its activities to those for which the field trip was required, and it cannot act on other matters which could have been acted upon at its usual place of business at a public meeting.

The Open Meetings Act expressly requires that "[r]easonable public notice shall be given for all meetings required to be open under this section." AS 44.62.310(e). This will almost certainly be interpreted to mean adequate notice under the circumstances. That is, what is reasonable depends upon the situation in which the public body must meet to hear, consider, deliberate, and take -- or not take -- action, and the effect of its doing so on the public and on any individual. The greater the exigency of the former, the less notice will probably be necessary. The greater the latter, the more notice will probably be required. If the notice is lacking or so inadequate that the public is unaware of the meeting, the law apparently is violated. Sullivan v. Credit River Township, 217 N.W.2d 502 (Minn. 1972). Regularly scheduled meetings need no further notice, if the time and place are known to the public, but special meetings always require special notice, unless an emergency makes notice impractical or impossible. Id., at 506. The latter consists solely of situations which call for immediate action to protect the public peace, health, or safety. Id. In other words, in the absence of a situation demanding immediate action to protect the public peace, health, or safety, it does not suffice that a meeting is held on such short notice that there is no effective notice. Public bodies must plan ahead, and their failure to do so will not justify their holding a meeting without adequate, effective public notice.

Absent exigent circumstances, three-days notice appears to be the minimum allowable to be reasonable public notice and the three days cannot include Saturday, Sunday, or holidays. Some jurisdictions allow a 24-hour minimum. Bd. of Ed. v. Kankakee Federation of Teachers Local No. 886, 264 N.E.2d 19 (Ill. App. 1970). But we advise that the three-day rule be followed absent an emergency. Even emergency meetings must be noticed, if possible, by calling radio and television stations and the press and by posting. It is the receipt of notice which is required. Mailing notices to the media three days before a meeting will not suffice. As a general rule, agencies are well advised to give notice as far in advance and as widely as is practicable in order to avoid challenges to their actions under AS 44.62.310(f). The penalty for failing to comply with the statutes is to void the public body's ac-

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tion. Accordingly, every public body to which AS 44.62.310 and 44.62.312 apply should have a standard procedure for making notice of the time, place, and subject of its meetings.

Because of its application to all public bodies, we are making copies of this memorandum available to those bodies.

RWP/pjg

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AK Supreme Court
1982

1982 City of Kenai v. 642 P2nd 1816
1980 Horowitz v. AK. Bar

quoted Hannond v. Noorat Score Borough
645 P2nd 750 1982

— Uniform Rule Municipality Laws —

check Headnote for Shepard's

LAW LIBRARY has Briefs

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Joe Hayes 272-3471
office

— any municipality or pol. sub. not expressed to act on state business not covered — cannot be exercised —
decisions on positions & stations, posture — aimed at pol. accomplishments but not accomplishments they — agreed upon — technically legitimate (Sackett's action)

STATE of ALASKA

MEMORANDUM

Randall P. Burns, Exec. Director
Alaska Public Offices Commission
610 'C' Street, Suite 209
Anchorage, Alaska 99501

ATTN: Richard E. Vollertsen

DATE: August 22, 1979

FILE NO: J-66-018-80

TELEPHONE NO:

SUBJECT: Secret ballot for electing the commission's officers

AVRUM M. GROSS
ATTORNEY GENERAL

By:
Rodger W. Pegues
Assistant Attorney General

You have asked whether the Alaska Public Offices Commission's by-law which provides for a secret ballot on the election of its officers is valid under AS 44.62.310 (Alaska's sunshine law).

The election of officers concerns "votes required to be taken to organize" the commission under AS 44.62.310-(a). Accordingly, the provisions of AS 44.62.310(a) which require votes to be public do not apply to the votes to elect the commission's officers.

There is no merit to the view that the exception here applies solely to the first organizational meeting and not to subsequent ones. Its only purpose is to avoid the sort of frictions, hard feelings, and interpersonal pressures which voting openly against a fellow member will generate. This purpose must be served not only at the first organizational meeting but also at each subsequent one. Limiting the exception to the first election of officers deprives it of any rational purpose. A law may not be so interpreted.

RWP/pjg

of ALASKA

MEMORANDUM

Michael F. Porcaro
Executive Director
Alaska Public Broadcasting
Commission

DATE: October 15, 1979

FILE NO: J-66-218-80

TELEPHONE NO: 465-3684

SUBJECT: Public Meetings by Conference Call

AVRUM M. GROSS
ATTORNEY GENERAL

GTK

By:
G. Thomas Koester
Assistant Attorney General

On October 5, 1979, you requested by telephone our advice regarding the permissibility under Alaska's Open Meeting Law, AS 44.62.310, of the Alaska Public Broadcasting Commission taking action by telephone conference call instead of at a public meeting attended by members of the commission in person. At that time, I advised you "off the top of my head" that such a procedure was permissible if (1) the public was made aware that a decision was to be made in such a fashion and (2) it was indeed a conference call where the actual voice votes of the members of the commission could be ascertained by anyone attending one of the conference call locations.

Since that time, I have discovered that the State Board of Education requested our advice on a similar question in 1978, and that we advised that board that such a procedure was permissible "in emergencies." I am enclosing a copy of the memorandum of advice which we provided to that board at that time; to place it in context, I also am enclosing a copy of the letter that board received from the Ombudsman criticizing the board's actions in that case.

Note that in the memorandum of advice which we provided the board, we suggest that an "emergency" be defined as "a situation in which a formal decision must be made by the board before its next regularly-scheduled meeting." Memorandum, page 1. The ultimate conclusion, however, is clear: A "public meeting" of a state agency (including the Alaska Public Broadcasting Commission) should, if at all practicable, be in person and pursuant to the express provisions of Alaska's Public Meeting Law. In the specific context which you describe in your October 5, 1979 memorandum requesting our advice, the commission taking action pursuant to a conference telephone call would appear to be legally permissible. In the future, however, we strongly recommend that public comment be solicited sufficiently in advance to permit the commission to meet in person and to take action at that time.

If you have further questions, do not hesitate to contact us.

GTK:dlm

TE
LASKA

MEMORANDUM

Charles H. Meacham, Director
International Fisheries &
External Affairs

DATE: December 4, 1979

FILE NO: J-66-322-80

TELEPHONE NO:

AVRUM M. GROSS
ATTORNEY GENERAL

By:
Rodger W. Pegues
Assistant Attorney General

SUBJECT: Gubernatorial meetings with members of Board of Fisheries and others

You have asked whether it is possible for the Governor to hold private meetings with the members of the Board of Fisheries and representatives from fishermen's and processor's groups for consultations on handling a projected record harvest of salmon at Bristol Bay in 1980.

Under Alaska law, all meetings of government boards must be public. AS 44.62.310. There are express exceptions, narrowly construed, which include "matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit." AS 44.62.310(c). Given the nature of the subject matter here, that exception could apply, at least in part, to the proposed meeting. By its plain language, however, it does not apply. But, as a practical matter, the meeting which the Governor proposes does not constitute a meeting of the Board of Fisheries, and therefore, the requirement for an open meeting does not apply to it.

In our view, AS 44.62.310 does not apply to any and all gatherings at which the members of a board or other government organizations are in attendance. While a board cannct avoid the statute's requirements by holding rump meetings, members of a board are able to attend meetings called by others in which they, first, have a legitimate interest and at which they, second, will not be sitting as a board to consider in confidence matters which must be considered in public. We emphasize the last point.

A private or closed meeting cannot, of course, be used by the board members to consider and arrive at tentative decisions on regulation of the salmon fishery. The essence of AS 44.62.310 is that the public has a right to know -- with only limited exceptions -- the information on which the board reaches its decisions. Evading the statute's requirements runs the risk of the action's being voided under AS 44.62.310(f). Accordingly, we urge that the utmost caution be exercised to avoid that result and that the board in no way act in its capacity as a board.

We may be too cautious about this, but our advice is that the board members probably should participate in the proposed meeting solely insofar as necessary to hear matters which industry representatives, for legitimate reasons, are not willing to make public. We believe that the appearance of any conflict with the dictates of AS 44.62.310 will be scrutinized very closely if legally challenged and that only good faith efforts to comply with the law will be upheld. To the maximum extent possible, therefore, the board members themselves should limit their participation in the proposed meeting.

RWP/pjg

cc: Greg Cook, Executive Director
Boards of Fisheries & Game
Department of Fish & Game

STATE of ALASKA

MEMORANDUM

Charles Webber, Chairman,
Board of Marine Pilots
Commissioner, Commerce &
Economic Development

DATE: February 8, 1979

FILE NO:

TELEPHONE NO:

AVRUM M. GROSS
ATTORNEY GENERAL

SUBJECT: Applicability of AS 44.62 to the rate-making proceeding; Participation of Absent Board Members in the proceeding; Ex Parte Contacts. Our File: J-66-458-79

By: Joseph K. Donohue
Assistant Attorney General

You have requested our advice generally concerning the proper conduct of the rate-making proceeding presently designated the Proposed Tariff Increase filed by Southwest Alaska Pilots Association, BMP Rate Case No. 78-1. This office has reviewed the course of the proceeding thus far and wishes to give the board members several general instructions concerning the proper conduct of a rate-making proceeding. Many of these rules of conduct are of general application and the Director of the Division of Occupational Licensing should instruct members of other boards along similar lines whenever he deems it appropriate.

1. Applicability of AS 44.62.330 - .620

The Southwest Alaska Pilots Association filed a request for rate adjustment prior to the December 5th meeting of the Board of Marine Pilots in accordance with 12 AAC 56.150. */ In doing so, they initiated a rate making proceeding under the Board's general authority to "regulate pilotage fees." AS 08.62.040(a)(4). The hearing was subsequently continued until January 30, 1979. The question arises as to whether the administrative adjudication provisions of the Administrative Procedure Act (APA), AS 44.62.330 - .630 apply to a rate-making proceeding. AS 44.62.330(a)(33) expressly states that the Board of Marine Pilots is subject to this article of the APA. A review of those provisions clearly demonstrate that they are designed to establish the proper procedure for license revocation proceedings. There can be no question but that the Board is subject to the APA in any case involving the denial, suspension or revocation of a marine pilot's license.

However, it is also clear that the accusation, notice of defense and other provisions of the APA are not readily adapted

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*/ That regulation provides that "[a]ny party having a material interest in the rate structure desiring a rate change for an area must file a request for rate adjustment at least 60 days prior to the next meeting of the board."

or his attorney */ approaches a member of the board, the board member should merely refrain from discussing any matter pertinent to the proceeding and request that the interested party refrain from discussing the case. Ex parte contacts between board members and parties interested in the outcome of the litigation arguably violate constitutional due process rendering that member subject to disqualification and possibly invalidating the entire proceeding. See Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970); Sangamon Valley v. United States, 269 F.2d 221 (D.C. Cir. 1959).

A corollary of the rule prohibiting ex parte contacts is the rule concerning the confidentiality of the board's deliberation process. The importance of flexible and open debate in such closed session is expressly recognized and promoted in AS 44.62.310. That section provides two general exceptions to the open meeting requirement for board meetings. First, certain topics which are carefully delimited in subsection (c) may be discussed in executive session e.g. matters which would prejudice the reputation of any person. Second, subsection (d) exempts meetings of judicial or quasi-judicial bodies holding a meeting to make a decision in any adjudicatory proceeding e.g. in rate-making proceeding. In both cases, the matters discussed should be confidential. Obviously, no one is prejudiced by this confidentiality since the board cannot act in the absence of a public decision with related findings and conclusions supported by the record.

This office requests strict compliance with these latter rules of conduct. This advice is of general application to any member of a professional licensing board participating in, or likely to review the result of, an adjudicative proceeding involving licensing, rates etc.

JKD:mll

cc: All Board Members

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*/ Such ex parte contacts by an attorney would in most cases be deemed an unethical practice. See Code of Professional Responsibility Canon 7. EC 7-35.

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K-STATE CAPITOL
JUNEAU, ALASKA 99811

March 15, 1979

The Honorable Terry Stimson
Alaska State Senate
Pouch V
Juneau, Alaska 99811

Re: Executive Sessions
Our File: J-60-485-79

Dear Senator Stimson:

This responds to your request for further elaboration on the use of executive sessions. Specifically, you wish to know whether, if the subject of discussion is hiring, firing, or transfer of any person, the person being discussed is entitled to advance notice.

It is our best guess that the courts would hold that advance notice to the person being discussed is required.

The law requires that, with certain exceptions, all meetings of governmental bodies be open to the public. The applicable exception is stated as follows:

> The following . . . may be discussed in an executive session:
>
> * * * * *
>
> Subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion . . . .

AS 44.62.310(c)(2) (emphasis added). Discussing the subject of hiring, firing, or transferring a person obviously could tend to prejudice the person's reputation and character. Any number of disparaging things could be said about the person as reasons for not hiring him, for firing him, or for transferring him. Therefore, the subject is patently within the coverage of the exception.

However, the person being discussed "may request a

public discussion." If he does so, there can be no executive session to discuss hiring, firing, or transferring him. He may exercise this right, however, only if he has advance notice that his hiring, firing, or transfer is to be discussed; that matters tending to injure his reputation and character will (or may) be discussed; and that the body intends to meet in executive session at a given time and place; and that he may request that the matter be discussed in public rather than at an executive session. Only in this manner will the affected person have a reasonable opportunity to exercise his right to a public meeting. Cf., McCarrey v. Comm'r. of Natural Resources, 526 P.2d 1353 (Alaska 1974).

If, without adequate notice to the person affected, a governing body announces in the course of its meeting that it is going into executive session, the person affected will have no reasonable way of exercising his right to a public meeting. Even if the person happened to be present at the meeting, the failure to afford him adequate advance notice compels him to consider his options in unreasonable haste, without any time to prepare, and without any opportunity to seek counsel on the matter. The individual's statutory rights are made a sham. We very much doubt that the courts would look with favor on that kind of practice.

As a practical matter, a week to ten days is a minimum period -- absent an emergency -- for adequate notice. For more complicated matters, at least 30 days is the minimum reasonable period of notice. We conclude, therefore, that in order to use the exception for executive sessions under AS 44.62.310(c), the governing body must give the person affected at least one week's notice that it intends to do so, together with notice of the subject to be discussed and of his right to a public discussion on the subject.

Sincerely yours,

AVRUM M. GROSS
ATTORNEY GENERAL

By: Rodger W. Pegues
Rodger W. Pegues
Assistant Attorney General

RWP/pjg

ATE
ALASKA

MEMORANDUM

Katherine T. Hurley, Chairman
State Board of Education
Department of Education

DATE: April 7, 1978
FILE NO:
TELEPHONE NO.
SUBJECT: Board meetings by phone
Our File J-66-472-78

Avrum M. Gross
Attorney General

By: Ronald W. Lorensen
Ronald W. Lorensen
Assistant Attorney General
Department of Law

This is in response to your request for guidelines relating to the use of telephone calls by the state Board of Education for taking official Board action. Your request is the result of a recent letter to you from Ombudsman Frank Flavin on the subject. In his letter the Ombudsman recommends that the Board establish procedures governing the manner in which, if at all, the Board will take action by telephone.

Before outlining what we feel would be an acceptable procedure, we think it important to make an observation regarding the purpose of the state's public meeting law, AS 44.62.310. The purpose of that provision is to assure that the general public has access to and knowledge of actions taken by administrative agencies. The policy which the statute promotes is one which assures that important governmental decisions will not be made "behind closed doors", protected from the public's scrutiny and the accountability to the public which that scrutiny entails. Contrary to the view of the Ombudsman, the statute does not, and was not intended to, require that the public have the opportunity to speak at the meeting. In the absence of a specific statute to the contrary, the Board (as well as all other governmental agencies) has no obligation to open up any of its meetings to public discussion; the statute requires only public knowledge.

We agree with Ombudsman Flavin that the Board should only take formal action by telephone in that very limited number of cases necessitating an emergency decision. In this regard, it seems appropriate to define an "emergency" as being a situation in which a formal decision must be made by the Board before its next regularly scheduled meeting. Judging from past experience, these situations will arise only very infrequently.

The Ombudsman recommends that, in emergency situations necessitating action by telephone, an effort be made in advance to inform the public of the Board's intention to act. While this may be possible in some cases, it is obvious that there will also be some situations requiring the Board's immediate attention where providing advance notice will be unrealistic and impractical. As a general guideline, therefore, we would recommend that the Board provide that notice which is practicable and reasonably necessary in the specific circumstances. If there is a need for instant action, advance notice could at least be given to those parties, if any, directly affected, with more general notice of the action being provided through the news media within a reasonable period following the action. Where action can be delayed for at least a day or two, advance notice could be provided generally through news releases to or legal notices in local news media in each community where a board member resides. In that way, interested persons could at least contact their local board member and express their views on the proposed action prior to its being taken, and it may be possible for one or more of the members to arrange to take the call at a location where the public could be in attendance.

One point of clarification should be stressed. Any official action taken by the Board by telephone must be done through a conference-call mechanism. Use of the conference call assures that the Board members are able to communicate fully with and listen to all other members taking part in the decision, thereby promoting full expression and exchange of views on the issue under discussion. This is not to say, of course, that the members of the Board may never be polled individually on a specific subject. Polling of the Board by telephone serves a necessary function in that it permits the pollster to determine whether a given course of action is open to further pursuit. However, this member-to-member polling may not be employed where official action of the Board on a subject is sought.

RWL:jf

cc: Frank Flavin
Ombudsman

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K — STATE CAPITOL
JUNEAU 99811

February 13, 1976

The Honorable Hugh Malone
Representative
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Representative Malone:

Your letter to the Attorney General requested our comments on the use by a city council or borough assembly of the secret ballot to fill a vacancy on the council or assembly. You question the use of a secret ballot by a public body to make decisions on matters of public policy; you inquired whether remedial legislation is required.

We have noted that a school board in Alaska recently stated in a news story that it would be inviting applications for a vacancy on the board. The article said:

> "The board then decides among themselves by secret voting who will replace [the resigned school board member]."

AS 44.62.310 requires that municipalities and school boards conduct their business in view of the public. Section 310(c) provides that executive sessions may be held on certain specified subjects but §310(b) provides that the meeting must be convened in public and the question of holding the executive session voted on publicly. Further, no votes can be taken in the executive session.

We note, moreover, that while a secret ballot appears contrary to the spirit of §310, the vote is taken in the public's view. It appears that §310 does not explicitly prevent the secret ballot; we have been able to locate no case which discusses the use of a secret ballot in the context of an open meeting law.

We note that the mandates of §310, like many other provisions of law, have no explicit sanctions. Public bodies typically comply with the provisions because they are the law

and not because of sanctions. In this case, the sanction would be that the act taken in secret, not having been performed in accord with statutory requirements, is invalid and voidable.

We believe that it is not clear from the provisions of §310 that acts taken not in strict conformity are either voidable or void. We draw this conclusion because typically open meeting laws which have been construed to make acts taken inconsistent with their policy void or voidable have done so explicitly. In one case, after language in a law similar to §310's, the law continued:

> . . . and no resolution, rules, or regulation or formal action shall be considered binding except as taken or made at such meeting. See Board of Public Education v. Doran, 224 So.2d 693, Annot: 38 ALR3d 1070 (Florida, 1969).

At the same time, we note that two Alaskan cases have voided executive action where the executive failed to comply with procedural requirements established to control and regulate the contemplated action. See Alyeska Ski Corporation v. Holdsworth, 420 P.2d 1006 (1967) and State v. Aleut Corp., 541 P.2d 730 (1975).

Accordingly, while §310 would not explicitly void the action taken by a municipality in violation of its provisions, the logic of the Alyeska and Aleut cases casts doubt on the wisdom of such action or even of the likelihood of such actions surving judicial review. If the legislature wishes to clear this matter up, it may consider amending §310 in fashion similar to the law of Florida.

Sincerely,

AVRUM M. GROSS
ATTORNEY GENERAL

By:
Richard A. Bradley
Assistant Attorney General

RAB:md

April 9, 1976

The Honorable Jim Duncan
Representative
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Representative Duncan:

This will confirm our telephone conversation of April 5, 1976 in which we discussed certain questions relating to the Association of Alaska School Boards that you had directed to the Attorney General by letter dated March 22, 1976. In our conversation I advised you as follows:

1. The Association of Alaska School Boards is not a state agency. The Alaska Supreme Court has addressed the question of whether a certain organization is a state agency on a number of occasions. That court has looked at various factors in those cases (for example, Alaska State-Operated School System v. Mueller, 536 P.2d 99 (1975); Alaska State Housing Authority v. Dixon, 496 P.2d 649 (1972); and Walker v. Alaska State Mortgage Association, 461 P.2d 245 (1966)) such as whether the entity involved is subject to control by either the executive or the legislature; whether it submits various reports to either the governor or the legislature; whether its officers are appointed by either the governor or the legislature; whether its powers are created by statute; whether the Attorney General is designated as its counsel; whether its budget is subject to legislative scrutiny; and whether its financial records are subject to audit by the legislative auditor. None of these factors, to our knowledge, apply to the Association of Alaska School Boards.

2. There are no specific restrictions on the expenditures of the Association. I would point out here, however, that, to the extent that the funds of the Association are received from public sources such as school districts, they must be used for a public purpose as required by Section 6 of Article IX of the Alaska Constitution. What constitutes a public pur-

pose is difficult to say. The Alaska Supreme Court has approached the question of "public purpose" as follows:

> At the outset we observe that the phrase "public purpose" represents a concept which is not capable of precise definition. We believe that it would be a disservice to future generations for this court to attempt to define it. It is a concept which will change as changing conditions create changing public needs. Whether a public purpose is being served must be decided as each case arises and in the light of the particular facts and circumstances of each case. Walker, supra, at 251.

3. The Association is not subject to the state's public meeting law, AS 44.62.310. That statute, by its terms, applies only to meetings of various agencies and other kinds of organizations "of the state or any of its political subdivisions". The Association is neither a state agency nor a political subdivision of the State. The public meeting law does express a public policy which may not be fully served where its application is restricted only to meetings of entities of the state and its political subdivisions. However, as currently written, I find no basis for applying it to private organizations which receive all or even a substantial portion of their funding from public sources.

4. Since the Association is not subject to the public meeting law, the determination as to when it may hold executive sessions is presently entirely up to it.

If I can be of any further assistance, please let me know.

Sincerely yours,

AVRUM M. GROSS
ATTORNEY GENERAL

By: RWL

Ronald W. Lorensen
Assistant Attorney General

RWL:jf

MEMORANDUM State of Alaska

TO: Avrum M. Gross
Attorney General

DATE: July 19, 1976

FILE NO:

TELEPHONE NO:

FROM: Ronald W. Lorensen
Assistant Attorney General

SUBJECT: Release of the Division of Corrections Morgan/Levick Escape Report

This will summarize the analysis applied in advising Brad Mattson of the Department of Health and Social Services as to which portions of the above-referenced report could be released to the press and which must be treated as confidential.

There were three applicable exceptions to the general rule of AS 09.25.110 and 09.25.120 that all state records are open to public inspection. They may be described as follows:

1. Matters relating to personnel evaluations and performance reports which are contained in a state employee's personnel file.

2. Matters relating to a grievance over personnel action filed by a state employee and which are in the grievance process.

3. Statements by potential prosecution witnesses in criminal matters.

I. PERSONNEL MATTERS

The first exception is based on AS 39.25.080 and Article I, § 22 of the Alaska Constitution, the "Right of Privacy" provision. AS 39.25.080 provides:

> The state personnel records, except those records which the rules require to be held confidential for reasons of public policy, are public records and are open to public inspection, subject to reasonable regulations as to the time and manner of inspection.

The Personnel Rules provide:

> 14 07.0 Public Records
>
> Except for examination materials, performance evaluations, personal history, or other confidential materials so designated by the Director, employee records shall be public

records. Such records shall be available for inspection in the presence of authorized personnel by the public during regular office hours in accordance with such procedure as the Director may establish.

Under the above, performance evaluations are expressly made confidential. A portion of the Corrections report included letters, copies of which were placed in the respective employee's personnel files, from Huston to the various guards informing them of their termination and detailing the performance-related grounds for the action. While I believe these may properly be characterized as performance evaluations, Mike McMullen of Personnel advises that letters of termination and suspension are also designated by the Director as confidential.

Also included in the Corrections report were memoranda, not copied to the respective personnel files, from Huston to Commissioner Williamson setting out the action taken with respect to each employee involved and describing the performance-related basis for the action. Since this material was nothing more than a repetition of the confidential matter to be found in the employee's personnel file, I advised that this matter be treated as confidential as well. For us to do otherwise would be to permit the State to circumvent the guarantee of privacy made to its employees by the Personnel Rules and Article I, Section 22 of the Alaska Constitution. To be meaningful, this right must be viewed as being that of the individual, and not of the State; therefore, it may be waived only by the individual and not by any state officer, whether or not that officer does so knowingly or inadvertantly.

II. GRIEVANCE MATTERS

The second exception, relating to matters raised in a grievance proceeding filed by a state employee, is tied in with the first exception described above, as well as having a separate statutory basis. Its relation to the first exception is based on the unavoidable fact that matters raised in a grievance proceeding will frequently require that confidential portions of an employee's personnel file be taken into consideration, bringing into play, again, the individual's right to privacy. Beyond that consideration, however, AS 44.62.310 which states the general rule at (a) of that section that all meetings of state bodies be open to the public, specifically precludes, at (c)(2) of the section, a public meeting where the subject is one that "tend[s] to prejudice the reputation and

character of any person, provided the person may request a public discussion." With respect to the grievance procedure, Personnel Rule 12 01.22 carries out this provision by providing that a grievance hearing before the State Personnel Board "shall be closed or open as requested by the employee." Obviously the protection of a closed grievance hearing is of no value to an employee if all the written material under consideration in the grievance process may be disclosed to the public. Again, the right to waive confidentiality is the grievant/employee's, not the State's.

III. STATEMENTS OF POTENTIAL PROSECUTION WITNESSES

AS 12.45.050 provides:

> In a criminal prosecution, no statement or report in the possession of the state which was made by a prosecution witness or prospective prosecution witness (other than the defendant) to an agent of the state may be the subject of subpoena, discovery, or inspection until the witness has testified on direct examination at the preliminary hearing, or in the trial of the case.

There were two documents in the Corrections report which could have fallen under this exception, if Joe Balfe's outfit decided to use them. I tried to call Joe and pin these down, but he was not available and did not return my call until the following day, by which time I had already advised Mattson to treat the two documents in question as confidential under the above quoted section.

Based on Balfe's follow-up call and my discussions with one of his assistant D.A.'s, Steve Branchflower, I am not sure that this exception is really available to the State. Branchflower indicated that it is now pretty much viewed as having been eliminated by the Supreme Court's liberal discovery rules in criminal matters. Practically, anything the D.A. has, the defendant may see prior to trial. Whether or not this change means that statements and reports under AS 12.45.050 are now public (as opposed to simply being available to the defense for preparation of its case -- again, the individual's right of privacy may come into play here) is not clear.

Even if the two statements involved no longer must be kept confidential under AS 12.45.050, they do appear to be statements which the State would use in the involved employee's grievance proceeding. The State's making them public at this point would, again, seemingly defeat the purpose of a closed grievance procedure.

Attached is a copy of the marked-up index to the Corrections report which I furnished Brad Mattson, indicating those portions of the report which are to be treated as confidential. An explanatory key is at the bottom of the first page of the index. I discussed this with Brad and described to him the analysis I have set out here. Based on that discussion he was also going to identify certain portions of Huston's Escape Report memorandum which, under this analysis, would also have to be confidential.

WLL:jf

Attachment

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

September 24, 1975

M E M O R A N D U M

TO: Francis S.L. Williamson
Commisioner
Department of Health and
Social Services

ATTN: Samuel H. Trivette
Executive Director
Alaska Board of Parole

FROM: Avrum M. Gross
Attorney General

BY: Richard L. Peter
Assistance Attorney General

RE: Confidentiality of Proceedings.

Although AS 44.62.310(c)(3) allows the Parole Board to conduct closed meetings, there is no provisions that the decisions may remain confidential. In this respect you are bound only by AS 33.15.140 which restricts disclosure of preparole reports.

We recognize that it may not be possible in many cases to explain the actions of the Parole Board if they are based entirely upon material contained in the preparole reports, but this restriction may be pointed out to those seeking such information. When the Board can explain a decision based upon such materal, without disclosing the material itself, this may be done. The public has a right to know the disposition of persons convicted of a crime. These statutes may sometimes have the effect of placing the board in an uncomfortable position but their effect can not be avoided.

AS 09.25.120 provides in pertinent part:

> Every person has a right to inspect a public writing or record in the state. . . except. . . records required to be kept confidential by a federal law or regulation or by a state law. Every public officer having the custody of records not included in the exceptions shall permit the inspection.

upon where the applicant lives, the issuing authority is either the chief of police, or, where there is none, the warden of the borough or the first selectman of the town. General Statutes § 29-28. They are officials who would immediately become aware of cause to revoke when it arises. Normally they are responsible people who presumably would do their best to ascertain the facts and to perform their duties before revoking a permit.

The plaintiff seeks pre-revocation notice and a hearing. Frequently there could be a long delay before such a hearing could be held. At issue is the right to carry a dangerous weapon. Time is of the essence in such a situation. Under the statute, the plaintiff may request a hearing as soon as he receives notice of the revocation. Any error in the revocation can be corrected within a reasonable period of time. The present scheme provides a reasonably reliable procedure for checking the validity of the facts upon which the revocation is based.

The government's interest, including the function involved and the fiscal and administrative burdens that the plaintiff's suggested procedures would produce, is the final factor to be weighed. The governmental interest here is to protect the safety of the general public from individuals whose conduct has shown them to be lacking the essential character or temperament necessary to be entrusted with a weapon. *Pelose v. County Court of Westchester*, 53 A.D.2d 645, 384 N.Y.S.2d 499, 500.

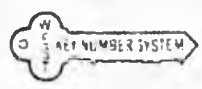
"Reasonable gun control legislation is within the police power of a legislative body to enact; any such restriction imposes a restraint or burden upon the individual, but the interest of the governmental unit is, on balance, manifestly paramount." *Mosher v. City of Dayton*, 48 Ohio St. 2d 243, 247, 358 N.E.2d 540, 543.

The states have always had great leeway in adopting summary procedures to protect the public health and safety. *Mackey v. Montrym*, supra, 99 S.Ct. 2621. Unlike the situation in *Society for Savings v. Chestnut Estates, Inc.*, supra, here the governmental or general public interest is one that could be characterized as extraordinary.

The summary nature of a pistol permit revocation is vital to protect the public safety. A permittee who is, in fact, unfit to carry a pistol could conceivably do a good deal of harm if given advance notice that his permit might be revoked; it could even result in the loss of human life. The risk is too great.

[6] The requirements of procedural due process are met by General Statutes §§ 29-32 and 29-32b. The temporary injunction heretofore ordered is dissolved; mandamus is denied; and judgment is rendered in favor of the defendant, with costs.

Judgment may enter accordingly.



36 Conn. Sup. 117

Carl GIORDANO et al.

v.

FREEDOM OF INFORMATION COMMISSION.

No. 2443.

Superior Court of Connecticut, Judicial District of Ansonia-Milford.

Dec. 19, 1979.

Democratic members of city board of aldermen filed complaint with Freedom of Information Commission alleging that meeting of the board's Republican members, Republican mayor, mayor's Republican administrative assistant, and Republican chairman of city board of finance failed to meet notice requirements applicable to public meetings. The Commission issued decision holding that it had jurisdiction to hear the matter, that the gathering was a public meeting, and that statutory requirements for such a meeting had not been met, and

rior Court, O'Sullivan, J., held that such meeting was not a caucus but was a public meeting subject to statutory notice requirements where phone conference was held with non-Republican warden of city borough in which deal was made on amount to be appropriated to such borough and where budget items to be considered at board meeting next day was discussed.

Appeal dismissed.

1. Municipal Corporations ⇐92

Failure of Freedom of Information Commission to comply with statutory time periods governing hearing of complaints did not deprive the Commission of jurisdiction over complaint that Democratic members of city board of aldermen did not receive notice of a gathering of remaining Republican aldermen with the city's Republican mayor. C.G.S.A. § 1-21i(b).

2. Municipal Corporations ⇐92

Gathering of Republican city aldermen with Republican mayor, mayor's Republican administrative assistant, and Republican chairman of board of finance in which telephone conversation was held with non-Republican warden of city borough, deal with such borough on amount to be appropriated to it was made, and budget items to be considered at board meeting the next day were discussed was not a caucus and thus was not exempt from rules concerning public meetings, including notice requirements. C.G.S.A. § 1-18a(b).

Gitlitz, Ronai & Berchem, Milford, for named plaintiff.

Constance L. Chambers, Meriden, for defendant.

O'SULLIVAN, Judge.

This is an appeal from a decision of the defendant commission.

The board of aldermen of the city of Milford is a fifteen-member elected legislative body. On April 16, 1978, the board consisted of five Democratic members and ten Republican members. Under the Milford charter, the board is the budget making authority of the city and, as such, holds deliberative meetings on the proposed budget during the month of April in each year. On Sunday evening, April 16, 1978, at approximately 7 p.m. the ten Republican aldermen met in the office of Mayor Henry A. Povenelli, also a Republican. Present at that time and place besides the ten Republican aldermen were Richard Dowin, administrative assistant to the mayor and Frederick Lisman, chairman of the board of finance of the city of Milford, both of whom were Republicans. The Democratic members of the board of aldermen did not receive notice of the gathering. The purpose of the gathering was to discuss budget items to be considered at the board meeting to be held on the following evening, April 17, 1978. Neither the minutes nor the votes taken, if any, were kept. Among the items under discussion was the annual grant to the borough of Woodmont, a municipality located within the city of Milford. Under the provisions of the Woodmont charter, the amount of money to be given to the borough by the city each year was to be determined by the budget making authority of the city of Milford (the board of aldermen) and the board of warden and burgesses of borough. If a mutually acceptable appropriation could not be agreed on, the borough is empowered by statute to file a lawsuit in the Superior Court. The board of warden and burgesses consist of one elected warden and six elected burgesses. During preliminary budget processes, the borough officials had requested a grant of $69,000 for the 1978-1979 fiscal year and the mayor and board of finance of the city had recommended that the city appropriate $46,000 to the borough. During the discussion in the mayor's office, Carl Giordano, one of the Republican aldermen and chairman of the board, placed a telephone call to Richard Austin, warden of the borough of Woodmont. Austin is registered as an unaffiliated voter in Milford. The telephone used was equipped with a speaker device that permitted everyone present in the conversation and to be heard by Austin if they wished to speak. Giordano asked Austin if $50,000 would be an acceptable figure as a grant to the borough. Austin indicated he would talk to the burgesses and call back. He did call back and indicated that $50,000 was acceptable. During the morning of April 17, 1978, Austin called Giordano and advised him that, after reconsideration, the burgesses would not accept the $50,000 figure. On the evening of April 17, 1978, the board of aldermen, by a nine to six vote (nine Republicans voting in the affirmative and five Democrats and one Republican voting in the negative) appropriated $40,000 as a grant to the borough.

On April 26, 1978, the five Democratic aldermen filed a complaint with the defendant commission that the gathering in the mayor's office on April 16, 1978 was a public meeting, that they were not notified of the meeting, that there was no public notice of the meeting and that no minutes were taken or filed with the city clerk. A hearing was held on the complaint by the defendant commission on June 19, 1978. On August 23, 1978, the defendant commission issued a decision holding that it had jurisdiction to hear the matter, that the gathering was a public meeting and that the requirements of General Statutes §§ 1-7—1-21k for such a meeting had not been met. It ordered the Republican aldermen henceforth to comply with the statutes by limiting participation in their caucuses to those enrolled members of the Republican party who were members of the board of aldermen.

This appeal was then taken by the Republican aldermen. They are obviously aggrieved for the purpose of taking an appeal.

[1] The plaintiffs' first claim is that the complaint to the defendant commission was not timely heard and decided and that, therefore, the defendant commission had no jurisdiction over the matter. This claim is based on § 1-21i(b) of the General Statutes which reads in part as follows: "Said commission shall, within twenty days after receipt of the notice of appeal, hear such . . . shall decide the appeal within . . . days after such hearing . . . ." In fact, the defendant commission scheduled the hearing approximately fifty-two days after its receipt of the complaint and issued its decision approximately fifty-five days after the hearing.

The time periods, however, are directory and not mandatory and failure to comply with them does not deprive the defendant commission of jurisdiction in the matter.

[2] The plaintiffs also claim that the gathering on April 16, 1978 was not a public meeting but was a caucus and was therefore exempt from the rules applying to public meetings. This claim is based on § 1-18a(b) of the General Statutes which reads in part as follows: " 'Meeting' means any hearing or other proceeding of a public agency . . . to discuss or act upon a matter over which the public agency has supervision, control, jurisdiction or advisory power. 'Meeting' shall not include . . . a caucus of members of a political party . . . . 'Caucus' means a convening or assembly of the enrolled members of a single political party who are members of a public agency . . . ." The Milford board of aldermen is a public agency within the meaning of the statute. The obvious purpose of a caucus is to discuss and to decide on the position to be taken by the members of the political party holding the caucus on matters to come before the public agency of which they are a part.

The gathering in the mayor's office on April 16, 1978 included the ten Republican members of the board of aldermen, the mayor's administrative assistant, a Republican, the chairman of the board of finance, also a Republican and, by phone, Austin, who was not a Republican. The gathering thus was not of the Republican members of the board of aldermen.

In addition, the gathering was to discuss budget items to be considered at the board meeting the next day and to make a deal

with the borough of Woodmont on the amount to be appropriated to that borough. An agreement was made that night. It is obvious that the gathering was for a purpose other than to determine what the Republican position would be on the Woodmont appropriation.

Under these circumstances the gathering was not a caucus, the exemption does not govern the situation and the rules concerning a public meeting do apply. The defendant commission was correct in its finding and in its ruling.

The appeal is dismissed.



83 Ill.2d 191
46 Ill.Dec. 678

The PEOPLE ex rel. Thomas J. DIFANIS, State's Attorney, Appellee,

v.

Joan BARR et al., Appellants.

No. 52948.

Supreme Court of Illinois.

Dec. 19, 1980.

State's Attorney brought declaratory judgment action against nine members of city council, seeking a declaration that the council members violated the Open Meetings Act. The Circuit Court entered judgment in favor of State's Attorney and the Appellate Court, 78 Ill.App.3d 842, 34 Ill. Dec. 223, 397 N.E.2d 895, affirmed, and the city council members appealed. The Supreme Court, Clark, J., held that: (1) meeting of nine members of the city council was not necessarily excluded from coverage of Open Meetings Act merely because the meeting was designated as an informal gathering as opposed to a formal "meeting" of the city council, as unofficial or informal meetings are within the coverage of the Act; (2) where nine members of city council, in meeting prior to city council meeting, discussed matters concerning public business which were scheduled to be dealt with at subsequent city council meeting, such meeting violated the intent and the terms of the Open Meetings Act despite designation of meeting by members as a party caucus; and (3) under rational-basis equal protection standard, appellate court refused to preempt legislative judgments which exempted members of legislature from coverage under Open Meetings Act, but applied requirements of the Act to other bodies of government.

Affirmed.

Ward, J., with whom Underwood, J., joined, dissented and filed opinion.

1. Statutes ⇐195

An expression of certain exceptions in a statute is construed as an exclusion of all others.

2. Administrative Law and Procedure ⇐124

Legislative amendment to Open Meetings Act to delete the word "official" before the word "meeting" was intended to include unofficial or informal meetings within the coverage of the Act. S.H.A. ch. 102, §§ 41, 42.

3. Municipal Corporations ⇐92

Meeting of nine members of the city council was not necessarily excluded from coverage of Open Meetings Act merely because the meeting was designated as an informal gathering as opposed to a formal "meeting" of the city council, as unofficial or informal meetings are within the coverage of the Act. S.H.A. ch. 102, §§ 41, 42.

4. Administrative Law and Procedure ⇐124

"Body" in context of Open Meetings Act covering all meetings of any legislative, executive, administrative or advisory bodies and any subsidiary bodies of any of the foregoing, must necessarily be interpreted to mean an informal gathering of nine members of a legally constituted public body. S.H.A. ch. 102, § 42.

See publication Words and Phrases for other judicial constructions and definitions.

5. Constitutional Law ⇐17, 70.3(4, 6)

It is not the province of appellate court to pass on the wisdom or desirability of legislation, and as long as the means chosen by the legislature to achieve a desired end are lawful and inoffensive to the State and Federal Constitutions, inquiry by appellate court may proceed no further.

6. Constitutional Law ⇐70.1(12)

Although Open Meetings Act, by its express terms, does sacrifice the ability of public officials to act and deliberate privately to what the legislature obviously perceived to be the more important governmental interest of opening processes of government to public scrutiny, such a legislative judgment was peculiarly within the domain of the legislature, and not the courts on appeal. S.H.A. ch. 102, § 42.

7. Municipal Corporations ⇐92

Where nine members of city council, in meeting prior to city council meeting, discussed matters concerning public business which were scheduled to be dealt with at subsequent city council meeting, such meeting violated the intent and the terms of the Open Meetings Act despite designation of meeting by members as a "party caucus." S.H.A. ch. 102, § 42.

8. Constitutional Law ⇐238.5
Municipal Corporations ⇐92

Contention of nine city council members that Open Meetings Act denied them equal protection since members of the legislature were exempt from coverage under the Act and members of the legislature could attend caucuses without risking prosecution, whereas local officials, such as themselves, ran the risk of being prosecuted under the Act for attending political caucuses, was erroneous, as the city council members were not susceptible to prosecution simply for participating in a political caucus, and the Act came into play only where public business which could eventually come up for decision for the full body was deliberated or acted upon in private. S.H.A.Const. Art. 1, § 2; U.S.C.A.Const. Amend. 14; S.H.A. ch. 102, § 41 et seq.

9. Constitutional Law ⇐213.1(2)

Under well-established standards regarding equal protection of the laws, a legislature may differentiate between persons similarly situated, and equal protection requires only that there be a reasonable and rational basis for the classifications which justify different procedures for treating the two groups. S.H.A.Const. Art. 1, § 2; U.S.C.A.Const. Amend. 14.

10. Constitutional Law ⇐213.1(2)

Under rational-basis equal protection standard, appellate court refused to preempt legislative judgment which exempted members of legislature from coverage under Open Meetings Act, but applied requirements of the Act to other bodies of government. S.H.A.Const. Art. 1, § 2; U.S.C.A. Const. Amend. 14; S.H.A. ch. 102, § 41 et seq.

11. Statutes ⇐47

A statute is impermissibly vague when men of common intelligence must necessarily guess at its meaning. S.H.A.Const. Art. 1, § 2; U.S.C.A.Const. Amend. 14.

12. Constitutional Law ⇐258(2)

A criminal statute violates due process if it fails to give adequate notice as to what action or conduct is proscribed. S.H.A. Const. Art. 1, § 2; U.S.C.A.Const. Amend. 14.

13. Municipal Corporations ⇐92

Open Meetings Act was not impermissibly vague in proscribing informal meeting of nine city council members designated as political caucus, as amendments to the Act had deleted the word "official" where it had appeared before the word "meetings," demonstrating that all private meetings by members of legislative bodies were prohibited where deliberations were conducted or actions taken on public business, and as the Act clearly intended that any subdivision of a legislative body, including but not limited to committees and subcommittees supported by tax revenues, was subject to its provisions. S.H.A. ch. 102, § 41 et seq.

14. Statutes ⇐76(2)

Open Meetings Act did not violate state's constitutional provision which prohibited special or local legislation when a general law is, or can be made, applicable, as legitimate governmental interests in creating smaller governmental bodies differently from legislature existed with regard to the public's access to governmental deliberations and actions. S.H.A.Const. Art. 4, §§ 5(c), 13; S.H.A. ch. 102, § 41 et seq.

15. Constitutional Law ⇐82(4)

A governmental purpose to control or prevent activities constitutionally subject to state regulations may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. S.H.A.Const. Art. 1, § 2; U.S.C.A.Const. Amend. 14.

16. Constitutional Law ⇐82(4)

A statute is overly broad if it may reasonably be interpreted to prohibit conduct which is constitutionally protected.

17. Constitutional Law ⇐90(3)

The government may adopt reasonable time, place and manner regulations which do not discriminate among speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication. U.S.C.A.Const. Amend. 1.

18. Administrative Law and Procedure ⇐7
Constitutional Law ⇐90.1(1), 91

In context of Open Meetings Act, the legislature adopted reasonable regulations with regard to public official's rights of speech and assembly when balanced against the extremely important governmental interest of the public's right of access to public information. S.H.A. ch. 102, § 41 et seq.; U.S.C.A.Const. Amend. 1

Arnold F. Blockman of Hatch, Blockman & McFheters, Champaign and James Kuehl of Finch & Kuehl, Urbana, for appellants.

Thomas J. Difanis, State's Atty., Urbana (Joseph D. Pavia, Asst. State's Atty., Urbana, of counsel), for appellee.

William E. Feurer of William E. Feurer, Ltd., Springfield, for amicus curiae Illinois Press Ass'n.

Ronald D. Rotunda, Champaign, Illinois News Broadcasters Ass'n, for amicus curiae Illinois News Broadcasters Ass'n.

CLARK, Justice:

Thomas J. Difanis, as State's Attorney of Champaign County, brought a declaratory judgment action against the nine defendants, who are members of the Urbana city council. The plaintiff sought a declaration that the defendants violated the Open Meetings Act (Ill.Rev.Stat.1977, ch. 102, par. 41 *et seq.*) when, on October 23, 1978, they met and conferred shortly before a special session of the Urbana city council. The circuit court of Champaign County entered judgment in favor of the plaintiff. The appellate court affirmed. (78 Ill. App.3d 842, 34 Ill.Dec. 225, 397 N.E.2d 895.) We allowed the defendants' petition for leave to appeal. 73 Ill.2d R. 315.

The parties entered into a stipulation of facts which reveals that an Urbana city council meeting was scheduled for Monday, October 23, 1978, at 7:30 p. m. On Friday, October 20, 1978, two members of the city council, defendants John Peterson and Bob Hurt, decided to hold a party caucus prior to the city council meeting. The caucus meeting was scheduled for October 23, 1978, at 6 p. m. in the home of a member of the city council. Attendance at the meeting was voluntary. The nine defendants attended the 6 p. m. meeting. Eight of the defendants are members of the Champaign County Democratic party, and one defendant has no political affiliation. There are 15 members of the Urbana city council, nine of whom are Democrats. Eight persons constitute a quorum of the council.

The meeting was called to discuss matters the city council would consider at its meeting later that night, as well as party matters and an election to be held in November 1978. No agenda was prepared for the 6 p. m. meeting, and no votes were taken. It is further stipulated that the defendants were not meeting as a duly constituted committee of the Urbana city council and they received no compensation for attending the hour-long meeting. One defendant, Donald Wort, arrived approximately 15 minutes before the end of the meeting and participated in a discussion of matters not on the city council agenda. Of the five matters on the formal agenda for the 7:30 p. m. city council session, four were discussed at the 6 p. m. meeting. Three votes were taken at the city council session on matters discussed at the 6 p. m. meeting. On a vote to approve a ward map recommended by a committee of the council, the nine defendants voted as a bloc. The measure thereupon was passed by the council nine votes to four. On the other two votes taken, concerning a community-development-agency appointment and approval of

defendants did not vote in a uniform manner. The fourth agenda matter discussed at the 6 p. m. meeting concerned the mayor's appointments to the Public Works Commission. The stipulated facts show that the discussion at the 6 p. m. meeting involved "reasons for holding up the Mayor's nominations." This matter was not brought up at the council session. Finally, the defendants stipulated that they have had "caucuses of this nature in the past and will continue to have caucuses of this nature in the future."

Section 2 of the Open Meetings Act provides in part:

> "All meetings of any legislative, executive, administrative or advisory bodies of the State, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees or commissions of this State, and any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees which are supported in whole or in part by tax revenue, or which expend tax revenue, shall be public meetings • • •. This Act does not apply to the General Assembly or to committees or commissions thereof." (Ill.Rev.Stat.1977, ch. 102, par. 42.)

The defendants contend first that the 6 p. m. meeting does not fall within the ambit of the Act. The defendants argue that the meeting was called primarily as a political caucus and not as a formal "meeting" of the city council. We disagree.

[1] Section 1 of the Open Meetings Act states:

> "It is the public policy of this State that the public commissions, committees, boards and councils and the other public agencies of this State exist to aid in the conduct of the people's business. It is the intent of this Act that their actions be taken openly and that their deliberations be conducted openly." (Ill.Rev.Stat.1977, ch. 102, par. 41.)

This clearly enunciated public policy would be poorly served were we to carve out exceptions other than those expressly stated in the Act (see Ill.Rev.Stat.1977, ch. 102, par. 42) for informal political caucuses where, as here, public business was deliberated and it appears that a consensus on at least one issue was reached outside of public view. Moreover, an expression of certain exceptions in a statute is construed as an exclusion of all others. *Landfill, Inc. v. Pollution Control Board* (1978), 74 Ill.2d 541, 557, 25 Ill.Dec. 602, 387 N.E.2d 258; *City Savings Association v. International Guaranty & Insurance Co.* (1959), 17 Ill.2d 609, 612, 162 N.E.2d 345; 1971 Ill.Att'y Gen.Op 51, 53

[2, 3] Indeed, in 1967 the General Assembly amended the Act to delete the word "official" before the word "meeting" in sections 1 and 2. Palpably, the amendment was intended to include unofficial or informal meetings within the coverage of the Act. In *Sacramento Newspaper Guild, Local 92 v. Sacramento County Board of Supervisors* (1968), 263 Cal.App.2d 41, 69 Cal.Rptr. 480, a luncheon meeting was held at which several county officials, including the five county supervisors, met privately with labor officials to discuss a strike of the social workers union. Newspaper reporters sought but were denied admission to the gathering. In affirming the trial court's preliminary injunction order except to the extent it prevented attorneys for the county from discussing privileged matters with county officials, the court stated:

> "An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices. As operative criteria, formality and informality are alien to the law's design, exposing it to the very evasions it was designed to prevent. Construed in the light of the Brown Act's objectives, the term 'meeting' extends to informal sessions or conferences of the board members designed for the discussion of public business. The Elks Club luncheon, attended by the Sacramento County Board of Supervisors, was such a meeting." (*Sacramento Newspaper Guild, Local 92 v. Sacramento County Board of Supervisors* (1968), 263 Cal.App.2d 41, 50–51, 69 Cal.Rptr. 480, 487.) Thus, to allow the nine defendants to circumvent the Act simply because they designate their meeting as an informal gathering or informal caucus would be to thwart the intent of the Act.

[4] A related argument raised by the defendants is that the nine defendants do not constitute a "legislative body" or "subsidiary body" which is subject to the Act. This argument misapprehends both the wording of the statute and reality. The statute states that "[a]ll meetings of any legislative, executive, administrative or advisory bodies • • • and any subsidiary bodies of any of the foregoing *including but not limited to* committees or subcommittees • • • shall be public meetings • • •." (Emphasis added.) (Ill.Rev.Stat.1977, ch. 102, par. 42.) We interpret the foregoing to mean that the Act was intended to apply to more than meetings of full bodies or duly constituted committees. Thus, "body" must necessarily be interpreted to mean an informal gathering of nine members of a legally constituted public body. The trial court decided that the Open Meetings Act would apply to meetings of three or more persons. Since the instant case involved nine public officials, we need not and do not make any decision as to whether three persons automatically trigger application of the Act.

[5–7] It should be emphasized that it is not the province of this court to pass on the wisdom or desirability of legislation. (*Garcia v. Tully* (1978), 72 Ill.2d 1, 10, 17 Ill.Dec. 820, 377 N.E.2d 10.) As long as the means chosen by the legislature to achieve a desired end are lawful and inoffensive to the State and Federal constitutions, our inquiry may proceed no further. Thus, whether, as the defendants argue, the instant means to accommodate secrecy in government and permit the free flow of information to the public might restrict the ability of public officials, either as minority blocs or majority groups, to support or oppose legislation, is not within our power to alter. The Act, by its express terms, does sacrifice the ability of public officials to act and deliberate privately to what the General Assembly obviously perceives to be the more important governmental interest of opening the processes of government to public scrutiny. Such a legislative judgment is peculiarly within the domain of the General Assembly. While there appear to be obvious problems of enforcement inherent in the Act, that consideration does not render the Act invalid. Nor may it affect our scrutiny of it. The Act is not intended to prohibit *bona fide* social gatherings of public officials, or truly political meetings at which party business is discussed. Rather, the Act is designed to prohibit secret deliberation and action on business which properly should be discussed in a public forum due to its potential impact on the public. Thus, the items discussed in the meeting in the instant case regarding a new ward map, the appointments of public officers for two separate agencies, and a housing development not only concerned public business but were scheduled to be dealt with that very evening. Moreover, the stipulated facts show that several other items discussed that evening were matters that the city council would need to consider sometime in the future, for example, the burning of leaves within city limits, the treatment of cable television, and the possibility of rescinding an ordinance which required an appointed comptroller. Therefore, it is reasonably clear and definite that the meeting at issue in this case violated the intent and the terms of the Open Meetings Act. The defendants have challenged the Act on its face as violative of equal protection and due process of law. We need not consider these broad-based attacks, however. Instead, we will only decide whether, under the narrow facts presented, the Act violates the constitutional rights of these nine defendants.

The Budget!

[8] The first of defendants' four constitutional arguments is that the Open Meetings Act as applied to defendants denies them the equal protection of the law under the fourteenth amendment to the United States Constitution and article I, section 2, of the Illinois Constitution of 1970. The defendants claim that, since the General Assembly is exempted from coverage under the Act, Democratic members of the General Assembly may attend caucuses without risking prosecution whereas Democratic local officials run the risk of being prosecuted under the Act for attending political caucuses. This argument must fail for the reason that the factual foundation is incorrect. We have previously discussed the subject matter of the 6 p. m. meeting, as set forth in the stipulation of facts. While a few of the matters discussed could be considered political in nature, in that they concerned the November 1971 election and strategy related to that election, we have previously rejected, as did the circuit court, the premise that the meeting was conducted solely, or even primarily, as a political caucus. It clearly was not. Most of the 14 matters discussed concerned city council business. Certainly, a true political caucus is beyond the purview of the Act: the Act comes into play only where public business which could eventually come up for decision before the full body is deliberated or acted upon in private. Thus, the defendants' argument that they could be susceptible to prosecution simply for participating in a political caucus is erroneous.

[9] The defendants argue that the General Assembly, in contravention of its own stated policy of open deliberations and open actions, has exempted itself from coverage under the Open Meetings Act. The defendants further argue that, while a rational relationship to a legitimate governmental interest may exist for making a distinction between the General Assembly and other bodies, any such interest would be subordinated to the General Assembly's stated purpose of conducting public business in the open. The General Assembly's exemption might appear inconsistent with the public policy behind the Act were it not for article IV, section 5(c), of the 1970 Constitution which provides:

"(c) Sessions of each house of the General Assembly and meetings of committees, joint committees and legislative commissions shall be open to the public. Sessions and committee meetings of a house may be closed to the public if two-thirds of the members elected to that house determine that the public interest so requires; and meetings of joint committees and legislative commissions may be so closed if two-thirds of the members elected to each house so determine."

Illinois caucus exemption

The defendants argue that the Constitution only requires that formal sessions be conducted openly and that meetings of committees and commissions need not be open to the public. This argument is incorrect, however. Article IV, section 5(c), expressly requires that sessions, meetings of committees, joint committees and legislative commissions shall be open to the public. It is true that informal meetings of members of the General Assembly are thus not required to be conducted openly. Under the well-established standards regarding equal protection of the laws, the legislature may differentiate between persons similarly situated (*Kujawinski v. Kujawinski* (1978), 71 Ill.2d 563, 578, 17 Ill.Dec. 801, 376 N.E.2d 1382); equal protection requires only that there be a reasonable and rational basis for the classifications which justify different procedures for treating the two groups. *People v. Pembrock* (1976), 62 Ill.2d 317, 321, 342 N.E.2d 28; *People v. Sherman* (1974), 57 Ill.2d 1, 4, 309 N.E.2d 562; *People v. McCabe* (1971), 49 Ill.2d 338, 341, 275 N.E.2d 407; *People ex rel. Hopf v. Barger* (1975), 30 Ill.App.3d 525, 534, 332 N.E.2d 649.

[10] It is conceivable that the General Assembly concluded that the relatively smaller size of other bodies covered by the Act and their generally greater proximity to their constituents justified a difference in treatment. Due to its compliance with the well-entrenched rational-basis standard we may not preempt a legislative judgment.

The next constitutional contention raised by the defendants is that the Open Meetings Act, as applied to these defendants, is a denial of due process of law under the fourteenth amendment to the United States Constitution and article I, section 2, of the Illinois Constitution of 1970. Those constitutional provisions read in pertinent part:

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *." (U.S. Const., amend. XIV, sec. 1.)

"Section 2. Due Process and Equal Protection

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws." (Ill.Const.1970, art. I, sec. 2.)

In particular the defendants argue that the Open Meetings Act is vague, uncertain and indefinite with regard to the phrase "meetings of a legislative body."

[11, 12] A statute is impermissibly vague when "men of common intelligence must necessarily guess at its meaning." (*Broadrick v. Oklahoma* (1973), 413 U.S. 601, 607, 37 L.Ed.2d 830, 837, 93 S.Ct. 2908, 2913, quoting *Connally v. General Construction Co.* (1926), 269 U.S. 385, 391, 70 L.Ed. 322, 328, 46 S.Ct. 126, 127.) A criminal statute violates due process if it fails to give adequate notice as to what action or conduct is proscribed (*People v. Schwartz* (1976), 64 Ill.2d 275, 280, 1 Ill.Dec. 8, 356 N.E.2d 8; *People v. Vandiver* (1971), 51 Ill.2d 525, 283 N.E.2d 681.) "Impossible standards of specificity, however, are not required." *People v. Schwartz* (1976), 64 Ill.2d 275, 280, 1 Ill.Dec. 8, 356 N.E.2d 8, citing *Jordan v. De George* (1951), 341 U.S. 223, 231, 95 L.Ed. 886, 892, 71 S.Ct. 703, 707-08.

[13] We think that the Open Meetings Act, as applied to these defendants, is not impermissibly vague for two reasons. First, after the 1967 amendments deleted the word "official" where it had appeared before the word "meetings," no guessing was required to prohibit *all meetings* of members of legislative bodies, where deliberations were conducted or actions taken on public business. Secondly, the clear import of section 2 of the Act is that any subdivision of a legislative body, "including but not limited to committees and subcommittees" supported by tax revenues, is subject to the Act. Ill.Rev.Stat.1977, ch. 102, par. 42.

In *Broadrick v. Oklahoma* (1973), 413 U.S. 601, 37 L.Ed.2d 830, 93 S.Ct. 2908, and its companion case, *United States Civil Service Com. v. National Association of Letter Carriers* (1973), 413 U.S. 548, 37 L.Ed.2d 796, 93 S.Ct. 2880, the Supreme Court upheld, respectively, a State and a Federal statute against several constitutional challenges. The statutes involved in those cases prohibited certain public employees from participating in political parties or campaigns. We think the court's statements in *Broadrick v. Oklahoma* (1973), 413 U.S. 601, 607-08, 37 L.Ed.2d 830, 837-38, 93 S.Ct. 2908, 2913-14, in rejecting the due process attack in those cases are particularly appropriate in this case:

"Whatever other problems there are with section 818, it is all but frivolous to suggest that the section fails to give adequate warning of what activities it proscribes or fails to set out 'explicit standards' for those who must apply it. *Grayned v. City of Rockford* [(1972), 408 U.S. 104, 108, 33 L.Ed.2d 222, 227, 92 S.Ct. 2294, 2299]. In the plainest language, it prohibits any state classified employee from being 'an officer or member' of a 'partisan political club' or a candidate for 'any paid public office.' It forbids solicitation of contributions 'for any political organization, candidacy or other political purpose' and taking part 'in the management or affairs of any political party or in any political campaign.' Words inevitably contain germs of uncertainty and, as with the Hatch Act, there may be disputes over the meaning of such terms in section 818 as 'partisan,' or 'take part in,' or 'affairs of' political parties. But what was said in [*United States Civil Service Com. v. National Association of Letter Carriers* (1973), 413 U.S. 548, 578-79, 37 L.Ed.2d 796, 816, 93 S.Ct. 2880, 2897], is applicable here: 'there are limi-

spect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.' *Moreover, even if the outermost boundaries of section 818 may be imprecise, any such uncertainty has little relevance here, where appellants' conduct falls squarely within the 'hard core' of the statute's proscriptions and appellants concede as much.* See *Dombrowski v. Pfister* [(1965), 380 U.S. 479, 491 92, 14 L.Ed.2d 22, 31, 85 S.Ct. 1116, 1123 24]; *United States v. National Dairy Products Corp.* [(1963), 372 U.S. 29, 9 L.Ed.2d 561, 83 S.Ct. 594]; *Williams v. United States* [(1951), 341 U.S. 97, 95 L.Ed. 774, 71 S.Ct. 576]; *Robinson v. United States* [(1945), 324 U.S. 282, 286, 89 L.Ed. 944, 947, 65 S.Ct. 666, 669]; *United States v. Wurzbach* [(1930), 280 U.S. 396, 74 L.Ed. 508, 50 S.Ct. 167]." (Emphasis added.)

The same is true in the instant case. Therefore, the Act, as applied to these defendants, is neither vague, indefinite nor uncertain, and thus comports with minimum due process requirements.

[14] The defendants' penultimate contention is that the Open Meetings Act violates the State constitutional provision which prohibits special or local legislation "when a general law is or can be made applicable" (Ill.Const.1970, art. IV, sec. 13). We find no merit in this contention, since we have already held that a legitimate governmental interest in treating smaller governmental bodies differently from the General Assembly exists with regard to the public's access to governmental deliberations and actions. *Bridgewater v. Matz* (1972), 51 Ill.2d 103, 111-12, 281 N.E.2d 317.

Thus, the exemption of the General Assembly from coverage under the Act is not akin to an attempt to enact reforms "one step at a time" (*Grace v. Howlett* (1972), 51 Ill.2d 478, 487, 283 N.E.2d 474, quoting *Williamson v. Lee Optical Co.* (1955), 348 U.S. 483, 489, 99 L.Ed. 563, 573, 75 S.Ct. 461, 465) but, rather, is an instance where a general law recognizes a distinction between two classes which warrant different treatment. (*McRoberts v. Adams* (1975), 60 Ill.2d 458, 462, 328 N.E.2d 321.) The Open Meetings Act is intended to create a practicable means of opening the deliberative processes of government to public view. The General Assembly is already affected in this area by article IV, section 5(c), of the 1970 Constitution, which requires that sessions and meetings of committees, joint committees and legislative commissions will, subject to two exceptions, be open to the public. In its substantive effect, then, the Open Meetings Act exemption refers only to private meetings between General Assembly members; however, the size of the General Assembly and the volume of public business it deals with, compared to the size and volume of substantially all of the bodies covered by the Act, reveal why it is reasonable for a distinction to be made between the General Assembly and other bodies. Recognition of the different nature of the General Assembly under the Act does not violate the special legislation provision of the 1970 Constitution.

Finally, the defendants contend that the Open Meetings Act, as applied to them, violates their rights of freedom of speech and assembly under both the Federal and State constitutions. The defendants argue that the Act is overly broad and raises the specter of public officials fearing to discuss political or public business at any time outside of a formal public forum, lest they be prosecuted under the Act.

[15, 16] A governmental purpose to control or prevent activities constitutionally subject to State regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. (*Zwickler v. Koota* (1967), 389 U.S. 241, 250, 19 L.Ed.2d 444, 451, 88 S.Ct. 391, 396; *NAACP v. Alabama ex rel. Flowers* (1964), 377 U.S. 288, 307, 12 L.Ed.2d 325, 338, 84 S.Ct. 1302, 1314; *People v. Ridens* (1974), 59 Ill.2d 362, 370, 321 N.E.2d 264.) A statute is overly broad if it may reasonably be interpreted to prohibit conduct which is constitutionally protected. *People v. Klick* (1977), 66 Ill.2d 269, 273, 5 Ill.Dec. 858, 362 N.E.2d 329, citing *Grayned v. City of Rockford* (1972), 408 U.S. 104, 114 15, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222, 231.

[17, 18] It is a well recognized constitutional principle that the government may adopt reasonable time, place and manner regulations which do not discriminate among speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication. (*Buckley v. Valeo* (1976), 424 U.S. 1, 18, 46 L.Ed.2d 659, 687, 96 S.Ct. 612, 634, and cases cited therein.) We conclude that the General Assembly has adopted reasonable regulations with regard to public officials' rights of speech and assembly when those rights are balanced against the extremely important governmental interest of the public's right of access to public information. The Open Meetings Act does not prohibit political discussions between or among members of public bodies; thus there is no chilling effect upon political discussion. Moreover, we agree with the Attorney General's opinion that "whether a gathering falls within the definition of meeting as used in the Act, would depend upon the peculiar facts in each situation. It is unlikely that the casual non-prearranged conversation among less than, or even all, of the members of a particular body in a coffee shop, during which the business of the body was discussed, would constitute a meeting within the terms of the Act. I assume such a gathering is primarily a social gathering and business is discussed only incidentally between certain individuals and not among the group as a whole. Of course, if any decisions or agreements to make decisions are made, such a gathering would be a meeting within the terms of the Act." (1974 Att'y Gen.Op. 123, 126.) The Act is only addressed to meetings designed to discuss or reach an accord with regard to deliberated or acted upon in an open forum. In short, the Act requires that public business must be conducted publicly. We perceive this limitation to be reasonable when viewed in relation to a public official's obligation to carry out the public trust honorably and in good faith. Moreover, we think the Act clearly does not prohibit consultation between an official and his staff so that the official may offer views for discussion and debate in a private setting. (See *People ex rel. Cooper v. Carlson* (1975), 28 Ill.App.3d 569, 328 N.E.2d 675 (staff members not subject to Act).) Thus the Open Meetings Act is a reasonable attempt to balance the right of the press and the people to view the deliberative and decision-making processes of government first-hand with the right of public officials to speak their minds freely and associate with whomever they choose. The Act places a limited and reasonable regulation upon officials by requiring them to speak of public business with their fellow officials only when they are in a public forum, and sufficient notice under the Act has been given. (Ill. Rev.Stat.1977, ch. 102, par 42.02.) We agree with the appellate court that public officials' desire to consult privately must give way to the open conduct of the public's business "or else the people risk having their business done in secret, with the possibility that private deals will supplant the public interest." (78 Ill.App.3d 842, 845, 34 Ill.Dec. 223, 397 N.E.2d 895.) We are unable to say therefore that the balance struck by the General Assembly is unreasonable.

In the instant case, nine public officials, a majority of a 15-member city council, had a prearranged meeting to discuss matters set to be discussed in a public meeting later that same night. Their conduct fell within the "hard core" of the Act's proscriptions. Whether the Act applies to other meetings and whether it is constitutional in other settings or as applied to other public officials must await further determination. We conclude only that the Act applies to the meetings held by these defendants and

re caucus decision to vote for X budget.

that the Open Meetings Act (Ill.Rev.Stat. 1977, ch. 102, par. 41 *et seq.*) is constitutional as applied to these defendants.

Accordingly, for the reasons stated, the judgment of the appellate court is affirmed.

Judgment affirmed.

WARD, Justice, dissenting:

The majority leaves a cloud of constitutional doubt hanging over this important statute.

The statute expressly states that it shall apply to meetings of executive as well as legislative bodies and raises serious questions as to whether it violates the constitutional assurances of separation of governmental powers. Is the Act to apply to meetings of the governor's cabinet, for example, or to meetings of officials of the Attorney General's office or State's Attorneys offices? The statute was amended in 1979 to make it inapplicable to "that portion of meetings of law enforcement agencies, committees or commissions involved in the investigation of criminal activities which are concerned with or are to discuss informant sources, the hiring or assignment of undercover personnel, the purchase and assignment of undercover autos, or actual ongoing, prior or future investigations, or any budgetary considerations specifically concerning any of the foregoing." Ill.Rev. Stat.1979, ch. 102, par. 42(h).

But what about meetings of officials of the Attorney General's office or the State's Attorneys offices with discussions not regarding criminal investigations, but prosecutions? Topics discussed might be flaws or merits in the particular case, trial strategy, summoning of witnesses and their suspected unreliability, caliber of defense counsel or trial judges and the like. It is to be noted that the Act states that its intent is that "deliberations be conducted openly." Ill.Rev.Stat.1977, ch. 102, par. 41.

The Act fairly bristles with questions regarding the separation of powers and other constitutional areas. The opinion of the majority implicitly acknowledges constitutional problems, stating that the decision here is only "under the narrow facts presented" (83 Ill.2d at 292, 46 Ill.Dec. at 682, 414 N.E.2d at 735 and that "[w]hether the Act applies to other meetings and whether it is constitutional in other settings or as applied to other public officials must await further determination" (83 Ill.2d at 211, 46 Ill.Dec. at 686, 414 N.E.2d at 739). But the deep and troubling problems will not go away. I believe it is a disservice not to address the problems and permit the legislature, if the Act is in fact determined to be unconstitutional, to take fresh legislative action.

As a general proposition it is said that a court, of course, will avoid constitutional questions if possible and will decide only the question before it. But this court on its own initiative will consider constitutional problems and will if necessary declare legislation unconstitutional. *People ex rel. Peoria Civic Center Authority v. Vonachen* (1975), 62 Ill.2d 179, 340 N.E.2d 1.

There is a severability provision in the act here (Ill.Rev.Stat.1977, ch. 102, par. 45) but if the legislature intended the provisions of the Act as a whole piece of legislation, as unquestionably was the case here, the entire act would fall. *People ex rel. Peoria Civic Center Authority v. Vonachen* (1975), 62 Ill.2d 179, 340 N.E.2d 1.

UNDERWOOD, J., joins in this dissent.



83 Ill.2d 213
46 Ill.Dec. 687

CATERPILLAR TRACTOR CO., Appellee,

v.

The INDUSTRIAL COMMISSION et al.

Appeal of Clara D. JOHNSON.

No. 53061.

Supreme Court of Illinois.

Dec. 19, 1980

Claimant filed application for award under Workmen's Compensation Act for al-

Law, § 99, subd. 2), there was no other violation since the press was in fact notified and attended, and the statute does not require notice to the committee members themselves. The Open Meetings Law provides that "the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part", and that "[A]n unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body" (Public Officers Law, § 102, subd. 1). Thus, not every violation of the Open Meetings Law automatically triggers its enforcement sanctions (*Matter of New York Univ. v. Whalen*, 46 N.Y.2d 734, 735, 413 N.Y.S.2d 637, 386 N.E.2d 245), and, in the instant case, the technically inadequate notice does not justify the sanctions imposed by the Trial Court. The Open Meetings Law is designed to foster public awareness, not to assure public participation. Since the resolution merely called for a public hearing, the court acted improvidently by voiding all actions of respondents. At the public hearing the opportunity exists to make public the deliberations of the Democrats in approving the plan, which opportunity, indeed, was present at the ad hoc committee meetings attended by the press.

[5] Finally, the claim that the due process rights of petitioners were violated because a reapportionment plan was developed without full public participation is without merit. The Municipal Home Rule Law (§ 10, subd. 1, par. a, subpar. [13]) authorizes a county to reapportion its legislative body through adoption of a local law effecting such a reapportionment plan following a public hearing. Petitioners, citizens and taxpayers, do not claim that the reapportionment plan violates substantive due process (see *McGill v. Board of Supervisors of Niagara County*, 28 A.D.2d 637, 280 N.Y.S.2d 448, app. dsmd. 19 N.Y.2d 860) and indeed, no such plan had been enacted when this lawsuit was commenced. Nor do the respondents seek to annul the resolution calling for a public hearing. A challenge to a reapportionment plan, when and if enacted, on due process grounds would, of course, be proper (see *Franklin v. Krause*, 32 N.Y.2d 234, 344 N.Y.S.2d 885, 298 N.E.2d 68, app. dsmd. 415 U.S. 904, 94 S.Ct. 1397, 39 L.Ed.2d 461; *Iannucci v. Board of Supervisors of County of Washington*, 20 N.Y.2d 244, 282 N.Y.S.2d 502, 229 N.E.2d 195).

It is unnecessary to reach other issues raised by the respondents.

Accordingly, the judgment should be reversed, respondents cross motion granted and the petition dismissed without costs.

Judgment reversed on the law, respondents' cross motion granted and petition dismissed without costs.

SIMONS, J. P., and CALLAHAN and DENNAN, JJ., concur.

HANCOCK, J., concurs in the following opinion.

HANCOCK, Justice (concurring):

I concur. I would, however, hold that the party caucuses of the Democratic members of the legislature on March 7, March 21 and April 20, 1981 were outside the purview of the Open Meetings Law not because there were no quorums of the legislature present at those meetings but because as partisan political caucuses there were exempt (Public Officers Law, § 97, subds. 1 & 2; Public Officers Law, § 103, subd. 2). A meeting of the legislators of one political party to discuss legislation is not a "meeting", i. e., "the official convening of a public body for the purpose of conducting public business." (Public Officers Law, § 97, subd. 1). Nor is a partisan caucus of legislators a "public body", i. e., "an 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 the legislature—the official public body. It is an unofficial meeting of legislators who belong to the same party. No quorum is required and no official business may be conducted.

That the legislature intended to exclude such a meeting from the Open Meetings Law is demonstrated by the express exemption in Public Officers Law, section 103, subdivision 2 and their failure to amend or modify such exemption after the amendments to Public Officers Law, section 97 (L.1979, Ch. 704), following the decision of the Third Department in *Matter of Daily Gazette Co. v. North Colonie Bd. of Educ.*, 67 A.D.2d 803, 412 N.Y.S.2d 494.



81 A.D.2d 475

In the Matter of Anthony J. SCIOLINO, Individually and as a Member of Rochester City Council, Respondent,

v.

Thomas P. RYAN, Jr., et al., Members of Rochester City Council, Rochester City Council, Peter A. Korn, Rochester City Manager, Patricia B. Adduci, Rochester City Clerk, Appellants. Appeal No. 1.

In the Matter of the Application of GANNETT CO., INC., Christopher Scharf, John Stewart and Laurie Bennett, Respondents,

v.

CITY OF ROCHESTER, New York, Thomas P. Ryan, Jr., et al., as Members of the Rochester City Council, Appellants. Appeal No. 2.

Supreme Court, Appellate Division, Fourth Department.

June 29, 1981.

Article 78 proceeding was brought to determine whether closed session meetings come before it at public meetings. The Open Meetings Law. The Supreme Court, Monroe County, Boomer, J., 103 Misc.2d 1021, 431 N.Y.2d 664, held that meeting as used in Open Meetings Law includes gathering or meeting of public body for purpose of transacting public business whenever quorum is present, whether vote is taken and whether minority members are excluded, and exception of political caucus refers to meetings in which only political and not public business is discussed. On appeal, the Supreme Court, Appellate Division, Moule, J., held that: (1) sessions of council's majority constituted meetings within scope of open meetings law, and (2) action of majority party members of council to exclude minority members, and thereafter conduct public business in closed session under guise of political caucus, violated statute.

Affirmed.

1. Administrative Law and Procedure ⇐124

By enactment of statute governing open meetings, legislature intended to affect entire decision-making process, not just formal act of voting or formal execution of official document. Public Officers Law §§ 95, 97, subds. 1, 2, 98.

2. Municipal Corporations ⇐92

Statute governing open meetings encompasses private meetings, attended by only quorum of members of public entity, at which matters for discussion and eventual decision are such as would otherwise arise at public meeting. Public Meetings Law §§ 95, 97, subds. 1, 2, 98.

3. Municipal Corporations ⇐92

It is not necessary that entity have binding authority for it to be considered "public body" within meaning of statute governing open meeting; entity is within meaning of statute if entity's determina-

cers Law §§ 95, 97, subds. 1, 2, 98.

4. Municipal Corporations ⇐92

Where majority of nine-member council constituted quorum, quorum was present at three closed sessions to which lone minority member of council and two newspaper reporters sought, but were refused, admission, and decisions of sessions, although not binding, affected public and directly related to possibility of municipal matter becoming official enactment, closed sessions of council's majority constituted meetings within scope of statute governing open meetings. Public Officers Law §§ 95, 97, subds. 1, 2, 98.

5. Administrative Law and Procedure ⇐124

To assure that purpose of statute governing open meetings is realized, exemption for political caucuses should be narrowly, not expansively, construed. Public Officers Law §§ 95, 97, subds. 1, 2, 98, 103, subd. 2.

6. Municipal Corporations ⇐92

Where closed sessions of city council's majority were used not to discuss private matters of political party, but, rather, to discuss legislative future of items before council, which affected public and directly related to possibility of municipal matter becoming official enactment, action of majority party members of council in excluding minority member, and thereafter conducting business in closed sessions under guise of political caucus, violated statute governing open meetings. Public Officers Law §§ 95, 97, subds. 1, 2, 98, 103, subd. 2.

Louis N. Kash, Thomas A. Fink, Rochester, for appellants.

Anthony J. Sciolino, Rochester, pro se in Appeal No. 1.

Nixon, Hargrave, Devans & Doyle, Rochester, for respondents in Appeal No. 2; Robert Bernius, Rochester, of counsel.

MONS, CALLAHAN, DOERR, and MOULE, JJ.

MOULE, Justice.

The question presented on this appeal is whether certain gatherings of members of the Rochester City Council, and other public officers, are required to be open to the public under the Open Meetings Law (Public Officers Law, § 95–106).

The Rochester City Council (Council), the legislative governing body of the City of Rochester, holds regular public meetings twice a month on Tuesdays. On most Thursday afternoons respondents, the eight Democratic members of the nine member Council, meet in the office of the Mayor of Rochester at his invitation. Members of the City's administrative staff, including the City Manager and City Clerk, are frequently invited and attend these sessions, with occasional invitations extended to members of advisory boards and commissions, and consultants under contract with the City of Rochester. The sole Republican member of the Council, representatives of the news media and the general public are excluded from these meetings. These closed sessions held prior to the public meeting are apparently a custom, having also been conducted by the Republican members of the Council when they were in the majority.

At these sessions the majority receives information relating to city government matters likely to come before the entire Council, and discusses such matters. The frequent result of these discussions are decisions to include or not to include an item on the agenda of the regular public Council meeting, to communicate with the leader of another legislative body or to support a bill in the State Legislature.

On May 8, 1980 petitioner in the first proceeding, Anthony J. Sciolino, the Republican member of the Council, attempted to attend one of these closed sessions but was denied admission. On May 22, 1980 and tioner in the second proceeding, Gannett Co., Inc., also requested admission to these sessions but were denied. On these three occasions, petitioners observed at least six members of the Council's Democratic majority.

On June 4, 1980 petitioner Sciolino commenced an article 78 proceeding seeking a judgment that the term "meeting" within the meaning of the Open Meetings Law includes a majority gathering of the Council, regardless of political affiliation, where topics of discussion and decision are such as would arise at a regular meeting; that the closed sessions held by the Democratic majority are public meetings within the Open Meetings Law, and not a "political caucus" (Public Officers Law, § 103, subd. 2); and that further closed sessions be prohibited unless petitioner and the public are notified and allowed to attend. Petitioner Gannett Co., Inc. commenced an article 78 proceeding on July 17, 1980 seeking a judgment that respondents' closed sessions were public meetings and an order that respondents admit petitioner to the sessions. In response to both proceedings, respondents moved to dismiss on the ground that the petition failed to state a cause of action, based on the claim that the sessions were "political caucuses" and exempt from the requirements of the Open Meetings Law (Public Officers Law, § 103, subd. 2).

The two proceedings were consolidated, and respondents agreed to allow their motions to dismiss to be treated as answers and to have judgment granted on the undisputed facts. Judgment was granted for petitioners, the court determining that the closed sessions were meetings within the Public Officers Law, and ordering that respondents notify the public and petitioner Sciolino of further meetings and allow them to attend (*Matter of Sciolino v. Ryan*, 103 Misc.2d 1021, 431 N.Y.S.2d 664).

Respondents' first contention on appeal is that the political majority of a legislative body is not a quorum or a public body Law. Specifically, they contend that, since the Democratic majority has no authority to conduct public business or perform any governmental function, and possesses no power to bind the entire Council or the municipal corporation, it is a political majority, not a quorum.

The intent behind the enactment of the Open Meetings Law was the performance of public business in an open and public manner, with the public able to attend and listen to the deliberations and decisions that go into the making of public policy (Public Officers Law, § 95). Every meeting of a public body is required to be open to the general public (Public Officers Law, § 98). A "meeting" is the official convening of a public body to conduct public business; a "public body" is any entity for which a quorum consisting of two or more members is required to conduct public business (Public Officers Law, § 97, subds. 1, 2).

[1–3] By enactment of the Open Meetings Law, the Legislature intended to affect the entire decision-making process, not just the formal act of voting or the formal execution of an official document (*Matter of Orange County Pubs., Div. of Ottaway Newspapers v. Council of City of Newburgh*, 60 A.D.2d 409, 401 N.Y.S.2d 84, affd. 45 N.Y.2d 947, 411 N.Y.S.2d 564, 383 N.E.2d 1157). The statute encompasses private meetings, attended by only a quorum of the members of a public entity, at which the matters for discussion and eventual decision are such as would otherwise arise at a public meeting (*Matter of Britt v. County of Niagara*, 82 A.D.2d 65, 440 N.Y.S.2d 790 [1981]; *Matter of Oneonta Star Div. of Ottaway Newspapers v. Board of Trustees of Oneonta School Dist.*, 66 A.D.2d 51, 412 N.Y.S.2d 927). It is not necessary that an entity have binding authority for it to be considered a public body; it is within the meaning of the Open Meetings Law if its determinations affect the public and eventually obtain substance in official form (*Matter of Syracuse United Neighbors v.*

City of Syracuse, 80 A.D.2d 984, 437 N.Y.S.2d 466 [1981]).

[4] The closed sessions of the Council's Democratic majority constitute meetings within the scope of the Open Meetings Law. A majority of the nine-member Council constitutes a quorum (Rochester City Charter, § 5–7), and it is undisputed that a quorum was present at the three closed sessions to which petitioners sought admission. The decisions of these sessions, the legislative future of items before the Council, although not binding, affect the public and directly relate to the possibility of a municipal matter becoming an official enactment. To keep the decision making process of all but one of the members of the Council secret, simply because they term themselves a "majority" instead of a "quorum", allows the public to be aware of only legislative results, not deliberations, violating the spirit of the Open Meetings Law and exalting form over substance (*Matter of Syracuse United Neighbors v. City of Syracuse*, supra).

Respondents' second contention on appeal is that the closed sessions are within the exemption from the Open Meetings Law extended to the "deliberations of political • • • caucuses" (Public Officers Law, § 103, subd. 2). The term "political caucuses" is not defined by the statute. Respondents contend that the phrase "political caucus" should be interpreted to apply to a political majority of a legislative body regardless of what it discusses.

[5, 6] An expansive definition of a political caucus, as urged by respondents, would defeat the purpose of the Open Meetings Law that public business be performed in an open and public manner (Open Meetings Law, § 95), for such a definition could apply to exempt regular meetings of the Council from the statute. To assure that the purpose of the statute is realized, the exemption for political caucuses should be narrowly, not expansively, construed. The entire exemption is for the "deliberations of political committees, conferences and caucuses" (Public Officers Law, § 103, subd. 2), indicating that it was meant to prevent the statute from extending to the private matters of a political party, as opposed to matters which are public business yet discussed by political party members. To allow the majority party members of a public body to exclude minority members, and thereafter conduct public business in closed sessions under the guise of a political caucus, would be violative of the statute (see, *Matter of Syracuse United Neighbors v. City of Syracuse*, supra).

Accordingly, the judgments appealed from should be affirmed.

Appeal No. 1.—Judgment unanimously affirmed with costs.

Appeal No. 2.—Judgment unanimously affirmed with costs.

CARDAMONE, J. P., and SIMONS, CALLAHAN and DOERR, JJ. concur.

main in public service". *In re State Employees' Pension Plan, supra* at 1235. The latter may be a consequence of the Statute's operation, but the calculation period provided in § 6532 is merely a length of time in which to measure economic change, and nothing more. Employment during such period does not entitle a State employee to any supplemental employment benefits.

Thus, the Statute basically provides that on April 1 and October 1 of each year, "all" employees (with specified exceptions), regardless of length of service and regardless of whether or not employed during the calculation period, shall be paid a salary supplement equal to the change in the Consumer Price Index for the Philadelphia region measured during the period from January 1 to June 30, or July 1 to December 31. The key dates under the plan are April 1 and October 1, the effective dates of the increase, for on those dates the right to the supplement vests in each State employee compensated at that time with a "regular state pay check." Compare *Kingston v. McLaughlin*, D.C.Mass., 359 F.Supp. 25 (1972), aff'd 411 U.S. 923, 92 S.Ct. 1900, 36 L.Ed.2d 388 (1973); *Bennett ex rel. Arizona State Pers. Comm'n v. Beard*, 27 Ariz.App. 534, 556 P.2d 1137 (1976); *Butterworth v. Boyd*, 12 Cal.2d 140, 82 P.2d 434 (1938); *Austin v. Benefield*, 140 Ga.App. 96, 230 S.E.2d 16 (1976); *Committee of Int. & Res. v. City of New York*, 87 Misc.2d 504, 386 N.Y.S.2d 177 (1976); *Personnel Division of Executive Dep't v. St. Clair*, 10 Or.App. 106, 498 P.2d 809 (1972); and *Yelle v. Kramer*, 83 Wash.2d 464, 520 P.2d 927 (1974).

In this context, then, the salary supplement falls within the category of future benefits which may be lawfully adjusted or eliminated by the State prior to the vesting date. See 63 *Am.Jur.*2d, Public Officers and Employees § 368 (1972); 81 *C.J.S.* States § 92f(2) (1953), 67 *C.J.S.* Officers § 94 (1950); and cases cited therein. Since that was accomplished in this case, plaintiffs never acquired any rights to the salary supplement.

We hold, therefore, that H.B. No. 172 did not violate the Contract Clause of the Federal Constitution.

[5] The second certified question is whether passage of the repealer Act deprived plaintiffs of property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution and Article 1, § 7 of Delaware's Constitution. This does not require discussion because, having established that plaintiffs did not acquire a contract right to the salary supplement, it follows that they did not possess a constitutionally protected property interest which was taken by the Act.

We hold, therefore, that the repealer is not violative of either the Due Process Clause of the Federal Constitution or the Law of the Land Clause of Delaware's Constitution.

* * *

Both certified questions are answered in the negative.

KEY NUMBER SYSTEM

The NEWS-JOURNAL COMPANY and Wendy Fox, Plaintiffs,

v.

William T. McLAUGHLIN, Mayor of the City of Wilmington, Leo T. Marshall, Clerk of the Wilmington City Council, and Frank D. Vari, James M. Baker, Wallace E. Brooks, Sr., Norman D. Hughes, James F. Keeley, Richard V. Pryor, Thomas V. Quinn, Jr., Jesse W. Samluk, Frederick C. Sears, II, Joe L. White, and Charles L. Yates, members of Wilmington City Council, Defendants.

Court of Chancery of Delaware, New Castle.

Submitted June 27, 1977.

Decided July 7, 1977.

Publisher of daily and Sunday newspapers having statewide circulation, together seeking declaratory judgment [illegible] ly enacted Freedom of Information Act claiming that their rights were violated when they were excluded from meeting of city council. The Court of Chancery, in and for New Castle County, Brown, Vice Chancellor, held that where 11 of 13 members of city council met in mayor's office to consider possible action by the General Assembly which, if taken, could have abolished city wage tax and thereby compelled restructuring of city finances, both matters over which city council clearly had control, supervision and jurisdiction, purpose of meeting was to discuss matter of "public business" within meaning of the sunshine law.

Ordered accordingly.

1. Municipal Corporations ⇐92

Where 11 of 13 members of city council and mayor all members of one political party, met in mayor's office to discuss the possible action by the General Assembly which, if taken, could have abolished the city wage tax and thereby compelled restructuring of city finances, both matters over which city council clearly had control, supervision and jurisdiction, purpose for the meeting was to discuss a matter of "public business" within meaning of the sunshine law and to consider the best course of action to be taken in the interests of the city and its inhabitants and, thus, exclusion of public from meeting was a violation of statute. 29 Del.C. §§ 10001 et seq., 10002(b), 10004(a, e).

2. Municipal Corporations ⇐92

Sunshine law applies to meetings called to discuss public business as well as to meetings called to take action on public business. 29 Del.C. §§ 10001 et seq., 10004(a, e).

3. Municipal Corporations ⇐92

Sunshine law is to be liberally construed in favor of citizens of state. 29 Del.C. §§ 10001, 10002(e).

asserting violation of sunshine law to [illegible] lish what public body actually did and said at meeting from which he was excluded in order to obtain relief; rather, proof of purpose will be sufficient to establish a violation of the statute and proof of that which took place would perhaps have a bearing on extent of any relief to be granted. 29 Del.C. §§ 10001 et seq., 10004(a, e).

On cross motions for summary judgment. Judgment for plaintiffs. Motion of defendants denied.

Richard G. Elliott, Jr., of Richards, Layton & Finger, Wilmington, for plaintiffs.

Michael P. Maguire, of Biondi & Babiarz, Wilmington, for defendants.

BROWN, Vice Chancellor.

This suit is brought by the News-Journal Company, the Wilmington publisher of daily and Sunday newspapers having statewide circulation, together with Wendy Fox, one of its reporters, seeking a declaratory judgment under the recently enacted Freedom of Information Act as it is now codified at 29 *Del.C.* § 10001 et seq. The defendants are sued in their respective capacities as Mayor, City Clerk and members of the City Council of the City of Wilmington. The relevant facts are undisputed and the matter is before the Court on cross motions for summary judgment.

The Freedom of Information Act, commonly referred to as the "Sunshine Law," became effective on January 1, 1977. 60 *Del.L.* Ch. 641, § 5. A legislative declaration of its policy and purpose is set forth as follows at 29 *Del.C.* § 10001:

> "It is vital in a democratic society that public business be performed in an open and public manner so that the citizens shall be advised of the performance of public officials and of the decisions that are made by such officials in formulating and executing public policy. Toward this end, this chapter is adopted, and shall be construed."

meetings of all public bodies "shall be open to the public" after timely notice of any such meeting shall have been given. An available agenda of the subjects proposed for discussion or action at the meeting is also required. 29 *Del.C.* § 10004(a) and (c). Provision is made for the meeting of the public body in executive session closed to the public under certain specified conditions. 29 *Del.C.* § 10004(b) and (c). However, an executive session can only be called at a meeting otherwise open to the public, 29 *Del.C.* § 10004(c), and, since it is the position of the defendants that the gathering here in question was not one covered by the statutes and since there is no contention that an executive session was called, no defense is claimed based upon this limited statutory right to exclude the public.

The provisions of the statute which do come into play and which govern the outcome of the litigation are contained in the definition of terms found at 29 *Del.C.* § 10002. The definitions pertinent to the present issue are as follows:

"(a) 'Public body' means any regulatory, administrative, advisory, executive or legislative body of the State or any political subdivision of the State including, but not limited to, any board, bureau, commission, department, agency, committee, counsel, [sic] legislative committee, association or any other entity established by an act of the General Assembly of the State, which (1) is supported in whole or in part by public funds; (2) expends or disburses public funds; or (3) is specifically charged by any other public body to advise or make recommendations.

"(b) 'Public business' means any matter over which the public body has supervision, control, jurisdiction or advisory power.

* * * * * *

"(c) 'Meeting' means the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business."

meeting of the Wilmington City Council was scheduled (and held) on February 3, 1977 at 8:00 p. m. The events giving rise to this suit, however, occurred at approximately 6:30 p. m. on this same date.

The Wilmington City Council is composed of thirteen members, of which at present eleven are members of the Democratic Party and two are members of the Republican Party. The eleven Council members named as defendants here are the eleven Democrats. At approximately 6:30 p. m. on February 3, 1977 these eleven councilmen met at the office of Mayor McLaughlin who, (as is the defendant City Clerk who attended the meeting) is also a Democrat by political affiliation. Certain members of the Mayor's staff were also in attendance.

The purpose of this meeting was to provide the eleven councilmen with a report as to the status of efforts then being made in the State General Assembly to repeal certain statutes found at 22 *Del.C.* §§ 901–906 which, in their effect, provided the basis upon which the City of Wilmington, through ordinance, was authorized to impose and collect a City wage tax. Such a wage tax was then in existence and constituted the basis for a considerable portion of the funds utilized to maintain City government. Repeal of the authorizing statutes would have terminated the authority of the City to collect the tax. The purpose of the meeting was to bring the councilmen up to date on the activities of the General Assembly and to elicit support from those present at the meeting to persuade the General Assembly not to repeal the statutes. From the composition of the gathering, it seems obvious that the criterion for attendance had a political basis.

No notice of this 6:30 p. m. meeting was given. Prior to its occurrence, however, the plaintiff Fox received word from an unidentified caller that there would be an unannounced special meeting of City Council at approximately 6:30 p. m. She immediately called the defendant City Clerk who confirmed that "they were getting together" to talk about the possible repeal of the wage tax. She asked if she could attend permissible. Upon arrival, however, she was denied admission to the gathering and was told to wait in the office of the City Clerk. Various reasons were offered in support of her exclusion, including the representation that it was an emergency meeting,[1] that it was not a public meeting but rather one being held to discuss party strategy, and that she could not attend because the group could not afford to allow members of the General Assembly to learn in advance of what they might propose to do. Ms. Fox returned to her office, but thereafter attended the regularly scheduled meeting of City Council at 8:00 p. m.

Plaintiffs contend that the gathering of the Democratic councilmen in the presence of the Mayor, the City Clerk and other municipal personnel constituted a meeting of a public body to discuss or take action on public business and that as such the decision of the defendants to meet in closed session to the exclusion of the public, and thus to the exclusion of plaintiffs, was a violation of the Delaware Sunshine Law. The defendants do not dispute that the Council of the City of Wilmington is a public body within the meaning of the statute. Nor do they dispute the fact that eleven councilmen out of the total of thirteen constitute a quorum of the City Council for the purpose of transacting governmental business.[2] They do deny, however, that the meeting was convened for any purpose relating to "public business" as that term is defined at 29 *Del.C.* § 10002(b).

Defendants point out that "public business" is defined as any matter over which the public body has (1) supervision, (2) control, (3) jurisdiction or (4) advisory power. They say that the matter on which the councilmen were to be briefed was the likelihood that the General Assembly would repeal the statutes which empowered the City to levy and collect its wage tax. They say that City Council has absolutely no assembly or the existing statutes then under consideration by it. Likewise, the possible repeal of a State statute is something which does not fall within the jurisdiction of municipal government. Finally, while defendants concede that perhaps everyone has a right to offer advice and opinion to members of a legislative body, they point out that there is no statute or constitutional provision which would give the City Council "advisory power" as to actions taken by the General Assembly. Thus, their argument concludes, the subject matter which brought them together and on which information was provided was not one over which City Council had any supervision, control, jurisdiction or advisory power and, as a consequence, their meeting was not for the purpose of discussing or taking action on public business.

[3] What this argument chooses to ignore, however, is the fact that the purpose of the gathering was not merely for academic discussion on the repeal of a statute which would have no effect upon the City. Rather it was to consider possible action by the General Assembly which, if taken, could have abolished the Wilmington wage tax and thereby compelled a restructuring of City finances, both matters over which City Council clearly had control, supervision and jurisdiction. In fact, a repeal of the City's power to impose the tax by ordinance would have deprived the City thereafter of something over which it was then exercising control and supervision. From the undisputed facts I think it without question that the purpose for the meeting, which was predominated by a quorum of City Council, was to discuss a matter of public business within the meaning of the Sunshine Law and to consider the best course of action to be taken in the interests of the City and its inhabitants.

1. 29 *Del.C.* § 10004(e)(1) provides that statutory notice is not required as "to any emergency meeting which is necessary for the immediate preservation of the public peace, health or safety. . . ."

2. Code of City of Wilmington § 2-204.

Defendants complain that to require such a strategy meeting to be open to the public constitutes an unfair limitation on their ability as majority political party to function as a unified group. As a practical matter, it obviously does. But apparently this is a burden which the General Assembly feels to be outweighed by the benefit that will flow to the citizenry by requiring those in control of public business to exercise it in an open manner. In this regard it has been noted generally that one purpose of sunshine laws is to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance, that rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors, and that a sunshine statute, being for the benefit of the public, should be construed so as to frustrate all such evasive devices. *Town of Palm Beach v. Gradison*, Fla.Supr., 296 So.2d 473 (1974); *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*, 3rd Dist., 263 Cal.App.2d 41, 69 Cal.Rptr. 480 (1968).

[2] Defendants also rely on the recent Pennsylvania decision of *Judge v. Pocius*, 28 Pa.Cmwlth. 139, 367 A.2d 788 (1977) which held that a meeting at which a superintendent of schools gave information to school board members was only a "work session" and not a meeting required to be open to the public under the Pennsylvania sunshine law. From the decision, however, it appears that the Pennsylvania law only applied to meetings where "formal action" was taken. Our law is not so limited. Rather it applies to meetings called to discuss public business as well as to meetings called to take action on public business. Thus the case is readily distinguishable.

[3,4] Defendants further argue, with unassailable accuracy, that the present record is devoid of any indication that the defendant councilmen either discussed anything themselves or decided upon any course of action at the 6:30 meeting. Of course, they are the only ones who would know since all other uninvited persons were excluded. If the Delaware statute is to be liberally construed in favor of the citizens of the State as its policy declaration at 29 *Del.C.* § 10001 intends it to be, then the burden should not be cast upon one asserting a violation of it to establish what the public body actually did and said at a meeting from which he was excluded in order to obtain relief. The statutory definition of a "meeting" found at § 10002(e) seems satisfied when a quorum of a public body gathers "for the purpose" of discussing or taking action on public business regardless of what they might choose to do once convened. Proof of purpose seems sufficient to establish a violation of the statute; proof of that which took place would perhaps have a bearing on the extent of any relief to be granted. In the present case the purpose of the 6:30 meeting is factually conceded and, in my opinion, it dealt with public business within the meaning of the statute.

I therefore conclude that plaintiffs are entitled to summary judgment declaring that the closed 6:30 p. m. meeting of February 3, 1977 attended by the defendant Mayor, City Clerk and the eleven councilmen of the City of Wilmington was in violation of 29 *Del.C.* § 10004(a) which provides that "[e]very meeting of all public bodies shall be open to the public." The motion of the defendants for summary judgment is denied. To the extent that defendants may feel the law to be an infringement on their right to political association, their grievance must be addressed to the General Assembly which has made the policy decision to enact the Delaware Freedom of Information Act in its present form. As stated in *Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753, 756 (1968), a case interpreting the Arkansas sunshine law;

> "Policy decisions such as that are peculiarly within the province of the legislative branch of the government. In this instance that branch has spoken so unequivocably that its command cannot be misunderstood. Our duty is simply to give effect to its mandate."

Plaintiffs are directed to submit a suggested form of order, on notice.

* * * Finally, the same concern is manifested in cases where the defendant has made a mature decision to the effect that he shall defend himself without counsel. Thus, except in specified situations wherein the Legislature has determined that counsel is essential [footnote omitted] the court cannot force a competent defendant to be represented by an attorney. People v. Mattson, 51 Cal.2d 777, 788, 336 P.2d 937; see also Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435.

"All of the foregoing cases demonstrate a conviction that the state should keep to a necessary minimum its interference with the individual's desire to defend himself in whatever manner he deems best, using any legitimate means within his resources—and that that desire can constitutionally be forced to yield only when it will result in significant prejudice to the defendant himself or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case."

We answer the last portion of defendant's contention by quoting the words of People v. Elliott, 54 Cal.2d 498, 505, 6 Cal.Rptr. 753, 758, 354 P.2d 225, 230: "Obviously, if actual prejudice must be shown, the guarantee would become meaningless. (People v. Byrnes, 84 Cal.App.2d 72, 79, 190 P.2d 290.)" [6]

[15] Once again we are reminded of the oft given quotation of that great English jurist, Lord Chancellor Herschell: "Important as it was that people should get justice, it was even more important that they should be made to feel and see that they were getting it." [7] This is as true for the defendant as it is for the citizenry generally.

[16] Thus we conclude that the determination adverse to the defendant's motion to proceed in propria persona in this case was either an application of the wrong standard,[8] or an otherwise erroneous conclusion which, in either event, constituted an abuse of discretion, and the error is not one subject to the now even more restructed application of the harmless error rule.[9]

The judgment is reversed.

KAUS, P. J., and AISO, J. pro tem.†, concur.

6. We recognize that the cases of People v. Shroyer, 203 Cal.App.2d 478, 483, 21 Cal.Rptr. 460; People v. Marcus, 133 Cal.App.2d 579, 583, 284 P.2d 848; and People v. Mayfield, 85 Cal.App. 77, 79, 259 P. 75 have been cited as authority for the contrary conclusion. All of these cases were decided before Gideon v. Wainwright, supra, (1963) 372 U.S. 335, 342, 83 S.Ct. 792 and Miranda v. State of Arizona (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694

7. See 2 Atlay, Victorian Chancellors 460 (1908).

8. People v. Addison, supra, 256 Cal.App. 2d —, 63 Cal.Rptr. 626 (Advance report citation: 256 A.C.A. 32).

9. Chapman v. State of California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705.

† Assigned by Chairman of Judicial Council.

The SACRAMENTO NEWSPAPER GUILD, Local 92 of the American Newspaper Guild, AFL-CIO, etc., Plaintiffs and Respondents,

v.

The SACRAMENTO COUNTY BOARD OF SUPERVISORS, Eugene T. Gualco, James Phelan, Leslie E. Wood, Henry Kloss, and Frank O'Brien, Individually and as Members of the Sacramento County Board of Supervisors, Defendants and Appellants.

Civ. 11685.

Court of Appeal, Third District.

June 12, 1968.

As Modified June 20, 1968.

Injunction proceeding to restrain county board of supervisors and its com-

mittees from holding any closed meeting except in certain limited instances. The Superior Court, Sacramento County, B. Abbott Goldberg, J., granted preliminary injunction and appeal was taken. The Court of Appeal, Friedman, J., held that term "meeting" as used in public meeting law extends to informal sessions or conferences of county board members designed for discussion of public business but that preliminary injunction which prohibited county board of supervisors from conferring privately with their attorney on occasions properly requiring confidentiality was too broad.

Affirmed as modified

See also, Cal.App., 62 Cal.Rptr. 819.

1. Counties ⇐52

County board of supervisors was subject to provisions of public meeting law. West's Ann.Gov.Code, §§ 54950–54960.

2. Citizens ⇐10.1

Right to disclosure of action of public officials is attribute of citizenship not possessed in any increased degree by persons or groups whose interest in access to news is economic.

3. Injunction ⇐114(2)

There was doubt that newspaper guild had standing to bring action seeking injunction against county supervisors meeting in private; but public's right to disclosure extended standing to any county elector and amendment of complaint to add appropriate parties would have been little more than matter of mechanics, and where supervisors did not question newspaper guild's standing, trial court's decree would not be held infirm on ground of newspaper guild's lack of standing. West's Ann.Gov.Code, § 54960.

4. Counties ⇐47

County board of supervisors actually performs legislative, executive and even quasi-judicial functions.

5. Counties ⇐52
Municipal Corporations ⇐86

It is intent of public meeting law that deliberation as well as action of legislative body of local agency occur openly and publicly. West's Ann.Gov.Code, §§ 54950–54960.

6. Counties ⇐52
Municipal Corporations ⇐86

Term "meetings" as used in public meeting law includes deliberative gatherings however confined to investigation and discussion. West's Ann.Gov.Code, § 54953.

See publication Words and Phrases for other judicial constructions and definitions.

7. Officers ⇐121

Not every violation of open meeting law is a violation of misdemeanor section of law. West's Ann.Gov.Code, §§ 54950–54960, 54959.

8. Counties ⇐52
Municipal Corporations ⇐86

Carefully designed criminal penalty contained in public meeting law evidences act's broader scope when no crime is involved, that is, when deliberation is unaccompanied by action taken. West's Ann.Gov.Code, § 54959.

9. Counties ⇐52
Municipal Corporations ⇐91

By specific inclusion of committees and their meetings, public meeting law demonstrates its general application to collective investigatory and consideration activity stopping short of official action. West's Ann.Gov.Code, §§ 54952, 54955.

10. Constitutional Law ⇐81

In area of regulation, statute may push beyond debatable limits in order to block evasive techniques.

11. Counties ⇐52

Term "meeting" as used in public meeting law extends to informal sessions or conferences of county board members designed for discussion of public business. West's Ann.Gov.Code, § 54953.

12. Counties ⇐52

Where members of county board of supervisors along with county counsel, county executive, county director of welfare and several members of central labor counsel attended luncheon at Elks Club and

discussed strike of social workers union against county, luncheon was a "meeting" within meaning of public meeting law. West's Ann.Gov.Code, § 54953.

13. Witnesses ⇐205

Lawyer-client privilege cannot be invoked where client's communication was not intended to be confidential. West's Ann. Evid.Code, § 952.

14. Witnesses ⇐222

Where attorney-client privilege is claimed, its opponent has burden of proving nonconfidentiality. West's Ann.Evid.Code, §§ 917, 952.

15. Counties ⇐52
Witnesses ⇐205

Where members of county board of supervisors along with the county counsel, county executive, county director of welfare and several members of central labor counsel attended luncheon meeting at Elks Club to discuss strike of social workers union against county and none of the supervisors stated that he or any other supervisor had said anything to county counsel in confidence, meeting violated open meeting law and was not protected by lawyer-client privilege. West's Ann.Gov.Code, §§ 54950–54960; West's Ann.Evid.Code, §§ 917, 952.

16. Witnesses ⇐217

California' decisional law assumes that lawyer-client privilege is just as available to public agency clients and their lawyers as to their private counterparts.

17. Witnesses ⇐217

Statutory provisions relating to lawyer-client privilege may be invoked by public agencies. West's Ann.Evid.Code, §§ 175, 200, 951.

18. Counties ⇐63

Subject to charter restrictions, county supervisors may employ special counsel to furnish representation and advice in civil legal matters. West's Ann.Gov.Code, §§ 25203, 26520–26528, 26529, 27640–27645, 31001.

19. Witnesses ⇐198(1)

Objective of lawyer-client privilege is to enhance value which society places upon legal representation by assuring client full disclosure to attorney unfettered by fear that others will be informed. West's Ann. Evid.Code, §§ 917, 952.

20. Statutes ⇐161(1)

When later statute supersedes or substantially modifies earlier law but without expressly referring to it, earlier law is repealed or partially repealed by implication.

21. Statutes ⇐212.1

Courts assume that in enacting statute, legislature was aware of existing, related laws and intended to maintain consistent body of statutes.

22. Statutes ⇐158

There is presumption against repeals of statutes by implication.

23. Statutes ⇐159

Repeal of statute by implication will occur only where two acts are so inconsistent that there is no possibility of concurrent operation, or where later provision gives undebatable evidence of intent to supersede earlier.

24. Statutes ⇐161(1)

Where later statute supersedes or substantially modifies earlier law without expressly referring to it, courts are bound to maintain integrity of both statutes if they may stand together.

25. Statutes ⇐223.2(1)

When seeming inconsistencies appear in separate codes, codes must be considered as blending into each other and constituting single statute for purposes of statutory construction.

26. Witnesses ⇐185

Where public meeting law was applicable to local legislative bodies "notwithstanding the conflicting provisions of any other state law" but law failed to designate what if any laws were superseded, quoted clause had no greater force than a repeal by implication of laws relating to lawyer-client privilege that were irreconcilable. West's Ann.Gov.Code, § 54958; West's Ann.Evid.Code, §§ 917, 952.

27. Statutes ⇐217.4

Unadopted legislative proposals have little value in establishing legislative intent.

28. Statutes ⇐223.2(1)

Public meeting law and statute relating to lawyer-client privilege are capable of concurrent operation if lawyer-client privilege is not overblown beyond its true dimensions. West's Ann.Gov.Code, §§ 54950–54960; West's Ann.Evid.Code, §§ 917, 952.

29. Witnesses ⇐198(1)

As barrier to testimonial disclosure, lawyer-client privilege tends to suppress relevant facts and must be strictly construed. West's Ann.Evid.Code, §§ 917, 952.

30. Witnesses ⇐198(1)

As barrier against public access to public affairs, lawyer-client privilege tends to suppress relevant facts and must be strictly construed. West's Ann.Evid.Code, §§ 917, 952.

31. Witnesses ⇐205

Private clients, relatively free of regulation, may set relatively wide limits on confidentiality. West's Ann.Evid.Code, §§ 917, 952.

32. Witnesses ⇐205

Public board members, sworn to uphold law, may not arbitrarily or unnecessarily inflate confidentiality for purpose of deflating spread of public meeting law. West's Ann.Gov.Code, §§ 54950–54960; West's Ann.Evid.Code, §§ 917, 952.

33. Injunction ⇐157

Preliminary injunction which prohibited county board of supervisors from conferring privately with their attorney on occasions properly requiring confidentiality was too broad. West's Ann.Gov.Code, §§ 54950–54960.

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Edward L. Compton of Flint & MacKay, Los Angeles, amicus curiae, Calif. Newspaper Publication-Association.

John B. Heinrich, County Counsel of Sacramento, Sacramento, for defendants and appellants.

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FRIEDMAN, Associate Justice.

At the behest of plaintiff Newspaper Guild the trial court issued a preliminary injunction restraining the Sacramento County board of supervisors and its committees from holding any closed meeting at which three or more members were present except under the statutory exceptions for personnel and national security matters. The lawsuit was premised upon asserted violations of California's public meeting law, known as the Brown Act. (Gov. Code, §§ 54950–54960.[1]) The board of supervisors and its members appeal from the order granting the preliminary injunction.

Immediate occasion for the lawsuit was a luncheon gathering at the Elks Club in Sacramento on February 8, 1967. Participants were the five county supervisors, the county counsel, county executive, county director of welfare and several members of the Central Labor Council, AFL-CIO. The subject of discussion was a strike of the Social Workers Union against the county and the county's effort to enforce an injunction secured in connection with the strike. Newspaper reporters sought but were denied admission to the gathering. In their amended complaint the plaintiffs described not only the February 8 occurrence but alleged threatened future meetings of the supervisors, the county counsel and county executive with third persons selected by them.

Pending the appeal this court issued a limited writ of supersedeas permitting the supervisors to confer with the county coun-

1. In this opinion statutory references will be to the Government Code unless otherwise indicated.

sel under conditions in which the lawyer-client privilege would obtain, but otherwise maintaining enforceability of the trial court decree. (Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 255 A.C.A. 71, 62 Cal.Rptr. 819.)

[1] The Brown Act opens with section 54950, which states the law's intent that the "actions [of local legislative bodies] be taken openly and that their deliberations be conducted openly."[2] At its core is section 54953, which declares: "All meetings of the legislative body of a local agency shall be open and public * * *." Both these declarations were in the original version of the Brown Act adopted in 1953. As the legislative body of a local agency, a county board of supervisors is subject to the act. (Secs. 54951, 54952.) One feature of the act is section 54957, which permits executive sessions to consider (a) matters affecting the national security and (b) employment and dismissal of personnel. The 1961 legislature made several additions to the Brown Act (Stats.1961, ch. 1671), among them a definition of the phrase "action taken" in section 54952.6 and a new misdemeanor penalty provision in section 54959.[3]

[2,3] A provision of the Brown Act, section 54960, authorizes any "interested person" to seek legal restraint against violations or threatened violations. Defendants do not question the Newspaper Guild's standing to sue. The complaint alleges that the Newspaper Guild is a labor organization composed of professional working newspaper men and women. Whether that allegation makes out adequate standing to sue is at least questionable. (See United States ex rel. Stowell v. Deming (1927) 19 F.2d 697, 698, cert. den. 275 U.S. 531, 48 S.Ct. 28, 72 L.Ed. 410; Adler v. City Council of Culver City (1960) 184 Cal.App. 2d 763, 775, 7 Cal.Rptr. 805; Associated Boat Industries of Northern California v. Marshall (1951) 104 Cal.App.2d 21, 22, 230 P.2d 379.) The right to disclosure is an attribute of citizenship, not possessed in any increased degree by persons or groups whose interest in access to news is economic. (See Oxnard Publishing Co. v. Superior Court (1968) 261 A.C.A. 505, 513, 68 Cal.Rptr. 83.) Section 54950's broad declaration of the public's right to disclosure should logically extend standing to any county elector. Had the county raised the issue in the trial court, amendment of the complaint to add appropriate parties and allegations would have been little more than a matter of mechanics. Under the circumstances, there is substantial compliance with section 54960.

Although all five of the county supervisors were present at the Elks Club luncheon of February 8, 1967, and although the subject or discussion was a matter of county governmental interest, defendants contend that the trial court erred in view-

2. The full text of section 54950 declares:
"In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.
"The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."

3. Section 54952.6 states: "As used in this chapter, 'action taken' means a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance."
Section 54959 provides: "Each member of a legislative body who attends a meeting of such legislative body where action is taken in violation of any provision of this chapter, with knowledge of the fact that the meeting is in violation thereof, is guilty of a misdemeanor."

ing it as a meeting within the scope of the Brown Act. They rely upon Adler v. City Council of Culver City, supra, 184 Cal.App. 2d at pp. 770–774, 7 Cal.Rptr. 805, which held the statute applicable only to formal meetings for the transaction of official business, inapplicable to informal sessions. The Newspapers Guild, on the other hand, argues that the 1961 amendments of the Brown Act were designed to nullify the Adler decision. (See 42 Ops.Cal.Atty. Gen. 61 (1963); Comment, Access to Governmental Information in California, 54 Cal.L.Rev. 1650, 1653–1655 (1966); cf. Herlick, California's Secret Meeting Law, 37 St.Bar J. 540 (1962).

Section 54953 is unequivocal in its central thrust upon official sessions for the transaction of official business, but somewhat ambiguous as it encounters peripheral gatherings or conversations among board members where public business is a topic. Interpretation to accomplish legislative intent is a truism of the law. Instead of appraising the accuracy of Adler as an interpretation of the pre-1961 law and analyzing the 1961 amendments so far as they bear upon Adler, we prefer to interpret the public meeting provision by examining the current enactment of which it forms a part. Attempts to define "meeting" by synonyms or by coupling it with modifying adjectives involve a degree of question-begging. Interpretation requires inquiry into the Brown Act's objective and into the functional character of the gatherings or sessions to which the legislature intended it to apply.

[4, 5] There is nothing in the Brown Act to demarcate a narrower application than the range of governmental functions performed by the agency. Although the Brown Act artificially classifies it as a legislative body, a board of supervisors actually performs legislative, executive and even quasi-judicial functions. (Chinn v. Superior Court (1909) 156 Cal. 478, 481, 105 P. 580; Fraser v. Alexander (1888) 75 Cal. 147, 152, 16 P. 757.) Section 54950 is a deliberate and palpable expression of the act's intended impact. It declares the law's intent that deliberation as well as action occur openly and publicly. Recognition of deliberation and action as dual components of the collective decision-making process brings awareness that the meeting concept cannot be split off and confined to one component only, but rather comprehends both and either. To "deliberate" is to examine, weigh and reflect upon the reasons for or against the choice. (See Webster's New International Dictionary, 3d ed.) Public choices are shaped by reasons of fact, reasons of policy or both. Any of the agency's functions may include or depend upon the ascertainment of facts. (Walker v. County of Los Angeles (1961) 55 Cal.2d 626, 635, 12 Cal.Rptr. 671, 361 P.2d 247.) Deliberation thus connotes not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision.

[6–8] The act supplies additional internal evidence that deliberative gatherings are "meetings," however confined to investigation and discussion. Section 54952.6 defines the phrase "action taken." (Fn. 3, supra.) This definition leads to two other provisions where this phrase, or an approximation of it, appears: the declaration of legislative intent in section 54950 and the misdemeanor declaration in section 54959 (fns. 2 and 3, supra). In section 54950 the notion of action-taking is juxtaposed to that of deliberation, indicating that deliberation and action, however they may coalesce, are functionally discernible steps, both of which must be taken in public view. The misdemeanor penalty in section 54959, in contrast, is limited to a meeting "where action is taken." Critics of open meeting laws have been troubled by the prospect of criminal prosecutions against public officials who make the wrong guess when confronted with an ambiguous situation. (See Comment, Open Meeting Legislation, 75 Harv.L.Rev. 1199, 1211 (1962); Comment, 54 Cal.L.Rev. supra, at p. 1662.) Apparently sharing this concern, the legislature has made the criminal sanction nar-

rower than the law's declaration of intended coverage. Not every violation of the Brown Act is a violation of section 54959. The misdemeanor penalty is focused on the meeting where action is taken, not on the meeting confined to deliberation. The narrow, carefully designed criminal penalty evidences the act's broader scope when no crime is involved, that is, when deliberation is unaccompanied by "action taken."

[9] Section 54952 defines the "legislative body" of a local agency to include its committees.[4] Boards of supervisors have investigatory powers which they may delegate to committees, which in turn may "send for persons and papers." (Gov.Code, §§ 25170-25171.) Without troubling the lexicographers, one recognizes a committee as a subordinate body charged with investigating, considering and reporting to the parent body upon a particular subject. Normally, committees investigate, consider and report, leaving the parent body to act. By the specific inclusion of committees and their meetings, the Brown Act demonstrates its general application to collective investigatory and consideration activity stopping short of official action.[5]

Extrinsic as well as intrinsic evidence of legislative intent impels rejection of a narrow interpretation. Tendencies toward secrecy in public affairs have been the subject of extensive criticism and comment. Such governmental phenomena as "managed" news, secret meetings and closed records are disparaged as inimical to the goals and needs of a self-governing nation.[6] The suppression of public information at the local government level in California was the subject of investigation by an Assembly Interim Committee on Judiciary, which submitted its report at the 1953 legislative session. (Progress Report to the Legislature, Assembly Interim Comm. on Judiciary (1953 Reg.Sess.) pp. 13–62.) The committee's recommendations included the proposed measure which later became the Brown Act. The report noted widespread evasion of existing open meeting statutes.[7]

4. Specifically, section 54952 provides: "As used in this chapter, 'legislative body' means the governing board, commission, directors or body of a local agency, or any board or commission thereof, and shall include any board, commission, committee, or other body on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency, whether such board, commission, committee or other body is organized and operated by such local agency or by a private corporation." The trial court limited the injunction to board and committee meetings of three or more members. At this point the injunction parallels an opinion of the Attorney General holding the public meeting requirement inapplicable to those committees composed of less than a quorum of the parent body (32 Ops.Cal.Atty.Gen. 240). That phase of the injunction is not in dispute.

5. In section 54955 the Brown Act provides for notice of adjourned or continued meetings. Section 54955.1, added in 1965, provides for the continuation of "hearings" in the same manner as continuation of "meetings." This segmented terminology supplies a foothold for the argument that a hearing is not a meeting, thus is unaffected by the public meeting demand of section 54953. Instead of signifying exclusion, section 54955.1 points to the inclusion of meetings and hearings within a single concept, since it assures public notice and awareness of both.

6. See, for example, James Russell Wiggins, Freedom or Secrecy (1964 rev. ed); Harold L. Cross, The People's Right to Know (1953) (Columbia Univ. Press); Lectures on Communications Media (1954) Univ. of Mich. Law School; Pickerell and Feder, Open Public Meetings of Legislative Bodies—California's Brown Act (1957 Legislative Problems, No. 7, Bureau of Public Administration, Univ. of Calif.; The Right to Know, Assembly Interim Comm. on Government Organization (1965), California Legislature, vol. 12, no. 10; Comment, Access to Governmental Information, 54 Cal.L.Rev. 1650 (1966); Comment, Open Meeting Legislation, 75 Harv.L.Rev. 1199 (1962); Parks, Applying the Right to Know Under the Constitution, 26 Geo.Wash.L.Rev. 1 (1957).

7. See Government Code section 25080, governing county boards of supervisors, section 36708, relating to city councils of

through unannounced "sneak" meetings and through indulgence in euphemisms such as executive session, conference, caucus, study or work session, and meeting of the committee of the whole. (Ibid., pp. 21–23.) The report declared: "It is now apparent to this committee that there is a real need for legislative action. Legislative and administrative groups and officials through devious ways are depriving us, the public, of our inalienable right to be present and to be heard at all deliberations of governmental bodies wherein decisions affecting the public are being made." (Ibid., p. 21.) In presenting and recommending the measure later known as the Brown Act, the committee stated: "The committee is of the opinion that there is a genuine and compelling need for legislative action of a nature designed to curb this misuse of democratic process by public bodies who would legislate in secret. Unless for proper security reasons, the public has the right to be present and to be heard during all phases of legislative enactment by any governmental agency. This right is a source of strength to our Country and must be protected at all costs." (Ibid., p. 61.)

[10–12] In this area of regulation, as well as others, a statute may push beyond debatable limits in order to block evasive techniques. An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices.[8] As operative criteria, formality and informality are alien to the law's design, exposing it to the very evasions it was designed to prevent. Construed in the light of the Brown Act's objectives, the term "meeting" extends to informal sessions or conferences of the board members designed for the discussion of public business. The Elks Club luncheon, attended by the Sacramento County board of supervisors, was such a meeting.

Defendants, nevertheless, contend that the occasion was a lawful exercise of the lawyer-client privilege existing between the supervisors and the county counsel, as their attorney; that the pending lawsuit to restrain striking and picketing by county-employed social workers furnished the occasion for exercise of the privilege.[9] Defendants point out that the former law denied the privilege where persons other than the attorney and client were present; that section 952 of the new Evidence Code now extends the privilege to limited situations involving the presence of third persons.[10]

general law cities, and Education Code section 966, relating to school boards, all having statutory predecessors which antedated the Brown Act and all requiring meetings to be public.

8. Members of public boards bring to bear upon their ultimate decisions a range of impressions, experiences and beliefs, some gained individually, others collectively. The writer of the comment in 54 California Law Review 1050, 1051, observes: "There is a spectrum of gatherings of agency members that can be called a meeting, ranging from formal convocations to transact business to chance encounters where business is discussed. However, neither of these two extremes is an acceptable definition of the statutory word 'meeting.' Requiring all discussion between members to be open and public would preclude normal living and working by officials. On other hand, permitting secrecy unless there is formal convocation of a body invites evasion." Although one might hypothesize quasi-social occasions whose characterization as a meeting would be debatable, the difference between a social occasion and one arranged for pursuit of the public's business will usually be quite apparent.

9. The injunction suit is described in some detail in In re Berry (1968) 68 A.C. 135, 65 Cal.Rptr. 273, 436 P.2d 273.

10. Section 952 of the Evidence Code provides: "As used in this article, 'confidential communication between client and lawyer' means information transmitted between a client and his lawyer in the

[13] Evidence Code section 952 confers the privilege upon information communicated "in confidence" to the lawyer and upon advice given by the lawyer. The privilege cannot be invoked where the client's communication was not intended to be confidential. (City and County of San Francisco v. Superior Court (1951) 37 Cal.2d 227, 234–235, 231 P.2d 26, 25 A.L.R.2d 1418.) Participants in the Elks Club luncheon testified at the preliminary injunction hearing. In substance they said that the luncheon took place because the labor representatives wanted to discuss the social workers' strike and to ascertain whether a strike sanction by the central labor council would involve that body in the lawsuit. One supervisor testified that he had attended as a guest of the central labor council, but had no knowledge of the discussion topic until he arrived. Another supervisor testified that he had attended to ascertain the attitude of the central labor council regarding the strike litigation. A third supervisor filed an affidavit. None of these supervisors stated that he or any other supervisor had said anything to the county counsel in confidence. None claimed attendance for the purpose of getting the county counsel's legal advice and none claimed receiving any. If any communication passed between the supervisors and their attorney at the Elks Club luncheon, the record fails to reveal it.

[14, 15] Where the privilege against disclosure is claimed, its opponent has the burden of proving nonconfidentiality. (Evid.Code, § 917.) Here, although a courtroom occasion occurred, the privilege against testifying was not claimed.[11] The assertion appears belatedly, in the form of argument urging a legal characterization. There is no evidentiary basis at all for the characterization. The luncheon meeting of February 8, 1967, finds no shelter under the lawyer-client privilege. The trial court correctly concluded that it violated section 54953.

Aside from the statutory exceptions for national security and personnel matters, the preliminary injunction prohibits nonpublic meetings of three or more supervisors "for whatever purpose." Dedendants object to the breadth of the injunction, asserting that the Brown Act should not be construed to prevent conferences between the supervisors and the county counsel for the purpose of seeking and receiving confidential legal advice. Defendants rely upon an opinion of the Attorney General, 36 Ops.Cal.Atty.Gen. 175 (1960), holding that in narrowly limited situations, where a public discussion of legal problems would benefit the agency's adversary and injure the public interest, the board members may meet privately with their attorney. Defendants' position is supported by a brief filed by the county counsel of Los Angeles County as *amicus curiae*.

[16, 17] The Brown Act, specifically section 54953, broadly encompasses "all meetings." Viewed as a statutory microcosm, its demand is forthright, offering no internal interstice for private lawyer-client consultations. It is not a microcosm, however, but one element in a structure of constitutional and statutory policies covering the powers, duties and procedures of local agencies of government. Another part of this legal structure is the privilege attaching to confidential lawyer-client communications. This privilege was for almost a

course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes advice given by the lawyer in the course of that relationship."

11. At the preliminary injunction hearing the supervisors claimed the privilege for official information where disclosure would injure the public interest (Evid. Code, § 1040), but not the attorney-client privilege. The claim was overruled by the trial judge. The ruling is not assailed on appeal.

century expressed in Code of Civil Procedure section 1881, subdivision (2), and has now been recodified in the Evidence Code. California decisional law assumes without discussion that the privilege is just as available to public agency clients and their lawyers as to their private counterparts. (Holm v. Superior Court (1954) 42 Cal.2d 500, 506–508, 267 P.2d 1025, 268 P.2d 722; Jessup v. Superior Court (1957) 151 Cal. App.2d 102, 108–111, 311 P.2d 177.) Codifying this notion, the Evidence Code distinctly includes public agencies and entities among the clients who may assert the privilege.[12]

[18] Traditionally the district attorney has served both as public prosecutor and as civil attorney for California counties and their officials. He fulfills this dual role in those counties which have not established separate civil law offices. (§§ 26520–26528.) When the office of county counsel is established by charter or by act of the supervisors under state law, that officer usually assumes the civil law functions as attorney for the county and its board of supervisors. (§§ 26529, 27640–27645.) Subject to charter restrictions, supervisors may also employ special counsel to furnish representation and advice in civil legal matters. (§§ 25203, 31001.)

[19] Plaintiffs do not dispute the availability of the lawyer-client privilege to public officials and their attorneys. They view it as a barrier to testimonial compulsion, not a procedural rule for the conduct of public affairs. The view is too narrow. The privilege against disclosure is essentially a means for achieving a policy objective of the law. The objective is to enhance the value which society places upon legal representation by assuring the client full disclosure to the attorney unfettered by fear that others will be informed. (Greyhound Corp. v. Superior Court (1961) 56 Cal.2d 355, 396, 15 Cal.Rptr. 90, 364 P.2d 266; Holm v. Superior Court, supra, 42 Cal.2d at pp. 506–507, 267 P.2d 1025, 268 P.2d 722; 8 Wigmore on Evidence (McNaughton rev. 1961) § 2291; Comment, Attorney-Client Privilege in California, 10 Stan.L.Rev. 297–300 (1958); Louisell, Confidentiality, Conformity and Confusion: Privileges in Federal Court Today, 31 Tulane L.Rev. 101 (1956).) The privilege serves a policy assuring private consultation. If client and counsel must confer in public view and hearing, both privilege and policy are stripped of value. Considered in isolation from the Brown Act, this assurance is available to governmental as well as private clients and their attorneys.

Thus the structure of laws governing local public boards includes two separate substructures, one in the Government Code demanding open meetings, the other in the Evidence Code assuring confidential lawyer-client conferences. Each expresses a separate policy objective, but neither refers expressly to the other in terms of dominance or reconciliation. At this point we assume without deciding that the Evidence Code, enacted in 1965, merely recodified and continued the existing statutory lawyer-client privilege of public agencies; that the Brown Act, adopted in 1953, is really the later of the two statutes.

[20–25] When a later statute supersedes or substantially modifies an earlier law but

12. Evidence Code section 951: "As used in this article, 'client' means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent."
Evidence Code section 175: "'Person' includes a natural person, firm, association, organization, partnership, business trust, corporation, or public entity."
Evidence Code section 200: "'Public entity' includes a nation, state, county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation, whether foreign or domestic."
See Law Revision Commission Comment following Evidence Code section 951; also, 6 Calif.Law Rev.Comm., Reports, Recommendations and Studies, p. 221.

without expressly referring to it, the earlier law is repealed or partially repealed by implication. The courts assume that in enacting a statute the legislature was aware of existing, related laws and intended to maintain a consistent body of statutes. (Stafford v. Realty Bond Service Corp. (1952) 39 Cal.2d 797, 805, 249 P.2d 241; Lambert v. Conrad (1960) 185 Cal.App.2d 85, 93, 8 Cal.Rptr. 56; 1 Sutherland, Statutory Construction (3d ed.) § 2012, pp. 461–466.) Thus there is a presumption against repeals by implication; they will occur only where the two acts are so inconsistent that there is no possibility of concurrent operation, or where the later provision gives undebatable evidence of an intent to supersede the earlier; the courts are bound to maintain the integrity of both statutes if they may stand together. (Warne v. Harkness (1963) 60 Cal.2d 579, 588, 35 Cal.Rptr. 601, 387 P.2d 377; Penziner v. West American Finance Co. (1937) 10 Cal.2d 160, 176, 74 P.2d 252; Smith v. Mathews (1909) 155 Cal. 752, 758, 103 P. 199; see Williams v. Los Angeles Metropolitan Transit Authority (1968) 68 A.C. 623, 628, 68 Cal.Rptr. 297, 440 P.2d 497.) Also relevant when the seeming inconsistencies appear in separate codes is the rule declaring that the codes blend into each other and constitute a single statute for the purposes of statutory construction. (Pesce v. Dept. of Alcoholic Bev. Control Bd. (1958) 51 Cal.2d 310, 312, 333 P.2d 15; People v. Vassar (1962) 207 Cal.App.2d 318, 322, 24 Cal.Rptr. 481.)

[26] One of the provisions of the Brown Act, section 54958, declares its application to local legislative bodies "notwithstanding the conflicting provisions of any other state law." Failing to designate what if any laws are superseded, such a clause has no greater force than a repeal by implication; it subordinates or repeals existing law only to the extent that the two laws are irreconcilable. (Penziner v. West American Finance Co., supra, 10 Cal.2d at pp. 174-175, 74 P.2d 252; 45 Cal.Jur.2d, Statutes, § 69, p. 590; 1 Sutherland, op. cit., § 2013, pp. 466-468.)

The question, then, is whether the public meeting requirement of section 54953 abrogates by implication the statutory policy assuring opportunity for private legal consultation by public agency clients; or, in equivalent terms, whether the Brown Act supplies unmistakable evidence of a legislative intent to abolish that statutory policy. That policy is just as meaningful, as financially important, to public as to private clients. Public agencies are constantly embroiled in contract and eminent domain litigation and, with the expansion of public tort liability, in personal injury and property damage suits. Large-scale public services and projects expose public entities to potential tort liabilities dwarfing those of most private clients. Money actions by and against the public are as contentious as those involving private litigants. The most casual and naive observer can sense the financial stakes wrapped up in the conventionalities of a condemnation trial. Government should have no advantage in legal strife; neither should it be a second-class citizen. We reiterate what we stated in the supersedeas aspect of this suit, Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, supra, 255 A.C.A. at page 73, 62 Cal.Rptr. at page 821: "Public agencies face the same hard realities as other civil litigants. An attorney who cannot confer with his client outside his opponent's presence may be under insurmountable handicaps. A panoply of constitutional, statutory, administrative and fiscal arrangements covering state and local government expresses a policy that litigating public agencies strive with their legal adversaries on fairly even terms. We need not parse for citations to demonstrate the obvious. There is a public entitlement to the effective aid of legal counsel in civil litigation. Effective aid is impossible if opportunity for confidential legal advice is banned."

Settlement and avoidance of litigation are particularly sensitive activities, whose conduct would be grossly confounded, often made impossible, by undiscriminating insistence on open lawyer-client confer-

ences. In settlement advice, the attorney's professional task is to provide his client a frank appraisal of strength and weakness, gains and risks, hopes and fears. If the public's "right to know" compelled admission of an audience, the ringside seats would be occupied by the government's adversary, delighted to capitalize on every revelation of weakness.[13] A lawyer worth his salt would feel a *sense of treachery* in disclosing that kind of appraisal. (8 Wigmore op. cit. § 2291, p. 553.) To him its conduct in public would be shocking, unprofessional, unthinkable. He would prefer to fight the lawsuit to its bitter end. Frustration would blunt the law's policy in favor of settlement, and financial imprudence might be a compelled path.

As ex-lawyers, judges have been exposed to conditioning experiences which might induce inflation of the privilege's value. Actually it poses competing values. Professor Wigmore has observed that its benefits are indirect and speculative; that, as a testimonial privilege, it is worth preserving but is nevertheless an obstacle to the investigation of the truth.[14] In counterthrust to the values expressed in the "right to know" slogan, it permits an undeniable quantum of secrecy and, in overreaching hands, a potential tool of evasion. Implicit in its abrogation by implication is the assumption that the California Legislature indulged in a knowing choice between these competing public interests; that it adopted the Brown Act with unmistakable intent to abolish the values inherent in the lawyer-client privilege of local boards of government.

Evidence of such intent is by far too thin. It consists of the open meeting requirement of section 54953 and the declaration of legislative policy in section 54950 (fn. 2, supra). In requiring board members to deliberate and act in public, these do not inexorably embrace the board members in their roles as clients calling upon their attorney for legal advice. In declaring the public's right to be informed, they do not necessarily propel the public's legal adversary into the lawyer-client conference clad in the robes of good citizenship. In recommending the bill which became the Brown Act, the Assembly Interim Committee on Judiciary gave no clue that it had even considered the statutory lawyer-client privilege of public boards. Indeed, the committee professed no attempt to cope with the entire gamut of disclosure problems in local government.[15]

Parallel to the lawyer-client privilege is that of a public officer to refuse disclosure of communications made to him in official confidence when "[d]isclosure of the information is against the public interest * * *." (Evid.Code, § 1040(a), (b) (2), replacing former Code Civ.Proc., § 1881,

13. That the public's adversary in litigation may wrap himself in the banner of the public's right to know is illustrated by the following observation in Jessup v. Superior Court, supra, 151 Cal.App.2d at pages 107–108, 311 P.2d at page 181: "Here Sanders is not desirous of seeing these reports as a citizen primarily interested in protection of the public; he is desirous of seeing them in the hope that he may gain some advantage therefrom in his contemplated suit against the city, making disclosure a possible disadvantage to the city. Thus the public welfare requires that inspection be postponed until disclosure will no longer be of disadvantage to the city."

14. 8 Wigmore, op. cit., § 2291, p. 554; see Jencks v. United States (1959) 353 U.S. 657, 670–672, 77 S.Ct. 1007, 1 L.Ed. 2d 1103; Carrow, Governmental Nondisclosure in Judicial Proceedings, 107 U.Pa.L.Rev. 166 (1958); Timbers and Cohen, Demands of Litigants for Government Information, 18 U.Pittsburgh L. Rev. 687 (1957).

15. Referring to the bill it was recommending, the committee stated: "While such a measure would not provide an answer to all the needs of legislation aimed at cleansing this evil of suppression of public information by public bodies, from our government, it is felt it will effectively plug the most apparent loopholes in the existing laws as they now relate to meetings at which legislative action may be taken." (Progress Report to the Legislature, 1953 Reg.Sess., by Assembly Interim Comm. on Judiciary, p. 61.)

subd. 5; see Jessup v. Superior Court, supra, 151 Cal.App.2d at pp. 107–108, 311 P.2d 177.) The interim committee voiced no criticism of the latter privilege, although it too is a possible tool of official secrecy. Neither the Brown Act nor its history supplies undebatable evidence of a legislative intent to supersede the assurance of private legal consultation stemming from the statutory lawyer-client privilege.

[27] At various legislative sessions after 1953 bills were introduced, but not passed, expressly amending the Brown Act to permit board members and their attorneys to confer on property acquisition or pending litigation. A recommendation to the same general effect was made by an interim committee in 1965. (The Right to Know, Assembly Interim Comm. on Governmental Organization (1965), California Legislature, vol. 12, no. 10, pp. 41–44.) The record and briefs point to the failure of these proposals as alleged evidence of the 1953 legislature's design to abrogate the public lawyer-client privilege. The unpassed bills of later legislative sessions evoke conflicting inferences. Some legislators might propose them to replace an existing prohibition; others to clarify an existing permission. A third group of legislators might oppose them to preserve an existing prohibition, and a fourth because there was no need to clarify an existing permission. The light shed by such unadopted proposals is too dim to pierce statutory obscurities. As evidences of legislative intent they have little value. (See Ambrose v. Cranston (1968) 261 A.C.A. 155, 161–162, 68 Cal.Rptr. 22; Willard and MacDonald, The Effect of An Unsuccessful Attempt to Amend a Statute, 44 Cornell L.Q. 336 (1958).)

[28–32] The two enactments are capable of concurrent operation if the lawyer-client privilege is not overblown beyond its true dimensions. As a barrier to testimonial disclosure, the privilege tends to suppress relevant facts, hence is strictly construed. (Greyhound Corp. v. Superior Court, supra, 56 Cal.2d at p. 396, 15 Cal. Rptr. 90, 364 P.2d 266.) As a barrier against public access to public affairs, it has precisely the same suppressing effect, hence here too must be strictly construed. As noted earlier, the assurance of private legal consultation is restricted to communications "in confidence." Private clients, relatively free of regulation, may set relatively wide limits on confidentiality. Public board members, sworn to uphold the law, may not arbitrarily or unnecessarily inflate confidentiality for the purpose of deflating the spread of the public meeting law. Neither the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest. To attempt a generalization embracing the occasions for genuine confidentiality would be rash. The Evidence Code lawyer-client provisions may operate concurrently with the Brown Act, neither superseding the other by implication.

[33] Because the Brown Act did not abolish the statutory opportunity of boards of supervisors to confer privately with their attorney on occasions properly requiring confidentiality, the preliminary injunction is too broad. The preliminary injunction is modified by adding at its end a new paragraph 6, to read as follows:

"6. This preliminary injunction shall not prevent the Sacramento County Board of Supervisors from consulting privately with the county counsel or other attorney representing the board under circumstances in which the lawyer-client privilege conferred by sections 950 through 962 of the California Evidence Code may lawfully be claimed."

As so modified, the preliminary injunction order is affirmed. Each party is to bear its own costs on appeal.

PIERCE, P. J., and REGAN, J., concur.

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11, 1983 THE BUREAU OF NATIONAL AFFAIRS, INC. Vol. 9, No. 36

OPINIONS IN THIS ISSUE

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MONY—GRAND JURY

ıer the First Amendment nor the nd shield law protects a *Washington* porter from testifying before a grand ıcerning her series of articles which ed sexual assaults in a county jail vhich she identified the names of her of information, the Maryland Court als rules, noting that the grand jury been shown to have acted ir ood outside the legitimate scope of its (Tofani v. Maryland, 9/16/83).

S—MEETINGS

arranged telephone conference call members of a school board is not a g" to which the Virginia Freedom mation Act applies, according to the Supreme Court (Roanoke School . Times-World, 9/9/83); a federal court in Rhode Island rules that the Open Meetings Law gives the press olic the right to tape record a school committee's nonexecutive mee ings (Belcher v. Mansi, 6/30/83).

ALSO IN THIS ISSUE—

An Indiana statute which autho izes a court, upon the motion of a pros ecuting attorney, to seal an information or indictment, and which prohibits the disclosure of any such sealed record until the defendant is arrested does not violate the First Amendment (Worrell Newspapers v. Westhafer, 9/20/83); South Dakota Governor William Janklow, who has sued both Viking Penguin publishers and *Newsweek* magazine in South Dakota for libel, and who entered New York solely to attend depositions in the *Newsweek* suit, is immune from service of process in Viking's New York lawsuit seeking a declaratory judgment that it did not act with actual malice in publishing the allegedly libelous book (Viking Penguin v. Janklow, 8/24/83); enforcement of a new Mississippi obscenity statute is preliminarily enjoined (Goldstein v. Allain, 6/28/83).

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MEDIA LAW REPORTER®

October 25, 1983 THE BUREAU OF NATIONAL AFFAIRS, INC. Vol. 9, No. 38

OPINIONS IN THIS ISSUE

To Be Cited 9 Med.L.Rptr.

BOOK CONTRACT—PROMOTION

A book author who alleged that Prentice-Hall reduced its promotional efforts for his book concerning the DuPont family as a result of economic coercion by E.I. DuPont de Nemours & Company but who failed to show that the publisher's initial printing and promotional efforts were so inadequate that the book never had a reasonable chance of achieving market success and who also failed to show that Prentice-Hall's subsequent promotional and advertising decisions were motivated by reasons other than good faith business judgment has failed to demonstrate that the publisher breached its contract, according to the U.S. Court of Appeals for the Second Circuit, which also rules that DuPont's good faith, noncoercive expression of its views concerning the book's objectivity and accuracy does not constitute tortious interference with contractual relations (Zilg v. Prentice-Hall, 9/1/83).

FCC—FAIRNESS DOCTRINE

The Federal Communications Commission did not err by denying the Democratic National Committee's Fairness Doctrine complaint alleging that NBC and CBS failed to afford a reasonable opportunity for the presentation of contrasting points of view regarding the Reagan Administration's economic policies, the U.S. Court of Appeals for the District of Columbia Circuit rules, although it emphasizes the "continuing vitality" of the Fairness Doctrine (Democratic National Committee v. FCC, 9/27/83).

ALSO IN THIS ISSUE—

A New York trial court refuses to quash a subpoena served upon CBS by the district attorney seeking all videotapes and audiotapes, including "outtakes," of its "60 Minutes" interviews with defendants who had been convicted in absentia for illegal weapons sales to terrorists (New York v. Korkala, 9/19/83); a newspaper article which, in recounting the hazards faced by police officers, identified plaintiff's involvement in the hit-and-run death of a police officer 20 years earlier does not constitute the public disclosure of private facts, even though the plaintiff was a juvenile at the time, since his involvement was later noted in an official, public court record regarding a subsequent criminal charge, the Nevada Supreme Court rules (Montesano v. Las Vegas Review Journal, 9/6/83); a city planning commission which has only advisory powers but which plays a substantial role in policymaking is a "public body" subject to the Mississippi Open Meetings Law (Vicksburg v. Vicksburg Printing, 7/20/83).

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Bruce HOROWITZ, William Parker, James Love, David Loutrel, Wilson A. Rice, John E. Duggan, Donald E. Clocksin, Thomas G. Beck, Elizabeth Ratner, Randall Simpson, Philip R. Volland, Jeffrey Lowenfels, Appellants/Cross-Appellees,

v.

The ALASKA BAR ASSOCIATION, Appellee/Cross-Appellant.

Nos. 4310, 4311.

Supreme Court of Alaska.

April 4, 1980.

Members and nonmembers of Alaska Bar Association brought action seeking declaration that business meeting of ABA Board of Governors was void as violating federal and state due process rights and Alaska's open meeting statute. The Superior Court, Third Judicial District, Mark C. Rowland, J., found for the ABA but denied it any attorney fees, and appeal and cross appeal were taken. The Supreme Court, Connor, J., held that: (1) ABA is exempt from the open meeting statute; (2) repeal and reenactment of the open meeting statute in 1966 did not remove it as part of the Administrative Procedure Act; and (3) denial of attorney fees was not abuse of discretion.

Affirmed.

Dimond, Senior Justice, dissented in part and filed opinion.

Rabinowitz, J., dissented in part and filed opinion.

1. Statutes ⇐188

If the meaning of a statute is plain it should be enforced as it reads without judicial modification or construction.

2. Attorney and Client ⇐31

Provision of open meeting statute that bylaws and regulations adopted by board or members of Alaska Bar are not subject to Administrative Procedure Act exempts board bylaws and regulations themselves and not merely their method of adoption; hence, violation of open meeting requirements in connection with meeting of Board of Governors of Alaska Bar Association in connection with business meeting did not render the meeting void, as meeting was otherwise convened in accordance with ABA bylaws. AS 08.08.080(a)(3, 6), (b)(2), 08.08.100, 44.62.310.

3. Attorney and Client ⇐31

Although open meeting statute was repealed and reenacted in 1966 it was not thereby taken outside scope of Administrative Procedure Act thereby bringing Alaska Bar Association within its scope, notwithstanding provision of Administrative Procedure Act that bylaws and regulations conducted by the board were not subject to ABA, since repeal and re-enactment did not move open meeting law from the ABA. AS 08.08.100, 44.62.650.

4. Constitutional Law ⇐255(1), 278(1)

Supreme Court will take cognizance of a due process claim only where there is an alleged deprivation of sufficient liberty or property interest to warrant constitutional protection. U.S.C.A.Const. Amend. 14

5. Costs ⇐172

Although judgment was rendered for Alaska Bar Association in action seeking declaration that business meeting violated, among other things, the open meeting statute, it was not abuse of discretion to deny the Association an award of attorney fees on ground that case was brought in the public interest. Rules of Civil Procedure, rule 82.

Michael J. Frank, Richard Brown, and Gregory M. O'Leary, Anchorage, for appellants/cross-appellees.

John M. Conway and Patrick B. Gilmore, Atkinson, Conway, Young, Bell & Gagnon, Anchorage, for appellee/cross-appellant.

Before RABINOWITZ, C. J., CONNOR, BOOCHEVER and BURKE, JJ., and DIMOND, Senior Justice.

OPINION

CONNOR, Justice.

At issue in this case is whether a meeting of the Board of Governors of the Alaska Bar Association held in Hawaii in 1978 was valid.

This is an appeal from an order of the Superior Court, Third Judicial District, Anchorage, Mark C. Rowland, J., granting the Alaska Bar Association's (hereinafter ABA) motion for judgment on the pleadings pursuant to Alaska Rule of Civil Procedure 12(c) but denying ABA's motion for attorney's fees. The suit was brought against the ABA by ten members and two nonmembers seeking a declaration that a business meeting of the ABA Board of Governors held in Kauai, Hawaii in February, 1978,[1] was void because it violated their federal and state due process rights and Alaska's open meeting statute. Appellants challenge the Superior Court's rejection of their due process claims and the finding that the open meeting statute, as part of the Administrative Procedure Act, is not applicable to the ABA. The ABA has cross-appealed from the superior court's denial of its motion for an attorney's fee award. The superior court denied that award on the ground that the suit constituted public interest litigation.

The open meeting statute contained in Sections .310 and .312 of the Alaska Administrative Procedure Act, AS 44.62, requires that the meetings of a number of public agencies and entities be open to the public, that votes be recorded in a certain manner, that executive sessions be held in conformity with the act and limited to the discussion of certain enumerated subjects, and that reasonable public notice be given for all meetings required to be open under the act.[2]

1. The Board of Governors' meeting was held in conjunction with a continuing legal education program conducted in Kauai for the members of the ABA.

2. AS 44.62.310 provides in full.

Agency meetings public. (a) All meetings of a legislative body, of a board of regents, or of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of its political subdivisions, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations, advisory or otherwise, of the state or local government supported in whole or in part by public money or authorized to spend public money, are open to the public except as otherwise provided by this section. Except when voice votes are authorized, the vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote. This section does not apply to any votes required to be taken to organize the afore-mentioned bodies.

(b) If excepted subjects are to be discussed at a meeting, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss matters that come within the exceptions contained in (c) of this section shall be determined by a majority vote of the body. No subjects may be considered at the executive session except those mentioned in the motion calling for the executive session unless auxiliary to the main question. No action may be taken at the executive session.

(c) The following excepted subjects may be discussed in an executive session:

(1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit;

(2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;

(3) matters which by law, municipal charter, or ordinance are required to be confidential.

(d) This section does not apply to

(1) judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding;

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff; or

(5) meetings of the governing body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges or discipline.

(e) Reasonable public notice shall be given for all meetings required to be open under this section.

(f) Action taken contrary to this section is void.

[1, 2] The Alaska Bar Association concedes, for the purpose of this appeal, that the Hawaii meeting did not comply with the open meeting statute in a number of respects.[3] The question presented is simply whether the ABA is exempt from the open meeting statute, as part of the Administrative Procedure Act, by reason of AS 08.08.100, which provides:

> "*Administrative Procedure Act.* The bylaws and regulations adopted by the board or the members of the Alaska Bar under this chapter are not subject to the Administrative Procedure Act (AS 44.62)."

Appellants assert that this language meant only to exempt the ABA from the procedures prescribed by the Administrative Procedure Act for the adoption of bylaws and regulations. If the meaning of a statute is plain it should be enforced as it reads without judicial modification or construction. *Poulin v. Zartman*, 542 P.2d 251, 270 (Alaska 1975), *reh.*, 548 P.2d 1299 (Alaska 1975); *Application of Babcock*, 387 P.2d 694, 696 n. 6 (Alaska 1963); Sutherland, *Statutes and Statutory Construction*, § 45.02 at 4-5 (4th ed. 1973).

The language of AS 08.08.100 is clear. It exempts the bylaws and regulations themselves, not merely their method of adoption, from the Administrative Procedure Act, both by naming that act and by referring to the chapter number, AS 44.62. There is nothing in this language which hints that the exemption should be any narrower in scope.

Other statutory provisions empower the ABA to adopt "reasonable bylaws and regulations, and other reasonable provisions concerning annual and special meetings" and "all other matters affecting in any way the organization and functioning of the Alaska Bar." AS 08.08.080(a)(3), (a)(6) and (b)(2). The Hawaii meeting was convened in accordance with the bylaws adopted by the ABA.[4] Thus, if these provisions are applied in accordance with the plain meaning of AS 08.08.100, the Hawaii meeting was lawful.

[3] Alternatively, appellants argue that despite AS 08.08.100, the ABA is subject to the open meeting statute. They contend that because the open meeting statute was repealed and re-enacted in 1966, it is no longer part of the Administrative Procedure Act, and that it is a new, independent enactment, operating upon all subjects

AS 44.62.312 states:

> *State policy regarding meetings.* (a) It is the policy of the state that
>
> (1) the governmental units mentioned in § 310(a) of this chapter exist to aid in the conduct of the people's business;
>
> (2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;
>
> (3) the people of this state do not yield their sovereignty to the agencies which serve them;
>
> (4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;
>
> (5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created.
>
> (b) Section 310(c)(1) of this chapter shall be construed narrowly in order to effectuate the policy stated in (a) of this section and avoid unnecessary executive sessions.

3. In answer to an interrogatory the ABA admitted that public notice was not given, although notice was given in the Alaska Bar Brief and was sent to the officers of the ABA, the members of the Board of Governors, and to the presidents of local bar associations, as required by the ABA's bylaws. During the Hawaii meeting the Board of Governors held a number of executive sessions without following AS 44.62.310(b), and subjects were discussed which do not fall within AS 44.62.310(c) and (d).

4. Article V, Section 8, of the ABA's bylaws provides in relevant part:

> "Section 8. MEETINGS.
>
> (a) *Regular Meetings.* Unless otherwise ordered by the Board of Governors, the regular meetings of the Board *shall be held at such times and places as designated by the President.* It shall be the duty of the Executive Director to mail timely notice of each meeting of the Board of Governors to the officers of the Alaska Bar Association, members of the Board of Governors, and to the presidents of local Bar Associations, together with a tentative agenda."

within its scope.[5] But the legislature did not remove the open meeting statute from chapter 62 of title 44, which is denominated the Administrative Procedure Act,[6] and there is no other indication that the legislature intended to do so. To the contrary, the fact that the legislature repealed the original statute and replaced it with another which was given the same statutory numeration is ample evidence that the legislature intended to merely amend the statute.

Moreover, the interpretation contended for by appellants would mean that the legislature's action in 1966 amounted to an implied repeal of AS 08.08.100, a result which we should be reluctant to reach in the absence of an irreconcilable conflict between the two statutes. *Peters v. State*, 531 P.2d 1263, 1268 (Alaska 1975). Cutting against this argument is the legislature's action in 1976, ten years after the re-enactment of the open meeting statute, broadening the exemption of AS 08.08.100 from merely "rules" to "by-laws and regulations." Ch. 181, § 8, SLA 1976.[7]

We hold that the Board of Governors' meeting in question was not subject to the requirements of AS 44.62.310. It follows that the meeting was valid. The superior court ruled correctly on this question.

[4] Appellants also claim that by reason of the meeting being held in Hawaii, they were denied due process of law. We will take cognizance of a due process claim only where there is an alleged deprivation of a sufficient liberty or property interest to warrant constitutional protection. *Herscher v. State Dept. of Commerce*, 568 P.2d 996, 1002 (Alaska 1977); *Nichols v. Eckert*, 504 P.2d 1359, 1362 (Alaska 1963). On the record we do not think that a cognizable deprivation of property or liberty has been made out. We find no merit in this contention.

[5] As to appellee's cross-appeal, we find no abuse of discretion by the superior court in denying appellee an award of attorney's fees, because the case was brought in the public interest, under Civil Rule 82. *Gilbert v. State*, 526 P.2d 1131, 1136 (Alaska 1974).

AFFIRMED.

DIMOND, Senior Justice, with whom RABINOWITZ, Chief Justice, joins, dissenting in part.

AS 08.08.100 provides:

> *Administrative Procedure Act.* The by-laws and regulations adopted by the board or the members of the Alaska Bar under this chapter are not subject to the Administrative Procedure Act (AS 44.62).

The effect of the majority opinion is to hold that this statute plainly[1] exempts from the Administrative Procedure Act not only the Alaska Bar Association's method of adopting bylaws and regulations, but also any act of the Alaska Bar which happens to be authorized by bylaw or regulation, including violation of the open meeting act, AS 44.62.310. With this, I disagree.

5. The ABA's exemption from the Administrative Procedure Act as to "rules" adopted by the Board of Governors of the ABA was created in 1960. Ch. 178, § 3, SLA 1960. In 1976 the exemption was changed to "by-laws and regulations." Ch. 181, § 1, SLA 1976.

6. AS 44.62.650 states:
> "This chapter may be cited as the Administrative Procedure Act."

7. It is noteworthy that in 1978 the legislature in exempting the Alaska Housing Finance Corporation from the Administrative Procedure Act, expressly did not exempt it from the open meeting statute. AS 18.56.088, Ch. 167, § 5, SLA 1978. Therefore, it is reasonable to conclude that when the legislature acted concerning the ABA in 1976, it consciously granted the ABA a broad exemption from AS 44.62.

1. The majority relies on *Poulin v. Zurtman*, 542 P.2d 251, 270 (Alaska 1975), for the proposition that a statute whose meaning is plain is not subject to judicial construction. But in *Poulin* the court also said that the plain meaning rule applies if the legislative language is " 'so unambiguous as to leave no doubt as to the meaning or scope of the result dictated.' " 542 P.2d at 270. I do not find any plain legislative intent to exempt the Alaska Bar from the open meeting act, AS 44.62.310-.312.

The main impact[2] of the Act on state agency regulations is to provide a detailed and comprehensive procedure for their adoption, promulgation, amendment and repeal,[3] and for judicial[4] and legislative[5] review. If the bylaws[6] and regulations of the Alaska Bar were subject to the Act, they would be subject to the *procedural* requirements of the Act with respect to their adoption and other handling, because that is the principal relevance of the Act to such bylaws and regulations. The effect of AS 08.08.100 making these bylaws and regulations "*not* subject to the Administrative Procedure Act (AS 44.62)" (emphasis added), is that they are not subject to the procedural aspects of the Act, *i. e.*, their method of adoption is not governed by the Administrative Procedure Act, but rather by action of the Alaska Bar Association or its Board of Governors under the Alaska Integrated Bar Act.[7]

The majority errs, I believe, in concluding from the fact the Alaska Bar's bylaws and regulations are exempt from the Administrative Procedure Act that the Alaska Bar, as an agency, is exempt from the Administrative Procedure Act, including its open meeting requirements. AS 44.62.310—.312, the open meeting statute, is a portion of the Administrative Procedure Act. It does not deal at all with the procedural aspects of the adoption of regulations, and purports by its terms to encompass the activities of legislative-created agencies such as the Alaska Bar Association and its Board of Governors. It follows that the Association and Board are subject to the Administrative Procedure Act to this extent. Article 6 of Title 44, chapter 62 (AS 44.62.310—.312), requires meetings of a broad range of governmental agencies of the state and its political subdivisions to be open to the public. AS 44.62.310 provides in part:

Agency meetings public. (a) All meetings of a legislative body, of a board of regents, or of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of its political subdivisions, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations, advisory or otherwise, of the state or local government supported in whole or in part by public money or authorized to spend public money, are open to the public except as otherwise provided by this section.

This comprehensive statute includes meetings of the Board of Governors of the Alaska Bar Association not exempted under AS 44.62.310(c) and 44.62.310(d).[8] This is so

2. There is a substantive, rather than merely procedural, aspect of the Act as it relates to regulations. AS 44.62.030 provides:

   Consistency between regulation and statute. If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.

   However, this section has no relevance to the controversy in this case.

3. AS 44.62.040—.290.

4. AS 44.62.300.

5. AS 44.62.320.

6. I would hold that "bylaws" fall generally in the category of regulations, since they are "[r]egulations . . . [or] rules . . . adopted by an association . . . for its government." Black's Law Dictionary at 182 (5th ed. 1979).

7. AS 08.08.080(b)(2) provides in part that the Board of Governors of the Alaska Bar Association may "adopt reasonable bylaws and regulations consistent with the Alaska Bar Rules." AS 08.08.090 provides:

   Power of the bar to make or change bylaws and regulations. Any bylaw or regulation adopted by the Board of Governors may be modified or rescinded, or a new bylaw or regulation may be adopted, by a vote of the active members of the association under bylaws and regulations to be prescribed by the Board of Governors.

8. AS 44.62.310(c) provides:

   The following excepted subjects may be discussed in an executive session:

because the legislature created the Alaska Bar Association and its Board of Governors, and expressly provided that the Association was created as an "instrumentality of the state." AS 08.08.010. Furthermore, the Alaska Bar is "supported . . . in part by public money or authorized to spend public money" as that term is used in defining the scope of the open meeting statute, AS 44.62.310(a). First, the Alaska Court System provides a portion of the Alaska Bar's income for various purposes. The Alaska Court System in turn is supported by legislative appropriations. Second, the Board is empowered by the legislature to "fix the annual membership fee for active and inactive members," AS 08.08.080(b)(4), and to adopt reasonable provisions "concerning the collection, deposit, and disbursement of membership and admission fees, penalties, and all other funds." AS 08.08.080(a)(4). There can be little question that the mandatory annual dues paid to the Association by its members to support the Association constitute "public money" as that term is used in AS 44.62.310(a). As was stated by a Louisiana appellate court,

> [R]evenues raised through exercise of such governmental powers by an agency created by the legislature and pursuant to legislative authorization constitute state funds no less than revenues deposited in the State Treasury . . . .

State Licensing Board of Contractors v. State Civil Service Commission, 110 So.2d 847, 851 (La.App.1959), *aff'd*, 240 La. 331, 123 So.2d 76 (1960).

I conclude that the public meeting portion of the Administrative Procedure Act is applicable to the Board of Governors of the Alaska Bar Association.

> (1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit,
> (2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;
> (3) matters which by law, municipal charter, or ordinance are required to be confidential.
> AS 44.62.310(d) provides:
>
> This section does not apply to
> (1) judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding;
> (2) juries,
> (3) parole or pardon boards,
> (4) meetings of a hospital medical staff, or
> (5) meetings of the governing body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges or discipline.

The Alaska Bar Association admits that its Hawaii meeting did not comply with the open meeting statute in a number of respects. These are listed in note 3 of the court's opinion. It is my opinion that there is another way in which the meeting did not comply with the requirements of the statute. That is the fact that the meeting was held in Hawaii and not in Alaska. I believe it is fair to presume that when the Alaska legislature required meetings to be "open to the public," it contemplated that the "public" should consist principally of people residing in Alaska. It would follow from this that Alaska residents should not be expected to travel outside the state in order to take advantage of their right to be present at a meeting of an Alaska governmental agency. In my opinion, the public meeting statute was violated by the fact that the Board of Governors met in Hawaii and not in Alaska.

With respect to the cross-appeal regarding denial of attorney's fees to the Alaska Bar, I concur in the court's holding.

RABINOWITZ, Chief Justice, dissenting in part.

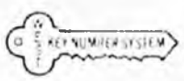
I concur in Senior Justice Dimond's dissent. In addition to the grounds advanced by Justice Dimond, I wish to note a further point of disagreement with the majority opinion. More particularly, I have concluded that even if the Alaska Bar Association's meeting was exempt from the Administrative Procedure Act, holding the meeting in Hawaii violated Article IX, Sec. 6 of the Alaska Constitution, which provides:

> *Public Purpose.* No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose.

We have stated that the "public purpose" concept in this provision is not capable of precise definition. *Wright v. City of Palmer*, 468 P.2d 326, 330 (Alaska 1970); *Walker v. Alaska State Mortgage Ass'n*, 416 P.2d 245, 251 (Alaska 1966); *DeArmond v. Alaska State Dev. Corp.*, 376 P.2d 717, 721 (Alaska 1962). Under even the broadest of definitions, however, I have difficulty finding any legitimate public purpose in locating the meeting in Hawaii. The use of the dues mandatorily paid by ABA members, which I agree with Justice Dimond constitute public monies, to hold the meeting outside Alaska seems to me to be clearly prohibited by Article IX, Sec. 6 of the Alaska Constitution.

This same principle is subsumed within the broader constitutional guarantee of substantive due process of which appellants argue they have been deprived. Substantive due process is denied when the actions of a public agency are arbitrary and bear no reasonable relationship to a legitimate governmental purpose. *Concerned Citizens of Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447, 452 (Alaska 1974). While one challenging government action bears a heavy burden of proof under this standard, I am persuaded it has been met here. The ABA has not offered any legitimate reasons for holding the meeting in Hawaii.

The ABA alleges appellants have not shown that they were deprived of any cognizable liberty or property interest by the actions of the Board of Governors, since no issues directly affecting the appellants' livelihood were resolved at the meeting, and since none of the appellants have indicated that they attempted to attend the meeting in Hawaii or would have attended the meeting even if it had been held in Alaska. There remains the fact, however, that property of appellants in the form of mandatory dues money was spent by a public agency in an apparent arbitrary manner. This, in my opinion, is probably sufficient to establish a violation of substantive due process under the standard noted herein.



TOWN OF PALM BEACH et al.,
Petitioners,

v.

Jules T. GRADISON, Respondent.

TOWN OF PALM BEACH et al.,
Petitioners,

v.

Fred GLADSTONE, Respondent.

TOWN OF PALM BEACH et al.,
Petitioners,

v.

FAIRMONT CONVERTING CO., INC.,
Respondent.

TOWN OF PALM BEACH et al.,
Petitioners,

v.

Morris LANSBURGH, Respondent.

TOWN OF PALM BEACH et al.,
Petitioners,

v.

Perry KAYE, Respondent.

TOWN OF PALM BEACH et al.,
Petitioners,

v.

Ralph H. SHERE et al., Respondents.

TOWN OF PALM BEACH et al.,
Petitioners,

v.

Walter PORANSKI et ux., Respondents.

TOWN OF PALM BEACH et al.,
Petitioners,

v.

FIRST BANK AND TRUST CO. OF
BOCA RATON, etc., Respondents.

Nos. 44099 to 44106.

Supreme Court of Florida.

May 1, 1974.

Rehearing Denied July 10, 1974.

Action challenging town zoning ordinance. The Circuit Court, Palm Beach County, James C. Downey, J., upheld the ordinance, and the challengers variously appealed. The District Court of Appeal, 279 So.2d 353, reversed the order but certified the question. The Supreme Court, Adkins, C. J., held that a citizens' planning commission composed of private citizens, established by the town council, which appointed the members, was subject to the government in the sunshine law.

Certified question answered, and cause remanded.

Dekle, J., dissented and filed opinion in which Roberts, J., joined.

1. Municipal Corporations ⇐92

Though legislature would have no right to require meetings of civic organizations, unconnected with municipal government, to conform to government in the sunshine law, a subordinate group or committee selected by governmental authorities should not feel free to meet in private. West's F.S.A. § 286.011.

2. Municipal Corporations ⇐92

Citizens' planning commission, composed of private citizens, and established by town council, which appointed its members, was subject to government in the sunshine law. West's F.S.A. § 286.011.

3. Municipal Corporations ⇐92

One purpose of government in the sunshine law was to prevent at nonpublic meetings the crystallization of secret decisions to point just short of ceremonial acceptance. West's F.S.A. § 286.011.

4. Municipal Corporations ⇐92

Government in the sunshine law should be construed so as to frustrate all evasive devices. West's F.S.A. § 286.011.

5. Municipal Corporations ⇐92

Under government in the sunshine law, when in doubt, members of any board, agency, authority or commission should follow the open-meeting policy of the state. West's F.S.A. § 286.011.

6. Municipal Corporations ⇐111(1)

Mere showing that government in the sunshine law has been violated constitutes irreparable public injury so that ordinance is void ab initio. West's F.S.A. § 286.011.

7. Municipal Corporations ⇐92

Although criminal prosecution requires proof of scienter, unintended violation of government in the sunshine law will negate any action taken by a town council. West's F.S.A. § 286.011.

Chester Bedell and John A. DeVault, III, Bedell, Bedell, Dittmar, Smith & Zehmer, Jacksonville, and Burns, Middleton, Farrell & Faust, Palm Beach, for petitioners.

H. L. Cooper, Jr., O'Connell & Cooper, West Palm Beach, for Jules T. Gradison, Morris Lansburgh, Perry Kaye, Ralph H. Shere and Walter Poranski.

Larry B. Alexander, Jones, Paine & Foster, West Palm Beach, for Fred Gladstone and Fairmont Converting Co., Inc.

Ross, Hardies, O'Keefe, Babcock, McDugald & Parsons, Chicago, Ill., and Fisher, Prior, Pruitt & Schulle, West Palm Beach, for First Bank and Trust Co. of Boca Raton.

ADKINS, Chief Justice.

By petition for writ of certiorari, we have for review the consolidated cases arising out of a decision of the District Court of Appeal, Fourth District (IDS Properties, Inc. v. Town of Palm Beach, 279 So.2d 353), which is accompanied by a certificate of the District Court of Appeal that its decision has passed upon a question of great public interest, to-wit:

"Whether a zoning ordinance adopted by zoning authorities and the Town Council after public hearings is rendered invalid under the § 286.011, F.S.1971, [F.S.A.], Government in the Sunshine Law, because of the nonpublic activities of a citizen's planning committee which committee was established by the town council and acting on behalf of the council in an advisory capacity participated in the formulation of the zoning plan."

We have jurisdiction. Fla.Stat., art. V, § 3(b)(3), F.S.A.

The Town Council of the Town of Palm Beach, hereinafter referred to as "Town Council," passed a resolution providing that the Council would undertake the updating and revision of the town zoning ordinances. Interviews were held with a planning firm, hereinafter called "Planners," and, at a public meeting, the Town Council authorized a contract with the Planners. A citizens' planning commission was decided upon and chosen by the Town Council at a nonpublic administrative meeting. The nominees were told that the Town Council had nominated each one to serve on the town planning committee for the purpose of guiding the Planners in their efforts to assure that the plan produced would be consistent with the character, image and land use controls intended by the citizens. Changes in the plan during its formulation were made by the Planners to reflect the decisions of the planning committee.

The planning committee, a lay group of citizens, were not regularly employed personnel of the Town. The members of the committee were not landscape or civil engineers nor expert vocational zoning planners performing their work outside the scope of the sunshine law. Neither were they contractors engaged by the Town for making zoning studies, surveys or plans. To the contrary, they were a buffer lay group of citizens to serve part-time as the alter egos of the Town Councilmen to make tentative decisions guiding the zoning planners and advising the Council as to their ultimate zoning ordinances. In other words, the Council delegated to the committee much of their administrative and legislative decisional zoning formulation

authority which is ordinarily exercised by a city-governing body itself—and particularly the position of the process where the affected citizens expect to be officially heard. Thus, the nature of the committee and its function reached the status of a board or commission that to act legally must comply with the sunshine law.

The trial court specifically found that the Planning Advisory Committee meetings with the Planners were not open to the public, nor were minutes taken. There meetings were numerous and detailed.

At a joint meeting of the Town Council and the planning committee the role of the committee was explained. The Town Council was of the opinion the committee should work as an "element" of the zoning commission, and further, that the Town Council had the authority to override any changes induced by the zoning commission and "would do so without timidity." This joint meeting was held without notice, without members of the public or press present, and no official minutes were taken or recorded.

Thereafter, the President of the Town Council and various members of the zoning commission met with the town manager and were finally advised as to the operation of the committee. An agenda was prepared for presentation of the tentative comprehensive plan to a meeting of the Town Council. At that meeting the plan was discussed. Further executive sessions of the zoning commission were held.

Thereafter, full public meetings and hearings of the zoning commission and of the Town Council were conducted and proper procedure followed. The comprehensive zoning plan was approved in essentially the same form as that which had been produced by the consultants and the planning advisory committee.

The government in the sunshine law contains the following:

"(1) All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation or any political subdivision, except as otherwise provided in the constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, regulation or formal action shall be considered binding except as taken or made at such meeting." Fla.Stat. § 286.011, F.S.A.

The only question to be determined is whether the citizens planning commission composed of private citizens, which was established by the Town Council and the members thereof appointed by the Town Council, was subject to the government in the sunshine law.

Every meeting of any board, commission, agency or authority of a municipality should be a marketplace of ideas, so that the governmental agency may have sufficient input from the citizens who are going to be affected by the subsequent action of the municipality. The ordinary taxpayer can no longer be led blindly down the path of government, for the news media, by constantly reporting community affairs, has made the taxpayer aware of governmental problems. Government, more so now than ever before, should be responsive to the wishes of the public. These wishes could never be known in nonpublic meetings, and the governmental agencies would be deprived of the benefit of suggestions and ideas which may be advanced by the knowledgeable public.

Also, such open meetings instill confidence in government. The taxpayer deserves an opportunity to express his views and have them considered in the decision-making process.

Those who do not attend public meetings are given ample opportunity to participate in government by securing information of governmental activities from the news media. Responsible reporting of governmental activities results in letters or telephone calls from interested citizens so that governmental officials are given the benefit of

both sides of the question. No governmental board is infallible and it is foolish to assume that those who are elected or appointed to office have any superior knowledge concerning any governmental problem. Every person charged with the administration of any governmental activity must rely upon suggestions and ideas advanced by other knowledgeable and interested persons. As more people participate in governmental activities, the decision-making process will be improved.

Few, if any, governmental boards or agencies deliberately attempt to circumvent the government in the sunshine law. We feel that the Town Council of Palm Beach acted in good faith, but any committee established by the Town Council to act in any type of advisory capacity would be subject to the provisions of the government in the sunshine law.

The citizens' planning committee was not an organization formed by any civic group such as a taxpayer's league, better government league, civic association, etc. It was conceived and formed by the Town Council for the purpose of working with the planning consultant so that the plan produced would be consistent with the land-use controls intended by the citizens. The citizens' planning committee was an arm of the Town Council.

[1, 2] The Legislature would have no right to require meetings of civic organizations, unconnected with municipal government, to conform to the government in the sunshine law. However, a subordinate group or committee selected by the governmental authorities should not feel free to meet in private. The preponderant interest of allowing the public to participate in the conception of a proposed zoning ordinance is sufficient to justify the inclusion of this selected subordinate group, within the provisions of the government in the sunshine law.

Cases from other jurisdictions dealing with the scope of similar statutes compel the conclusion that bodies such as the Palm Beach Planning Committee selected by the Town Council are governed by Fla.Stat. § 286.011, F.S.A.

In Raton Public Service Co. v. Hobbes, 76 N.M. 535, 417 P.2d 32 (1966), the Board of Directors of a city-owned electric utility were held to be within the scope of a statute governing "all other governmental boards and commissions."

In Glick v. Trustees of Free Public Library, 2 N.J. 579, 67 A.2d 463 (1949), trustees of the Library were held to be within the purview of a statute requiring the "governing body" to advertise for bids.

In the case of Bogert v. Allentown Housing Authority, 426 Pa. 151, 231 A.2d 147 (1967), the Pennsylvania Supreme Court, interpreting that State's "right to know" statute, stated:

"Within the past several decades we have witnessed the creation of these public bodies called 'authorities' which have been granted the power to, and do, perform important governmental functions which vitally affect the public. Unlike other public bodies, the members of the 'authorities' are appointed and not elected and are not *directly* responsible for their actions to the electorate. If the elected members of public bodies are to be subjected to public disclosure of their actions, how much more important that the appointed members of public bodies be required to make such disclosure." (p. 151)

In Beacon Journal Publishing Co. v. City of Akron, 3 Ohio St.2d 191, 209 N.E. 399, 404 (1965), it was held that a city planning commission created by the city charter with "such other powers and duties as the council may confer upon the planning commission," was subject to the open meeting provision of the Akron City Code which applied to "any board or commission . . . created by the charter or by action of council."

In Lhormer v. Bowen, 410 Pa. 508, 188 A.2d 747, 749 (1963), a proposed rezoning ordinance was held ineffectual to restrict the issuance of a building permit, one of the reasons being the failure of the planning commission to hold a public hearing on its preliminary report before submitting a final report to the borough council for action, as required by the zoning enabling legislation.

In Sacramento Newspaper Guild v. Sacramento County Board of Supervisors, 263 Cal.App.2d 41, 47, 69 Cal.Rptr. 480, 485 (1968), California's Third District Court of Appeal upheld an injunction restraining the Sacramento County Board of Supervisors, and its committees, from holding informal meetings in violation of the Brown (California) Act. It held that there was nothing in the new Brown Act "to demarcate a narrower application than the range of governmental functions performed by the agency." It further held the Act applied not only to "action" but also to "deliberative gatherings . . . however confined to investigation and discussion." Noting the widespread evasion of pre-Brown Act open-meeting statutes "through unannounced 'sneak' meetings and through indulgence in euphemisms such as executive session, conference, caucus, study or work session, and meeting of the committee of the whole," the court concluded that the statute could be pushed "beyond debatable limits" to block such evasive techniques. The court continued:

"An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices. As operative criteria, formality and informality are alien to the law's design, exposing it to the very evasions it was designed to prevent. Construed in the light of the Brown Act's objectives, the term 'meeting' extends to informal sessions or conferences of the board members designated for the discussion of public business." (p. 487)

[3, 4] One purpose of the government in the sunshine law was to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance. Rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. The statute should be construed so as to frustrate all evasive devices. This can be accomplished only by embracing the collective inquiry and discussion stages within the terms of the statute, as long as such inquiry and discussion is conducted by any committee or other authority appointed and established by a governmental agency, and relates to any matter on which foreseeable action will be taken.

[5] The principle to be followed is very simple: When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State. See Florida Law Review, Government in the Sunshine by Ruth Mayes Barnes, Vol. XXIII, 361, 365 (Winter 1971).

[6] Mere showing that the government in the sunshine law has been violated constitutes an irreparable public injury so that the ordinance is void *ab initio*. Times Publishing Co. v. Williams, 222 So.2d 470 (Fla.App.2d 1969). Florida Law Review, Government in the Sunshine by Ruth Mayes Barnes, Vol. XXIII, p. 369 (Winter 1971).

[7] Although a criminal prosecution requires proof of scienter (Board of Public Instruction of Broward County v. Doran, 224 So.2d 693, 699 (Fla.1969)), an unintended violation of the government in the

sunshine law will negate any action taken by the Town Council. Fla.Stat. § 286.011, F.S.A.

The Superior Court of New Jersey in Wolf v. Zoning Board of Adjustment of the Borough of Park Ridge, 79 N.J.Super. 546, 192 A.2d 305 (1963), held that the proper implementation of their "Right to Know Law" requires the court upon proper application to set aside any official action taken without compliance, even in the absence of bad faith, saying:

> "The trial judge noted, and the defendant officials stress, that the act states that 'official action taken in violation of the requirements of this act shall be *voidable* [Emphasis theirs.] in a proceeding in the Superior Court,' thereby supposedly indicating a legislative intent that the voiding of such action should rest in the discretion of the judge. The court concluded that since no impropriety or bad faith on the part of the board was indicated, it should exercise its discretion to permit the action to stand. We think the court took too narrow a view of the intent and underlying policy of the statute. The purpose of the act, as reflected in N.J.S.A. 10:4-1, is to implement the declaration therein that it is 'the public policy of this State to insure the right of the citizens of this State to attend meetings of public bodies * * * for the protection of the public interest.' In other words, the object of the act is primarily prophylactic, and not necessarily restricted to creation of a remedy for illegalities at particular public meetings from which the public is excluded. Appropriate implementation of that object and policy calls, as a general rule, for the Superior Court upon proper application to set aside any official action, as defined by the act, which is taken without compliance with the prescriptions of the statute, as here. We need not now decide that no discretion is ever to be reserved to the court to save the validity of official action taken in contravention of the statute. That question may be left to await a case where a sufficiently impelling counter-interest may be argued to bespeak sustaining the action impugned. *It suffices here to say that mere absence of bad faith or other impropriety on the part of the public body should not ordinarily move the court to stay its hand in voiding official action taken contrary to the statute upon proper application therefor.*" (Emphasis supplied.) (pp. 308–309)

Fla.Stat. § 286.011(1), F.S.A., specifically provides that "no resolution, rule, regulation or formal action shall be considered binding" where the government in the sunshine law is violated. We follow the reasoning of the New Jersey court in Wolf v. Zoning Board of Adjustment of the Borough of Park Ridge, *supra*.

Answering the question presented by the District Court of Appeal in the case *sub judice*, we hold that the zoning ordinance adopted by the zoning authorities and the Town Council after public hearing was rendered invalid because of the non-public activities of the citizens planning committee, which committee was established by the Town Council, active on behalf of the Council in an advisory capacity, and participated in the formulation of the zoning plan. We approve the decision of the District Court of Appeal.

Having answered the certified question, this cause is remanded to the District Court of Appeal for further proceedings in accordance with the views expressed herein.

It is so ordered.

ERVIN, BOYD and McCAIN, JJ., concur.

DEKLE, J., dissents with opinion.

ROBERTS, J., dissents and concurs with DEKLE, J.

DEKLE, Justice (dissenting):

The Town Council, upon determining that an updated zoning plan was advisable for the Town of Palm Beach, employed a

professional planning firm for the purpose of preparing such a plan. In addition, the Town Manager named five citizens from a group recommended by council members to serve as guides to the professional consultants in the preparation of the comprehensive zoning plan. The crux of the problem before this Court is that this group, the Advisory Planning Committee, held its meetings without public attendance or involvement.

The plan finally proposed by the consultants was adopted, with some modifications, by the Zoning Commission and Town Council, *following public meetings and discussion*. The adoption of the plan was accordingly carried out "in the sunshine."

The controlling statutory law in this case is, of course Fla.Stat. § 286.011 F.S.A., which provides:

"(1) All *meetings of any board or commission* of any state agency or authority or of any agency or authority of any county, municipal corporation or any political subdivision, except as otherwise provided in the constitution, *at which official acts are to be taken* are declared to be public meetings open to the public at all times, and no resolution, rule, regulation or formal action shall be considered binding except as taken or made at such meeting.

"(2) The minutes of a meeting of any *such board or commission* of any such state agency or authority shall be promptly recorded and such records shall be open to public inspection. . . .

"(3) Any *person* who is a *member of a board or commission* or of any *state agency* or authority of any *county, municipal corporation* or any political subdivision who violates the provisions of this section by attending a meeting not held in accordance with the provisions hereof is guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083." (emphasis added)

The role of the Advisory Planning Committee was well defined by the learned trial judge in a memorandum order:

"This was an ad hoc committee of local residents familiar with the character, historical background and desired future development of the Town. It was the committee's function to transmit to the Planner that information and to advise with it so that the eventual plan would be compatible with the known desires of the community. This committee of citizens, while influential in what the Planner ultimately produced, was merely advisory as far as the Planner, the Zoning Commission and the Town Council were concerned. They made no decision which bound either the Zoning Commission or the Town Council. Much of what the Planning Committee did with the planner could have been done by the Town Manager, or some of the Town's staff, or the Planner could have sought out residents on his own initiative for advice and assistance in preparing the plan."

The trial judge concluded that the acts complained of did not fall within the purview of the Sunshine Law.

The district court of appeal reversed the trial court's finding, reasoning that the Town Council should not be able to do by proxy that which it is forbidden to do itself by Fla.Stat. § 286.011, F.S.A., suggesting that the Planning Committee had *de facto* authority to act on behalf of the Town Council, so that it must stand in the shoes of the Council in regard to the Government in the Sunshine Law. In the words of the district majority opinion:

"Although, admittedly, the zoning plan was 'born' when the Town Council (acting in the sunshine) voted upon the ordinance at a public meeting, the 'conception', which is an inseparable part of the life-giving process, took place (in the dark) with the appointment of the Citizens' Planning Committee. The zoning ordinance was, therefore, not conceived

eo instanti at the public meetings held by the Town Council and Zoning Commission. It was the product of the deliberations and actions of the Citizens' Planning Committee acting as the alter ego of the Town Council; the action of the Citizens' Planning Committee was an indispensable requisite to and integral part of the 'official acts' or 'formal action' of the Town Council." 279 So.2d 353, 356.

The question presented in the case *sub judice* is one of first impression in this State. The effect of the "Government in the Sunshine" Law has been considered in the past as it applies to various boards and commissions of elected officials, the terms used in the statute. But it has never before been suggested, by either the Courts or the Legislature, that meetings of all unofficial and purely advisory groups be likewise public and give notice of meetings held and otherwise act to insure that their meetings are "public." The statute simply does not include such persons.

Should the Legislature choose so to extend the Act, then would be the time to so hold, but not by this precipitous judicial extension thereof without the benefit of the majority's own requirement of a "marketplace of ideas" first allowed to be debated by the citizens' elected representatives in the Legislature. Let the same worthy principle be applied in both instances. "Consistency, what a jewel thou art."

The Legislature having chosen not to include such advisory and purely private groups under the mandate of the statute, the Courts are powerless to extend the statute beyond the clear intent of the Legislature. As this Court has stated:

> "In construing or interpreting the words of a statute it should be born in mind that the courts have no function of legislation, and seek only to ascertain the will of the Legislature. The courts may not imagine an intent and bend the letter of the act to that intent, much less, says the Maryland court, 'can we indulge in the license of striking out and inserting and remodeling with the view of making the letter express an intent which the statute in its native form does not evidence.'" Fine v. Moran, 74 Fla. 417, 77 So. 533, 536 (1917).

Despite the majority's assertion to the contrary, the extension of the statute here asserted would as logically apply also to gatherings of civic groups which meet with elected officials to discuss or recommend suggested legislation, resulting in the invalidation of otherwise quite proper "sunny" subsequent decisions by such officials because in all innocence no notice to the press and the public might have issued for the occasion. Likewise, all organizations dedicated to the swaying of public opinion and the initiation of public action later taken by a public body—be it a private group of legislative lobbyists, the League of Women Voters or the editorial board of a civic-minded publication—would have to welcome public involvement in their decision-making processes to avoid "tainting" such officials' subsequent decisions in public.

In the most recent pronouncement by this Court on the "Sunshine" issue, it was decreed that a county school board sitting in a quasi-judicial matter is still required to meet in the "Sunshine." Canney v. Board of Public Instruction of Alachua County, 278 So.2d 260 (Fla.1973). This Court has previously held that executive sessions of school boards (Board of Public Instruction of Broward County v. Doran, 224 So.2d 693 (Fla.1969)), or city councils (City of Miami Beach v. Berns, 245 So.2d 38 (Fla.1971)), must be in the "Sunshine," reasoning:

> "A secret meeting occurs when *public officials* meet at a time and place to avoid being seen or heard by the public. When at such meetings *officials* mentioned in Fla.Stat. § 286.011, F.S.A.,

transact or agree to transact public business at a future time in a certain manner they violate the government in the sunshine law, regardless of whether the meeting is formal or informal." City of Miami Beach v. Berns, *supra*, at 41. (Emphasis added).

However, both cases involved meetings of officials mentioned in the statute, to-wit:

"[A]ny board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation or any political subdivision, except as otherwise provided in the constitution." Fla.Stat. § 286.011(1), F.S.A.

Nothing in the statute or in the prior decisions of the courts of this State dictates or even hints that the "Government in the Sunshine" Law is intended to go beyond elected or officially appointed boards. In fact, it is constitutionally questionable in light of the freedoms of speech and peaceable assembly guaranteed by the U.S. Const., Amendment I, and by Fla.Const., art. I, §§ 4, 5, F.S.A., to forbid private citizens to meet and discuss matters of public concern merely because their ideas are to be transmitted to a firm of professional planners and consultants, and because their ideas might be incorporated into a suggested plan which might then pass muster before the public in full hearings, and before two public bodies meeting in the "Sunshine," as occurred *sub judice*. The Citizens' Planning Committee working with the professional planner here cannot, under any reasonable theory, be equated with such a public "board or commission." These were solely private citizens, unsalaried volunteers.

In my view, the language of the statute mandates that the fact that a purely advisory group of private citizens did not hold public meetings, is not a violation of Fla. Stat. § 286.011, F.S.A., such as to void official action later taken in the "Sunshine" by the Zoning Commission over a period of five days of public hearings and debate and thereafter, by the City Council, after six days of public hearings at which the only decisions were made. The fact that a private advisory group provided a part of the input which resulted in the plan presented to the official bodies for consideration is at best a preliminary planning aid which is entirely subject to the will ("decisions") of the Commission and the Council (official body). It only provided a starting point from which the Commission could start to work and into which the public could inject its contentions and plans to be incorporated or substituted as the *public* body should decide. The "marketplace of ideas" occurs at that point and total input from the public is therefore not denied.

Where it can be shown that a public body has intentionally, and for the purpose of avoiding the light of public scrutiny, appointed a board of non-elected citizens to determine *for the elected board what course should be pursued*, and where the actions of the private citizens are in any way *binding* upon the elected officials, a different situation would be presented. No such evidence or any indication of collusion between the Town Council and the Citizens' Planning Committee has been found in the case *sub judice*. No intentional or incidental wrongdoing or collusion has been shown. If such collusion and impropriety of purpose had been made to appear, then the hearings of the private committee could be viewed as an alter ego extension of the official board, and thus amenable to the "Sunshine." This is not the case.

So long as the Committee has been advisory only, and the Zoning Commission and Town Council have remained free to view the suggested comprehensive plan as objectively as though it had been prepared solely by the hired consultants, and have made the decisions in the "Sunshine," the requirements of the statute have been met. See Basset v. Braddock, 262 So.2d 425

(Fla.1972). Accordingly, the question posed by the District Court of Appeal, Fourth District, as stated, should have been answered in the negative.

I therefore most respectfully must dissent.

ROBERTS, J., concurs.

GULF POWER COMPANY, a corporation, Petitioner

v.

William H. BEVIS et al., Respondents.

CITY GAS COMPANY OF FLORIDA, a corporation, Petitioner,

v.

William H. BEVIS et al., Respondents.

FLORIDA POWER & LIGHT COMPANY, Petitioner,

v.

FLORIDA PUBLIC SERVICE COMMISSION, Respondent.

FLORIDA GAS COMPANY, Petitioner,

v.

William H. BEVIS et al., Respondents.

SOUTHEASTERN TELEPHONE COMPANY and Florida Central Telephone Company, corporations, Petitioners,

v.

William H. BEVIS et al., Respondents.

Nos. 44189, 44190, 44198, 44199 and 44801.

Supreme Court of Florida.

June 13, 1974.

Writs of certiorari to review rule of Public Service Commission which provided that in rate proceedings the Commission would treat as an operating expense so much of state corporate income tax as was necessary to prevent allowable earnings of a regulated company from falling below minimum fair, just and reasonable rate of return allowed by the Commission from time to time. The Supreme Court, Ervin, J., held that such rule would be approved, but with admonitions that word "minimum" be eliminated and that rule must not be applied niggardly in the Commission's rate fixing or in ways that would clearly cripple a utility's capabilities to provide adequate services to its customers or curtail its ability to induce investors to respond to its capital needs.

Decree accordingly.

Boyd, J., concurred specially with opinion.

Overton, J., concurred specially with opinion.

Public Service Commissions ⇐8

Rule of Public Service Commission which provided that in rate proceedings the Commission would treat as an operating expense so much of state corporate income tax as was necessary to prevent allowable earnings of a regulated company from falling below minimum fair, just and reasonable rate of return allowed by the Commission from time to time, would be approved, but with admonitions that word "minimum" be eliminated and that rule must not be applied niggardly in the Commission's rate fixing or in ways that would clearly cripple a utility's capabilities to provide adequate services to its customers or curtail its ability to induce investors to respond to its capital needs. West's F.S.A. §§ 220.01 et seq., 336.041.

D. Fred McMullen and Lee L. Willis, Ausley, McMullen, McGehee, Carothers & Proctor, Tallahassee, Bert H. Lane, Beggs, Lane, Daniel, Gaines & Davis, Pensacola, and Earl B. Hadlow, Mahoney, Hadlow,

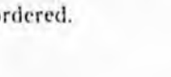
PER CURIAM.

Article IV, Section 22(c) (2) of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar, 32 F.S.A. is hereby amended to read:

(2) upon producing such evidence as the Board may require, that such applicant was in the practice of law in the District of Columbia or in other States of the United States of America, or in practice in federal courts in territories, possessions or protectorates of the United States for at least ten years, and that he was in good standing at the bar of the District of Columbia, the territory, possession or protectorate, or of the State from which he came; and

It is so ordered.

ROBERTS, C. J., and ERVIN, CARLTON, ADKINS, BOYD, McCAIN and DEKLE, JJ., concur.



CITY OF MIAMI BEACH, a Florida municipal corporation and political subdivision of the State of Florida, D. Lee Powell, Norman Climent, Malvin Englander, P. [illegible] Seidorman and Leonard O. Weinstein, as City Councilmen, Petitioners,

v.

Hendrik J. BERNS, Robert W. Swift and Gerry Levin, Respondents.

No. 39503.

Supreme Court of Florida.

Jan. 27, 1971.

Petition was filed to enjoin city, mayor and members of city council from holding meetings of council other than in public and to restrain city from prosecuting petitioner for offense of disorderly conduct with which he had been charged upon his refusal to leave closed session of city council. The Circuit Court for Dade County, James Lawrence King, J., granted petitioner relief and the city and council members appealed. The District Court of Appeal, 231 So.2d 847, affirmed certifying that questions of great public interest had been passed upon and writ of certiorari was filed. The Supreme Court, Adkins, J., held that when public officials meet at a time and place to avoid being seen or heard by the public to transact or agree to transact public business at a future time in a certain manner they violate the "government in the sunshine" law regardless of whether the meeting is formal or informal.

Writ discharged.

Drew, J. (retired), dissented.

1. Municipal Corporations ⇐92

Statute which required meetings of a city or town council to be public and which had been interpreted to be applicable only when municipal council was assembled in a formal session attended by quorum was superceded by statute providing that all meetings at which official acts are to be taken are public meetings and no resolution, rule, regulation or formal action shall be considered binding except as taken or made at such meeting. F.S.A. §§ 165.22, 286.011; F.S.A.Const. art. 5, § 4(2).

2. Municipal Corporations ⇐86

When municipal officials meet at a time and place to avoid being seen or heard by public to transact or agree to transact public business at a future time in a certain manner, they violate the "government in the sunshine" law regardless of whether the meeting is formal or informal. F.S.A.Const. art. 5, § 4(2); F.S.A. §§ 165.22, 286.011.

Joseph A. Wanick, Ira M. Elegant and Sam Daniels, Miami, for petitioners.

Daniel Neal Heller, Miami, for respondents.

ON REHEARING GRANTED AND ORIGINAL OPINION WITHDRAWN

ADKINS, Justice.

Jurisdiction comes to us with a petition for certiorari to review a decision of a District Court of Appeal, which passed upon questions certified by that court to be of great public interest. Fla.Const. art. V § 4(2), F.S.A.; City of Miami Beach v. Berns, 231 So.2d 847 (Fla.App.3rd 1970).

The question presented by the petitioners reads as follows:

"Whether the Third District Court of Appeal erred in holding that the provisions of F.S.A. 286.011, rather than the provisions of F.S.A. 165.22 as interpreted by this court in the Turk case, now apply to all meetings of the city council of a municipal corporation and that a city council can no longer hold informal executive sessions at which the public is excluded for the discussion of condemnation matters, personnel matters, pending litigation or any other matter relating to city government."

We must first determine whether the provisions of Fla.Stat. § 286.011, F.S.A., supersedes or repeals Fla.Stat. § 165.22, F.S.A.

Fla.Stat. § 165.22, F.S.A., reads in part as follows:

"165.22 Meetings of council to be public; penalty—

All meetings of any city or town council or board of aldermen of any city or town in the state, shall be held open to the public of any such city or town, and all records and books of any such city or town shall be at all times open to the inspection of any of the citizens thereof."

There follows a provision for a penalty of two months in jail or a fine not to exceed one hundred dollars upon conviction of a city official who violates the act. Such a conviction shall also create a vacancy in the office of the offending official. There is no specific provision for enforcement by injunction, nor does a violation of this act invalidate action taken at a closed session.

In Turk v. Richard, 47 So.2d 543 (Fla. 1950), this Court held that the "open meeting" requirement applied only when the municipal council was assembled in a formal session attended by a quorum.

Fla.Stat. § 286.011, F.S.A., reads in part:

"286.011 Public meetings and records; public inspection; penalties

"(1) *All meetings* of any board or commission of any state agency or authority or *of any agency or authority of any* county, *municipal corporation* or any political subdivision except as otherwise provided in the constitution, *at which official acts are to be taken are declared to be public meetings* open to the public at all times, and no *resolution, rule, regulation* or *formal action* shall be considered binding except as taken or made at such meeting." (Emphasis supplied)

This is followed by a requirement that minutes be promptly recorded and open to the public. Circuit courts are authorized to issue injunctions to enforce the statute on the application of any citizens. Violation of this statute constitutes a misdemeanor. Conviction carries a fine up to five hundred dollars and a jail sentence up to six months, or both. No action shall be considered as binding unless taken at a public meeting as prescribed by the statute.

In Board of Public Instruction of Broward County v. Doran, 224 So.2d 693 (Fla.1969), we held that Fla.Stat. § 286.011, F.S.A., was applicable to a county board of public instruction and was not limited to formal meetings. In construing this statute, we said:

"Under the decision in Turk v. Richard, *supra*, it would have been unnec-

essary to include a provision declaring certain meetings as 'public meetings' if the intent of the Legislature had been to include only formal assemblages for the transaction of official business. The obvious intent was to cover any gathering of the members where the members deal with some matter on which foreseeable action will be taken by the board." (p. 698)

[1] We do not overlook the arguments that the right to attend meetings of government bodies did not exist at common law; that the earlier statute dealt with the special subject of municipal meetings; that the two acts should be construed in harmony if possible because repeals by implication are not favored. The rules of statutory construction relied upon by petitioners are cogent but not conclusive. We are persuaded to apply the rule that a statute enacted for the public benefit should be construed liberally in favor of the public even though it contains a penal provision. In this posture a reasonable construction should be applied giving full measure to every effort to effectuate the legislative intent. Board of Public Instruction of Broward County v. Doran, *supra;* George v. State, 203 So.2d 173 (Fla.App.2nd, 1967). The intent of the act as reflected by its language and legislative setting is absorbed into and becomes a part of the law itself. Pillans & Smith Co. v. Lowe, 117 Fla. 249, 157 So. 649 (1934). It appears to us that in enacting Fla.Stat. § 286.011, F.S.A., the Legislature intended a general revision of the law applicable to open meetings of public agencies. In such a situation a later statute operates as a substitute for or repeal of an earlier one. We therefore hold that Fla.Stat. § 286.011, F.S.A., supersedes and repeals Fla.Stat. § 165.22, F.S.A. The former governs the conduct of city councils and other municipal agencies and its provisions are applicable to violations at the municipal corporation level.

[2] The next question to be determined is whether a city council can hold informal executive sessions at which the public is excluded for the discussion of condemnation matters, personnel matters, pending litigation or any other matter relating to city government.

The Government in the Sunshine Law, Fla.Stat. § 286.011, F.S.A., was enacted in 1967. Since that time the Legislature has not seen fit to repeal, modify, or insert any exceptions in the law. Our duty is to interpret this law as it is written and, if possible, do so in a manner to prevent its circumvention.

The Legislature intended to extend application of the "open meeting" concept as to bind every "board or commission" of the state, or of any county or political subdivision over which it has dominion or control. This conclusion was first expressed in Times Publishing Company v. Williams, 222 So.2d 470 (Fla.App.2nd, 1969), and the Legislature was charged with knowledge of this expression at the time it met during the 1970 session. Nevertheless, the Government in the Sunshine Law was not amended.

We emphasize the following principle expressed in Board of Public Instruction of Broward County v. Doran, 224 So.2d 693:

"The obvious intent was to cover any gathering of the members where the members deal with some matter on which *foreseeable action* will be taken by the board." (Emphasis supplied) (p. 698)

The question of whether secret sessions could be held concerning privileged matters was definitely determined in Board of Public Instruction of Broward County v. Doran, *supra*. The opinion contains the following:

"The final judgment, inter alia, enjoins the defendant from the holding of any meeting or conference session,

"'* * * at which are held any discussions on current, or foreseeably

so, matters not privileged, pertaining to the duties and responsibilities of the Board of Public Instruction of Broward County.'

"Fla.Stat., § 286.011 (F.S.A.) contains no exception. Therefore, this portion of the final judgment is amended so as to read as follows:

"'* * * at which are held any discussions on matters pertaining to the duties and responsibilities of the Board of Public Instruction of Broward County.'" (p. 709)

Whether Fla.Stat. § 286.011, F.S.A., should authorize secret meetings for privileged matter is the concern of the Florida Legislature and unless the Legislature amends Fla.Stat. § 286.011, F.S.A., it should be construed as containing no exceptions.

A secret meeting occurs when public officials meet at a time and place to avoid being seen or heard by the public. When at such meetings officials mentioned in Fla.Stat. § 286.011, F.S.A., transact or agree to transact public business at a future time in a certain manner they violate the government in the sunshine law, regardless of whether the meeting is formal or informal.

The Legislature did not intend to muzzle lawmakers and administrative boards to an unreasonable degree. It would be contrary to reason and violate the right of free speech to construe the law to prohibit any discussion whatever by public officials between meetings. The practice of discussing politics and government is part of our American heritage enjoyed by public officials and private citizens. The evil of closed door operation of government without permitting public scrutiny and participation is what the law seeks to prohibit. If a public official is unable to know whether by any convening of two or more officials he is violating the law, he should leave the meeting forthwith.

It is the law's intent that any meeting, relating to any matter on which foreseeable action will be taken, occur openly and publicly.

In this area of regulating, the statute may push beyond debatable limits in order to block evasive techniques. An informal conference or caucus of any two or more members permits crystallization of secret decisions to a point just short of ceremonial acceptance.

The majority of the Court is of the opinion that this case should be decided solely upon the question presented by the petitioner and that future problems will have to be met as they arise.

The writ of certiorari is discharged.

ERVIN, Acting C. J., CARLTON and BOYD, JJ., concur.

DREW, J (Retired), dissents.

Clifford Harry BROWN, Petitioner,

v.

STATE of Florida, Respondent.

No. 39671.

Supreme Court of Florida.

Feb. 10, 1971.

The Circuit Court of Record for Brevard County, Cecil R. Rosier, J., convicted defendant of illegal possession of marijuana and denied his motion to set aside judgment to permit him to change his plea from guilty to not guilty, and defendant appealed. The District Court of Appeal, Fourth District, affirmed with one judge dissenting, 234 So.2d 161, and defendant peti-

George PETERS, Plaintiff, Appellant,

v.

BOWMAN PUBLIC SCHOOL DISTRICT # 1, a public corporation, Defendant, Appellee.

Civ. No. 9123.

Supreme Court of North Dakota

July 11, 1975.

Rehearing Denied July 30, 1975.

Teacher counselor at high school brought action for injunction to restrain school district from denying him a teaching contract and from seeking to find a replacement for his position. The District Court of Bowman County, William Hodny, J., dismissed action, and plaintiff appealed. The Supreme Court, Pederson, J., held that executive session conducted by school board for purpose of evaluating plaintiff's performance violated the open meetings law and that action taken at subsequent board meeting in voting not to renew contract was void, notwithstanding that such meeting met requirements of the law, and that since statutory dates for contract renewal procedures could not now be met district court was to specify reasonable dates in lieu thereof.

Reversed and remanded.

1. Schools and School Districts ⇐57

Executive session conducted by school district for purpose of teacher evaluation violated the open meetings law. NDCC 44-04-19.

2. Schools and School Districts ⇐133.15

Decision not to renew teacher's contract was illegal where although actual decision to send letter of nonrenewal was taken at open board meeting the reasons for the contemplated nonrenewal were discussed at a prior, invalid executive session. NDCC 15-47-27, 15-47-38, subd. 5, 44-04-19.

3. Schools and School Districts ⇐57

When official action of a school district is clearly the product of an illegal meeting, documented in its minutes, and not clearly denied in the testimony, it is invalid even though taken at an otherwise legal meeting.

4. Schools and School Districts ⇐133.15

Where dates specified for procedures concerning renewal of teacher's contract could not be met, district court, in proceeding challenging school board's nonrenewal decision, was to specify reasonable dates in lieu thereof. NDCC 15-47-27, 15-47-38, subd. 5.

Syllabus by the Court

1. A meeting of a school board to evaluate teachers, held as an executive session, violates § 44-04-19, N.D.C.C. and is void.

2. Official action of a school board which is clearly the product of an illegal meeting, documented in its minutes, and not clearly denied in the testimony, is invalid even though taken at an otherwise legal meeting.

Daniel J. Chapman, Bismarck, for plaintiff, appellant.

T. L. Secrest, Hettinger, for defendant, appellee.

Gerald W. VandeWalle, First Asst. Atty. Gen., Bismarck, amicus curiae.

PEDERSON, Judge.

CASE SUMMARY

This is an appeal by the plaintiff, George Peters, from a judgment granted by the district court of Bowman County on May 28, 1975, dismissing plaintiff's action for an injunction to restrain the defendant school district from denying Peters a teaching con-

tract for the school year 1975-1976, and from seeking to find a replacement for the position held by Peters as a teacher in the Bowman school. After a hearing on an order to show cause, this court entered an order temporarily enjoining and restraining the school district from hiring a replacement and set the matter for oral argument on the merits for July 7, 1975.

The judgment is reversed and the case remanded for appropriate action by the trial court.

FACTS

George Peters has been a teacher-counselor at Bowman High School for twelve years. He was not offered a renewal contract for the 1975-1976 school year.

Portions of the official minutes of the school board pertinent to this case are as follows:

Minutes of the March 4, 1975, meeting state: "The Board then went into Executive Session for teacher evaluation."

Minutes of the March 18, 1975, meeting included the following item:

"Pladsen moved to contemplate a non-renewal contract for George Peters. Fischer seconded it. Voting were: Pladsen—aye; Tarpo—nay; Hinek—nay; Fischer—aye; and Stearns—aye. Motion carried."

Minutes of "a hearing for contemplated non-renewal of contracts" held on April 3, 1975, included the following:

"Mr. George Peters appeared before the Board and he also requested an open hearing. Hinek moved that this hearing be opened to the public and Tarpo seconded it. Voting were: Hinek—aye; Tarpo—aye; Pladsen—nay; Fischer—nay; and Stearns—nay. Motion defeated. The Board presented reasons why they considered the non-renewal of Mr. Peters' contract. After some discussion, the NDEA lawyers requested a continuance of this hearing. Request granted."

Minutes of "a hearing for contemplated non-renewal of contracts" held on April 7, 1975, contains the following entries:

"It was moved by Hinek and seconded by Tarpo that the contemplation of nonrenewing contracts for • • • Mr. Peters • • • be dropped. Voting were: Hinek—aye; Tarpo—aye; Pladsen—nay; Fischer—nay; and Stearns—nay. Motion defeated."

• • • • • •

"Mr. Peters appeared before the Board for the continuance of his hearing. He then waived the right to any further hearing."

Minutes of the April 9, 1975, meeting contains the following entry:

"It was moved by Tarpo and seconded by Hinek that George Peters' contract be renewed. Voting were: Tarpo—aye; Fischer—nay; Hinek—aye; Pladsen—nay; and Stearns—nay. Motion defeated."

This action was instituted by Peters on April 23, 1975, and the school district answered, praying for dismissal. The parties stipulated that the case be heard at the May Term of court. The school district was temporarily enjoined from filling the position held by Peters, pending trial. Trial was held on May 21, 1975, and judgment was entered on May 28, 1975. Peters appealed and a special term was granted by this court to permit arguments on July 7, 1975.

The trial court made the following findings of fact:

"I.

"That the plaintiff, George Peters, is a teacher in the defendant school district and has been such a teacher for the 1974-1975 school year.

"II.

"That on March 18, 1975, the defendant school district voted and decided to con-

template the nonrenewal of plaintiff's teaching contract and sent him notice of such contemplated nonrenewal.

"III.

"That on April 3, 1975, the plaintiff, together with his attorney, appeared at the defendant school district meeting and the defendant school district explained and gave the plaintiff its reasons for the contemplated nonrenewal of his contract.

"IV.

"That on April 8, 1975, the defendant school district decided not to renew the plaintiff's contract by a majority vote."

And the following conclusions of law:

"I.

"That the Court has jurisdiction over all the parties and of the subject matter of this action.

"II.

"That the defendant school district's procedure in nonrenewing the plaintiff's teaching contract was valid under the law.

"III.

"That the complaint of the plaintiff be dismissed.

"IV.

"It is further ordered, that the injunction against defendant be continued for a period of 15 days from the date of this Order and if the North Dakota Supreme Court has not acted during this time, said injunction will automatically terminate."

At the end of the trial, the trial court made the following oral memorandum opinion:

"Well, in this case, as in the other two, the Court's function here is to determine whether the school board followed the law and the procedure as set out in the law in acting on Mr. George Peters' contract.

"I don't think there is any question that the meeting of March 4th, the latter portion of it where they went into executive session did violate the provisions of Section 44-04-19, under which all meetings of a school board must be open to the public. I think that the precedent that is cited by Mr. Chapman—*Quast v. Knudson*, a Minnesota case, [276 Minn. 340] 150 N.W.2d 199, is valid and any official action taken of the School Board would be void.

"Unfortunately, I wouldn't know what to void. There was nothing voted on. It was all done at a subsequent meeting on March 18th, if I have got the correct dates, which was an open meeting and did comply with the law. It's my feeling that once there is an illegal meeting, it can't change every meeting thereafter. I feel that if any one of these motions had been presented at this March 4th meeting, it would certainly render it invalid and the nonrenewal contract would be illegal and he would be reinstated to his position. The official action was March 18th, which was a legal meeting.

"It is the finding of the Court that the school board did follow all of the provisions of Section 15-47-27 and the school board did follow all the provisions of 15-47-38, particularly subsection 5; and that the procedure in not renewing Mr. Peters' contract was valid.

"They did discuss with him the reasons for his nonrenewal and they related to the ability, competence and qualifications of a teacher as a teacher as required by the Supreme Court in the case of *Ming v. Wildrose School Board* [N.D.,] 217 N.W.2d 781.

"We have not gone into the validity or invalidity of these reasons. They may be trumped-up charges, or they may be just as valid as a man can say. We have no

way of knowing, nor do we go into that at a hearing of this kind. That is a discretionary matter left up to the school board. The school board members are elected officials. They must discharge their duties. They have to use their discretion in how they vote. The only ones they answer to is the voters. If they follow the law they don't have to answer to the Court any further than just following the proper procedure and doing things in a legal manner. I don't see anything that's been wrong here.

"It's the conclusion of the Court here that the action of the school board in not renewing the contract of George Peters is valid and the Complaint is dismissed."

(The remaining portions of the memorandum opinion do not relate to any issue before us.)

ISSUES

Peters describes the issues as:

1. Does the failure of the school board to take action approving the giving of a letter of contemplated nonrenewal to a teacher at a valid meeting of the board vitiate the entire nonrenewal procedure?

2. Where the entire discussion concerning the evaluation of a teacher and the reasons for the contemplated nonrenewal is conducted at an invalid "executive session" of the school board but the actual decision to send the letter of nonrenewal is taken at a later open meeting of the board, is the sending of the letter of contemplated nonrenewal a valid action of the board?

DECISION

I and II

The two issues stated by Peters are so interrelated we find it unnecessary to answer them separately.

[1] Everyone concedes that the executive session conducted by the school district on March 4, 1975, for the purpose of teacher evaluation violated § 44-04-19, N.D.C.C. The trial court so held.

[2, 3] The minutes of the March 4 meeting, and the testimony at the trial, clearly indicate that an official board meeting was closed and that its purpose was "teacher evaluation." The superintendent and the principal made recommendations on rehiring and stated reasons.

The first official action taken upon these recommendations, without disclosure or discussion, occurred at the open meeting on March 18, 1975.

The trial court's ruling indicated that it could void action only when it is taken at an invalid board meeting. We do not agree.

Without implying that in every case action taken upon the basis of information learned outside of an official and legal board meeting is void, we find the action of the school district in this case a clear attempt to evade § 44-04-19, N.D.C.C.

When the official action of the school district is clearly the product of an illegal meeting, documented in the minutes, and not clearly denied in the testimony, such official action is invalid even though such official action is taken at an otherwise legal meeting.

The provisions of § 44-04-19, N.D.C.C. (requiring that all meetings of public or governmental bodies be open to the public, except as otherwise specifically provided by law) were violated by the school district and the action thereafter taken to not renew the contract of George Peters was void.

The district court, in denying the application for temporary injunction, abused its discretion.

The judgment is reversed and the case is remanded with instructions to the district court to direct the school district to reconsider the action whereby it determined not to renew its contract with George Peters.

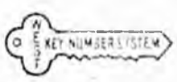
[4] If the school district, after reconsideration at an open meeting of the school board, redetermines that Peters should be

sent a notice of contemplated nonrenewal, appropriate notice and hearing should be afforded to him pursuant to § 15-47-38(5), N.D.C.C. Because the dates specified for procedures under §§ 15-47-27 and 15-47-38(5), N.D.C.C., cannot now be met, the district court should specify reasonable dates in lieu thereof.

Until such proceedings have been carried out, the school district is enjoined from employing a replacement for Peters.

Because a public question is involved, no costs are allowed on this appeal.

ERICKSTAD, C. J., and PAULSON, SAND and VOGEL, JJ., concur.



STATE of North Dakota ex rel. Bonnie ASKEW et al., Petitioners,

v.

Ben MEIER, as Secretary of State of the State of North Dakota, Respondent.

Civ. No. 9129.

Supreme Court of North Dakota.

July 11, 1975.

Rehearing Denied July 30, 1975.

Petitions were filed to enjoin the Secretary of State from placing on ballot for referral the legislature's ratification of proposed amendment to the United States Constitution popularly known as the Equal Rights Amendment. The Supreme Court, Vogel, J., held that the ratification by the legislature of the federal constitutional amendment was not subject to referendum under state law, and that petitions proposing a referendum of resolution ratifying amendment which were ineffectual for proposed purpose could not be construed to call for a nonbinding plebiscite or straw vote.

Injunction granted.

1. Constitutional Law ⇐10

Ratification of amendment to United States Constitution is not act of legislation, but an expression of assent to proposed amendment and is an exercise of power conferred by the Federal Constitution. U.S.C.A.Const. art. 5.

2. Constitutional Law ⇐10

Congressional selection of legislature as agent of state to ratify or reject an amendment to the United States Constitution does not permit state to ratify by any other method or to review the ratification by referendum. U.S.C.A Const. art. 5.

3. Constitutional Law ⇐10

Ratification by state legislature of federal constitutional amendment is not subject to referendum under state law. U.S.C.A.Const. art. 5; Const. § 25.

4. Constitutional Law ⇐10

Referendum petitions whose language was indicative of an intent to suspend operation of resolution approving amendment to the United States Constitution were ineffectual to either require a referendum under State Constitution of legislature's ratification of the amendment to the United States Constitution or to authorize a nonbinding plebiscite or straw vote, a procedure not authorized by state constitutional provisions relating to suspending the operation of measure enacted by legislature. Const. § 25.

5. Constitutional Law ⇐91

Plebiscite or straw vote is permissible method by which to petition for redress of grievances under State and Federal Constitution. U.S.C.A.Const. Amend. 1; Const. § 10.

Syllabus by the Court

1. Ratification of an amendment to the United States Constitution is not legis-

not a proposed action may have a significant environmental effect and for assessing typical associated effects of actions found likely to require the preparation of an EIS (ECL 8-0113, subd. 2 pars. [b] and [d]). The regulation in question (6 NYCRR 617.11[b]) is not irrational or arbitrary. Rather it is clearly consistent with the legislative intent of establishing a policy of comprehensive assessment of all related projects at an early stage of review as opposed to an uncoordinated, individual review of projects or permit applications (see ECL 8-0103, subds. 5, 9; ECL 70-0103, subd. 5; ECL 70-0117, subds. 1[b], 2).

[3, 4] The determination of whether a proposed action may have a significant impact on the environment is a matter for the exercise of discretion by DEC (ECL 8-0109, subd. 4). There is a relatively low threshold for requiring an EIS, and where the record establishes that the agency identified relevant areas of environmental concern, took a "hard look" at those concerns and made a reasoned elaboration of the basis for its positive declaration, that determination must be confirmed (see *H.O.M.E.S. v. New York State Urban Dev. Corp.*, 69 A.D.2d 222, 232, 418 N.Y.S.2d 827). The DEC has met those requirements.

[5] Special Term erred in making findings contrary to those of DEC with respect to the short-term environmental effects of the mining operation itself. There is a rational basis for that aspect of the positive declaration and the court should not substitute its own judgment (*Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 231-232, 356 N.Y.S.2d 833, 313 N.E.2d 321). The fact that DEC has included the potential effect of the proposed subdivision by Charles Realty as part of its consideration of the environmental impact of the mining operation is consistent with the policy articulated in the statute and is not arbitrary, capricious or an abuse of discretion.

[6, 7] Finally we note that even if DEC had abused its discretion in requiring an process the application, but not to issue a permit. It is only after DEC gives the required notice of the application and holds a public hearing, if appropriate, (see ECL 70-0109, subd. 2; ECL 70-0119, subd. 1; 6 NYCRR 621.7 and 621.8), that a final determination can be made.

Judgment unanimously reversed without costs and petition dismissed.



82 A.D.2d 65

In the Matter of the Application of Lucille BRITT, et al., Respondents,

v.

The COUNTY OF NIAGARA, The Niagara County Legislature, Edward D. Lewis, Anthony F. Quaranto, Dominic L. Penale, Walter Fedak, Arthur V. Curcione, Daniel J. White, Henry J. Buchalski, Doris Skinington, Lloyd J. O'Connor, Joseph J. Tyree, James A. Sacco, Russell C. Parker, Anthony J. Manna, Dr. John H. George, Bronislaus Pienta, John Chiasera, Richard M. Shanley, Russell C. Parker, Chairman, Niagara County Legislature, Whitney E. Barnum, Clerk, Niagara County Legislature, John V. Simon, County Attorney, Morton H. Abramowitz, Asst. County Attorney, Appellants.

Supreme Court, Appellate Division, Fourth Department.

June 26, 1981.

In Article 78 proceeding, petitioners challenged reapportionment of county legislature. The Niagara Supreme Court, Stiller, J., annulled reapportionment plan, enjoined county legislature from holding public hearing scheduled on proposed local law, directed legislature to initiate new reapportionment plans with full legislator participation, and appeal was taken. The Supreme Court, Appellate Division, Schnepp, J., held that: (1) Open Meetings Law was not shown to be inapplicable to meetings, at which county legislators belonging to majority political party discussed reapportionment, on basis of contention that they were not meetings of a public body for purpose of conducting public business; (2) such meetings and meeting involving ad hoc legislative committee did not violate Open Meetings Law, in light of fact that no quorum of the legislature was present at any of the meetings; (3) technical violation of Open Meetings Law consisting of failure to conspicuously post public notice in regard to the ad hoc legislative committee's meeting did not warrant the sanctions imposed by trial court; and (4) petitioners were not entitled to relief on theory that their due process rights were violated because reapportionment plan was developed without full public participation.

Judgment reversed, and petition dismissed.

Hancock, J., specially concurred and filed opinion.

1. Counties ⇐52

Open Meetings Law was not shown to be inapplicable to meetings, at which county legislators belonging to majority political party discussed reapportionment of county legislature, on basis of contention that they were not meetings of a public body for purpose of conducting public business; political caucus exemption did not apply to majority political party's closed session meetings to discuss matters of public business. Public Officers Law §§ 97, subds. 1, 2, 98(a), 103, subd. 2.

2. Counties ⇐52

Meetings, at which reapportionment of county legislature was discussed by legislators belonging to majority political party and by ad hoc legislative committee consisting of four members of majority party and violate Open Meetings Law, in light of fact that no quorum of the legislature was present at any of the meetings. Public Officers Law §§ 97, subd. 2, 98(a).

3. Counties ⇐52

Not every violation of Open Meetings Law automatically triggers its enforcement sanctions. Public Officers Law § 102, subd. 1.

4. Counties ⇐52

Technical violation of Open Meetings Law, consisting of failing to conspicuously post public notice in regard to ad hoc legislative committee's meeting which involved reapportionment of county legislature and which was attended by the press, did not warrant imposition of sanctions under which reapportionment plans were annulled and legislature was enjoined from holding a public hearing scheduled on proposed local law. Public Officers Law §§ 99, subd. 2, 102, subd. 1.

5. Constitutional Law ⇐274.2(3)

Petitioners were not entitled to relief on theory that their due process rights were violated because reapportionment plan for county legislature was developed without full public participation, in light of fact that a reapportionment plan had not been enacted, but rather, a resolution called for a public hearing on reapportionment plan. U.S.C.A.Const. Amends. 5, 14; Municipal Home Rule Law § 10, subd. 1, par. a(13).

John V. Simon, Niagara County Atty., Lockport, for appellants; Walter Moxham, Lockport, of counsel.

F. Warren Kahn, Niagara Falls, for respondents.

Before SIMONS, J. P., and HANCOCK, CALLAHAN, DENMAN and SCHNEPP, JJ.

SCHNEPP, Justice.

This Article 78 proceeding involves a challenge to the reapportionment of the Niagara County Legislature based on 1980

ara County (County) reapportionment plan, as reflected in proposed Local Law, No. 2, 1981, was (1) prepared in violation of the Municipal Home Rule Law (§ 10, subd. 1, par. a, subpar. [13], cl. [c]), which requires utilization of "the latest statistical information obtainable from an official enumeration", (2) planned at closed meetings in violation of the Open Meetings Law (Public Officers Law, art. 7), and (3) prepared in violation of due process. Petitioners challenge the procedure used by respondents (the Democratic majority members of the County Legislature, Edward D. Lewis, a Republican legislator who voted with the majority, the County and assistant County attorneys, and the Clerk of the County Legislature) to develop the reapportionment plan. Petitioners seek a judgment, inter alia, declaring that the proposed local law adopted by the County Legislature was adopted in violation of these statutes and restraining respondents from taking further action on the proposed law. Respondents cross-moved for dismissal.

It appears that the preliminary structuring of legislative district lines and the drafting of a reapportionment plan were first undertaken in October, 1980 under the direction of the County Attorney. As official census data for the County was then unavailable, preliminary data was reviewed and, by February, 1981, some district lines were drawn on County maps. Reapportionment had been discussed at meetings of individual Democratic legislators on March 7, and 21, 1981. At the March 7 meeting the assistant County attorney, Morton Abramowitz, presented a map which was revised from the March 21 meeting to reflect objections raised by the participants. Further objections were raised and it was understood that further revisions to the plan would be attempted. During this time Abramowitz also met and discussed the reapportionment with a group of Republican legislators. After the receipt on April 3, 1981 of the final census data, Russell C. Parker, Chairman of the Legislature, on April 7, 1981 appointed an ad hoc legislative committee, consisting of 4 Democrats and 3 Republicans to bring the reapportionment plan before the Legislature. Parker, a Democrat, also served on the committee. The ad hoc committee's first meeting was held on April 15, 1981 at which, in the presence of the press, Abramowitz presented a proposed reapportionment plan. By a party-line vote the committee passed a motion "that the Resolution calling for the Notice of Public Hearing" on the proposed reapportionment plan be placed on the April 21, 1981 County Legislature meeting agenda. On April 20, 1981 a Democratic caucus[1] was held to evaluate the plan at which 14 of the 16 Democratic legislators, including Parker and 3 other members of the ad hoc committee, were in attendance. At this meeting Abramowitz presented a proposed final plan and submitted maps which incorporated modifications made after the April 15 ad hoc committee meeting. On April 21, 1981 the ad hoc committee again met and the assistant County attorney presented the revised maps and plans, which included additional changes made earlier that day and, after discussion, the plan was approved. The resolution of April 15 calling for a public hearing was then amended to reflect the changes in the reapportionment plan. Later that day the County Legislature approved a resolution setting May 5, 1981 as the date for the public hearing on the proposed reapportionment plan. The votes on all resolutions, except for Lewis' vote, were along party lines.

Following a hearing in the Article 78 proceeding the Trial Court held that the April 20, 1981 caucus, the ad hoc committee meetings, and other meetings of Democratic legislators violated the Open Meetings Law and that the reapportionment plans were developed without due process of law "through proper legislative action". Respondents appeal from the judgment which directed that the County and the County Legislature be named parties respondent, annulled the reapportionment plans, enjoined the County Legislature from holding the public hearing scheduled for May 5, 1981 on proposed Local Law, No. 2, 1981, directed the Legislature to initiate new reapportionment plans with full legislator participation and public input for the County, and ordered that all future reapportionment committee or legislative meetings be open to the public upon proper notice.

[1] Initially we point out that the contention of respondents that the meetings of the Democratic legislators were not subject to the Open Meetings Law because they did not constitute meetings of a "public body for the purpose of conducting public business" is without merit. The statutory directives are clear: "Every meeting of a public body shall be open to the general public" (Public Officers Law, § 98 subd. [a]). A public body is defined as "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 . . . or committee or subcommittee or other similar body of such public body" (Public Officers Law, § 97, subd. 2). Meeting is defined as "the official convening of a public body for the purpose of conducting public business" (Public Officers Law, § 97, subd. 1). In interpreting and applying these provisions the courts have construed the Open Meetings Law liberally and have held that gatherings by a public body to discuss public business fall within its provisions (*Matter of Orange County Pubs., Div. of Ottaway Newspapers v. Council of City of Newburgh*, 45 N.Y.2d 947, 411 N.Y.S.2d 564, 383 N.E.2d 1157; see *Matter of Sciolino v. Ryan*, 81 A.D.2d 475, 440 N.Y.S.2d 795 [1981]; *Matter of Syracuse United Neighbors v. City of Syracuse*, 80 A.D.2d 984, 437 N.Y.S.2d 466). It is of no significance that formal action is not taken or that such gatherings are denominated "work sessions" or "agenda sessions". Moreover, the political caucus exemption has been variously construed and, contrary to respondents' assertion, is inapplicable to closed-session meetings of the majority political party to discuss matters of public business (*Matter of Sciolino v. Ryan*, supra).

[2] The determinative issue is whether a quorum was present at those meetings which allegedly violated the Open Meetings Law. The statutory requirement of a quorum is paramount because the existence of a quorum at an informal conference or agenda session "permits 'the crystallization of secret decisions to a point just short of ceremonial acceptance' (Adkins, Government in the Sunshine, Federal Bar News, vol. 22, No. 11, p. 317)" (*Matter of Orange County Pubs., Div. of Ottaway Newspapers v. Council of City of Newburgh*, 60 A.D.2d 409, 416, 401 N.Y.S.2d 84, affd. 45 N.Y.2d 947, 411 N.Y.S.2d 564, 383 N.E.2d 1157, supra). Since no quorum of the Legislature was present at the caucuses on March 7 and 21, the Trial Court erred in finding that these meetings violated the Open Meetings Law. Furthermore, a quorum of the County Legislature was not present at the April 20 caucus since a quorum of that body constitutes 16 legislators and only 14 were present. Nor was there a quorum of the ad hoc committee at that meeting since a quorum of that committee constitutes 5 members and only 4 were present. Although the Trial Court excluded Parker in its determination as to the number of committee members required to make up a quorum on the ground that he was an ex officio member of the committee and concluded that a quorum constituted 4, even under this construction a quorum was not present because Parker was 1 of the 4 ad hoc members present at the caucus. The court could not exclude Parker to determine the number necessary to constitute a quorum and then include him to conclude that a quorum of the committee was present. Thus, since a quorum was not present at any of these meetings there was no violation of the Open Meetings Law.

[3,4] Although a technical violation oc-

1. Respondents allege in their answer and return that the April 20, 1981 meeting "was a political caucus only".

Legislative — History 1959 - 1976

opportunity to present statements, arguments, or contentions in writing, with or without opportunity to present the same orally. The State agency shall consider all relevant matter presented to it before adopting, amending or repealing any regulation.

In any hearing under this section the State agency or its duly authorized representative shall have authority to administer oaths or affirmations, and may continue or postpone such hearing from time to time to such time and at such place as it shall determine.

Sec. 8. **Right to Petition.** Except where the right to petition for adoption of a regulation is restricted by statute to a designated group or where the form of procedure for such a petition is otherwise prescribed by statute, any interested person may petition a State agency requesting the adoption or repeal of a regulation as provided in this article. Such petition shall state clearly and concisely:

(1) The substance or nature of the regulation, amendment, or repeal requested;

(2) The reasons for the request;

(3) Reference to the authority of the State agency to take the action requested.

Sec. 9. **Procedure on Petition.** Upon receipt of a petition requesting the adoption, amendment or repeal of a regulation pursuant to this article, a State agency shall within 30 days deny the petition in writing or schedule the matter for public hearing pursuant to Sections 5, 6, and 7 of this article.

Sec. 10. **Retroactive Action; Limitation.** All regulations promulgated by an agency subject to this Act which are primarily legislative in nature shall have prospective effect only. Any regulation adopted pursuant hereto which is primarily an "interpretative regulation" shall have retroactive effect only if the agency adopting it has adopted no prior inconsistent regulation or has followed no prior course of conduct inconsistent with said regulation. Silence or failure to pursue any course of conduct shall be deemed prior inconsistent conduct.

Article V

Judicial Review

Section 1. **Court Review.** Any interested person may obtain a judicial declaration as to the validity of any regulation by bringing an action for declaratory relief in the superior court in accordance with the provisions of the Code of Civil Procedure and in addition to any other ground which may exist, such regulation may be declared to be invalid for a substantial failure to comply with the provisions of this chapter or, in the case of an emergency regulation or order of repeal, upon the ground that the facts recited in the statement do not constitute an emergency within the provisions of Section 2 (2) of Article 4.

Article VI
Agency Meeting Public

Section 1. **Agency Meetings Public.** All meetings of governing bodies of all State and local government agencies, including municipalities, boroughs, school boards and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations (advisory or otherwise) of the State or local government, supported in whole or in part by public funds or entrusted with the expending of public funds, except juries and such other agencies as shall be expressly exempt by the Legislature, shall be public meetings, but the public may be excluded only from such portions thereof as deal with matters, the immediate knowledge of which would deleteriously affect the finances of the government unit, or that deal with subjects that tend to prejudice the reputation and character of persons. When meetings are held at which such excepted subjects are to be discussed, the meeting must first be convened as a public meeting, and the question of holding an executive session to discuss matters that come within the two exceptions shall be determined by a majority vote of the agency, and no subjects can be considered at such executive session except those as are mentioned in the motion calling for the executive session, and no action shall be taken at said executive session.

LAWS OF ALASKA

1966

Source:
SCSHB 170

Chapter No.
48

AN ACT

Requiring that the meetings of agencies of the state and its subdivisions be open to the public with certain exceptions.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA

* Section 1. AS 44.62.310 is repealed and re-enacted to read:

Sec. 44.62.310. AGENCY MEETINGS PUBLIC. (a) All meetings of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of its political subdivisions, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations, advisory or otherwise, of the state or local government supported in whole or in part by public money or authorized to spend public money, are open to the public except as otherwise provided by this section.

(b) If excepted subjects are to be discussed at a meeting, the meeting must first be convened as a public meeting and the question of holding an executive session to

discuss matters that come within the exceptions contai
in (c) of this section shall be determined by a majori
vote of the body. No subjects may be considered at th
executive session except those mentioned in the motion
ing for the e cutive session unless auxiliary to the
question. No ction may be taken at the executive ses

(c) The following excepted subjects may be discu
in an executive session:

(1) matters, the immediate knowledge of wh
would adversely affect the finances of the government

(2) subjects that tend to prejudice the rep
tion and character of any person, provided the person
request a public discussion;

loophole → (3) matters which by law, municipal charter
ordinance are required to be confidential.

(d) This section does not apply to judicial or q
judicial bodies when holding a meeting solely to make
decision in a adjudicatory proceeding, or to juries,
parole or pardon boards

(e) Reasonable public notice shall be given for
meetings required to be open under this section.

(f) Action taken contrary to this section is voi

Approved by Governor March 30, 1966
Actual effective date: June 28, 1966

LAWS OF ALASKA

1968

Chapter No.

78

AN ACT

Relating to meetings of public bodies not required to be open to the public.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

Section 1. AS 44.62.310(d) is amended to read:

(d) This section does not apply to

(1) judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding,

(2) juries,

(3) parole or pardon boards,

(4) meetings of a hospital medical staff or meetings of the governing body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges or discipline.

Approved by governor: April 6, 1968
Actual effective date: July 5, 1968

LAWS OF ALASKA

1969

Source

HB 32

Chapter No.

7

AN ACT

Relating to the openness of meetings of public agencies.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 44.62.310(c) is amended to read:

(c) This section does not apply to

(1) judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding;

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff; or

(5) meetings of the governing body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges or discipline.

Staff deleted

Approved by governor: March 13, 1969
Actual effective date: June 11, 1969

LAWS OF ALASKA

1972

Source: SB 253

Chapter No.: 98

AN ACT

Relating to public agency meetings.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 44.62.310(a) is amended to read:

(a) All meetings of a legislative body or of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of its political subdivisions, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations, advisory or otherwise, of the state or local government supported in whole or in part by public money or authorized to spend public money, are open to the public except as otherwise provided by this section.

* Sec. 2. AS 44.62.310(c)(1) is amended to read:

(1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit;

* Sec. 3. AS 44.62 is amended by adding a new section in Article 6 to read:

Sec. 44.62.312. STATE POLICY REGARDING MEETINGS. (a) It is the policy of the state that

(1) the governmental units mentioned in sec. 310(a) of this chapter exist to aid in the conduct of the people's business;

(2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;

(3) the people of this state do not yield their sovereignty to the agencies which serve them;

(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

(5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created.

(b) Sec. 210(b)(1) of this chapter shall be construed narrowly in order to effectuate the policy stated in (a) of this section and avoid unnecessary executive sessions.

Approved by governor: June 2, 1972
Actual effective date: August 31, 1972

relate to Constants

LAWS OF ALASKA

1972

Source: HB 605 am

Chapter No. 100

AN ACT

Relating to the meetings of the Board of Regents of the University of Alaska; and providing for an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 14.40.160 is repealed and re-enacted to read:

Sec. 14.40.160. BOARD MEETINGS PUBLIC, MEETING NOTICE, PUBLIC FACILITIES. (a) The provisions of AS 44.62.310 apply to meetings of the Board of Regents. All meetings of the board, its committees or subcommittees, are open to the public and press except as otherwise provided in AS 44.62.310(c). The findings of an executive session shall be made a part of the record of the proceedings of the Board of Regents. All records of the meetings and proceedings shall be open to inspection by the public and the press at reasonable times.

(b) The board may determine the time and place of its meetings. However, 30 days notice is required for all regular meetings and 10 days notice is required for special meetings of the board, its committees or subcommittees called under the bylaws or rules of procedure of the board. Emergency meetings may be called without notice.

(c) The Board of Regents shall provide adequate facilities for members of the public to attend the meetings of the board, its committees or subcommittees.

* Sec. 2. AS 44.62.310(a) is amended to read:

(a) All meetings of a board of regents or of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of its political subdivisions, including but

not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations, advisory or otherwise, of the state or local government supported in whole or in part by public money or authorized to spend public money, are open to the public except as otherwise provided by this section.

* Sec. 3. This Act takes effect on the day after its passage and approval or on the day it becomes law without approval.

Approved by governor: June 2, 1972
Actual effective date: June 3, 1972

LAWS OF ALASKA

1976

Source

HB 831 am S

Chapter No.

189

AN ACT

Relating to public meetings.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 44.62.310(a) is amended to read:

(a) All meetings of a legislative body, of a board of regents, or of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of its political subdivisions, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations, advisory or otherwise, of the state or local government supported in whole or in part by public money or authorized to spend public money, are open to the public except as otherwise provided by this section. Except when voice votes are authorized, the vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote. This section does not apply to any votes required to be taken to organize the afore-mentioned bodies.

Approved by governor: June 18, 1976
Actual effective date: September 16, 1976

receive, manage and invest money or property obtained from sources other than the state legislature or by way of federal appropriation.[8] In addition, the legislature has provided that title and control or possession of land and personal property, other than monies, which are devised, bequeathed or given to the University, shall be taken by the University in its corporate capacity acting through the regents or an authorized agent, and shall be entered in the perpetual inventory of the University.[9] The board of regents is also authorized to execute leases for mining, agriculture, or other purposes to the lands granted by Congress to the University for the benefit of an agricultural college and school of mines.[10] In addition, the board of regents may select the lands granted to Alaska by the Act of Congress approved January 21, 1929, and may sell or lease such lands.[11]

But the University is also subject to some executive and legislative control. As mentioned, the constitution provides that the regents of the University shall be appointed by the governor, subject to confirmation by the legislature.[12] Furthermore, as has been pointed out, the formulation of university policy as well as the administration and disposition of University property are made subject to legislative enactment. At the beginning of each regular session of the legislature the board of regents is required to make a written report to the legislature showing the condition of University property, all receipts and expenditures, and the educational and other work performed.[13] In addition, the board must make an annual report to the governor which shall include a statement of all trust funds the University possesses.[14]

All monetary gifts, bequests or endowments received for the University expansion program or other uses must be turned over to the Department of Revenue where they are placed in a separate fund.[15] This fund, denominated as a trust fund, shall also include all monies derived by the University from the sale or lease of lands granted by act of Congress. These funds shall be invested by the Department of Revenue in interest-bearing securities as approved by the governor.[16] The proceeds from the sale or lease of lands granted to Alaska for University purposes by acts of Congress shall be deposited in the state treasury by the board of regents.[17] The governor is the person authorized to make all certificates required by law or by regulations of the federal Departments of Agriculture or Interior to entitle the state to grants of money for the benefit of state colleges of agricultural and mechanical arts authorized under acts of Congress.[18]

Finally, there is the matter of financing the operations of the University from state funds. In 1974 the total funding of the University of Alaska was over 41 million dollars. Approximately 65 per cent of that amount, 26½ million dollars, was appropriated by the legislature from the state's general fund.[19]

[2] Despite the degree of constitutional as well as statutory autonomy the University clearly possesses, we are of the opinion that it must be considered to be an integral part of the state educational system mandated by the constitution. In its constitutional status it stands as the single governmental entity which was specifically created by the people to meet the statewide need for a public institution of higher education. In this light, the University must be regarded as uniquely an instrumentality of the state itself. Unlike other public educational institutions created to meet the

8. AS 14.40.170; AS 14.40.250.
9. AS 14.40.280.
10. AS 14.40.250.
11. AS 14.40.300.
12. Note 7 *supra*.
13. AS 14.40.190.
14. AS 14.40.370.
15. AS 14.40.280.
16. AS 14.40.400.
17. AS 14.40.360.
18. AS 14.40.450.
19. § 17, ch. 147, SLA 1974.

needs of local areas, it exists constitutionally to act for the benefit of the state and the public generally.

We reach this conclusion not only from article VII of the constitution, which we construe to be the expression of the will of the people of this state that there shall be an institution of higher learning within the scope of the constitutional mandate providing for public education, but also from the degree of control over the affairs of the University which is exercised by the executive and legislative branches of our government, and from the financial dependence the University has upon the state.

It is true that the constitution has established the University as a body corporate.[20] The fact that the University has had conferred upon it the status of a juristic person is not dispositive, however, of our ruling in this case. There are several reasons why this structural approach may have been taken.[21] It may have been created as a corporation so as to simplify its transactions with the federal government in accepting grants of lands, and to facilitate its dealings with other persons in leasing and selling the lands it acquires or in conducting general business activities. Also, this corporate status may have been chosen in order to shield the individual members of the board of regents from personal liability in actions which might lead to a judgment for money damages against the University.

Whatever the framers' intentions, we have in the past recognized that corporate status alone is not determinative of the question of whether or not an entity performing public or governmental functions is an agent or instrumentality of the state. In Alaska State Housing Authority v. Dixon, 496 P.2d 649, 651 (Alaska 1972), we concluded that ASHA was a "state agency" within the intendment of the Administrative Procedure Act even though it was created as a "public corporate authority." In *Dixon* we also construed the holding in Bridges v. Alaska Housing Authority, 349 P.2d 149 (Alaska 1959), to the effect that the Alaska Housing Authority was not the state for purposes of eminent domain proceedings, to mean only that that agency was not "identical" with the state.[22]

The same general conclusion was reached in DeArmond v. Alaska State Development Corp., 376 P.2d 717 (Alaska 1962). There we held that the act creating ASDC as an "instrumentality of the state within the Department of Commerce" was constitutional even though it also provided that the agency was a corporation with a "legal existence independent of and separate from the state." We concluded that this latter provision was nothing more than "a declaration of the legal relationship that most corporations have with respect to their creators."[23] Such corporate status did not have the effect of removing ASDC from the Department of Commerce.

Although these decisions are not wholly dispositive of the question before us,[25] they are indicative of the fact that this Court has not been disposed to treat independent corporate status as sufficient to require the conclusion that a given entity is not in fact part of the State of Alaska. We recognize that the guideposts for such an inquiry are to be found more in political and functional realities than in organizational formalities

20. Alaska Const. art. VII, § 2.

21. Unfortunately the records from our constitutional convention offer no help in disclosing the thinking of the drafters on this matter.

22. 496 P.2d at 651 n. 4.

23. 376 P.2d at 724.

24. *See also* Walker v. Alaska State Mortgage Ass'n, 416 P.2d 245 (Alaska 1966), where the reasoning of *DeArmond* was followed in concluding that ASMA was not by virtue of its independent corporate nature an agency not within the Department of Commerce.

25. We are aware of the crucial fact that each of these cases dealt with a corporate entity which had been specifically declared in its organic act to be "within" a given executive department of the state. That is not the case here.

that the statute's grant did encompass tidelands adjacent to the subsequently expanded municipal boundaries. The state now brings this appeal.

Initially, we hold that the proper standard of review for us to apply is the "independent judgment" criterion since the only issue before us is a matter of statutory construction.[5] This was the standard applied by the superior court.

The state presents arguments based upon legislative history, general rules of statutory construction, and public policy. We find these unpersuasive.

The language of AS 38.05.320(b), quoted in note 2 above, does not appear to be ambiguous or doubtful on its face. Certain classes of municipalities, incorporated prior to April 1, 1964, are given a right to adjacent tidal lands, subject to the "preference rights" of certain previous users or developers. The April 1, 1964, date is the date by which the eligible municipality must have been incorporated. Once a city qualifies, its entitlement is to tidelands "between the mean high tide line in, or forming the boundary of, [the municipality], and [the pierhead line, harbor line, or other administratively drawn line]". We think that this does set a lateral boundary, as well as landward and seaward boundaries, for the tracts, contrary to the state's assertion. Thus, the facial meaning of the statute would indicate that post-April 1, 1964 expansion by cities which were incorporated before April 1, 1964, and are otherwise eligible, clearly creates entitlements to the corresponding tidelands.

This clarity of language, although it does not preclude the court from examining the legislative history proffered by the parties,[6] does place a greater burden on the state, as the party seeking to dissuade us from giving the statute its apparent meaning, to demonstrate that the legislative history reveals some hidden ambiguity in the legislature's usage of terms, and resolves that ambiguity in that party's favor. Otherwise, the statute should be given its facial meaning.

Here, we find it unnecessary to address the parties' lengthy legislative history arguments in full, as the state has not convinced us that either the language or the legislative history reveals any ambiguity. Each party attempts to extrapolate its desired result from the history of federal, territorial, and state legislation passed concerning Alaska's tidelands.[7] The fact is that no

5. *See State, Commercial Fisheries Entry Commission v. Templeton*, 588 P.2d 77, 81 (Alaska 1979).

6. If the parties present arguments based on legislative history, the court reads and considers them. We have rejected that formulation of the plain meaning rule which mandates that we must disregard all legislative history if the statute's wording is clear and unambiguous on its face. *North Slope Borough v. Sohio Petroleum Corp.*, 585 P.2d 534, 540 n.7 (Alaska 1978). To do so would overly restrict our inquiry, since reference to legislative history may provide an insight which is helpful to making a judgment concerning what a statute means, *id.* at 540, and since words are necessarily inexact and ambiguity is a relative concept. *United States v. United States Steel Corp.*, 482 F.2d 439, 444 (7th Cir.), *cert. denied*, 414 U.S. 909, 94 S.Ct. 229, 38 L.Ed.2d 147 (1973).

Consideration of the legislative history may demonstrate that an ambiguity, although not apparent on the face of the statute, does exist with respect to the legislature's use of a particular term. However, if not, then we must adhere to the general rule that if the language of a statute is unambiguous and expresses the intention of the legislature, it should not be modified or extended by judicial construction. *City & Borough of Juneau v. Thibodeau*, 595 P.2d 626, 635 n.31 (Alaska 1979).

Thus, although a facially clear and unambiguous statute does not preclude the court from consideration of the legislative history, it does indicate that the court need not explain its conclusion by reference to that legislative history; the "plain meaning" of the statute provides a sufficient basis on which to rest our decision. Although we reject the fictitious notion that the court does not consider the legislative history, we think it remains true that the court need not address the legislative history in its opinion if the statute, even read in light of that legislative history, remains clear and unambiguous.

7. The steps in the legislative history are the 1957 Act passed by the Territorial Legislature (ch. 184, SLA 1957); the 1957 federal Tidelands Act passed by Congress (Pub.L. 85-303, 71 Stat. 623, 48 U.S.C. §§ 455–455c); the 1959 Act passed by the new Alaska State Legislature (ch. 169, SLA 1959); a 1960 formal Attorney

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economics and business. These studies discuss the utility of various bidding methods under different assumptions concerning future oil prices, costs of exploration and production, and especially the expected field sizes. The Commissioner's knowledge of expected field sizes was derived from geological reports that must be kept confidential [11] pursuant to AS 31.05.035(c) and AS 38.05.035(a)(9).

In addition to these studies, the Commissioner considered eighteen other factors such as the number of bidders, the division of risk between lessees and the state, and development efficiency. In *Kelly v. Zamarello*, 486 P.2d 906, 912-13 (Alaska 1971), this court acknowledged the complexity of the bidding method determination and the necessity of the Commissioner to "evaluate a number of imponderables within his field of expertise."

B. *Is the Bidding Method for the Dinkum Sands Tracts Substantively Valid?*

[7] The plaintiffs contend that the use of the cash bonus/sliding scale royalty method for the disputed Dinkum Sands tracts does not achieve the objectives found in AS 38.05.180(a)(1) and is thus unreasonable. More specifically, the plaintiffs claim that this bidding method will not maximize economic return to the state. They cite several studies showing that the cash bonus/sliding scale royalty method will maximize economic return to the state only if there are not high quantities of oil in the land. Considering the extremely high bids for the Dinkum Sands tracts and other evidence of commercial quantities of oil in those tracts, the plaintiffs conclude that the Commissioner's choice was inappropriate.

The plaintiffs' argument is untenable. First, this court must review the Commissioner's decision at the time it was made and avoid any postsale analysis. Second, the plaintiffs ignore the studies that strongly support the Commissioner's selection, and they did not have access to the confidential information at the Commissioner's disposal. Finally, the Commissioner had to come to an agreement with the United States on the bidding method for the disputed tracts or not lease the land at all until the title dispute was settled. As the state correctly points out, the maximization of economic recovery is only one of the objectives found in AS 38.05.180(a)(1) and must be balanced against the statute's other objectives.

V. The Alaska Public Meetings Act

The superior court ruled that both the Agency Advisory Committee on Leasing (AACL) and the Joint Federal/State Beaufort Sea Task Force (Task Force) were within the purview of the Alaska Public Meetings Act, and that their actions violated the reasonable notice requirement of the Act. Those requirements are as follows.

> (a) All meetings of a legislative body, of a board of regents, or of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of its political subdivisions, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations, *advisory or otherwise*, of the state or local government supported in whole or in part by public money or authorized to spend public money, are open to the public except as otherwise provided in this section . . . .
>
> . . .
>
> (e) Reasonable public notice shall be given for all meetings required to be open under this section.
>
> (f) *Action taken contrary to this section is void.*

AS 44.62.310 (emphasis added).

The superior court further held, however, that such violations did not require it to void the lease sale, citing two reasons: first, the court found that it was not the decision

11. The lessees contend that the disclosure of the confidential information would destroy the competitive nature of the sale. This contention is supported by the record.

of the AACL or t Task Force to lease the land, but rather t at of the Commissioner; second, the court found that the record "reflects that there was opportunity for substantial public input at all stages leading up to the Commissioner's decision, and in fact there was substantial public input." Thus, the court concluded that the violation was harmless and that any ruling should be prospective.

The state and lessees do not object to the court's final conclusion, but contend that the advisory committees were not within the purview of the Act, and, even if they were, the committees complied with the reasonable notice requirement of the Act. Kaktovik claims that the violation was not harmless.

A. *Are the AACL and the Task Force Within the Purview of the Act, and if so, were the Reasonable Notice Requirements Satisfied?*

[8] The state's claim that the AACL was not empowered to address the lease sale, and that the Task Force did not have important responsibilities, is in conflict with the record. According to Commissioner LeResche and Thomas Cook, the director of the Division of Minerals and Energy Management, the AACL was originally founded to formulate the mitigating measures for another lease sale, but later was given part of the responsibility, along with the Task Force, to formulate mitigating measures and stipulations for the Beaufort Sea lease sale. Thus, it appears that the AACL and the Task Force were "advisory" committees within the meaning of the Public Meetings Act.

The state also contends that by including a representative from the North Slope Borough on the AACL, adequate public notice was given. However, according to an affidavit given by that repr ive, he did not give notice of the meetings to the villages of Kakto gut or Barrow. Of the numer u. tings held by these committees, notice was given in only several instances.[12]

B. *Was the Violation Harmless?*

[9] Kaktovik argues that it does not matter that the ultimate decision to lease the land was made by the Commissioner. The Act should be read to "void a decision based upon the work of an advisory committee." Furthermore, Kaktovik claims that the Commissioner was not truly independent from the AACL in light of the fact that he was co-chairman of that committee. Thus, considering the strong public policy behind the Public Meetings Act,[13] the Commissioner's decision should be struck down.

Kaktovik's claim that the Commissioner's decision was not made independently from the AACL and the Task Force is refuted by the record.[14] The Commissioner received

12. However, as the state points out, it is arguable that a strict public notice requirement applied to every meeting of advisory committees such as these would interfere with the administrative process. The legislative history is silent on this point.

13. AS 44.62.312 provides in pertinent part:

(1) the governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the people's business;

(2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;

(3) the people of this state do not yield their sovereignty to the agencies wh serve them;

(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

(5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created.

14. The fact that there is evidence indicating the Commissioner made his decision independently of the advisory committees distinguishes this case from *Town of Palm Beach v. Gradison*, 296 So.2d 473 (Fla.1974).

In *Gradison*, the town council appointed a citizen's planning committee to advise the council on the formulation of zoning ordinances. Although the council held a public meeting to announce their final decision, the court held that since the advisory meetings were closed to the public and in violation of the Public Meetings Act, the adopted zoning ordinance was void. However, in a later decision, the court clarified the *Gradison* case, stating that the council in *Gradison* approved the ad-

advice and studies from various state biological resource agencies as well as from OCSEAP scientists regarding possible mitigating measures and stipulations for the lease sale.

The record also supports the superior court's conclusion that there was opportunity for substantial public input concerning the lease sale, and in fact there was such input. In March 1976, the state held the first public hearings regarding the Beaufort Sea lease sale. On March 3, 1978, a call for nominations for the proposed lease sale was issued in the Federal Register. Nominations and comments were requested and received from the North Slope Borough, Kaktovik and Nuiqsut, concerning which tracts should not be included in the sale. Following the call for nominations, a formal tract selection meeting was held in Washington, D. C., on June 13, 1978, which included representatives from the North Slope Borough.

In May and June of 1979 the AACL held public hearings in Barrow, Nuiqsut, and Kaktovik to solicit comments from officials and residents regarding the DEIS and especially the proposed lease stipulations. Prior to the issuance of the JF/SID, the Division of Minerals and Energy Management met with representatives of the North Slope Borough on October 16, 1979 to discuss the content of that document. Finally, more than 100 written comments were received as a result of solicitation by news releases, federal register notices, and distribution of the DEIS.

Accordingly, we affirm the superior court's ruling that there was insufficient ground upon which to hold the Commissioner's decision void.

VI. Is The United States an Indispensable Party?

[10] The state and the United States contend that the superior court erred in finding that the United States was not an indispensable party.[15] Since the relief given by the superior court covers tracts whose ownership is disputed by the State of Alaska and the United States, the latter claims its interests are adversely affected. Since the superior court did not tailor its relief to protect the absent party, and considering that it could not be joined because of sovereign immunity, the United States claims it should have been considered indispensable.

In *State, Department of Highways v. Crosby*, 410 P.2d 724 (Alaska 1966), this court elucidated the test for determining when a party is indispensable:

> An indispensable party is one whose interest in the controversy before the court is such that the court cannot render an equitable judgment without having jurisdiction over such party. The determination of indispensability or lack of it involves a discretionary balancing of interests. On the one hand, consideration must be given to the possibility of render-

visory committee's recommendation in a "purely ceremonial public meeting." *See Occidental Chem. Co. v. Mayo*, 351 So.2d 336, 342 (Fla. 1977). Furthermore, *Gradison* did not involve the overall public input discussed in the following section.

15. Alaska Rule of Civil Procedure 19 provides in pertinent part:

> Rule 19. Joinder of Persons Needed for Just Adjudication.
>
> (a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction . . . shall be joined . . . if . . . (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest . . . .
>
> (b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

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6 Ohio Ops 3d 377, 370 NE2d 725.

38 ALR3d 1052–1065

§ 1 [38 ALR3d 1054]

[b] Related matters

71 Am Jur 2d, Specific Performance §§ 150, 151.

Specific performance of agreement to lend or borrow money. 82 ALR3d 1116.

Requirements as to certainty and completeness of terms of lease in agreement to lease. 85 ALR3d 414.

Complaint, petition, or declaration—for specific performance of contract to lease realty. 22 Am Jur Pl & Pr Forms (Rev ed), Specific Performance, Form 131.

5 Am Jur Proof of Facts 2d 371, Responsibility For Delay In Completing Building Construction.

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§ 4 [38 ALR3d 1057]

[a] Failure to complete at all

In action for breach of contract for failure of lessor to construct theater building for lessee, specific performance would not be denied on grounds that lessee had an adequate remedy at law where no issue was raised as to good faith of lessee. Easton Theaters, Inc. v Wells Fargo Land & Mort. Co. (1979, Pa Super) 401 A2d 1333.

§ 5 [38 ALR3d 1059]

[a] Failure to complete at all

See Easton Theaters, Inc. v Wells Fargo Land & Mort. Co. (1979, Pa Super) 401 A2d 1333, § 4[a].

38 ALR3d 1070–1092 ←

§ 1 [38 ALR3d 1072]

[b] Related matters

56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 161.

What land is contiguous or adjacent to municipality so as to be subject to annexation. 49 ALR3d 589.

Abstention from voting of member of municipal governing body on ground of personal interest as violation of statute or ordinance. 77 ALR3d 1222.

Validity and construction of statute or ordinance providing for disclosure to public of information concerning public officials. 100 ALR3d 699.

Zoning: validity and construction of provisions of zoning statute or ordinance regarding protest by neighboring property owners. 7 ALR4th 732.

What are "exceptional circumstances" under Freedom of Information Act provision (5 USCS § 552(a)(6)(C)) permitting court to grant additional time to federal agency to review records and comply with requests for information under Act. 38 ALR Fed 701.

What constitutes "unwarranted invasion of personal privacy" for purposes of law enforcement investigatory records exemption of Freedom of Information Act (5 USCS § 552(b)(7)(C)). 52 ALR Fed 181.

What are "enforcement proceedings" within Freedom of Information Act exemption from disclosure of investigatory records that would interfere with enforcement proceedings (5 USCS sec. 552(b)(7)(A)). 55 ALR Fed 583.

What constitutes "confidential source" within Freedom of Information Act exemption permitting nondisclosure of identity of confidential source and, in specified instances, of confidential information furnished only by confidential source (5 USCS sec. 552(b)(7)(D)). 59 ALR Fed 550.

Fed Proc, L Ed § 2:40

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§ 3 [38 ALR3d 1074]

[a] Under constitutional "due process" provision

See People ex rel. Difanis v Barr (1979) 78 Ill App 3d 842, 34 Ill Dec 223, 397 NE2d 895, § 3[b].

Criminal charges of "official misconduct" against two county commissioners, who conscientiously excluded third commissioner from meeting with administrative officer to discuss staff-reorganization plan, were dismissed, where criminal statute was void for vagueness because it was unclear whether subsequently broadened definition of "meeting" was intended to be incorporated in criminal statute. State v Conrad (1982, Mont) 643 P2d 239.

In action challenging conviction of members of City Board of Trustees for violating public meeting statute, wherein court noted that there was conflicting evidence as to whether any meeting statute; moreover, despite defendants' contention that open meeting statute was vague in defining role of public body in giving notice, recording minutes, and adhering otherwise to mandates of law, statute was upheld as constitutional and defendants' claims were found to be without merit. Court also rejected defendants' allegation that there was no proof of criminal intent, since record was deemed to have disclosed that failure to comply with public meeting statute was willful; furthermore, irrespective of issue of proof of criminal intent, court held that proof of criminal intent was not required as matter of law, since violation of public meeting statute is classified as in malum prohibitum. Hilliary v State (1981, Okla Crim) 630 P2d 791.

See Dorrier v Dark (Tenn) 537 SW2d 888, reh den (Tenn) 540 SW2d 658, infra § 3[b].

[b] Under other constitutional provisions

Defendants, members of city council, had standing to challenge constitutionality of state open meetings act to extent that they could show that provisions applied to them in their private or official capacity and that they had been injured by application of statute or suffered likely exposure to future injury; statute did not violate equal protection clause on ground that while prohibiting city council from conducting secret meetings, it did not prohibit state legislature from conducting such meetings, where state legislature was subject to even more stringent restrictions on its power to hold secret meetings by state constitution and statutory provisions, and where proper legislative purpose could arguably be served by classification; nor was act invalid on grounds that it compelled violation of attorney-client privilege by forbidding municipal attorney from advising his client in private on merits of bringing or defending litigation except in matters concerning "pending suits", where although act did specify "pending" litigation as exception to general rule of openness of meetings, legislature did not intend that consultations between governing body and its attorney must always be conducted openly, except under aforementioned exception, and such openness could result in public being placed at litigious disadvantage by premature disclosure; in instant case needs for confidentiality, which are foundation of attorney-client privilege, did not require that meeting under litigation be conducted privately, where attorney's presence was not for purposes of discussing prospective litigation or private consultation. People ex rel Hopf v Barger (Ill App) 332 NE2d 649.

Amendment of United States Constitution or under state constitution, since these rights protect expression of ideas, and not right to conduct public business in closed meetings. Act was not too vague and ambiguous as to deny due process; furthermore, act did not violate equal protection clauses of United States and state constitutions despite fact act did not apply to general assembly but did apply to other governmental bodies, since rational basis for different classification existed. People ex rel. Difanis v Barr (1979) 78 Ill App 3d 842, 34 Ill Dec 223, 397 NE2d 895.

Public meeting law was constitutional, notwithstanding contentions that it was void for vagueness, that it abridged free speech, that it was broader than its caption, and that it was arbitrary and unreasonable in failing to allow closed meetings under any circumstances, where (1) phrases "public body" and "to deliberate" were sufficiently clear so that persons of common intelligence did not necessarily have to guess as to their meanings and differ as to phrases' applications, (2) only legitimate "chilling effect upon free expression" that member of covered body could entertain was that deliberation in open meeting of particular matter would be detrimental to public interest which detriment the legislature determined should be assumed in order to secure benefits of open government, (3) all details of public meeting law were germaine to object expressed in caption and terms "public," "governmental," and "governing bodies" included in act fell within broader term "government bodies" used in caption, and (4) mere fact that public meeting law failed to provide for any closed meetings was insufficient to declare it unconstitutional. Dorrier v Dark (Tenn) 537 SW2d 888, reh den (Tenn) 540 SW2d 658.

§ 4 [38 ALR3d 1078]

See Dozier v Norris (1978) 243 Ga 230, 244 SE2d 853, § 6[f].

See Brown v East Baton Rouge Parish School Bd. (1981, La App) 405 So 2d 1148, § 6[c].

See Wexford County Prosecuting Attorney v Pranger (1978) 83 Mich App 197, 268 NW2d 344, § 6[c].

Although City clearly violated technical requirements of Open Meetings Act by failing to post notice of meeting at City Hall 48 hours in advance and by failing to keep minutes of meeting at which deliberations were held di-

did not appear that there was any desire by city to conduct its meeting out of public sight or that it in fact did so. Arnold Transp. Co. v Mackinac Island (1980) 99 Mich App 266, 297 NW2d 904.

See Accardi v North Wildwood, 145 NJ Super 532, 368 A2d 416 infra § 6[d].

Township council which gave notice of special meeting to approve application for transfer of liquor license to new location to four newspapers four days before meeting violated 48 hour notice requirement of Open Public Meetings Act where it was apparent from publishing schedules of four newspapers to which notices were sent that only one could have published notice 48 hours before scheduled meeting. Worts v Upper Township (1980) 176 NJ Super 78, 422 A2d 112.

See Gutierrez v. Albuquerque (1981) 96 NM 398, 631 P2d 304, § 6[d].

✓ See Scrodin v. Ryan (1981, 4th Dept) 81 App Div 2d 475, 440 NYS2d 795, § 6[d].

✓ See Britt v County of Niagara (1981, 4th Dept) 82 App Div 2d 65, 440 NYS2d 790, § 6[a].

Pursuant to Public Officers Law, town board at open meeting may convene executive sessions only in limited instances, one of which is to discuss proposed, pending, or current litigation upon motion carried by majority of total board membership and identifying general area of subject to be discussed, and such exceptions must be narrowly scrutinized; accordingly, petition, to extent that it sought order declaring that executive session was conducted in violation of Public Officers Law, would be granted where motion to go into executive session did not identify local tavern as subject of enforcement of zoning ordinance, which was pending, proposed or current litigation to be discussed. Daily Gazette Co. v Town Bd., Cobleskill (1981) 111 Misc 2d 303, 444 NYS2d 44.

See Marsh v Richmond Newspapers, Inc. (1982) 223 Va 245, 288 SE2d 415, § 9.

See Nageotte v Board of Supervisors (1982) 223 Va 259, 288 SE2d 423, § 6[b].

See Danville v Lurd (1982) 223 Va 271, 288 SE2d 429, § 6[b].

§ 5 [38 ALR3d 1075]

See Pacific Legal Foundation v Council on Environmental Quality (1980, App DC) 636 F2d 1259, § 6[d].

Chrysler Corporation Loan Guarantee Board was not an "agency" as defined in the federal public meeting statute and was therefore not required to comply with its open-meeting provisions. Symons v Chrysler Corp. Loan Guarantee Bd. (1981, App DC) 670 F2d 238.

Government in the Sunshine Act and was enjoined from noncompliance with Act in action by public interest organization. Symons v Chrysler Corp. Loan Guaranty Board (1980, DC Dist Col) 488 F Supp 874.

See Miglionico v Birmingham News Co. (1979, Ala) 378 So 2d 677, § 6[c].

Committees of state university board of trustees were required by Freedom of Information Act to permit newspaper reporters to be present at meetings. Arkansas Gazette Co v Pickens (Ark) 522 SW2d 350.

Sunshine law did not require that ad hoc advisory committee, created by board of education, and composed solely of members of governing body of district and which contained less than number needed for quorum of governing body, meet in public session in evaluating and interviewing candidates for vacancy on board. Henderson v Board of Education (1978) 78 Cal App 3d 875, 144 Cal Rptr 568.

In action by owners of property proposed to be purchased by Denver Urban Renewal Authority, lower court properly held that authority was not subject to public meeting statute where mere enactment of legislation permitting formation of authority did not suffice to make it "state agency or authority" within meaning of statute and enabling legislation described authority only as "body corporate and politic." Jones v Board of Comrs. (1980, Colo) 611 P2d 976.

See Gillies v Schmidt (Colo App) 556 P2d 82, infra § 6[b].

Open meeting statute was intended to bind every board or commission of state, or of any county or political subdivision over which it has dominion or control. Miami Beach v Berns (Fla) 245 So 2d 38. -HAVE-

Lease of public airport facilities to commercial airlines did not make airlines public representatives for purpose of state statute requiring that meetings of public entities be open to public. McCoy Restaurants, Inc. v Orlando (1980, Fla) 392 So 2d 252.

See Mitchell v School Board (Fla App D1) 335 So 2d 354, infra § 6[b].

See News-Press Publishing Co. v Carlson (1982, Fla App D2) 410 So 2d 546, § 6[d].

Committee of faculty and students which was organized to review allocations of student activity funds by student senate of state university was not required to hold public meetings since it had no authority to take official action. McLarty v Board of Regents, 231 Ga 22, 200 SE2d 117.

Committee composed of members of county board of supervisors which was established by board for purpose of considering and making

committee was made up of employees who voluntarily and in interest of efficiency or "good staff work" met together periodically in performance of their duties preliminary to providing the recommendations, but no statute, ordinance, resolution or other official action by county board designated the committee as public body or subsidiary body. People ex rel Cooper v Carlson (Ill App) 328 NE2d 672.

See Betts v Department of Registration & Education (1981) 103 Ill App 3d 654, 59 Ill Dec 355, 431 NE2d 1112, § 7[a].

Athletic council that was established by administrative officials of state university to manage and control intercollegiate athletic program and which had responsibility to determine which athletes received university letters, scholarships, and certain other awards was a "council authorized by laws of state" and therefore subject to open meetings statute. Greene v Athletic Council of Iowa State University (Iowa) 251 NW2d 559.

See Wedergren v Board of Directors (1981, Iowa) 307 NW2d 12, § 7[a].

Meetings of fiscal court, one held at boat club at which was discussed continuing effort of county police to have organization recognized as bargaining agent, and one held with county attorney involving discussions of proposed county ordinance, were in violation of open meetings law; however, fiscal court's meeting with county attorney at which pending litigation was discussed was not illegal. Fiscal Court of Jefferson County v Courier-Journal & Louisville Times Co. (1977, Ky) 554 SW2d 72.

Private, non-profit corporation sponsored by city and parish councils and designated as agency to administer anti-poverty programs was public body or authority within meaning of public meeting statute where corporation derived substantially all its support from local, state and federal funds and had considerable policy making authority in administering and distributing funds. Seghers v Community Advancement, Inc. (1978, La App) 357 So 2d 626.

High school athletic association was "public body" within meaning of state open-meeting statute requiring that meetings of every "public body" should be open to public. Spain v Louisiana High School Athletic Asso. (1980, La App) 393 So 2d 1386.

See Ridenour v Board of Education (1981) 111 Mich App 798, 314 NW2d 760, § 6[c].

Open public meetings act applied to meetings of charter commission which was established to propose improved form of city government to be voted upon by city's electorate; failure of commission to conform with act needed to be recommended. Polillo v Deane (1977) 74 NJ 562, 379 A2d 211.

See Accardi v North Wildwood, 145 NJ Super 532, 368 A2d 416 infra § 6[d].

Meetings of board of trustees of Cornell University, which is both a private university and a land grant college, concerning the four "statutory" colleges which were administered by Cornell but which were part of state university system were required to be open where board was public body within meaning of open-meetings statute and where board conducted public business and performed governmental function for state. Holden v Board of Trustees (1981, 3d Dept) 80 App Div 2d 378, 440 NYS2d 58.

See Orange County Publications Div. of Ottaway Newspapers, Inc. v Council of City of Newbergh, 89 Misc 2d 847, 393 NYS2d 298, mod (2d Dept) 60 App Div 2d 409, 401 NYS2d 84, affd 45 NY2d 947, 411 NYS2d 564, 383 NE2d 1157 infra § 6[d].

Meetings of medical advisory committee created by statute for sole purpose of advising state commission with respect to health and medical care services provided by state for needy persons were subject to open meetings law. MFY Legal Services, Inc. v Toia (1977) 93 Misc 2d 147, 402 NYS2d 510.

Open meetings law did not apply to meetings of faculty of state supported law school since, even though faculty is authorized to make certain decisions regarding operation of school, faculty is not a "governing or governmental body" where its decisions are subject to review and approval by university's board of governors. Student Bar Asso. Board of Governors, etc. v Byrd (1977) 293 NC 594, 239 SE2d 415.

Where city council authorized its police and fire committee to investigate morale and operation of police and fire departments and delegated subpoena power to committee, such committee was "public body" within meaning of Sunshine Law; committee's meetings were not exempt as "meeting to consider the employment of personnel" where discussions pertained to employees of police and fire departments rather than to employees of council or committee itself, and trial court properly permanently enjoined committee from failing to observe law. Maser v Canton (1978) 62 Ohio App 2d 174, 16 Ohio Ops 3d 373, 405 NE2d 731, motion overr.

Meeting of citizens' advisory committee, impanelled to provide information and to assist department of corrections in making recommendations to Board of Corrections concerning proposed locations for a community treat-

not subject to "Open Meeting Law" since, though committee was subordinate entity of parent-entity which came within purview of law, committee was not delegated any decision-making authority either actual or de facto. Sanders v Benton (1978, Okla) 579 P2d 815.

See Berry v Board of Governors of Registered Dentists (1980, Okla) 611 P2d 628, § 6[b].

Actions by school board leading to and effecting passage of annexation resolution violated open meeting law, where record cast serious doubt on whether timely notice preceded meetings and left no doubt whatsoever that such notice as there was did not meet agenda requirements of statute. Re Appeal of Order Declaring Annexation etc. (1981, Okla App) 637 P2d 1270.

Zoning hearing board was required by public meeting law to render its decision at open meeting, since public meeting law applied to all agencies except judiciary. Thus, board's decision was invalid, where it failed to render its decision on application for special exception at public meeting. Appeal of Emmanuel Baptist Church (Pa Cmwlth) 364 A2d 536.

See Bensalem Township School Dist. v Giglioti Corp. (1980, Pa Cmwlth) 415 A2d 123, § 7[b].

Statute which authorized school boards to hold executive sessions was repealed by public meeting law, notwithstanding that school board statute was not specifically mentioned in repeal provision of public meeting law and notwithstanding that school board statute was amended subsequent to passage of public meeting law, where public meeting law was in irreconcilable conflict with executive session provision of school board statute which was a prior statute and subsequent amendment of school board statute did not deal with subject of open meetings. Dorrier v Dark (Tenn) 540 SW2d 658.

See Marsh v Richmond Newspapers, Inc. (1982) 223 Va 245, 288 SE2d 475, § 9.

See Nageotte v Board of Supervisors (1982) 223 Va 259, 288 SE2d 423, § 6[b].

See Danville v Laird (1982) 223 Va 271, 288 SE2d 429, § 6[b].

Compliance with minimal notice requirement of "open meeting law" did not satisfy requirement of town zoning ordinance and thus, resolution of town or board of supervisors to repeal zoning ordinance relating to campaign signs was ineffective. Martin v Wray (1979, ED Wis) 473 F Supp 1131 (applying Wis law).

§ 6 [38 ALR3d 1077]

[a] Generally

In action challenging non-renewal of two probationary teachers' employment contracts, wherein teachers contended that private meeting during recess of regularly scheduled board meeting involving president of school district board and school principal and attorney for district was violative of public meeting statute, court held that, inasmuch as public meeting statute requires gathering of quorum of members of public body in order "to propose or take legal action," no violation had occurred, since quorum was not present, as to related contention that board president took "legal action" during recess so as to render compliance with public meeting statute mandatory, court disagreed, citing definition of "legal action" as "collective decision . . . made by a majority of members of a public body." Boyd v Mary E. Dill School Dist. (1981, App) 129 Ariz 422, 631 P2d 577.

Hearing officer, appointed under agreement between city and unions to hear grievances of municipal railway employees, was not "legislative body," and hearing was not "meeting," within meaning of statute requiring that all meetings of legislative bodies of local agencies be open to public. Wilson v San Francisco Municipal Railway, 29 Cal App 3d 870, 105 Cal Rptr 855.

State statute providing that county commissioners shall sit with "open doors" need not be taken literally, and where testimony indicated that door had been closed at commissioner's meeting only for purpose of reducing noise in meeting room, and that no one had in fact been excluded from the meeting, there had been no violation of statute. Allen v Board of County Comrs. (Colo) 497 P2d 1026.

Although Public Meeting Law would not prohibit any discussion whatever by public officials between meetings, secret meetings at which officials transact or agree to transact public business at future time violate law, regardless of whether meeting is formal or informal, and if public official is unable to know whether by any convening of 2 or more officials he is violating law, he should leave meeting forthwith. Miami Beach v Berns (Fla) 245 So 2d 38.

Secret discussions between school superintendent and individual school board members concerning redistricting and transfer of students to other schools were in contravention of state sunshine law where official action resulting from such discussions was very much a matter of public concern. Blackford v School Board (1979, Fla App D5) 375 So 2d 578.

State "sunshine law" which provided "all meetings . . . at which official actions are to be taken shall be open to the public . . ." as well as state constitutional provision that "all official meetings" of board of education must be open, did not preclude board from meeting in private executive unofficial session, either before or after official open meeting, to discuss subjects exempted from requirement of open meetings. Deriso v Cooper (1980) 245 Ga 786, 267 SE2d 217.

Closed meetings of village officials held prior to deliberations on ordinances to permit sale of certain municipal property to developer for construction of low-income housing for elderly did not violate open meetings statute where meetings did not constitute deliberations on developer's proposal, but were opportunity for village officials to express their need and desired requirements for low-income housing and to explore what experienced developer could do for village in this regard. Lurie v Skokie (1978) 64 Ill App 3d 217, 20 Ill Dec 911, 380 NE2d 1120.

Borough council could, at closed executive session, discuss whether to take appeals from various property tax adjustment adjudications and retain outside counsel for that purpose; however, resolution calling for executive meeting was inadequate for public meeting statute purposes where it made no mention of fact that meeting would involve discussion whether to pursue appeals; nevertheless, voidable acts made during executive meeting could be ratified by subsequent special meeting called by council. Hounan v Pompton Lakes (1977) 155 NJ Super 129, 382 A2d 113.

Action taken at regular meeting by municipal governing body which action had not been listed on published agenda was not per se void, in the absence of showing that governing body published agenda calculated to deceive or mislead public. Crilasi v Governing Body of Oakland (1978) 156 NJ Super 182, 383 A2d 736.

"Homestead Committee" that developed procedure by which city sold residential property to private citizens for nominal consideration and "Mayor's Task Force on Abandoned Property" reviewed and recommended policies regarding disposition or use of vacant and abandoned properties were public bodies within meaning of open meeting law so that minutes of their meetings were required to be redacted to extent they did not contain matter not required to be made public under Freedom of Information Act; however, since committees had operated either in ignorance of open meeting law or in belief they were not subject to it, and since minutes contained information impinging on privacy of various individuals, minutes were required to be remitted to Supreme Court for its in camera reduction thereof consistent with provisions of Freedom of Information Act. Syracuse United Neighbors v Syracuse (1981, 4th Dept) 80 App Div 2d 984, 437 NYS2d 466.

In action challenging reapportionment plan, party caucuses of Democratic members of legislature occurring on March 7, March 21, and April 20 were held to be valid and not in violation of statute directing that meetings of public bodies to be open to members of public, since no quorum of legislature was present at any of these meetings and since, in absence of quorum, meetings could not be deemed to be conducted by "public body" as required for public meeting statute to be applicable. Moreover, court concluded that technical violation had occurred at ad hoc committee meeting of April 21 inasmuch as no public notice was "conspicuously" posted; however, it was held that, pursuant to statute giving court discretionary authority to void any action failing to satisfy requirements of public meeting statute, lower court erred in voiding all actions of party caucuses inasmuch as press had, in fact, been notified and had attended and where resolution called only for public hearing. Britt v County of Niagara (1981, 4th Dept) 82 App Div 2d 65, 440 NYS2d 790.

See Daily Gazette Co. v Town Bd., Cobleskill (1981) 111 Misc 2d 305, 444 NYS2d 44, § 4.

Bureau director's decision to issue permit to construct and operate sanitary landfill did not constitute "formal action" subject to public meeting statute, where mere consultation with bureau subordinates did not constitute meeting, vote was not taken, and official policy was not set by bureau director in issuing permit. Commonwealth, Dept. of Environmental Resources v Steward (Pa Cmwlth) 357 A2d 255.

See Bensalem Township School Dist. v Giglioti Corp. (1980, Pa Cmwlth) 415 A2d 123, § 7[b].

Purported "meeting" of state emergency board in which two members were physically present and two participated by long distance telephone conference call was not meeting within meaning of public meeting statute. State v Vermont Emergency Board (1978, Vt) 394 A2d 1360.

[b] Specific kinds of discussions contended to be exception; attorney-client conferences

County board of supervisors did not violate statutory open meeting requirements by conferring privately with county counsel during public meeting at which environmental impact report (EIR) on proposed food processing plant was being considered, where it reasonably inferred that statement by counsel for plaintiffs that EIR before it had significant defects which precluded board from legally approving it was threat of specific lawsuit. Statute did not abrogate evidentiary privilege of attorney-client confidential communications, under which opportunity for private legal consultation was assured for public as well as private clients. Sutter Sensible Planning, Inc. v Board of Supervisors (1981, 3d Dist) 122 Cal App 3d 813, 176 Cal Rptr 342.

abuse was subject to public meeting law and, thus, committee's consideration of questions other than those on specific child abuse cases was required to be handled in public meetings, since it was committee of political subdivision of state. Reports and records on child abuse cases could only be considered in executive sessions, as was authorized by public meeting law, since child protection act made such reports and records confidential. Gillies v Schmidt (Colo App) 556 P2d 82.

Where town council convened meeting for "work" session, and upon reaching item on agenda listed as "legal matters" required public to leave without declaring it to be an executive session, statute was violated and injunction would issue. Journal Publishing Co. v Enfield (1974) 31 Conn Supp 392, 373 A2d 193, (citing annotation).

In action to determine whether school board properly abolished employee's position, application, pursuant to public meeting law applicable to school board but only applicable to meetings between two or more public officials, to compel discovery from administrators of conversations with school board attorney was properly denied, where no meeting was involved. Mitchell v School Board (Fla App D1) 335 So 2d 354.

Parole and Probation Commission's decision to appeal order of Division of Administrative Hearing was not formal action that required decision to be reached in open and public meeting pursuant to statute; ratification of legal decisions of formal public meetings would hamper efficient conduct of commission's business and make effective legal representation impossible. Florida Parole Com. v Thomas (1978, Fla App D1) 364 So 2d 480.

See Fiscal Court of Jefferson County v Courier-Journal & Louisville Times Co. (1977, Ky) 551 SW2d 72, § 5.

Under statute providing that school board meetings must be open to public, but that the board may recess for closed session or executive meetings as long as no final or binding action would be taken therein, school board's meetings with administrative staff for purposes of discussing school policy need not be open to public as long as no final or binding action is taken at such meetings, and provided that these meetings not be used to defeat purpose of statute. Reeves v Orleans Parish School Board (La App) 264 So 2d 243, revd on other grounds (La) 281 So 2d 719.

Where executive session by board of selectmen involved meeting with department heads to discuss salaries of nonunion town employees in preparation for proposed departmental budgets and did not involve discussion of "strategy with respect to collective bargaining" within meaning of that exception to open meeting law, session constituted violation of open meeting law. District Attorney for Northwestern Dist. v Board of Selectmen (1981, Mass App) 1981 Adv Sheets 740, 418 NE2d 642.

Closed session of board of regents of university to consider opinion of counsel on certain topics was exempt from open meeting requirements of state sunshine law since public body was privileged to retire to closed session to discuss materials exempt from disclosure under Freedom of Information Act and since written opinion of counsel was "material" which was not required to be disclosed under FOIA, despite fact that state law contained more restrictive exemption which would allow closed session consultation with counsel only regarding specific pending litigation. Booth Newspapers, Inc. v Regents of University of Mich. (1979) 93 Mich App 100, 286 NW2d 55.

See Channel 10, Inc. v Independent School Dist., 298 Minn 306, 215 NW2d 814, infra § 9.

Public meeting law was not applicable to municipal housing authority's conference with attorney, where purpose of conference was to discuss litigation strategy in action then pending in court. Minneapolis Star & Tribune Co. v Housing & Redevelopment Authority (Minn) 246 NW2d 448, rereported.

Housing and Redevelopment Authority was not required by Open Meeting Law to open to public meetings with attorney that were necessary to attain settlement of litigation involving members of authority in their capacity as members of public agency and also, in one case, as an individual. Minneapolis Star & Tribune Co. v Housing & Redevelopment Authority (Minn) 251 NW2d 620.

See Accardi v North Wildwood, 145 NJ Super 532, 368 A2d 416 in a § 6[d].

See Caldwell v Lambrou (1978) 161 NJ Super 284, 391 A2d 590, § 7[b].

Public meeting statute did not abrogate principle of attorney-client confidentiality with regard to public bodies; executive session of public body could be held for confidential communication between body and attorney where communication concerned pending investigation, claim, or action, and where disclosure of matters discussed would seriously impair ability of public body to process claim in public interests. Oklahoma Asso. of Municipal Attorneys v State (1978, Okla) 577 P2d 1299.

Where decision by plaintiff Board of Governors of the Registered Dentists of Oklahoma and plaintiff's attorney to seek judicial relief against defendants, allegedly engaged in unauthorized practice of dentistry, was not reached in public meeting, decision violated Open Meeting Law in that factual predicates for exception under Law, arising when public disclosure would seriously impair ability of public body to process claim in public interests, were not present, and improperly permitted action to proceed. Berry v Board of Governors of Registered Dentists (1980, Okla) 611 P2d 628.

See Marsh v Richmond Newspapers, Inc. (1982) 223 Va 245, 288 SE2d 415, § 9.

County board's motions to go into executive session ("to confer with legal counsel," "for legal counsel," and "for legal counsel and to discuss personnel matters") failed to comply with public meeting statute, but since there were no wilful and knowing violations, no civil penalties could be imposed; injunction was not justified where governing body in good faith committed insubstantial violations based on an erroneous construction of statutes; it is not necessary to identify personnel when convening executive session to consider personnel matters. Nageotte v Board of Supervisors (1982) 223 Va 259, 288 SE2d 423.

City council complied with public meeting statute in convening in executive session where, although motion to so convene did not specify which of two agenda items were to be discussed, both agenda items related to actual pending litigation. Danville v Laird (1982) 223 Va 271, 288 SE2d 429.

[c] Discussions relative to personnel

Although acceptance of teacher's letter of resignation was discussed and considered in executive session following a regular board of education meeting, state open meetings law was not violated where decision to accept resignation of teacher was made at regularly scheduled meeting of board. Shirley v Chagrin Falls Exempted Village Schools Board of Education (CA6 Ohio) 521 F2d 1329.

Open meetings laws evidence legislative policy that all meetings of municipal governing bodies are to be open to public and that no executive or secret sessions are to be held, except when character or good name of person is involved. Thus, open meeting laws were violated where city council held closed session to consider appointment to board of education since record indicated that "character" or "good name" was not sole discussion at meeting, and since this exception to open meeting laws does not per se include session considering personal matters, even though character or good name may often be issue in such discussions. Miglionico v Birmingham News Co. (1979, Ala) 378 So 2d 677.

City counsel was permitted to meet in executive session to discuss personal characteristics of applicants for city-manager position under provision in public meeting law which authorized executive sessions for "subjects that tend to prejudice the reputation and character of any person." Kenai v Kenai Peninsula Newspapers, Inc. (1982, Alaska) 642 P2d 1316.

Kenai v. Kenai Pen.

board meeting, even though board meeting had been preceded by executive session and minutes of board meeting did not reflect discussion of matter after board reconvened; statute required only that minutes include accurate description of all matters discussed not description of discussion and minutes of executive sessions were expressly excluded from requirement that they be open to public inspection. Hokanson v High School Dist. (1978, App) 121 Ariz 264, 589 P2d 907.

See Flagstaff v Bleeker (1979, App) 123 Ariz 436, 600 P2d 49, § 6[f].

In action by terminated college faculty members alleging defendant's violation of public meeting law, trial court improperly granted plaintiff's motion for summary judgment where record was unclear as to whether defendant's formation of final intent to decline to offer plaintiffs new contracts, constituting "legal action" which by statute had to take place during public meeting, occurred during portion of defendant's first meeting, open to public, or during portion of meeting devoted to executive session; question of whether defendant's second meeting, regarding which no notice was given, was separate meeting or continuation of meeting recessed on prior day was immaterial where statute required giving of notice in either case; at properly noticed third meeting defendant could have adopted and validated ineffective actions taken during previous meetings but summary judgment on issue in favor of plaintiffs was improperly granted where evidence regarding defendant's actions conflicted. Cooper v Arizona Western College Dist. Governing Board (1980, App) 125 Ariz 462, 610 P2d 465.

Members of school board could consider employment matters in closed executive session; certified probationary teachers whose contracts were not renewed were given adequate notice where notice stating renewal of contracts of certified personnel would be discussed was posted at various places and where only 18 teachers were employed by district so that nothing prevented teachers from informing board, prior to executive session, that if their contracts were going to be discussed, they desired that discussion be held in public meeting. McGown v Patagonia Union High School Dist. (1981, App) 129 Ariz 127.

District board of education's decision not to re-employ teacher was proper where it resulted from a closed meeting permissible under statute to consider dismissal of public employees unless employee requests public hearing, and no such request was made. Greer v Board of Education, 47 Cal App 3d 98, 121 Cal Rptr 542.

School board meeting in executive session with real-estate specialists to discuss their qualifications to assist board in disposing of surplus realty did not fall within open-meetings law exception which allowed for closed meetings to consider appointment or employment of public employee where individuals in question were independent contractors and not "employees." Rowen v Santa Clara Unified School Dist. (1981, 1st Dist) 121 Cal App 3d 231, 175 Cal Rptr 292.

Where school board at closed executive session elected to begin preparations for legal action to avoid threatened strike of public school teachers, it was not necessary to decide if "Sunshine law" had been violated since even if violation occurred, legal action taken pursuant to such meeting would not be invalidated thereby. Wilmington Federation of Teachers v Howell (1977, Del Super) 374 A2d 832.

Denial of injunction preventing board of education from implementing certain standards designed to evaluate performance of superintendent of schools which had been formulated in closed meetings was proper where, open meetings law excepted from its requirement those board meetings dealing with matters related to employees, and superintendent was employee within meeting of act, and where adoption of standard was not "final policy decision" within meaning of act so as to require meeting to be open to public. Goodwin v District of Columbia Board of Education (Dist Col App) 343 A2d 63.

Members-elect of boards, commissions, agencies, etc., held within scope of public meeting statute. Hough v Stembridge (Fla App) 278 So 2d 288.

Discussions and consultations of chief executive officer with legislative body relative to collective bargaining are exempt from state "sunshine" law. Winter Haven v Florida Public Employees Relations Com. (1978, Fla App D1) 358 So 2d 1374.

See Palm Beach County Classroom Teacher's Asso. v School Bd. (1982, Fla App 4th) 411 So 2d 1375, § 9.

School board's general discussion in closed session of salary report and recommendations for upcoming school year covering employees who were not within collective bargaining unit and school board's reaching in closed session tentative consensus as to personnel retention and salaries did not violate public meeting law that authorized closed sessions regarding employment matters but prohibited the taking of final action in closed sessions, where collective bargaining was in progress, board would need to have some idea of total budget requirements for compensation of personnel both within and

unit, and board subsequently held public meetings at which board's final actions were taken. People v Board of Education, 40 Ill App 3d 819, 353 NE2d 147.

Plaintiff teacher was not discharged by defendant school in violation of state open door law which precluded discharge without public meeting, where statute provided that executive session, closed to public, could be conducted when employee's status was to be discussed, although final action was required to be taken at meeting open to public, and where there was no "final action" by board, since plaintiff's employment was terminated by her own decision after she was given option of transfer or having her employment terminated. McQueeney v Glenn (1980, 1nd App) 400 NE2d 806.

Under open meeting statute providing that "'Meeting' means a gathering in person . . ., formal or informal, of a majority of the members of a governmental body . . .", one-on-one interviews with applicants for city manager with fewer than majority of council members in closed sessions did not violate open meeting statute especially since there was no intent to violate statute and council members at all times acted reasonably on their corporation counsel's advice. Telegraph Herald, Inc. v Dubuque (1980, Iowa) 297 NW2d 529.

See Fiscal Court of Jefferson County v Courier-Journal & Louisville Times Co. (1977, Ky) 554 SW2d 72, § 5.

Injunction was correct where board of education adopted resolution which declared that it would on fourth Monday of each month go into closed session, board's discussion of, inter alia, proposed merger of two teachers' associations and that employees at county supported television station might be laid off if court should vote to cut off funding did not fall into exceptions to open meetings law for collective bargaining negotiations or hearings which might lead to dismissal of individual employee. Jefferson County Board of Education v Courier-Journal (1977, Ky App) 551 SW2d 25.

University of Louisville Foundation was not public agency within open meetings law where foundation was created by resolution of another public agency rather than by action of municipal legislative body; meeting of foundation was public meeting within meaning of statute where meeting was attended by quorum of members of board of trustees of University of Louisville, admittedly a public agency; meeting of foundation to consider election of members to board of trustees was properly closed session under exception to open meetings statute relating to discussions concerning appointments of individual members. Courier-Journal & Louisville Times Co. v University of Louis-

School board did not violate statute pronouncing discussion of appointment of person to public body when it used multiple executive sessions in appointment of superintendent of public schools where superintendent was an employee and not member of a public body. Parent-Community Alliance for Quality Education, Inc. v Orleans Parish School Board (1980, La App) 385 So 2d 33, cert den (La) 386 So 2d 1379.

In action brought against parish school board and committee formed to select new school superintendent for alleged violations of open meeting law, which is to be liberally construed toward end of insuring that public business is performed openly, trial court properly held that closed executive sessions conducted under exception to open meeting law for discussion of character, professional competence, or physical or mental health of person exceeded bounds of statutory exemption where committee's actions constituted vote for elimination of certain applicants from consideration during sessions, and also properly held that closed meeting with several committee members present was not "meeting" under statute, where there was no quorum or "walking quorum" present; injunction restraining defendants from further violation of open meeting law was overly broad and would be recast to prohibit defendant from specific conduct which trial court found to have violated open meetings law. Brown v East Baton Rouge Parish School Bd. (1981, La App) 405 So 2d 1148.

School committee which considered list of applicants at public meeting for position of superintendent of schools violated open meeting law by failing to disclose names of candidates where committee made no attempt to hold executive session as permitted by statute and record did not indicate disclosure of names would violate any candidate's right of privacy. Atty. Gen. v School Committee of Northampton (1978) 375 Mass 127, 375 NE2d 1188.

School committee closed session grievance hearing relating to denial of teacher's request for sabbatical leave was not subject to open meeting law. Ghiglione v School Committee of Southbridge (1978) 376 Mass 70, 378 NE2d 984.

Meeting of school committee, conducted in executive session to discuss salaries and working conditions for certain non-union employees, came within public meeting exemption providing that closed session may be conducted to discuss strategy with respect to collective bargaining if open meeting may have detrimental effect on bargaining where there was evidence that factors involved in setting of salaries for non-union personnel could, if

gaining discussions with those groups. Atty. Gen. v School Committee of Taunton (1979) 7 Mass App 226, 386 NE2d 1295 (citing annotation).

City council closed meeting held to discuss city residency policy for city employees was subject to Open Meeting Act, and was not within statutory exception permitting closed sessions for "strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement when either negotiating party requests a closed hearing." Statute permits closed strategy sessions only when negotiation of labor agreement is in progress or about to commence, and negotiations sessions refer to actual collective bargaining sessions between employer and employees. Wexford County Prosecuting Attorney v Pranger (1978) 83 Mich App 197, 268 NW2d 344.

Open Meetings Act precluded board of education from meeting in a closed session for purpose of evaluating the performance of president of junior college and superintendent of education, where though statute permitted closed meeting for purpose of considering "dismissal, suspension or disciplining of" a public employee, there was no basis to anticipate application of dismissal, suspension, or disciplining in this matter. Ridenour v Board of Education (1981) 111 Mich App 798, 314 NW2d 760.

See Channel 10, Inc. v Independent School Dist., 298 Minn 306, 215 NW2d 814, infra § 9.

In class action brought by teacher's administrator's associations against school district, proceedings by school district which resulted in furloughing of several hundred probationary teachers and reassignment of large number of administrative employees, did not relate solely to individual personnel problems so as to fall within statutory exemption under public meeting law, but instead actions taken at proceedings were policy decisions with respect to programs and administration which should have been decided in open meeting. Mandatory injunction to restrain future violations of public meeting statute was properly denied where there was no proof that school board contemplated, planned, or even threatened to conduct any future meetings in matter violative of statute, and mandatory injunction undoing actions taken by school board was properly denied where actions constituted massive reorganization of programs and personnel of large metropolitan district and to require their undoing would create administrative and fiscal chaos within school district which would adversely affect public interest. Hudson v School Dist. (1979, Mo App) 578 SW2d 301 (citing annotation).

utilities' bargaining sessions or discussions of negotiations being held pursuant to state labor law were not required to be conducted as open meetings, although board was "public governmental body" within open meetings act, since act was not intended to apply in such manner as to destroy limited bargaining rights of public employees by exposing public employees' thought-processes, and those of employer, to public eye and ear; "hiring and firing" exception to act applied to collective bargaining and not just to discussions involving particular person. State ex rel. Board of Public Utilities v Crow (1979, Mo App) 592 SW2d 285.

See Stoneman v Tamworth School Dist. (NH) 320 A2d 657, infra § 7[b] (citing annotation)

Open meeting statute did not require that newspaper reporter be allowed to attend bargaining sessions between schoolboard and teachers' union committees, though final board approval of contract must be given in open meeting. Talbot v Concord Union School Dist., 114 NH 532, 323 A2d 912 (citing annotation).

In declaratory judgment action seeking determination whether meeting of board of education which was not held in public was in violation of public meeting statute, trial court incorrectly construed language, "personnel matters," in exemption provision of public meeting statute to mean "matters relating to discipline or hiring or dismissal of employee," since literal and commonly accepted meaning of "personnel matters" is not so limited. State v Hernandez (1976) 89 NM 698, 556 P2d 1174.

See Jones v East Windsor Regional Board of Education, 143 NJ Super 182, 362 A2d 1228, infra § 7[b].

School board did not violate open public meetings act when it called for executive session to discuss personnel matters; while 17 employees were entitled to reasonable notice of intention of board to consider their termination, plaintiffs failed to demonstrate any authority on their part to request public meeting on behalf of adversely affected employees. Rice v Union County Regional High School Board of Education (1977) 155 NJ Super 64, 382 A2d 386.

See Hounman v Pompton Lakes (1977) 155 NJ Super 129, 382 A2d 413, § 6[a].

Closed meeting at which board of education adopted resolution terminating plaintiff's probationary employment as secretary did not violate public meeting statute, despite failure of board to notify plaintiff of its intention to evaluate her performance. Cole v Woodcliff Lake Board of Education (1977) 155 NJ Super 398, 382 A2d 966.

Fire commissioners who were subject to open-meetings law and who introduced and adopted resolutions confirming creation of administrator's position at closed meeting violated open-meetings laws, and exception which allowed closed meetings for matters involving employment or appointment of specific prospective public officer or employee was not applicable where no discussion of any specific officer or employee was involved; fact that confirming resolution was adopted at subsequent public meeting in effort to correct open-meeting violation was not sufficient to cure violation since law required that such action be taken de novo and confirming action was merely perfunctory. Oughton v Board of Fire Comrs., etc. (1980) 178 NJ Super 633, 429 A2d 1096, affd in part and revd in part 178 NJ Super 565, 429 A2d 1059.

Closed meeting at which board of education voted to terminate employment of teacher was violation of statute requiring that meetings of public bodies be open to public except for executive sessions of such bodies, where board failed to comply with statute's express conditions precedent to conducting executive session, hence board's action of termination was nullity. Sauna v Lindenhurst Bd. of Education (1981) 107 Misc 2d 267, 433 NYS2d 976.

See News & Observer Publishing Co. v Interim Board of Education, 29 NC App 37, 223 SE2d 580, infra § 10.

School board properly held closed meetings for purpose of interviewing applicant for position of superintendent of schools, since Open Meetings Law permitted closed sessions for consideration of delicate matters of employment, discipline and dismissal. Godsey v Poe (1978) 36 NC App 682, 245 SE2d 522.

Where Sunshine Law allowed defendant board of education to meet in executive session closed to public when considering renewal of contracts of plaintiff nontenured teachers, further statutory provision allowing plaintiffs to demand "public hearing" did not apply to such sessions but rather pertained to hearings otherwise provided by law, and trial court properly held for defendant in plaintiffs' action alleging wrongful non-renewal. Matheny v Frontier Local Board of Education (1980) 62 Ohio St 2d 362, 16 Ohio Ops 3d 411, 405 NE2d 1041.

See Maser v Canton (1980) 62 Ohio App 2d 174, 16 Ohio Ops 3d 373, 405 NE2d 731, motion overr, § 5.

Suspension of police officer, during executive session of Board of Supervisor's meeting, for failure to comply with township ordinance requiring police officers to reside within township did not violate sunshine law where suspension was part of board's consideration of charges filed against officer and meeting was authorized by statute. Jeske v Upper Yoder Township (1979, Pa Cmwlth) 403 A2d 1010.

Meeting of city council at which evidence leading to suspension of police officer for conduct unbecoming a policeman was obtained was not required to be open to public under open-meeting laws where meeting fell within exclusion for investigations which would operate to prejudice of person's reputation. Mellin v Allentown (1981, Pa Cmwlth) 430 A2d 1048.

See Nageotte v Board of Supervisors (1982) 223 Va 259, 288 SE2d 423, § 6[b].

In action alleging wrongful termination of employment, it was held that compliance with requirements of public meeting statute was not required where court characterized special meeting, in which County Commissioners decided to dismiss plaintiff as fire chief, as execution session; statute was held inapplicable to executive sessions when convened to consider appointment, employment, or dismissal of public officer or employee. Kirk v Pierce County Fire Protection Dist. No. 21 (1976) 95 Wash 2d 769, 630 P2d 930.

Portion of regularly scheduled meeting from which members of general public were excluded and during which county commissioners met with local federal official and discussed availability and allocation of CETA funds, including possible promotion and dismissal of current CETA employees, was exempted from operation of open public meetings statute since it involved "matters affecting . . . appointment, employment, or dismissal" of public employee. Port Townsend Publishing Co. v Brown (1977) 18 Wash App 80, 567 P2d 664.

[d] Decisions with respect to particular assemblages; held required to be open to public

Council on Environmental Quality was governmental agency within meaning of federal sunshine statute requiring all meetings of government agencies to be open to public except for certain excepted types of meetings permitted to be closed on individualized and particularized basis, and thus all meetings of council were required to be open to public that involved deliberations and discussions among its members determining or resulting in joint conduct or disposition of official agency business, including meetings involving advice to President. Pacific Legal Foundation v Council on Environmental Quality (1980, App DC) 636 F2d 1259.

Nuclear Regulatory Commission failed to prove that budget meetings were lawfully closed to public, where Sunshine Act contained no express exception for budget deliberations, and where no specific items discussed at meetings were exempt from open meetings requirement so as to justify closing portions of meetings on individual and particularized basis. Common Cause v Nuclear Regulatory Com. (1982) 218 App DC 262, 674 F2d 921.

Board of education "superintendant's conferences" were "meetings" within meaning of public meetings statutes, despite facts that no formal action took place during such conferences, where members of board were given advance notice of conferences and most attended, where conferences were held regularly, and where agendas were [illegible] extensive and included many matters that were later acted upon in regular and special public meetings. Bagby v School Dist. 186 Colo 428, 528 P2d 1299.

Public meeting statute was violated by school board and, thus, collective bargaining agreement between school board and teachers' association was void, notwithstanding that agreement was adopted by school board in public meeting, where school board met in executive session with negotiating team to review progress of negotiations and to determine policy and strategy, and board decided in private to make its final offer which was accepted by teachers and subsequently adopted by school board in public meeting. Littleton Education Asso. v Arapahoe County School Dist. (Colo) 553 P2d 793.

Meeting of ten republican members of 15-member board of aldermen with other republicans who were not members of board of aldermen and one non-republican to discuss budgetary matters, was public meeting and not caucus, so that public notice, taking of minutes and recording of votes were required pursuant to state statute. Giordano v Freedom of Information Com. (1979) 36 Conn Supp 117, 413 A2d 493.

Where eleven out of thirteen members of city council who were members of Democratic Party met with city mayor, also a Democrat, to discuss status of efforts then being made in State General Assembly to repeal statutes which provided basis upon which city, through ordinance, was authorized to impose and collect wage tax, plaintiff newspaper was unlawfully denied admission to such meeting. News-Journal Co. v McLaughlin (1977, Del Ch) 377 A2d 358.

Since it was still part of legislative branch of government, county school board acting in quasi-judicial capacity violated public meeting statute when it recessed hearing to reach decision. Canney v Board of Public Instruction (Fla) 278 So 2d 260.

Resolution of citizens' planning commission, adopted at nonpublic meeting of town council, was void ab initio since commission's function reached status of board or commission that in order to act legally must comply with sunshine law. Palm Beach v Gradison (Fla) 296 So 2d 473.

Attempted ratification of invalid contract award by full county commission did not comply with Sunshine Law requirement that notice

ratification took place at breakfast meeting between contract applicants' representative and 2 members of commission acting as a committee, and the fact the meeting took place at a public inn did not make it "public" within meaning of statute. Bigelow v Howze (Fla App) 291 So 2d 645.

Indictment that alleged that elected city commissioner met with other city commissioners at meeting not open to public at all times, even though it neither alleged that city commissioner attended said nonpublic meeting as member of city commission nor that meeting was one at which "official acts" were to be taken, was sufficient to charge violation of Sunshine Law. Wollson v State (Fla App D2) 344 So2d 611.

Public meeting statute was applicable to meetings of citizens group organized by city manager to aid in selection of police chief, when city manager utilized citizens group to assist him, he created "board" under statute and he became "agency" under statute. Krause v Reno (1979, Fla App D3) 366 So 2d 1244.

Open public meetings law applied to parole revocation meetings of parole and probation commission, despite argument that constraints of that law would constitutionally invade clemency prerogatives of executive branch, since any executive commission could be created on conditions of obedience to laws not inconsistent with state constitution and, therefore, Commission was required to open to public all meetings at which official acts were to be taken, including meetings to decide issues of parole and mandatory conditional release revocation. Tunnel v Wainwright (1980, Fla App D1) 379 So 2d 148.

Ad hoc committee of staff members created to prepare 35-million-dollar budget was required to comply with public meeting statute by giving reasonable notice to public, by meeting in public, and by keeping minutes, although not a board or agency, when governing authority delegated budget responsibility to it, "nature and function of committee reached the status of a board"; while staff is normally not included within public meeting statute, staff members are included while operating on committee which has been delegated authority normally within governing body. News-Press Publishing Co. v Carlson (1982, Fla App D2) 410 So 2d 546.

Informal, unofficial caucus of nine members of 15-member city council was meeting of legislative body within meaning of statute requiring governmental bodies' meetings to be open to public where public business was deliberated and consensus on public issue was reached. People ex rel. Difanis v Barr (1980) 83 Ill 2d 191, 46 Ill Dec 678, 414 NE2d 731.

with agenda consisting of multitude of subjects, at which polls were taken on issues, minutes are made of topics discussed, and at which polls are made, except upon formal motion duly made, seconded, and carried, at open meeting, recessing, but not adjourning, in compliance with public meetings law. Reeves v Orleans Parish School Board (La) 281 So 2d 719.

School committee that was holding public hearing on charges against principal of school violated open-meeting statute by going into executive session ostensibly to consider reputation and character of superintendent of schools but in reality as sham device to enable avoidance of public hearing on charges against principal; discharge of principal that was decided in executive session was thus improper and principal would be entitled to salary from time of discharge until committee's compliance with open-meeting statute for public hearing on whether principal should be dismissed or otherwise disciplined. Puglisi v School Committee of Whitman (1981, Mass App) 414 NE2d 613.

Where, pursuant to adjournment, Board of Commissioners convened at 9:00 a.m. where minutes reflected that commissioners and county clerk were present and that subdivision was conditionally approved, and where actual decision was not made until 2:30 in afternoon by vote conducted by telephone, "meeting" took place as defined by open meeting law; due to framework in which meeting was held, i.e., by means of telephone conversation, and due to fact that one commissioner was not informed of meeting, it was not "open" meeting as required under statute. Board of Trustees v Board of County Comrs. (1980, Mont) 606 P2d 1069.

See Pokorny v Schuyler (1979) 202 Neb 334, 275 NW2d 281, § 7[b].

Meeting of town budget committee at which recommendations would be formulated for action by voters at annual town meeting was required to be open to public. Herron v Northwood (NH) 282 A2d 661 (citing annotation).

Zoning board of adjustment, as "public body" within meaning of Sunshine Law that granted public right to witness all phases of deliberation of public bodies (including discussion and evaluation of facts), was required to hold public meeting for its discussion, review, and decision on variance application. Furthermore, private session with solicitor during which board approved variance was not permitted as exception to Sunshine Law's requirement of public meetings where there was no discussion of pending or anticipated litigation or other matters covered by attorney-client privilege, and where deliberations did not deal by boards were in contravention of law and were void and required reconsideration in open public meeting. Accardi v North Wildwood, 145 NJ Super 532, 368 A2d 416.

Where county planning board originally called for meeting with members of various agencies of three municipalities within county to discuss impact of land developer's proposed housing tracts, and subsequently cancelled meeting when developer claimed right to attend it, second meeting, scheduled two weeks later, and involving similar parties was evidently intended to circumvent provisions of act, and, as nonconforming meeting, was within corrective scope of act, any action taken during meeting would be deemed nullity. Allan-Dean Corp. v Bedminster (1977) 153 NJ Super 114, 379 A2d 265.

See Caldwell v Lambrou (1978) 161 NJ Super 284, 391 A2d 590, § 7[b].

In action against fire district and commissioners, plaintiffs were entitled to injunction to insure future compliance with public meetings act where prior meetings involving annual budget and other fire district matters had been held in private without giving public notice of meeting. Oughton v Board of Fire Comrs. (1979) 168 NJ Super 434, 403 A2d 69.

Two reporters were unlawfully excluded from meeting of members of city council for regularly scheduled "work session" at which were discussed any topics of interest and which were scheduled four days prior to each regular council meeting. Portion of meeting of zoning board wherein members collectively weigh evidence taken during public hearing, apply law and reach conclusion are covered by "judicial or quasi-judicial proceedings" exclusion within "Sunshine Law" statute, and therefore public may be excluded; however, portion of proceedings where zoning board's decisions are announced are non-judicial and must be open to public. Orange County Publications, Div. of Ottaway Newspapers, Inc. v Council of Newburgh (1978) 60 App Div 2d 409, 401 NYS2d 84.

Petition stated cause of action under public meetings statute where it was alleged that at closed session meeting, mayor, committee from city council and school board discussed possible sale of junior high school and contemplated applications for funds under Public Works Act, that quorum of board was present and that subjects of meeting were such that they would ordinarily arise at public meeting. Oneonta Star Div. of Ottaway Newspapers, Inc. v Board of Trustees (1979, 3d Dept) 66 App Div 2d 51, 412 NYS2d 927.

Where Democratic majority of members of city council held weekly meetings to discuss within scope of public meeting statute and that press, public, and sole Republican of council could not be excluded. While Democratic members did not possess power to bind entire council, court concluded that it was unnecessary that such entity have binding authority in order to consider a public body within meaning of public meeting statute, since its determinations affected public and since legislature intended to affect entire decision-making process, not just formal act of voting or execution of official document, in adopting public meeting statute; furthermore, fact that Democratic members of Council described themselves as "political majority" instead of quorum was deemed to raise form over substance, violating spirit of Legislative enactment, and was rejected as untrue, since it was undisputed that quorum was present at three meetings in which petitioners sought admission. Similarly, contention that meetings in question were "deliberations of political caucuses" in that phrase "political caucuses" should be interpreted to apply to political majority of legislative body regardless of what is discussed, thereby exempting meeting of Democratic members of city council from compliance with public meeting statute was rejected by court as too expansive definition in light of legislative intent. Scolnino v Ryan (1981, 4th Dept) 81 App Div 2d 475, 440 NYS2d 795.

City council's informal discussions of city business without intent to transact any such business were not "meetings" governed by Public Officers Law that required every meeting of public body to be open to general public. However, although city's board of zoning appeals could conduct deliberations in private session, that part of its proceedings in which its decision was announced and vote of individual members taken was required to be open to public. Orange County Publications Div. of Ottaway Newspapers, Inc. v Council of City of Newburgh, 89 Misc 2d 847, 393 NYS2d 298, mod (2d Dept) 60 App Div 2d 409, 401 NYS2d 84, affd 45 NY2d 947, 411 NYS2d 564, 383 NE2d 1157.

"Planning sessions" held by board of education wherein oral reports were received from employees as well as from prospective contractors were not "executive sessions" or "informal gatherings" and should have been open to public under open meetings law. Kamlet v Board of Education (1977) 91 Misc 2d 1105, 399 NYS2d 366.

Public meeting statute was applicable to members of majority political party of city council who traditionally met in closed sessions to discuss matters that were to come before those bodies at public meetings despite conten-

entitled to exemption from requirements of statute, since exemption for "political caucus" refers to those meetings at which political and not public business is discussed, and term "conducting public business" within meaning of open meetings law includes discussions of any topics that may come before bodies at regular public meeting. City manager and city clerk had mandatory duty of notifying public and minority member of city council of any and all meetings held for purpose of conducting any public business and had to permit public and minority council member to attend those meetings. Sciolino v Ryan (1980) 103 Misc 2d 1021, 431 NYS2d 664. ← Yeah!

Board of township trustees' "special session" for which no notice was given and which was held at private residence of a township official did not qualify as public meeting open to the public. Crist v True, 39 Ohio App 2d 11, 68 Ohio Ops 2d 149, 314 NE2d 186.

Public meeting statute would be applicable to public service commission hearings where two or more commissioners convene and conduct hearing, but consultations with staff, deliberations or process of making decision would not constitute meeting within statute since quorum is not required at any stage and since convening of governing body is not involved at any stage. Adjudicatory sessions would be exempt under statute since they are quasi judicial proceedings involving notice, presentation of evidence, making of record, examination of witnesses under oath and exercise of subpoena power. Appalachian Power Co. v Public Services Com. (1979, W Va) 253 SE2d 377.

[c] —Held not required to be open to public

Federal Freedom of Information Act exemption pertaining to intragency and intragency memoranda and letters was applicable to documents voluntarily disclosed by agency to members of advisory committee and, thus, advisory committee properly held closed meeting pursuant to Federal Advisory Committee Act, where advisory committee chairman determined that discussions concerned intragency memorandum. Aviation Consumer Action Project v Washburn, 175 App DC 273, 535 F2d 101.

Meeting of the Board of Governors of the United States Postal Service, at which was discussed proposed postal rate commission changes in general revenue requirements which could have given rise to litigation was properly closed to the public, where such meeting fell within language of statutory exemption of "the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in § 554 of this title or otherwise involving a determination on the record after opportunity for a hearing" (5

For purposes of sunshine act, in camera hearings of Atomic Safety and Licensing Board to review private report on steam supply system to nuclear reactor, during otherwise open construction permit adjudicatory proceedings, did not violate section requiring deliberations of collegial body heading agency, the NRC in this case, to be open to public where subdivision of agency, the ASLB, did not have two or more NRC members sitting on it; sunshine act requires "meetings" of agency subdivision with two or more agency heads, which is authorized to take action on behalf of agency, to be open to public. Hunt v Nuclear Regulatory Com. (1979, ND Okla) 468 F Supp 817, affd (1979, CA10 Okla) 611 F2d 332, cert den (US) 63 L Ed 2d 322, 100 S Ct 1084.

Closed meeting of Board of Governors of Federal Reserve System was not violation of federal Sunshine Act (5 USCS § 552b), which requires that meetings of executive bodies of federal government be open to public, since Board properly invoked express exemptions from Act's requirements where meeting involved discussion of confidential information concerning financial institutions and Board's strategy in legal proceedings as well as general policy matters, and separation of meeting into closed and open sessions would not have been reasonably possible. However, Act's requirement that notice of meeting be given at earliest practicable time was violated where Board delayed giving notice until after meeting occurred. A. G. Becker, Inc. v Board of Governors of Federal Reserve System (1980, DC Dist Col) 502 F Supp 378.

School board did not violate Open Meeting Law in excluding public from meetings of textbook evaluation committee whose membership was not composed of and whose recommendations were not binding on school board. Washington School District No. 6 v Superior Court of Maricopa County (Ariz) 541 P2d 1137.

City council did not violate public meetings law where, at conclusion of public hearing on application for rezoning and after all evidence had been presented, council retired into fact-finding session returned to public meeting and by motion containing findings and conclusions denied application unanimously. There was no indication that council did anything other than deliberate upon evidence presented at public hearing, council took no evidence at closed session, nor did council act upon application there, all evidence had been presented at public hearing, and motion denying application was adopted at reconvened public meeting. Isaacsen v Wheat Ridge (1979, Colo App) 604 P2d 691.

Public meeting statute did not apply to executive action at which, historically, only voting members played roles and judicial atmosphere that assured freedom of expression to each deciding official encouraged free discussion which was essential to frank and impartial deliberation. Dupont Circle Citizens Asso. v District of Columbia Board of Zoning Adjustment (Dist Col App) 364 A2d 610.

College president's periodic private meetings with group of college employees designated by president as representatives of college career employees for purpose of discussing various problems and suggestions relating to employees' working conditions did not violate public meeting law applicable to boards and commissions, notwithstanding that president may have carried out directions, orders and policies of a board, where, by definition, president was neither "board" nor "commission," meetings were fact-finding expeditions by president, and designated group of employees was far too remote in decision-making process to have been capable of making policy or decisions anywhere near point just short of ceremonial acceptance by board. Bennett v Warden (Fla App D2) 333 So 2d 97.

Not so as all.

Administrative committee of state water resource board did not constitute that board's governing body and, thus, the administrative committee was not required by public meeting statute to conduct its business by public ing, where administrative committee d have authority to make decisions for or ... commendations to the board and administrative committee was not entrusted with formation of board's public policies. Idaho Water Resource Board v Kramer, 97 Idaho 535, 548 P2d 35.

Under statute requiring open meetings for public bodies that receive or expend tax funds, City Civil Service Commission whose members received p... diem did not violate open meeting law where per diem did not constitute type of tax receipt and disbursements contemplated under statute, even if it were given radically liberal construction. Eastwold v Garsaud (1980, La App) 387 So 2d 682, cert den (La) 393 So 2d 746.

Labor relations commission properly found that city was refusing to bargain in good faith where city held public collective bargaining sessions on basis that executive sessions would violate open meeting law; open meeting law did not require negotiations to be conducted in public. Board of Selectmen v Labor Relations Com. (1979, Mass App) 1979 Adv Sheets 645, 388 NE2d 302.

State board of education did not violate open-meetings law by failing to provide school board with opportunity to respond to report of officer recommending that proposed transfer of with fair and impartial hearing in accordance with full panoply of procedural safeguards guaranteed by statute; and state board should not allow parties or nonparties to address it concerning merits of contested case at public meeting. Board of Education v Michigan State Bd. of Education (1981) 104 Mich App 569, 305 NW2d 541.

Public meeting statute was not violated where, during recess of public meeting called by board of county commissioners, certain commissioners and others present retired to adjoining room, door to which was open at all times with no one being excluded, where informal conversation was had by commissioners and others with reference to agenda item, but where no formal action or vote was taken until board of commissioners reconvened in regular session following recess. Copple v Lincoln (1979) 202 Neb 152, 274 NW2d 520.

Where mayor and council of borough held "open caucus meeting" to which members of rent control board were invited, newspaper reporter was properly excluded during discussion of possible rent control ordinance amendment. Woodcock v Calabrese (1977) 148 NJ Super 526, 372 A2d 1178.

Meeting between individuals who comprised effective majority of sewerage authority and officials of department of environmental protection to discuss terms of administrative order was not type of meeting within purview of statute. Woodbury Daily Times Co. v Gloucester County Sewerage Authority (1977) 151 NJ Super 160, 376 A2d 607.

Meeting of majority of county sewage authority with representatives of Department of Environmental Protection to discuss disposal of sludge was not "public body" within meaning of public meetings statute where purpose of meeting was to inform authority members and not to take official action. Woodbury Daily Times Co. v Gloucester County Sewerage Authority (1978) 150 NJ Super 448, 386 A2d 445.

See Orange County Publications, Div. of Ottaway Newspapers, Inc. v Council of Newburgh (1978) 60 App Div 2d 409, 401 NYS2d 84, § 6[d].

Board of education committee meetings were not subject to public meeting statute; committees were not "public bodies" since quorum was not required to transact business, and committees did not transact public business since they were not given any authority to make final decisions, but merely made recommendations to entire board. Daily Gazette Co. v North Colonie Board of Education (1979, 3d Dept) 67 App Div 2d 803, 412 NYS2d 494.

See Orange County Publications Div. of Ottaway Newspapers, Inc. v Council of City of

supra § 6[d].

Where meeting of town board was conducted for purpose of reaching decision based on evidence submitted at previous public hearing and actual vote was taken and announced at subsequent public meeting, meeting for such deliberation was exempt from Open Meetings Law requirements. Blick v Webster (1980) 104 Misc 2d 852, 429 NYS2d 811.

In action challenging closing of institute for indigent and sale of its premises, involving institute that had been established in accordance with testamentary trust of private donor, it was held that trustee meetings of May 14 and June 16, called to consider closing of institute and sale of its premises, were not subject to public meeting statute inasmuch as trustees did not come within definition of public body as required in order to render compliance with public meeting statute mandatory, notwithstanding fact that trustees were appointed by public officials. Moreover, public meeting statute specified that court had discretion not to annul any determination taken at meeting which is later deemed to be in violation of statute. Borghet v Purrell (1981) 109 Misc 2d 531, 440 NYS2d 480.

Collective bargaining negotiations between City Manager and Firefighters Local did not fall within Oklahoma Open Meeting Law, where reference to "public body" would be considered to be made up of more than one individual person and "meetings" referred to in Law encompassed meetings wherein a majority of members of public body met personally, and where City Manager was subordinate to City Commissioners and had no authority, either express or de facto, to make binding agreements. International Asso. of Firefighters v Thorpe (1981, Okla) 632 P2d 408.

Statute providing for making of public proceedings open to public did not require that proceedings of state board of medical examiners to determine whether physician's license to practice medicine should be revoked be open to public where statute did not apply to deliberations of state agencies conducting hearings on contested case in accordance with provisions of Administrative Procedures Act or to any judicial proceedings. Spray v Board of Medical Examiners (1981) 51 Or App 773, 627 P2d 25.

School district was not agency as defined in and for purposes of Sunshine Law, which defined agency as school board or school governing body. Paterra v Charleroi Area School District (Pa Cmwlth) 349 A2d 813.

School board's discussion of curtailment of school programs and closing of some schools (in accordance with proposal adopted by board at prior public meeting) and its discussion of with teacher's union, and scheduling of classes was not formal action within purview of Sunshine Law where no official policy had been set and no decision had been reached to any matter, and the extent of action taken was discussion as to whether or not matters should be placed upon agenda of public board meeting. Judge v Pocius, 28 Pa Cmwlth 139, 367 A2d 788.

Preliminary to public meeting and final action of commissioners' court to adopt budget, conferences and discussions between district judge and commissioners at which they advise one another but commissioners' court takes no conclusive action do not come within mandatory requirements of Open Meeting Law. Commissioners' Court of Hays County v District Judge, 22nd Judicial Dist. (Tex Civ App) 596 SW2d 630, error ref n r e.

In action against State Board of Optometry for violations of Texas Open Meetings Act, executive session called for purpose of seeking attorney's advice with respect to pending litigation was private consultation between governmental body and its attorney, not an emergency session or an item of "urgent public necessity" requiring two-hour premeeting notice, and Board was not required to meet written notice requirements of open emergency and nonemergency meetings. Rogers v State Board of Optometry (1981, Tex Civ App 11th Dist) 619 SW2d 603.

See Appalachian Power Co. v Public Services Com. (1979, W Va) 253 SE2d 377, § 6[d].

[f] Sufficiency of compliance

Post-termination hearing granted to discharged fireman by city personnel board was subject to open meeting law and substantially complied therewith where meeting was held publicly after notice, and final decision was announced in detailed certificate of findings and recommendations, signed by each member of board who heard fireman's case. Flagstaff v Bleeker (1979, App) 123 Ariz 436, 600 P2d 49.

Agreement entered into between school district and private corporation providing for performance of research and development work and services for a fee did not violate open meeting provisions of statute, California School Employees Asso. v Sunnyvale Elementary School Dist., 36 Cal App 3d 46, 111 Cal Rptr 433.

Banking board's denial of charter was invalid for failure to comply with public meeting law, notwithstanding that notice was mailed to persons on "Sunshine list" and copy of notice was available for public inspection upon request in office of division of banking, where board took no overt action to give public notice of meetings at which vote was taken on application and

Banking Board (Colo App) 552 P2d 32.

"Sunshine Law" did not require that all meetings between public utility commission and its staff be made open to the public; where there was no showing that commission informally adopted staff proposal on rate matter prior to public meeting, law was satisfied when commissioners apparently reached mutual decision on matter at public hearing. Occidental Chemical Co. v Mayo (1977, Fla) 351 So 2d 336.

See Bigelow v Howze (Fla App) 291 So 2d 645, supra § 6[d].

Fact that city planning commission meetings, because of other activities being conducted in council meeting room at city hall, were held in small crowded office of mayor did not entitle citizen to have certain actions of planning commission declared void as violation of Sunshine Law, absent evidence that any person was excluded from or denied admission to meetings. Harzas v Adams, 238 Ga 186, 232 SE2d 61.

Georgia "sunshine law" does not require notice to the public of governmental meetings; rather, it merely requires meetings to be open to the public. No violation of "sunshine law" occurred where, though meetings of county commissioners were usually held in county courthouse, commissioners were empowered to convene meetings in other places and meeting objected to, which was held in one commissioner's home,, was hurriedly called to avoid loss of state funds and there was no evidence that meeting in question was secret. Dozier v Norris (1978) 241 Ga 230, 244 SE2d 853.

In action against city challenging validity of proposed public expenditures for new city hall, trial court erred in granting summary judgment for city on issue of city's compliance with sunshine law where genuine issue of material fact existed as to whether city complied with requirement that notice of meeting be posted 48 hours in advance. Blinn v Marion (1979, Ind App) 390 NE2d 1066.

See Reed v Richmond (1979, Ky App) 582 SW2d 651, § 7[b].

City council was in compliance with Sunshine Law where it posted advance written notice of workshop meetings on city hall bulletin board, together with subject matter of meeting, and where council, in accordance with its earlier notice, published in two newspapers, in compliance with Sunshine Law, that it would use this method of informing public of these meetings. Fact that meetings were "workshop" rather than regular meetings did not require specific invitation to public to attend in order to constitute requisite statutory notice. New Carrollton v Rogers (1980, Md) 410 A2d 1070.

See Sullivan v Credit River Township (Minn) 217 NW2d 502, infra § 7[a].

approval of contract with architectual firm, did not violate public meeting statute where notice of meeting was posted at high school, court house, and post office two days before meeting, where notice stated that agenda for meeting could be obtained at office of superintendent, and where agenda included notice of "discussion" with representative of architectual firm and stated that such discussion "should result in determining whether we want this company or not," since notice did inform public that agreement with architect was to be discussed and possibly entered into although language was not model of clarity. Banks v Board of Education (1979) 202 Neb 717, 277 NW2d 76.

City complied with agenda requirements of open meeting law where ordinance creating water district was scheduled and noted on agenda at regular session of city council, then delayed for consideration one week, duly scheduled and noted on agenda for later meeting. First Assembly of God Church v Scottsbluff (1979) 203 Neb 452, 279 NW2d 126.

Municipality did not violate open-meeting law by failing to give adequate notice to citizens of meeting at which salary increase ordinance raising salaries of city officials was passed, where municipality published notice of its schedule of regular meetings, ordinance had been previously published and posted, and ordinance was printed on agenda of meeting at which it was passed even though its placement on agenda was done at last minute. Donato v Gibson (1981) 178 NJ Super 163, 428 A2d 536.

In action challenge validity of "special reasons variance" granted by board of adjustment, plaintiff's argument that deliberations during what board erroneously called "executive session" violated open meeting law failed because public was not barred from meeting room, those who wished to hear moved closer to conference table, and, as required, detailed minutes were kept which were more than adequate and provided a "detailed recount of the deliberations." Hudanich v Borough Council of Avalon (1981) 183 NJ Super 244, 443 A2d 777.

With regard to meeting in city council chamber, wherein overflow crowd in attendance required that some members of public be excluded from chambers, petitioners contended that language in public meetings statute requiring that " . . . all persons so desiring shall be permitted to attend and listen . . . " had been violated irrespective of size of crowd and limitations of meeting hall, inasmuch as all members of public had not been allowed in chambers or within presence of council members; however, court held that phrase to "attend and listen" was better interpreted to require that

excluded or arbitrarily refused admittance, and that meeting could not be "closed" to public; therefore, meeting in city council chamber was deemed to have met requirements of public meeting statute inasmuch as meeting was held in hall designed to accomodate large number of spectators in which, when number of spectators exceeded capacity of hall, efforts were made to allow those who could not gain entrance to listen to proceedings by other means, i.e. outspeaker and radio broadcasts. Gutierrez v Albuquerque (1981) 96 NM 398, 631 P2d 304.

Failure of county executive officer to hold public hearing did not render reapportionment plan invalid where public hearing by county legislature satisfied statutory requirements and where violation of open-meeting law, which had led to invalidation of earlier version of plan, was cured by two subsequent public meetings held by county legislature. Wolf v Erie County Legislature (1981) 4th Dept) 83 App Div 2d 792, 440 NYS2d 146, affd 55 NY2d 1030, 442 NYS2d 498, 425 NE2d 886.

Where board of education voted in executive session whether to renew teaching contract and then publicly announced with all board members present that vote was 5-0 in favor of nonrenewal, public announcement of vote satisfied requirement of open meeting statute that "vote of each member be publicly cast" since announcement made it clear as to how each board member voted. Grayhill v Oklahoma State Board of Education (1978, Okla) 585 P2d 1358.

Notice provision of open meetings law required only substantial compliance; therefore, requirement that notice be posted for at least 72 hours prior to day of meeting was substantially complied with where wide segment of public was informed by news media of meeting more than 72 hours before day of meeting, and notices were posted for approximately 15 hours before day of meeting and were posted 31 hours before meeting commenced, requirement that notice state place of proposed meeting was substantially complied with where, although notice stated meeting place was to be "administration building", and school district owned no building known as "administration building", two principals' offices and superintendent's offices were maintained in high school, and district activities were usually conducted in those offices, and any person desiring to attend a meeting would have gone to only building of any significance maintained by school district in town in which meeting was held. Steizer v Huddleston (Tex Civ App) 526 SW2d 710.

Reapproval of school superintendent's administrative reorganization proposal, previously void, Spokane Education Asso. v Barnes, 83 Wash 2d 366, 517 P2d 1362.

In action by owners of properties within city's improvement district attacking assessments against their properties, trial court correctly found that no violation of public meetings law occurred where members of city council, who arrived half an hour before scheduled meeting, informally discussed assessment, but no vote was taken nor collective decision, commitment, or promise was made or reached during informal conversations. Emery v Rawlins (1979, Wyo) 596 P2d 675.

§ 7 [38 ALR3d 1086]

[a] View that action is not invalidated

Board of education's failure to read aloud names of teachers who were not being offered contracts did not violate open meeting law where list of teachers being offered contracts, with marks appearing next to names of teachers not being offered contracts, was attached to minutes of meeting available to public and board explained markings on list during meeting. Board technically violated open meeting law when it refused to allow certain persons in attendance to tape record the proceedings, even though state law provided that any public meeting could be recorded, but technical violation having no demonstrated prejudicial effect on complaining party would not nullify all business conducted at public meetings so long as meeting complies with the spirit of the law. Karol v Board of Education Trustees (1979) 122 Ariz 95, 593 P2d 649.

See Wilmington Federation of Teachers v Howell (1977, Del Super) 371 A2d 832, § 6[c].

Open Meetings Act does not mandate invalidity of public action allegedly taken during closed proceeding, where two county boards of school trustees adjourned to deliberate in private after taking of evidence and then returned to open forum to vote, orders issued by county boards and arising from such meetings were not ipso facto invalid. Board of Education v County Board of School Trustees (1978) 60 Ill App 3d 415, 17 Ill Dec 725, 376 NE2d 1054.

Park board's determination to annex land was not invalid, even though park district failed to publish or post public notice of its regular meetings for calendar and fiscal years in which annexation meeting occurred, as required by public meeting statute, since statute did not invalidate official actions taken at proceedings held in manner violative of statute. Re Byron Park Dist. (1978) 67 Ill App 3d 61, 24 Ill Dec 300, 385 NE2d 67.

Omission to post notice of meeting on door of meeting place, contrary to requirement of otherwise regularly enacted in all respects. Ciacco v Elgin (1980) 85 Ill App 3d 507, 40 Ill Dec 877, 407 NE2d 108.

Actions taken at closed session by public agencies subject to public meeting statute are not necessarily null and void; unsupported claim that state licensing board held secret meetings did not vitiate license revocation of pharmacists who refused or were unable to account for enormous purchases and distribution of prescription drugs. Betts v Department of Registration & Education (1981) 103 Ill App 3d 654, 59 Ill Dec 355, 431 NE2d 1112.

Contracts for teachers and administrators were not voidable even if open meetings law had been violated when contracts were approved by school board. Anti-Administration Asso. v North Fayette County Community School Dist. (Iowa) 206 NW2d 723.

School board that discharged superintendent did not violate open-meetings law where two, and on one occasion three, board members had several discussions, prior to public meeting at which vote to consider termination was taken, about possibility of discharge and retention of outside legal counsel to accomplish it; legislature extended coverage of law only to gatherings of majority of members of governmental body so that any gathering of two members of five-member board would not be meeting within meaning of statute; although court noted possibility that the one meeting among three members may have constituted a violation, it concluded that meeting at which board voted to consider termination was open to public should not be voided simply because on prior occasion there was possible violation of open-meetings law. Wedergren v Board of Directors (1981, Iowa) 307 NW2d 12.

In action against township alleging secret ballot procedure in violation of open meetings act, vote of township board, which eliminated 21 applicants from consideration for three liquor licenses through a system of elimination ballots where only the result of each tally was revealed, was not invalidated where there were no allegations of willful or intentional violations of act or of impairment of public's rights, and where record indicated that board acted in good faith in utilizing voting procedure. Esperance v Chesterfield Township (1979) 89 Mich App 456, 280 NW2d 559.

Although it may have been technical violation of state open meetings act for panel, convened to hear appeal from decision denying certificate of need for health care facility, to retire for 25 to 45 minutes of deliberation with only director of health planning and an assistant attorney general present, action of panel in voting unanimously to grant certificate of conducted as all-day public hearing, no secret ballot was taken during closed session, as each member's vote was public record, and deliberative session in question could have been an entirely lawful "executive meeting" under provision of act had formal motion been made. Olathe Hospital Foundation, Inc. v Extendicare Inc., 217 Kan 546, 539 P2d 1.

Town board meeting decision approving site for sanitary landfill was not validated by fact that door of meeting room was unlocked, but where directory rather than mandatory statute impliedly requiring timely notice to public failed to specify requirement that actions taken at nonpublic meetings shall be invalid, and where over $10,000 had been spent by landowner in reliance on board's approval, board was estopped to rescind its approval. Sullivan v Credit River Township (Minn) 217 NW2d 502.

In petition by taxpayer for declaratory judgment asking that ordinance of city increasing salary of its mayor be declared void in that no notice of special meeting of Board of Aldermen was given to general public, as required by Sunshine Law, trial court properly denied relief where, although without question there was violation of Sunshine Law, question of whether ordinance adopted increasing mayor's duties and his salary in absence of open meeting should be declared void was one which had never been decided in courts, and was matter for determination by legislators. Hawkins v Fayette (1980, Mo App) 604 SW2d 716.

Zoning board's failure to comply with openness of meeting ordinance did not vitiate granting of variance for dog racetrack. Carter v Nashua (NH) 308 A2d 847.

Although informal luncheon gathering of board of supervisors, at which staff reports concerning proposed budget were given, constituted meeting within public meeting statute, or in absence of showing of sufficient prejudice or good cause, isolated technical violation did not warrant invalidating entire budget adopted by board. Kessel v D'Amato (1979) 97 Misc 2d 675, 412 NYS2d 303, mod (2d Dept) 72 App Div 2d 790, 421 NYS2d 614.

Although property owners' attorney and traffic engineer were barred from meeting between city council and city traffic engineer at which ordinance authorizing taking of property was discussed, voiding of ordinance was not required where property owners' attorney later had opportunity to question engineer in public before council. Perez v Pawtucket Redevelopment Agency (RI) 302 A2d 785.

See Nageotte v Board of Supervisors (1982) 293 Va 259, 288 SE2d 423, § 6[b].

[b] View that action is voidable

In action by railroads and environmental

tion of dam replacement locks, court erred in not requiring Army Corps of Engineers to hold nonadjudicatory public meeting to discuss implementation of project. When an agency has clearly violated its own public meeting regulations, there should be a presumption in favor of order requiring a meeting. Izaak Walton League v Marsh (1981) 210 App DC 233, 655 F2d 346, cert den (US) 70 L Ed 2d 630, 102 S Ct 657.

See Littleton Education Asso. v Arapahoe County School Dist. (Colo) 553 P2d 793, supra § 6[d].

See Bigelow v Howze (Fla App) 291 So 2d 645, supra § 6[d].

Unannounced gathering of members of university faculty and Public Employee Relations Board held prior to scheduled meeting was in violation of "open meeting law" and adoption of motion at subsequent meeting without further discussion was technical violation which, standing alone, might not have required returning matter to board for discussion again, but such return to board was required where board members failed to acquaint themselves fully with record under facts of case and failed to serve parties with copy of hearing officer's report. Re University of Kansas Faculty (1978) 2 Kan App 2d 116, 581 P2d 817.

Comprehensive zoning plan adoption or amendment is invalid without compliance with statutory requirement of public hearing. Hines v Punchback-Halloran Volkswagen, Inc. (Ky) 513 SW2d 492.

Disciplinary action taken by hearing board against fireman was voidable as violative of open meeting law where fireman orally requested that meeting be held in public but request was denied, and where closed session was held without giving public notice of general nature of business to be conducted in closed session and reason for secrecy, and without adopting motion for closed session in open, public session. Reed v Richmond (1979, Ky App) 582 SW2d 651.

See Puglisi v School Committee of Whitman (1981, Mass App) 414 NE2d 613, § 6[d].

Amendments to zoning laws passed at meeting of zoning board of which public was not properly notified would be invalid in view of Public Board Meetings Act's requirement that public boards give notice of their meetings to provide members of public with opportunity to be present so that they can observe manner in which such boards transact public business. Haven v Troy, 39 Mich App 219, 197 NW2d 496.

Special meetings of city council, relating to purchase of land for improvement of sanitary sewage disposal system, were invalid on ground public meeting statute was violated

when notice of meeting was not met by posting notice in three public places at 10 p.m. on day preceding meeting and where deliberations of city council as to whether offer to purchase real estate should be made must take place in open meeting and not in closed executive session. Council properly cured defect in meetings by authorizing purchase of land at subsequent meeting which complied with all statutory requirements. Pokorny v Schuyler (1979) 202 Neb 334, 275 NW2d 281.

School board meeting for which no public notice was given was invalid where result of discussion concerning renewal of contract of controversial elementary school teaching principal was decision not to renew contract, which amounted to "dismissal" within meaning of statute requiring open meeting on matter affecting employment status of public employees. Stoneman v Unsworth School Dist. (NH) 320 A2d 657 (citing annotation).

See Polillo v Deane (1977) 74 NJ 562, 379 A2d 211, § 5.

Notwithstanding provision in public meeting law that actions were not voidable solely for failure to conform with any notice requirement, action of school board in filling board vacancy was void for failure to comply with 48-hour notice requirement of publication in two newspapers, where notice was delivered to two newspapers which would not publish an issue until after school board meeting and third newspaper published notice on same day as meeting. Executive session for purpose of interviewing applicants following adjournment of open meeting was not in violation of public meeting law, notwithstanding that record indicated that interviews did not relate to any particular fact situation that would invade individual privacy of school board applicants, where it was assumed that resumes submitted by applicants were available for review by board members and, thus, question of individual privacy could have arisen. School board did not violate public meeting law by failing to have any public discussion by any board member regarding filling board vacancy, where no evidence existed that any discussions took place in closed session. Jones v East Windsor Regional Board of Education, 143 NJ Super 182, 362 A2d 1228.

See Accaro, v North Wildwood, 145 NJ Super 532, 368 A2d 416 supra § 6[d].

See Allan-Deane Corp. v Bedminster (1977) 153 NJ Super 114, 379 A2d 265, § 6[d].

Action of township board in granting variance for erection of residence violated open public meeting statute and was void where portion of final meeting, at which variance was granted, was conducted in private session, even though merits of proposed variance were never privilege and anticipated litigation exception were not applicable. Caldwell v Lambron (1978) 161 NJ Super 284, 391 A2d 590.

School board violated open meetings act by failing to give 48 hour notice of meeting to terminate teachers where plans for budget reduction and termination lists were fully prepared prior to city council meeting at which board actions were to be approved, and where board had sufficient resources and knowledge in advance to make provision for meeting in full compliance with statute, without increasing costs or changing program modification plan. Prerequisites for emergency meeting did not exist and compliance notice provision was not excused. Jenkins v Newark Board of Education (1979) 166 NJ Super 357, 399 A2d 1034, affd 166 NJ Super 300, 399 A2d 1005.

See White v Battaglia (1980, 4th Dept) 79 App Div 2d 880, 434 NYS2d 537, § 10.

Closed meetings of rent board which resulted in issuance of rent guideline order for rent stabilized apartments violated public meeting statute since such meetings were neither announced to news media nor open to public; rent guideline order issued by board was invalid and implementation of order would be enjoined. Rent Stabilization Asso. v Rent Guidelines Board (1978) 98 Misc 2d 312, 413 NYS2d 950.

See Sanna v Lindenhurst Bd. of Education (1981) 107 Misc 2d 267, 433 NYS2d 976, § 6[c].

See Burgher v Purcell (1981) 109 Misc 2d 531, 440 NYS2d 480, § 6[c].

Dismissal of plaintiff's action requesting injunction to restrain school district from denying teaching contract and from seeking replacement for position held by teacher was error where, although school board voted not to renew teacher's contract at valid open meeting, all discussions concerning the evaluation of the teacher and reasons for contemplated nonrenewal of contract were conducted at prior invalid executive session, and where school district had clearly attempted to evade requirements of open meetings act by holding discussion at illegal meeting. Peters v Bowman Public School District No. 1 (ND) 231 NW2d 817.

See Berry v Board of Governors of Registered Dentists (1980, Okla) 611 P2d 628, § 6[b].

Employment contract, which was approved during special board meeting, was invalid where notice given to public was likely to mislead average reader and was willful violation of Open Meeting Act, which nullified action taken. Haworth Bd. of Education v Havens (1981, Okla App) 637 P2d 902.

See Appeal of Emmanuel Baptist Church (Pa Cmwlth) 361 A2d 536, supra § 5.

of resolution authorizing per capita tax constituted formal action of agency within meaning of Sunshine Law; thus where board did not attempt to give mandatory public notice, since news articles in two local newspapers failed to satisfy requirement, trial court properly held resolution to be invalid in action by landlords personally responsible under resolution for tenants' tax payments. Bensalem Township School Dist. v Gigliotti Corp. (1980, Pa Cmwlth) 415 A2d 123.

Teachers' strike was not "emergency," within meaning of Open Public Meetings Act, and action seeking temporary injunction against strike was invalid where authorization for action was passed at school district meeting held in violation of 24-hour notice requirement for nonemergency meetings. Mead School Dist. v Mead Education Asso. (MEA) 85 Wash 2d 140, 530 P2d 302.

[c] Effect of subsequent ratification on action otherwise voidable

In action by taxpayers challenging validity of contract made by school district in violation of open meeting laws, in which district responded that violation of open meeting laws was only technical and had no prejudicial effect in that it was cured when school board ratified its actions at later open meeting, contract was void for violation of open meeting laws where there was evidence that school board's decision to hire educational consultant was made during closed meeting, and where evidence that board members intended to pass resolution approving contract at open meeting did not make violation technical. Ahuert v Sunnyside Unified School Dist. (1980, App) 126 Ariz 473, 616 P2d 933.

Minority of town council members failed to state cause of action where, although plaintiffs alleged majority of town council had conducted closed meeting that resulted in dismissal of town manager in violation of open meeting law, plaintiffs' complaint also alleged that prior action was subsequently ratified at meeting complying with law. Valencia v Cota (1980, App) 126 Ariz 555, 617 P2d 63.

Readoption by livestock board, at public meeting, of plan to dismiss chief inspector cured "open meeting" defect of previous executive session, wherein resolution to dismiss was originally passed. McLeod v Chilton (1981, App) 132 Ariz 9, 643 P2d 712, cert den (US) 74 L Ed 2d 141, 103 S Ct 172.

Although sunshine law was technically violated when superintendent-elect and board members met privately on at least two occasions and discussed removal of former director of administration and abolition of his position, subsequent board action at public meeting

rector to elementary school position was not void where board took independent, final action in voting to abolish position by holding public meeting, permitting discussions and taking voice vote. Tolar v School Bd (1981, Fla) 398 So 2d 427.

See Houman v Pompton Lakes (1977) 155 NJ Super 129, 382 A2d 413, § 6[a].

Rate increase by river authority at meeting which did not comply with notice provisions of open meeting law insofar as subject of rates was concerned, was invalid, and subsequent ratification, attempted at meeting which properly complied with notice requirements was ineffective where, purported ratification could not be given retrospective operation to increase rates for power sold before meeting giving rise to ratification. Lower Colorado River Authority v City of San Marcos (Tex) 523 SW2d 641.

§ 8 [38 ALR3d 1090]

Where City Charter provided "all meetings of . . . all boards . . . shall be open to the public", "Minutes of all such meetings shall be kept and . . . shall constitute public records", and "all public records . . . shall be open to inspection . . .", newspaper reporter, who was citizen of city had standing to enjoin violation of statute and closed meeting of Equal Employment Opportunity Board to consider allegation of employment discrimination, at which no minutes were kept, was held in violation of Charter and if matter was to be pursued, deliberation would have to be held again and Board would have to take minutes and make them available to public. Abilene v Shackelford (1979, Tex) 585 SW2d 665.

See Cameron County Good Gov. League v Ramon (1981, Tex Civ App 9th Dist) 619 SW2d 224, § 10.

§ 9 [38 ALR3d 1091]

See Journal Pub. Co. v Enfield (1974) 31 Conn Supp 392, 373 A2d 193, (citing annotation), § 6[b].

Teacher's union, seeking judicial declaration that public meeting law did not apply to grievance arbitration hearings conducted by union and school board pursuant to agreement, was properly denied preliminary injunction it sought against newspaper representatives, where court noted its belief that private agreements by public bodies could not be used to circumvent public meeting law but based its ruling on trial court's finding of no irreparable injury. Palm Beach County Classroom Teacher's Assn. v School Bd. (1982, Fla App D4) 411 So 2d 1375.

See Jefferson County Board of Education v § 6[c].

See Brown v East Baton Rouge Parish School Bd. (1981, La App) 405 So 2d 1148, § 6[c].

Legislature, not court, must determine what acts of school board are not subject to open meeting law, and injunction against closed meetings was improper which detailed 8 mitigated exceptions, including hearings for discharge, suspension, or termination of employment of tenure teachers if so requested by teachers, meetings involving personnel evaluation of individual employees or consideration of charges against them, meetings for purpose of interviewing prospective employees or administrative or other sensitive positions, meetings with board attorney or attorneys to discuss pending litigation, and meetings of board with its labor negotiators to discuss certain proposals. Channel 10, Inc. v Independent School Dist., 298 Minn 306, 215 NW2d 814.

See Hudson v School Dist. (1979, Mo App) 578 SW2d 301, § 6[c].

See Rent Stabilization Asso. v Rent Guidelines Board (1978) 98 Misc 2d 312, 413 NYS2d 950, § 7[b].

See Bensalem Township School Dist. v Gilliotti Corp. (1980, Pa Cmwlth) 415 A2d 123, § 7[b].

In convening an executive session city council complied with public meeting statute, where motion to so convene tracked language of statute, referred to and quoted language of specific exemption (allowing discussion of "actual or potential litigation"), and identified agenda item to which specific exemption applied; council violated statute by discussing matters beyond scope of exemption but since there was only one violation and court did not infer therefrom that future violations would follow there was no justification for injunction Marsh v Richmond Newspapers, Inc. (1982) 223 Va 245, 288 SE2d 415.

See Nageotte v Board of Supervisors (1982) 223 Va 259, 288 SE2d 423, § 6[b].

§ 10 [38 ALR3d 1091]

See A. G. Becker, Inc. v Board of Governors of Federal Reserve System (1980, DC Dist Col) 502 F Supp 378, § 6[e].

See Cooper v Arizona Western College Dist. Governing Board (1980, App) 125 Ariz 463, 610 P2d 465, § 6[c].

Mayor could not be charged with violating public-meeting statute by releasing minutes of city council executive session, where executive session in question did not conform to statutory requirements entitling it to confidentiality State v Murphy (1982, App) 131 Ariz 354, 641 P2d 268.

agency and was therefore subject to local agency public meetings statute. Since there were no agenda notice requirements under local agency public meeting statute, local housing authority did not violate statute by failing to give notice of its intent to consider terminating tenant union's lease of housing authority property where meeting apparently ended with attorney-client conference, which was usual practice, but then reconvened for consideration of lease. Torres v Board of Comrs. (1979, 5th Dist) 89 Cal App 3d 545, 152 Cal Rptr 506.

Under public meeting statute requiring "full and timely notice" of meetings at which public business will be considered, state legislative committee provided fair notice to public where committee chairman directed secretary of senate to publish list of all bills capable of being considered on particular day by committee in senate calendar which was posted outside senate chambers and delivered to members of press in capital pressroom, notwithstanding agenda limited to bills which might be reasonably reached at given meeting was not furnished. Benson v McCormick (1978, Colo) 578 P2d 651.

Where board of education held meeting which was not at usual time or place and only notice of meeting given to public was one typewritten announcement posted on bulletin board where meeting was held, trial court properly invalidated action taken by board at meeting, since notice given violated requirements of statute mandating that public entities hold public meetings and give reasonable notice thereof. White v Battaglia (1980, 4th Dept) 79 App Div 2d 880, 434 NYS2d 537.

Where town board had been conducting its meetings on second floor of town hall in meeting room which was accessible only by ascending winding staircase, thus rendering meetings inaccessible to many of the physically handicapped, and where town had been aware for several months of statutory mandate that "reasonable efforts be made to insure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped," meetings would be moved to other available barrier-free facilities where there was no showing that such movement would disrupt governmental operations significantly and in spite of fact that town was in process of constructing elevator in town hall. Fenton v Randolph (1977) 92 Misc 2d 514, 400 NYS2d 987.

Public meeting statute provision that permitted closed sessions to consider information regarding appointment or employment of officer under jurisdiction of governing or governmental body was not applicable to meeting of board of education which met to select person to fill vacancy on board of education, since member of board of education was not an

provision that permitted closed sessions of investigative committees was not applicable to board of education meeting as "committee of the whole" for purposes of studying and investigating persons nominated to fill vacancy on board. Board of education violated public meeting statute requirement that actions be conducted openly, where board in voting to fill board vacancy used secret ballots. Notwithstanding public meeting statute stated no requirement regarding notice of meetings and no other statute specifically provided for notice of special meetings, education board's giving of one-hour notice by telephone to office of two newspapers regarding special meeting to fill board vacancy was insufficient, since board was required to give reasonable notice in order to effectuate the public meeting statute. News & Observer Publishing Co. v Interim Board of Education, 29 NC App 37, 223 SE2d 580.

See Hilliary v State (1981, Okla Crim) 630 P2d 791, § 3 [a].

Although public meeting statute was mandatory, and it was undisputed that school district board of trustees did not give notice of any meetings relative to calling of bond issue election, election would not be set aside where there was no showing that any meeting was ever held by trustees for purpose of calling election, and no statute required trustees to call such election. Hall v Thomas (Tex Civ App) 474 SW2d 276, error dism'd.

Member of board of trustees for school district could not tape record proceedings of board in executive session against wishes of majority of board, despite fact that open meetings law specifically authorized use of tape recorders at public meetings, since no similar provision authorized use of tape recorders at executive sessions of same public body and, therefore, legislature necessarily denied use of such devices in executive sessions. Zamora v Edgewood Independent School District (1979, Tex Civ App 9th Dist) 592 SW2d 649, writ ref n r e.

Under Open Meetings Act providing that nothing in statute "shall be construed to require governmental bodies to hold meetings open to the public in cases involving . . . public officer or employee . . . unless such officer or employee requests a public hearing," school board did not violate Act when it moved to enter into executive session before announcing in open session that it had voted to uphold its decision to not renew teacher's contract where teacher failed to object to school board's executive session. Bowen v Calallen Independent School Dist. (1980, Tex Civ App 13th Dist) 603 SW2d 229, writ ref n r e.

County commissioners' court violated provisions of Open Meetings Act where court held

notice for matters that were not of urgent public necessity and added matters to agenda after notice was posted; plaintiff good government league had standing as "interested person" to bring action to prevent violations of Act. Cameron County Good Government League v Ramon (1981, Tex Civ App 9th Dist) 619 SW2d 224.

38 ALR3d 1102–1193

§ 1 [38 ALR3d 1109]

[b] Related matters

Stockholder's personal conduct of operations or management of assets as factor justifying disregard of corporate entity. 46 ALR3d 428.

Validity and construction of state statute making successor corporation liable for taxes of predecessor. 65 ALR3d 1181.

Liability of parent corporation for acts of subsidiary. 16 Am Jur Proof of Facts 2d 679.

Auto-Cite®: Any case citation herein can be checked for form, parallel references, later history and annotation references through the Auto-Cite computer research system.

§ 3 [38 ALR3d 1114]

See International Union, United Auto., etc. v Cardwell Mfg. Co. (DC Kan) 416 F Supp 1267, infra § 22[b].

See Northern Illinois Gas Co. v Total Energy Leasing Corp. (1980, ND Ill) 502 F Supp 412, § 21[b].

Although parent corporation may not be held liable for contracts of its subsidiary solely because of stock ownership, corporation may become actor in whole business of subsidiary, since subsidiary corporation over which parent corporation exercises control in everyday operations may be deemed instrumentality or agent of parent, and when this occurs, parent will be legally responsible; determinative factor is whether subsidiary corporation is dummy for parent corporation. Accordingly, lower court erred in dismissing complaint for breach of contract as against parent corporation upon ground that it was neither signatory to the written contract between plaintiff and subsidiary nor named as party to it, where it was clear that practically all of dealings with respect to contract and its performance were had with parent and not with subsidiary, including actual approvals of orders taken, and allegations in complaint, supported by affidavits and documentary evidence, raised question as to whether parent so controlled actions of subsidiary that unitary liability to plaintiff arising from actions of defendants could be imposed on both corporations. A. W. Fiur Co. v Ataka &

See Amfac Foods, Inc. v International Systems & Controls Corp. (1981) 52 Or App 907, 630 P2d 868, § 22[a].

§ 4 [38 ALR3d 1116]

See Japan Petroleum Co. (Nigeria, Ltd.) v Ashland Oil Co. (1978, DC Del) 456 F Supp 831, § 22[b].

See Elvalsons v Industrial Covers, Inc., 269 Or 441, 525 P2d 105, infra § 22[c] (citing annotation).

See Hanson Southwest Corp. v Dal-Mac Construction Co. (1977, Tex Civ App) 554 SW2d 712, § 15.

See Soderberg Advertising, Inc. v Kent-Moore Corp., 11 Wash App 721, 524 P2d 1355, infra § 22[c].

§ 5 [38 ALR3d 1119]

Also recognizing that parent corporation may be held liable for contractual obligations of its subsidiary under alter ego theory:

US—International Union, United Auto., etc. v Cardwell Mfg. Co. (DC Kan) 416 F Supp 1267; Coastal States Trading, Inc., v Zenith Navigation S.A. (1977, DC NY) 446 F Supp 330.

Cal—Roman Catholic Archbishop of San Francisco v Superior Court of County of Alameda, 15 Cal App 3d 405, 93 Cal Rptr 338.

Ky—American Collectors Exchange, Inc., v Kentucky State Democratic Cent. Executive Committee (1978, Ky App) 566 SW2d 759.

Complaint by oil broker against oil producer subsidiary and grandparent oil corporation was sufficient to state cause of action against grandparent oil corporation, where complaint alleged, inter alia, that subsidiary was grandparent's alter ego in that subsidiary fraudulently claimed act of state upon grandparent's orders in order to avoid performance of contract. Leeward Petroleum, Ltd. v Mene Grande Oil Co. (DC Del) 415 F Supp 158.

See Hanson Southwest Corp. v Dal-Mac Construction Co. (1977, Tex Civ App) 554 SW2d 712, § 15.

§ 6 [38 ALR3d 1120]

See Soderberg Advertising, Inc. v Kent-Moore Corp., 11 Wash App 721, 524 P2d 1355, infra § 22[c].

§ 8 [38 ALR3d 1121]

See Japan Petroleum Co. (Nigeria, Ltd.) v Ashland Oil Co. (1978, DC Del) 456 F Supp 831, § 22[b].

§ 21[b].

§ 9 [38 ALR3d 1122]

Parent corporation was not liable on theory of unjust enrichment for subsidiary's overcharging through its false certification that it was billing lowest available net rates at time it was receiving rebates, notwithstanding that parent corporation sold stock of subsidiary subsequent to time that overcharges occurred, since alleged increase in value allegedly reflected in sale price of stock due to overcharges was exactly offset by legal obligation to repay those charges and subsidiary was not liquidated. United States v Dean Van Lines, Inc. (CA5 Fla) 531 F2d 289.

§ 10 [38 ALR3d 1123]

Also recognizing that stock ownership alone ordinarily does not render parent corporation liable for debts or contracts of subsidiary:

US—Trans-Amazonica Iquitos, S. A. v Georgia S.S. Co. (DC Ga) 335 F Supp 935.

Mass—Manufacturing Improv. Corp. v Georgia Pacific Corp. (Mass) 286 NE2d 339.

NY—Musman v Modern Deb, Inc. (App Div) 377 NYS2d 17.

Or—Amfac Foods, Inc. v International Systems & Control Corp. (1981) 52 Or App 907, 630 P2d 868.

See A. W. Fiur Co. v Ataka & Co. (1979, 1st Dept) 71 App Div 2d 370, 422 NYS2d 419, § 3.

§ 11 [38 ALR3d 1127]

Also recognizing that use of common officers, including directors, by parent and subsidiary corporations, does not of itself render parent liable for subsidiary's contracts or debts:

NY—Musman v Modern Deb, Inc. (App Div) 377 NYS2d 17, infra § 22[a].

See Bernardin, Inc. v Midland Oil Corp. (CA7 Ind) 520 F2d 771 (citing annotation).

Where subsidiary corporations maintained separate bank accounts, were separately listed in telephone book, were not grossly undercapitalized, substantially complied with formal requisites of corporate existence, and were not controlled to impermissible degree by parent, trial court could not disregard their separate corporate identities in action on contract of one of subsidiaries in spite of fact that parent corporation owned 100 per cent of subsidiaries' stock and all three corporations had some common directors and employees. Bendix Home Systems, Inc. v Hurston Enterprises, Inc. (1978, CA5 Fla) 566 F2d 1039.

See International Union, United Auto., etc. v Cardwell Mfg. Co. (DC Kan) 416 F Supp 1267, infra § 22[b].

See Farkar Co. v R. A. Hanson Disc., Ltd. (1977, DC NY) 441 F Supp 841, mod on other grnds (CA2 NY) 583 F2d 68, on reh (CA2 NY) 604 F2d 1, 26 UCCRS 1104, § 22[c].

See Japan Petroleum Co. (Nigeria, Ltd.) v Ashland Oil Co. (1978, DC Del) 456 F Supp 831, § 22[b].

See Northern Illinois Gas Co. v Total Energy Leasing Corp. (1980, ND Ill) 502 F Supp 412, § 21[b].

§ 12 [38 ALR3d 1129]

[a] Recovery affected

See Chengelis v Genco Instruments Corp. (DC Pa) 386 F Supp 862, affd without op (CA3 Pa) 523 F2d 1050, infra § 15.

See Farkar Co. v R. A. Hanson Disc., Ltd. (1977, DC NY) 441 F Supp 841, mod on other grnds (CA2 NY) 583 F2d 68, on reh (CA2 NY) 604 F2d 1, 26 UCCRS 1104, § 22[c].

[b] Recovery not affected

In suit to recover for value of magnetic tapes sold to both parent and subsidiary marketing organization, parent was liable for sales to subsidiary, despite fact that plaintiff was aware of corporate relationship, where two out of three directors of subsidiary were officers of parent; parent owned fifty-one per cent of stock of subsidiary; when plaintiff refused to grant corporate credit to subsidiary, parent agreed to inventory $20,000 worth of tapes for benefit of subsidiary; parent advanced monies to subsidiary for its commission sales account; parent received merchandise from plaintiff, along with monthly statements and invoices; and parent did all shipping and billing to customers. Ampex Corp. v Office Electronics, Inc., 24 Ill App 3d 21, 320 NE2d 486.

§ 15 [38 ALR3d 1134]

See Bendix Home Systems, Inc. v Hurston Enterprises, Inc. (1978, CA5 Fla) 566 F2d 1039, § 11.

See Garrow v Soo Line R. Co. (DC Wis) 361 F Supp 764, infra § 18 (citing annotation).

Defendant parent corporation was not liable under plaintiffs' contract with defendant's wholly owned subsidiary absent proof that corporate form of subsidiary was used by defendant to perpetrate fraud or promote injustice akin to fraud, and where evidence showed that plaintiffs executed contract which bound only subsidiary and not defendant notwithstanding plaintiffs' knowledge of interrelation of two. Chengelis v Genco Instruments Corp. (DC Pa)

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§ 1. Prefatory matters

[a] Scope

This annotation collects and analyzes the cases which have discussed the validity, construction, and application of those statutes which provide, in effect, that meetings of public entities are to be open to the public.[1]

Notwithstanding that a particular state's statute may be popularly or commonly known as the "Freedom of Information Act," or the "Sunshine Law" or the "Right to Know Law" such statutes will generally be referred to in the annotation as "public meeting" statutes.

This annotation does not purport to state the statutory law of any jurisdiction and statutory provisions are dealt with only to the extent that such enactments have been construed in reported decisions which are treated herein. The reader is advised always to consult the most recent statutes of his jurisdiction.

[b] Related matters

Right to cross-examination of witnesses in hearings before administrative zoning authorities. 27 ALR3d 1304.

Validity and construction of statutory notice requirements prerequisite to adoption or amendment of zoning ordinance or regulation. 96 ALR2d 449.

Right to hearing before revocation or suspension of liquor license. 35 ALR2d 1067.

Constitutional rights of owner as against destruction of building by public authorities. 14 ALR2d 73.

✦

Open meeting statutes: the press fights for the "right to know." 75 Harv L Rev 1199.

§ 2. Summary

A number of states have enacted "public meeting" statutes which generally provide that meetings of public entities within the state are to be open to the public at large. Observing that tendencies toward secrecy in public affairs have been the subject of extensive criticism and that terms such as "managed news," "secret meetings," "closed records," "executive sessions," and "study sessions" have become synonymous with "hanky-panky" in the minds

1. The annotation is limited to statutes of general applicability—that is, statutes that require that meetings of all public bodies, commissions, and the like be open to the public, as contrasted to statutes requiring that a particular body, agency, commission, or the like hold meetings open to the public.

of public-spirited citizens, one court has commented that one purpose of a "public meeting" statute is to maintain the faith of the public in governmental agencies, inasmuch as the right of the public to be present and to be heard during all phases of enactments by public entities is a source of strength in the country.[2]

The validity of such statutes has been upheld as against contentions that they are violative of constitutional "due process" provisions[3] or other constitutional provisions.[4] Such statutes having been enacted for the public benefit, it has been said that they should be liberally construed.[5] In so construing the statutes, the courts have found a considerable number of public entities to be within the purview of the statutes, but a few have been found to be beyond their pale.[6]

Assuming a public entity to be one covered by a "public meeting" statute, questions have occasionally arisen as to what assemblages of that entity are within the purview of the statute. It would appear that generally speaking not only are formal sessions of such an entity intended to be covered by the statute but also those gatherings of the members at which they might deal with matters on which foreseeable action could be taken.[7] particular gatherings have accordingly been found both required and not required to be open to the public.[8] An interesting situation has arisen in regard to conferences between a public entity and its counsel, the courts apparently reacting differently as to the necessity of grafting an "attorney-client" privilege onto a "public meeting" statute.[9]

Lastly, such statutes having been enacted for the public good, the question arises as to what is the status of official action taken in violation of them. Some courts have taken the view that such action is not invalidated,[10] although there is contrary authority[11] which further holds that a perfunctory ratification of that action at a later public meeting will not cure the original defective meeting and validate the action.[12]

2. Board of Public Instruction v Doran (1969, Fla) 224 So 2d 693.

3. § 3[a], infra.

4. § 3[b], infra.

5. § 4, infra.

6. § 5, infra.

7. § 6[a], infra.

8. § 6[d, e], infra.

9. § 6[b], infra.

Thus, for example, it is pointed out in Laman v McCord (1968) 245 Ark 401, 432 SW2d 753, that a city attorney, with the assistance of the mayor, department heads, and other municipal employees, could certainly prepare a case for trial without discussing his plans in detail with the city council.

However, in Sacramento Newspaper Guild, etc. v Sacramento County Board of Supervisors (1968) 263 Cal App 2d 41, 69 Cal Rptr 480, it is stated that settlement and avoidance of litigation are particularly sensitive activities whose conduct would be grossly confounded, and often made impossible, by undiscriminating insistence on open lawyer-client conferences when a public entity is involved. In settlement advice, the attorney's professional task is to provide his client a frank appraisal of strength and weakness, gains and risks, and hopes and fears, the court went on. If the public's "right to know" compelled admission of an audience, the ringside seats would be occupied by the government's adversary, delighted to capitalize on every revelation of weakness, the court added, stating that a lawyer worth his salt would feel a sense of treachery in disclosing that kind of appraisal. The attorney would prefer to fight the lawsuit to its bitter end, and frustration would blunt the law's policy in favor of settlement, and financial imprudence might be a compelled path, the court concluded.

10. § 7[a], infra.

11. § 7[b], infra.

12. § 7[c], infra.

§ 3. Validity of statute

[a] Under constitutional "due process" provision

In the following cases, the validity of a "public meeting" statute was upheld as against a public entity's contention that such a statute was unconstitutional as not affording due process of law to the entity.

Florida's "public meeting" statute, the Sunshine Law, providing that "[a]ll meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation or any political subdivision, except as otherwise provided in the constitution, at which official acts are to be taken *are declared to be public meetings* open to the public at all times, and no resolution, rule, regulation or formal action shall be considered binding except as taken or made at such meeting" was held to be constitutional in Board of Public Instruction v Doran (1969, Fla) 224 So 2d 693, as against the argument of a board of public instruction that the statute was so vague and ambiguous that it did not afford procedural due process of law to the board. Noting that in an earlier case it had held that the words "all meetings" as contained in a statute requiring all meetings of any city or town council to be held open to the public, meant such formal assemblages of a council sitting as a joint deliberative body as were required or authorized by law to be held for the transaction of official municipal business, the court observed that under the earlier decision it would have been unnecessary to include a provision in the "public meeting" statute declaring certain meetings as "public meetings" if the intent of the legislature had been to include only formal assemblages for the transaction of official business. The obvious intent was to cover any gathering of the members where they would deal with some matter on which foreseeable action would be taken by the board, the court concluded.

The court in Board of Public Instruction v Doran (Fla) supra, further held the "public meeting" statute constitutional, notwithstanding the board's argument that adequate standards were not included in the provisions of the statute. Pointing out that in order to satisfy the constitutional requirement of due process a statute must be sufficiently explicit in its descriptions of the acts, conduct, or conditions required or forbidden, prescribe the elements of the offense with reasonable certainty, and make known to those to whom it applies what conduct on their part will render them liable for its penalties, the court found that the "public meeting" statute complied with the constitutional requirements of organic due process.

And an unsuccessful contention was made in Raton Public Service Co. v Hobbes (1966) 76 NM 535, 417 P2d 32, that the "public meeting" statute was unconstitutional and void because it was so indefinite, vague, and uncertain, both as to the meetings covered by it and its application, as to deny due process of law. While appreciating that the statute was lacking in some detail and particularity, the court was unable to say that it was fatally defective for that reason.

[b] Under other constitutional provisions

In the following cases, the validity of a "public meeting" statute was upheld as against a public entity's contention that the statute was violative of one or another constitutional provision other than one relating to "due process."

The state constitutional provision prohibiting the passage of an act embracing more than one subject was held not to be violated by the state's "public meet-

ing" statute, in Board of Publ'c Instruction v Doran (1969, Fla) 224 So 2d 693. Pointing out that the term "subject of an act" as used in the constitution meant the matter which formed the groundwork of the act, and that it might be as broad as the legislature chose as long as the matters included in the act had a natural or logical connection, the court stated that the fact that a statute embracing the matter of open meetings for cerain boards and commissions also contained provisions for criminal penalties and for an injunction by application of citizens to restrain violations, did not make the statute unconstitutional.

The operator of an electric utility system, in an unsuccessful attack on the constitutionality of a "public meeting" statute, claimed deficiencies in the title of the statute, in Raton Public Service Co. v Hobbes (1966) 76 NM 735, 417 P2d 32. The statute was purported to be "An Act Relating to Public Meetings of All Governing Bodies of the State Which are Supported by Public Funds," and the utility, while conceding that it was a board or commission of the city, contended that it certainly was not a governing body of the state. The argument was made that the "public meeting" statute was unconstitutional insofar as "governing bodies of local subdivisions" were concerned, since the title failed to include them as was required by the state constitution. The court found no difficulty in concluding that governing bodies of local subdivisions were reasonably included within the term "all governing bodies of the state," if that term were construed to mean "governing bodies within the state" rather than "state governing bodies." Deciding that government bodies of local subdivisions within the state were governing bodies of the state in the broadest sense, the court found that the title was not so improper or misleading as to require a holding of unconstitutionality.

§ 4. Rules of construction, generally

In the following cases, the courts took the view that a "public meeting" statute, having been enacted for the public benefit, should be liberally construed notwithstanding the presence of penal provisions in the statute.

The state "public meeting" statute, the Freedom of Information Act, was passed wholly in the public interest and was to be liberally interpreted so that its praiseworthy purposes might be achieved, held the court in Laman v McCord (1968) 245 Ark 401, 432 SW 2d 753, rejecting a city's argument that the statute was of a penal nature requiring its strict construction. Although the statute provided that its wilful violation was a misdemeanor punishable by a fine or a jail sentence, the court pointed out that such a provision did not necessarily make the entire statute penal. Noting that whether a statute was to be construed narrowly or broadly depended upon the interests with which the statute dealt, and that generally statutes enacted for the public benefit were to be interpreted most favorably to the public, the court said that the legislature had clearly declared the state's public policy in the "public meeting" statute by providing that "[i]t is vital in a democratic society that public business be performed in an open and public manner."

To similar effect is Board of Public Instruction v Doran (1969, Fla) 224 So 2d 693, where the court observed that statutes enacted for the public benefit should be interpreted most favorably to the public, and that the fact that a statute contained a penal provision did not make the entire statute penal requiring its strict construction.

§ 5. Applicability of statute to particular entities

In the following cases, the courts found the particular entities mentioned

to be among those public entities intended to be covered by a "public meeting" statute.

See Laman v McCord (1968) 245 Ark 401, 432 SW2d 752, a case decided under a "public meeting" statute generally providing that "all meetings . . . of governing bodies of all municipalities [and other public bodies] . . . shall be public meetings," in which the court stated that a city council was unquestionably the governing body of a municipality.

Observing that the "public meeting" statute provided that "[a]ll meetings of the legislative body of a local agency shall be open and public," the court in Sacramento Newspaper Guild, etc. v Sacramento County Board of Supervisors (1968) 263 Cal App 2d 41, 69 Cal Rptr 480, stated that, as the legislative body of a local agency, a county board of supervisors was subject to the statute.

Affirming a judgment enjoining the holding of meetings of a city council other than in public, the court in Miami Beach v Berns (1970, Fla App) 231 So 2d 847, was of the opinion that boards constituting the governing bodies of municipal corporations were within the scope of the state's "public meeting" statute providing that "[a]ll meetings of any . . . municipal corporation are declared to be public meetings open to the public at all times . . . ."

And in Dobrovolny v Reinhardt (1970, Iowa) 173 NW2d 837, a county board of education was held to be a public agency clearly within the state's "public meeting" statute requiring meetings of such agencies to be open to the public at all times.

A board of adjustment was a public body within the intent of the Right to Know Law, the state's "public meeting" statute, requiring that "[t]he public shall be admitted to any meeting of a public body at which official action is taken," held the court in Wolf v Zoning Board of Adjustment (1963) 79 NJ Super 546, 192 A2d 305. Pointing out that the statute defined a public body as "a commission, authority, board, council, committee and every other group of 2 or more persons organized under the law . . . to perform a public governmental function by official action," the court found it too clear for extended debate that the statutory board of adjustment was such a body.

A corporation which operated a city's electric utility system, the property of which was owned by the city, was held in Raton Public Service Co. v Hobbes (1966) 76 NM 535, 417 P2d 32, to be subject to the provisions of a "public meeting" statute providing that "[t]he governing bodies of all municipalities, boards of county commissioners, board of public instruction and all other governmental boards and commissions of the state or its subdivisions, supported by public funds, shall make all final decisions at meetings open to the public." Rejecting the corporation's contention that legislative powers or governmental functions being absent, there was no reason for requiring meetings of its board of directors to be public, the court stated it would direct attention to other cases wherein the technical form had not been considered controlling, and where corporate instrumentalities for accomplishing public ends, whether governmental or proprietary, had been considered to be governmental agencies.

Of interest is Beacon Journal Publishing Co. v Akron (1965) 3 Ohio St 2d 191, 32 Ohio Ops 2d 183, 209 NE2d 399, involving an action by a publishing company for a declaratory judgment as to what publicly formed bodies, commissions, groups, boards and the like of the City of Akron, a charter city, were covered by a statute providing that "[a]ll meetings of any board or commission of any state agency or authority . . . are declared to be public meet-

ings open to the public at all times," in which the court enumerated several of the public entities which were covered. The assessment equalization board, created by an act of the legislature, was subject to the "public meeting" statute in the conduct of its meetings, the court commented. As to those boards and commissions, established by the city charter, the members of which were appointed by the mayor, sometimes with and sometimes without the advice and consent of the city council, it was said to be necessary to look at the provisions of the charter with regard to each board to determine whether it was subject to the statute. Thus, the sinking fund commission, the board of trustees of the public library, and the members of the board of directors of the municipal university, were found to be subject to the "public meeting" statute.

And in an equity action by property owners and taxpayers against the Allentown Housing Authority, the court in Bogert v Allentown Housing Authority (1967) 426 Pa 151, 231 A2d 147, was of the opinion that the state's "public meeting" statute, the Right to Know Law, providing that "[e]very public meeting of a board shall be open to the public," was applicable to the authority.

Notwithstanding the argument of the members of a municipal finance committee, which consisted of 5 of the 15 members of the city council, that the "public meeting" statute did not apply to subordinate committees of governing bodies whose functions were merely to make recommendations to the parent body, the court in Selkowe v Bean (1968) 109 NH 247, 249 A2d 35, 38 ALR3d 1066, held that the finance committee, the meetings of which the plaintiff news reporter sought to attend, was an agency of the municipal corporation, so that its meetings were included in the term "public proceedings" as defined by the statute.

Need Case

In the following cases, the courts found the particular entities mentioned not be within the purview of a "public meeting" statute.

Referring to a "public meeting" statute providing that "[a]ll meetings of the legislative body of a local agency shall be open and public," and defining "legislative body" as including "the governing board, commission, directors or body of a local agency or any board or commission thereof," the court in Adler v City Council of Culver City (1960) 184 Cal App 2d 763, 7 Cal Rptr 805, held that the phrase "or any board or commission thereof," fairly construed, meant any board or commission of the governing body and not a subordinate agency such as a zoning commission created by city charter, acting independently of the governing body and pursuant to authority flowing directly from the charter.

And in Beacon Journal Publishing Co. v Akron (1965) 2 Ohio St 2d 191, 32 Ohio Ops 2d 183, 209 NE2d 399, supra, the court mentioned some of the bodies in the city of Akron, a charter city, which were not covered by that state's "public meeting" statute. Thus, the court observed that boards and commissions created by executive order of the mayor and chief administrator were not subject to the statute. As to the civil service commission established by the city charter, the court, having examined the provisions of the charter to determine whether the commission was subject to the "public meeting" statute, concluded that it was not.

§ 6. Application of statute to particular kinds of gatherings

[a] Generally

In a number of cases within the scope of the annotation, courts have been called upon to determine what kinds of gatherings of a public entity are intended to be within the purview of a "public meeting" statute, and it would

appear from a reading of the cases that more than the purely formal sessions of a public entity may usually be required by mandate of the statute to be open to the public. See, for example, in addition to cases collected in §§ 6[b–e], infra, the following illustrative holdings and statements.

Thus, while there is language in a California case decided in the Second District of the District Court of Appeal that that state's "public meeting" statute was applicable only to formal meetings of the public entities covered,[19] a more recent case decided in the California Third District is to the effect that the statute, as amended following the earlier decision, extends its coverage to less formal assemblages.

Thus, in Sacramento Newspaper Guild, etc. v Sacramento County Board of Supervisors (1968) 263 Cal App 2d 41, 69 Cal Rptr 480, the court stated that, construed in the light of the state's "public meeting" statute, the term "meeting" extended to informal sessions or conferences of the county board of supervisors designed for the discussion of public business. The defendant board and its members contended that the trial court erred in reaching substantially the same finding, reliance being placed upon Adler v City Council of Culver City (1960) 184 Cal App 2d 763, 7 Cal Rptr 805, supra, which held the statute applicable only to formal meetings for the transaction of official business, while the plaintiff guild argued that the 1961 amendments to the statute were designed to nullify the Adler decision. Observing that instead of appraising the accuracy of Adler as an interpretation of the pre-1961 law and analyzing the 1961 amendments so far as they bore upon Adler, the court preferred to interpret the provision for public meetings by examining the current statute of which it formed a part. Finding nothing in the "public meeting" statute to demarcate a narrower application than the range of governmental functions performed by an agency, the court particularly noted the declaration of intent in the statute was that deliberation as well as action occur openly and publicly. Deliberation thus connoted not only collective discussion, but also the collective acquisition and exchange of facts preliminary to the ultimate decision, the court went on. Finding other extrinsic as well as intrinsic evidence of legislative intention impelling rejection of a narrow interpretation, the court observed that an informal conference or caucus permitted crystallization of secret decisions to a point just short of ceremonial acceptance. There was rarely any purpose to a nonpublic premeeting conference except to conduct some part of the decision process behind closed doors, the court continued, adding that only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, could an

13. In Adler v City Council of Culver City (1960) 184 Cal App 2d 763, 7 Cal Rptr 805, the court held that the language of the "public meeting" statute providing that "[a]ll meetings of the legislative body of a local agency shall be open and public," was not directed at anything less than a formal meeting of a city council or one of its subordinate agencies, for if it were, no practical line could be drawn. Citing the example of a local planning commission responsible to a city council, the court observed that the members of the commission and the council (whether the full number or only a few) would be impeded in conducting informal discussions among themselves, thus exchanging information, "could be handicapped in viewing property upon which they were about to legislate, would be unable to confer with real-estate experts or with their planning director or with informed individuals having special qualifications to speak upon municipal problems". Thus, the court found that the "public meeting" statute contemplated and did not forbid such informal development of facts pertinent to zoning problems.

open meeting regulation frustrate such evasive devices. The court concluded that as operative criteria, formality and informality were alien to the law's design, exposing it to the very evasions it was designed to prevent.

Referring to a "public meeting" statute providing in effect that "[a]ll meetings . . . at which official acts are to be taken are declared to be public meetings open to the public at all times," the court in Board of Public Instruction v Doran (1969, Fla) 224 So 2d 693, pointed out by virtue of its decision in an earlier case involving a similar but much more limited statute, that it would have been unnecessary to include a provision in the "public meeting" statute declaring certain meetings as "public meetings" if the legislature had intended to include only formal assemblages for the transaction of official business: the obvious legislative intent was to cover any gathering of the members where they would deal with some matter on which foreseeable action would be taken by the board, the court concluded.

With the narrow exception where public consultation by a public body with its attorney regarding pending or impending litigation would force him to violate the canons of ethics as promulgated by the state supreme court, the court in Times Publishing Co. v Williams (1969, Fla App) 222 So 2d 470, held that the provisions of the state's "public meeting" statute were applicable to every assemblage of a board or commission governed by the statute at which any discussion, deliberation, decision, or formal action was to be had, made, or taken relating to, or within the scope of the official duties or affairs of, such body. Every thought, as well as every affirmative act, of a public official as it related to and was within the scope of his official duties was a matter of public concern, the court commented, and it was the entire "decisionmaking" process that the legislature intended to affect. Pointing out that every step in the decisionmaking process, including the decision itself, was a necessary preliminary to formal action, the court stated that it followed that each such step constituted an "official act," an indispensable requisite to "formal action," within the meaning of the statute.

Citing the state's "public meeting" statute, the court in Schults v Board of Education (1964) 86 NJ Super 29, 205 A2d 762, aff'd 45 NJ 2, 210 A2d 762, stated that it knew of no prohibition against members of a public body holding a closed conference where no official action would be taken; what was prohibited, the court observed, was the taking of official action at other than a public meeting.

In Beacon Journal Publishing Co. v Akron (1965) 3 Ohio St 2d 191, 32 Ohio Ops 2d 183, 209 NE2d 399, the court had before it an action by a publishing company for a declaratory judgment as to what functions and activities of commissions, bodies, committees, bureaus, groups, boards and the like of the city of Akron, a charter city, were covered by a "public meeting" statute providing that "[a]ll meetings of any board or commission of any state agency or authority . . . are declared to be public meetings open to the public at all times." A second sentence of the statute provided that "[n]o resolution, rule, regulation or formal action of any kind shall be adopted at any executive session of any such board, commission, agency or authority." This second sentence limited the first sentence, the court observed, adding that the legislature intended that those meetings which were required to be open to the public were those where any resolution, rule, regulation, or formal action of any kind should be adopted or passed. This meant, the court concluded, that any session of a board or commission subject

to the "public meeting" statute, where any action was taken, which action was required by law, rule, or regulation to be recorded in the minutes, the journal, or any other official record of the board or commission, had to be open to the public.

[b] Specific kinds of discussions contended to be exception; attorney-client conferences

While a "public meeting" statute may of course contain an exception that meetings between a public entity and its counsel concerning pending or impending litigation need not be open to the public, the problem has on occasion arisen as to the general applicability of a "public meeting" statute to such a meeting in the absence of an exception. Thus, in the following case the court was of the opinion that such meetings were required by the "public meeting" statute to be open to the public, the court finding no shelter for the public entity in the attorney-client privilege.

A city council meeting in closed session with the city attorney to discuss a proceeding to which the city was a party, having been found violative of the state "public meeting" statute providing that "[e]xcept as otherwise specifically provided by law," all meetings of public entities were to be public meetings, the city council unsuccessfully contended in Laman v McCord (1968) 245 Ark 401, 432 SW2d 753, that the statute should not be construed to apply to a meeting between it and the attorney. The statute itself effectively refuted the council's contention inasmuch as the legislative mandate that "[e]xcept as otherwise specifically provided by law," all meetings of public entities were to be public meetings, could not be misunderstood, the court commented. While the general attorney-client privilege had been statutorily codified, the court observed that to say that such a statute, dealing only with a testimonial disqualification, "specifically" provided that the city council might consult its attorney in secret would simply amount to striking the word "specifically" from the "public meeting" statute.

Similarly, in the following case the court took the position that such meetings were generally required to be open to the public, the attorney-client privilege available to a public entity having been waived by the public in enacting the "public meeting" statute, although an exception was found where the attorney might be forced to violate the canons of ethics.

Having held that the provisions of the "public meeting" statute were applicable to every assemblage of a board or commission governed by the statute at which any discussion, deliberation, decision, or formal action was to be had, made, or taken relating to, or within the scope of, the official duties or affairs of such body, the court in Times Publishing Co. v Williams (1969, Fla App) 222 So 2d 470, answered its query as to whether there were any exceptions to the mandate of the statute by finding there was a narrow exception where public consultation by a public body with its attorney regarding pending or impending litigation would force him to violate the canons of ethics as promulgated by the state supreme court. Notwithstanding that there was no provision for exceptions on the face of the "public meeting" statute, the defendant school board contended that it might meet privately behind closed doors to go into secret consultation with its attorneys on all legal matters. The court observed that the clear import of the "all meetings" provision of the statute was that the public, acting through the legislature, had waived the attorney-client privilege with regard to the enumerated public bodies. However, there arose from an attorney's duties in the

conduct of pending or impending litigation certain obligations which bound him, the court continued, noting that his professional conduct in such matters was governed by the canon of ethics as set up by the state supreme court. The legislature was therefore without any authority to directly or indirectly interfere with or impair an attorney in the exercise of his ethical duties as an attorney and officer of the court, it was pointed out. The court emphasized however, that since the public had waived any privilege of confidentiality it might have had by virtue of such relationship, the "public meeting" statute did not permit private consultation between its agency and the attorney in any other circumstance.

However, the court in the following case was of the view that the "public meeting" statute did not abrogate a public entity's right to private consultation with its counsel on proper occasions, it being found that the attorney-client privilege might operate concurrently with the "public meeting" statute.

Notwithstanding language of the "public meeting" statute that "[a]ll meetings of the legislative body of a local agency shall be open and public," the statutory opportunity of boards of supervisors to confer privately with their attorney on occasions properly requiring confidentiality was not abolished by the statute, stated the court in Sacramento Newspaper Guild, etc. v Sacramento County Board of Supervisors (1968) 263 Cal App 2d 41, 69 Cal Rptr 480. Viewed as a statutory microcosm, its demand was forthright, offering no internal interstices for private lawyer-client consultations, the court observed. It was not a microcosm, however, but one element in a structure of constitutional and statutory policies covering the powers, duties, and procedures of local government, the court went on, noting that another part of this structure was the privilege attaching to confidential lawyer-client communications. The plaintiffs, seeking to enjoin nonpublic meetings of the board, did not dispute the availability of the privilege to public officials and their attorneys, but they viewed it as a barrier to testimonial compulsion, not as a procedural rule for the conduct of public affairs. Finding such a view too narrow, the court stated that the privilege was essentially a means of achieving the policy objective of enhancing the value placed by society upon legal representation by assuring the client full disclosure to the attorney unfettered by fear that others would be informed. If client and counsel were to confer in public view and hearing, both privilege and policy were stripped of value, the court noted. The question then was whether the "public meeting" statute abrogated by implication the policy assuring opportunity for private legal consultation by public agency clients, the court observed. Finding evidence of such intent to be too thin, the court pointed out that in requiring board members to deliberate and act in public, the "public meeting" statute did not inexorably embrace the board members in their roles as clients calling upon their attorney for legal advice, and in declaring the public's right to be informed, it did not necessarily propel the public's legal adversary into "the lawyer-client conference clad in the robes of good citizenship." Neither the "public meeting" statute nor its history supplied undebatable evidence of a legislative intent to supersede the assurance of private legal consultation stemming from the statutory privilege, the court found, adding that the two enactments were capable of concurrent operation if the privilege was not overblown beyond its true dimensions. Public board members, sworn to uphold the law, might not arbitrarily or unnecessarily inflate confidentiality for the pur-

pose of deflating the "public meeting" statute, the court continued, and neither the attorney's presence nor the happenstance of some kind of lawsuit might serve as the pretext for secret consultations whose revelation would not injure the public interest. To attempt a generalization embracing the occasions for genuine confidentiality would be rash, the court concluded, adding that the privilege might operate concurrently with the "public meeting" statute, neither superseding the other by implication.

[c] — Discussions relative to personnel

While a "public meeting" statute may of course contain an exception that meetings concerning the handling of a public entity's personnel matters need not be open to the public but may be conducted behind closed doors, the court in the following case refused to read such an exception into its state statute.

Having held that the state's "public meeting" statute was applicable to every assemblage of a board or commission governed by the statute at which any discussion, deliberation, decision, or formal action was to be had, made, or taken relating to, or within the scope of, or the official duties or affairs of, such body, the court in Times Publishing Co. v Williams (1969, Fla App) 222 So 2d 470, questioned as to whether there were any exceptions to the mandate of the statute. Notwithstanding that there was no provision for exceptions on the face of the statute, the defendant school board argued that it might meet privately behind closed doors to discuss matters relating to school personnel. In response to the board's contention that innocent school personnel might be harmed if hearings concerning charges of misconduct were aired publicly and proved ill-founded, the court said that the statute was not in and of itself concerned with any rights or privileges of third parties dealing with such agencies, and any such rights or privileges would have to be found elsewhere. Furthermore, the court noted, the public-at-large was as interested in the good quality of school personnel as was the school board.

[d] Decisions with respect to particular assemblages; held required to be open to public

In the following cases, the particular assemblages of public entities described were considered to be among those required by the mandate of a "public meeting" statute to be open to the public.

A city council meeting in closed session with the mayor and city attorney to discuss a public service commission proceeding to which the city was a party, at which meeting all members of the public were excluded, was held in Laman v McCord (1968) 245 Ark 401, 432 SW2d 753, to be violative of the state "public meeting" statute providing that "[e]xcept as otherwise specifically provided by law, all meetings formal or informal, special or regular, of the governing bodies of all municipalities, counties, townships, and School Districts, and all boards, bureaus, commissions, or organizations of the State of Arkansas, except Grand Juries, supported wholly or in part by public funds, or expending public funds, shall be public meetings." A judgment declaring that the meeting violated the statute and that the council could not meet secretly to discuss legal matters with the city attorney was accordingly affirmed. Stating that the city council was unquestionably the governing body of a municipality, and that its closed session was unquestionably a meeting, formal or informal, special or regular, the court queried as to how it could be said that the closed session was not a violation of the statute. The council contended that the statute should not

be construed to apply to a meeting between the council and the attorney, the prediction being made that the city would be unable to prepare its cases for trial without disclosing its strategy and its weaknesses to its adversaries. As a practical matter, however, the court felt the council to be unduly apprehensive, and it pointed out that the city attorney, with the assistance of the mayor, department heads, and other municipal employees, could certainly prepare a case for trial without discussing his plans in detail with the city council. Regardless of such practical considerations, the "public meeting" statute itself effectively refuted the council's argument, the court continued, pointing out that the legislative mandate that except as otherwise "specifically" provided by law, all meetings of governing boards of municipalities should be public meetings, could not be misunderstood. The key word was "specifically," the court said, and while the legislature itself provided a specific exception for personnel matters in a later section of the "public meeting" statute, it did not see fit to provide a similar exception for meeting between a city council and a city attorney.

Construed in the light of the "public meeting" statute's objectives, the term "meeting" extended to informal sessions or conferences of the county board of supervisors designed for the discussion of public business, stated the court in Sacramento Newspaper Guild, etc. v Sacramento County Board of Supervisors (1968) 263 Cal App 2d 41, 69 Cal Rptr 480, holding that a luncheon gathering at the Elks Club, attended by the five county supervisors, the county counsel, county executive, county director of welfare, and several members of the Central Labor Council, AFL-CIO, at which the subject of discussion was a strike of social workers against the county and the latter's efforts to enforce an injunction secured in connection with the strike, was such a meeting. The defendant board and its members further unsuccessfully contended that the occasion was a lawful exercise of the lawyer-client privilege existing between the supervisors and the county counsel, as their attorney, and that the pending lawsuit to restrain picketing and striking furnished the occasion for exercise of the privilege. Observing that the privilege cannot be invoked where the client's communication was not intended to be confidential, the court commented that none of the supervisors stated that he or any other supervisor had said anything to the county counsel in confidence, that none claimed attendance for the purpose of getting the county counsel's legal advice and none claimed receiving any, and that if any communication passed between the supervisors and their attorney, the record failed to reveal it. The court concluded that the luncheon meeting found no shelter under the lawyer-client privilege and that it violated the "public meeting" statute provision that "[a]ll meetings of the legislative body of a local agency shall be open and public."

Noting that the Hughes' Anti-Secrecy Act mandated that all public proceedings should be open to citizens of the state, the court in State ex rel. Wineholt v La Porte Superior Court (1967) 249 Ind 152, 230 NE2d 92, stated that "public proceedings" covered the voting and balloting upon public issues before a county council.

Where, at a public meeting of the town council concerning a proposed lease of certain town property to a club, the five town councilmen retired to a room closed to the public and sometime thereafter one of their number returned to the council chambers and announced to the persons in the audience that the lease had been tentatively approved, the court in Scott v Bloomfield (1967) 94 NJ Super 592, 229 A2d 667, affd 98 NJ

Super 321, 237 A2d 297, app dismd 52 NJ 473, 246 A2d 129, having concluded that the fact that the councilmen retired to a private room and later announced their decision indicated that they discussed in private the subject matter that was discussed in the open council chambers, held that the public was entitled to hear their discussion and how they voted and that their failure to do so was contrary to the "public meeting" statute providing that the public should be admitted to any meeting of a public body at which official action was taken. Plaintiffs' motion for summary judgment was accordingly granted in their action challenging both the validity of a resolution adopted by the council a week after the meeting granting the lease and the execution of the lease itself.

[c] — Held not required to be open to public

In the following few cases the courts held that the particular gatherings by public entities were not described among those assemblages required by a "public meeting" statute to be open to the public.

While in the following two California cases, particular gatherings were found not to be such as were required to be open to the public under the mandate of that state's "public meeting" statute, it is to be noted that subsequent amendments to the statute create a doubt as to whether the same result would now be reached.[14]

Thus, a dinner gathering attended by eight of the nine members of the city planning commission, which was given by a man who shortly thereafter applied for a change of zoning and at which general discussions were held relative to community planning and zoning, at which time the dinner-giver was interrogated as to certain matters, was held in Adler v City Council of Culver City (1960) 184 Cal App 2d 763, 7 Cal Rptr 805, not to be a meeting within the purview of the state's "public meeting" statute providing that "[a]ll meetings of the legislative body of a local agency shall be open and public," even if the statute were assumed to govern meetings of charter cities. It seemed evident to the court that the language of the statute was not directed at anything less than a formal meeting of a city council or one of the city's subordinate agencies, for if it were, no practical line could be drawn. A judgment adverse to the plaintiffs in their taxpayers' action for a declaratory judgment invalidating an ordinance enacted by the city council rezoning certain property of the dinner-giver, such rezoning having been recommended by the commission, was accordingly affirmed.

Likewise, a public school teacher had requested of a school district's board of trustees that a matter concerning his possible Communist affiliations be heard at a public hearing; at the outset of the second hearing, the chairman of the board stated that the board had reviewed the teacher's answers to the questions asked at the first hearing and that it considered the answers evasive; the chairman then said that the board had decided to allow the teacher another opportunity to answer the questions, and in Huntington Beach Union High School Dist. v Collins (1962) 202 Cal App 2d 677, 21 Cal Rptr 56, cert den 371 US 904, 9 L Ed 2d 166, 83 S Ct

14. In that connection, attention is called to Sacramento Newspaper Guild, etc. v Sacramento County Board of Supervisors (1968) 263 Cal App 2d 41, 69 Cal Rptr 480, wherein the court, in considering the 1961 amendments to the "public meeting" statute, was of the opinion that such amendments in effect extended the coverage of the statute to informal sessions or conferences of public entities designed for the discussion of public business.

210, affirming a judgment adjudging that the teacher might be dismissed, the court rejected the teacher's contention that the board held an executive session at which it made a vital decision as to the case and that this was contrary to the "public meeting" statute. The teacher claimed that since he had previously requested a public hearing, it was improper for the board to consider any phase of the matter at an executive session. Pointing out that the record did not show that the board took any action toward the teacher's discharge or heard any additional evidence pertaining thereto at the executive session, and that the only decision reached during the executive session was to allow the teacher another opportunity to answer the questions which he failed to answer at the first hearing, which opportunity was rejected, the court concluded that if there was a technical violation of the "public meeting" statute, it in no way prejudiced the teacher's rights and did not invalidate the action of the board.

Having observed that the directive in § 2 of the state's "public meeting" statute that "[a]ll public proceedings are open to the public, and all persons are permitted to attend any meetings of these boards or agencies," was qualified by § 3, I, which provided that "[n]othing contained in this chapter shall be construed to prevent these bodies or agencies from holding executive sessions but any decisions made during any executive session must be recorded and made available for public inspection promptly, and no ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official actions shall be finally approved in executive session," the court in Selkowe v Bean (1968) 109 NH 247, 249 A2d 35, 38 ALR3d 1066, held that a municipal finance committee, the duties of which included reviewing the budget proposed by the city comptroller and the making of recommendations to the city council which would take final action upon the budget, could properly meet in executive session for the purpose of reviewing the budget and receiving information relating to it, so long as no final action was taken by the committee and no recommendation to the city council was formulated or agreed upon. It appeared that a newspaper reporter and his employer had obtained an injunction restraining exclusion of themselves and the public from meetings of the committee except when, in accordance with § 3, II, of the "public meeting" statute, the committee as a "body or agency" was entitled to exclude the public while "considering or acting upon" certain specified subjects, such as employee demotions. The plaintiffs contended that the injunction was properly entered because the statute restricted the holding of executive sessions to meetings at which only the matters specified by § 3, II, were to be considered, and that § 3, II, was to be incorporated by reference to § 3, I. Rejecting this contention, the court stated that this would deny to § 3, I, the significance to which it was properly entitled, and that § 2 was qualified or limited by both § 3, I, and § 3, II. Pointing out that the controlling provisions with respect to the finance committee meetings were those of § 3, I, the court found that neither the purpose of the meetings nor the action taken by them went beyond what § 3, I, permitted, and that since the injunction would preclude consideration in closed session of any matter not specified in § 3, II, it would in effect nullify the provisions of § 3, I. Finding the injunction to have been improvidently granted, the court consequently vacated it.

[f] Sufficiency of compliance

In the following case, the contention was rejected that a public entity undertook action at an "executive session" forbidden by a "public meeting" statute

from taking formal actions, the court finding that the meeting presumably complied with the statutory requirement that it be open to the public.

A police constable who was discharged by the police chief immediately requested an opportunity to appear before the board of trustees, the board meeting in its regular session that day. The constable was given an opportunity to present his viewpoint and was extended an opportunity to resign but refused to do so, and the board thereupon unanimously voted to discharge him. In these circumstances, the court in Thomas v Board of Trustees (1966) 5 Ohio App 2d 265, 34 Ohio Ops 2d 432, 215 NE2d 434, held that the voting to discharge the constable was done in an "executive session" within the meaning of a "public meeting" statute providing in effect that all meetings of any board of any township were declared to be public meetings open to the public at all times and that no resolution, rule, regulation, or formal action of any kind should be adopted at any executive session of any such board. The only persons present when the action complained of was taken, beside the trustees, were the constable and the police chief. Observing that an executive session of a governmental body was normally one which was limited to the members of the body and such other persons as were specially invited by the body to attend the meeting, the court commented that the test was not who was present at the meeting, but whether the meeting was open to the public, and that if it were, but no one chose to attend it except the members of the body, then it was not legally an executive session of the body. Affirming a judgment against the constable in his action to recover wages allegedly due him, the court said that there was no evidence that the public was excluded from the meeting at which the trustees acted, that the action was taken at the end of a regular meeting, and that there was a presumption that the trustees complied with the law and that such meeting was open to the public.

§ 7. Validity of action taken in violation of statute

[a] View that action is not invalidated

Under the provisions of some "public meeting" statutes, courts have held that the fact that action has been undertaken by a public entity in violation of such a statute does not invalidate such action.

Even assuming that a dinner gathering which was attended by members of the city planning commission and which was given by a land developer who thereafter applied for a change of zoning (which change was granted by the city council after two public hearings following acceptance with modifications of the commission's recommendations), and at which general discussions were held relative to community planning and zoning, was violative of the "public meeting" statute providing that "[a]ll meetings of the legislative body of a local agency shall be open and public," the court in Adler v City Council of Culver City (1960) 184 Cal App 2d 763, 7 Cal Rptr 805, held that it did not follow that the subsequent action of the zoning commission (much less that of the city council) was invalidated by the commission's violation of the statute. A judgment adverse to certain taxpayers in their action to have the ordinance rezoning the property declared invalid was accordingly affirmed. While noting that the statute provided no penalty for infraction and no method of enforcement and that ordinarily this implied an absence of intent to make a statute mandatory, the court commented that, in view of the public purpose of the "public meeting" statute, which was directed toward the conduct of public officials, those statutes which punished as misdemeanors

offenses and delinquencies which did not otherwise prescribe punishments, were applicable and gave mandatory complexion to this particular statute. This was one of those instances in which the prescribed penalty for violation of the law precluded all others, the court went on, and left private persons, although taxpayers, without any right to declaratory relief or injunction incidental thereto. The court then concluded that the dinner, even if unlawful, could not have infected the proceedings of the city council in granting the application upon conditions somewhat different from those recommended by the planning commission, which was strictly an advisory body, pointing out that the council itself had fully complied with the terms of the "public meeting" statute and that its members evidently had no knowledge of the dinner.

And considering an appeal in an action brought by a taxpayers' association to nullify a comprehensive city zoning ordinance, the court in Claremont Taxpayers Asso. v Claremont (1963) 223 Cal App 2d 589, 35 Cal Rptr 907, stated that the association's contentions regarding purported violations of the "public meeting" statute were unavailing because, even if true, the ordinance would not be invalidated.

Likewise, in Old Town Development Corp. v Urban Renewal Agency (1967) 249 Cal App 2d 313, 57 Cal Rptr 426, it was stated that insofar as the allegations suggested that there was a collective commitment or promise by a majority of the members of the agency to make a positive or negative decision on the matters in question in violation of the "public meeting" statute, it would not invalidate the action subsequently taken.

A state's "public meeting" statute provided that its provisions and all rights of citizens under the statute might "be enforced by mandamus or injunction, whether or not any other remedy [was] legally available" and that "[a]ny person . . . violating any provision . . . shall be guilty of a misdemeanor . . . ," and in Dobrovolny v Reinhardt (1970, Iowa) 173 NW2d 837, it was held that the statute limited the remedies for violations of the statute and it could not be reasonably interpreted as providing that violations thereof rendered the actions of a public body void or voidable, for if the legislature had so desired, the statute could have been easily written to so provide.

A section of a "public meeting" statute provided that "[u]pon proof of failure by any officer to carry out any of his responsibilities for public notice of meetings, for holding them open to the public, or for maintaining public records thereof . . . an appropriate order [may be issued] requiring such officer to carry out as to meetings thereafter held all such responsibilities proved not to have been carried out . . . ; but action otherwise duly taken at any meeting shall not be invalidated by the failure of any officer to carry out the said responsibilities for public notice of meetings. . . . The remedy created hereby is not exclusive, but shall be in addition to every other available remedy," and in Elmer v Board of Zoning Adjustment (1961) 343 Mass 24, 176 NE2d 16, certain plaintiffs, aggrieved by a decision of a board of zoning adjustment, unsuccessfully contended that the express exemption from invalidation of only failure in respect of public notice of meetings meant that, for validity, the meeting was required to be open to the public. The imprecise statute did not intend that result, the court stated, adding that it would be unlikely that any of the public would be in attendance at a meeting of which no notice was given and that it would be arbitrary to let the validity of a meeting held without public notice and unattended by the public

depend upon whether the meeting was declared "open." Pointing out that the "public meeting" statute established that the public policy of open meetings was to be enforced by injunction against officers who disregarded the policy or by other "available remedy," the court commented that invalidation of action taken, although it would tend strongly to enforce the policy, would not be primarily a remedial measure. There were enough prospective difficulties in the implementation of such a policy, particularly as applied to boards and agencies which, after due public hearing, with opportunity for all concerned to present their arguments and counterarguments, must weigh and determine important legislative, executive, and quasi-judicial matters, the court went on, without putting otherwise valid action at the risk of a subsequent determination that the particular deliberations were required to be held under public scrutiny.

[b] View that action is voidable

The view was taken in the following cases, by virtue of the terminology of a "public meeting" statute, that action undertaken in violation of its requirement of open meetings is generally voidable.

Since the state's "public meeting" statute provided that official action taken in violation of the requirements of the statute should be voidable in a proceeding in the state superior court, the court in Wolf v Zoning Board of Adjustment (1963) 79 NJ Super 546, 192 A2d 305, reasoned that mere absence of bad faith or other impropriety on the part of a public body should not ordinarily move the court to stay its hand in voiding official action taken contrary to the statute upon proper application therefor. The court rejected the contention that the legislative intent was that the voiding of such action should rest in the discretion of the judge, stating that it found this to be too narrow a view of the intent and underlying policy of the statute. Noting that the purpose of the "public meeting" statute was to implement the declaration therein that it was "the public policy . . . to insure the right of the citizens . . . to attend meetings of public bodies . . . for the protection of the public interest," and that the object of the statute was primarily prophylactic and not necessarily restricted to the creation of remedies for illegalities at particular public meetings from which the public was excluded, the court commented that appropriate implementation of that object and policy called, as a general rule, for the superior court upon proper application to set aside any official action which was taken without compliance with the prescriptions of the statute. Observing that it need not then decide that no discretion was ever to be reserved to the court to save the validity of official action taken in contravention of the statute, the court added that that question might be left to await a case where a sufficiently impelling counter-interest might be argued to bespeak sustaining the action impugned.

And in Kramer v Board of Adjustment (1963) 80 NJ Super 454, 194 A2d 26, the court granted plaintiff's motion for summary judgment in an action challenging the validity of a zoning variance, it being said that the original resolution of the board of adjustment was void for failure to comply with the "public meeting" statute.

And seemingly to similar effect as the preceding cases is Bogert v Allentown Housing Authority (1967) 426 Pa 151, 231 A2d 147, in which the court, having noted that the "public meeting" statute provided that a violation of it exposed any member of a board so acting to a fine upon a summary conviction thereof, stated that the remedy so provided was

not exclusive, for if it were, the entire purpose of the statute would be nullified and the statute could be violated with particular impunity. In the immediate case involving an equity action by property owners and taxpayers against a housing authority, allegations of violations of the "public meeting" statute having been made, the court stated that in order to require the authority to live up to the mandate of the statute, the plaintiffs had to resort to equity or other appropriate remedy. Reversing a judgment dismissing the complaint, the court commented that since the inability of the plaintiffs to set forth a sufficient cause of action in the complaint was clearly thwarted by the authority's refusal to disclose its actions, past or contemplated, in violation of the statute, the trial court should have given the plaintiffs an opportunity to amend their complaint upon such disclosure being made.

[c] Effect of subsequent ratification on action otherwise voidable

Assuming that action undertaken by a public entity in violation of a "public meeting" statute is voidable, the view has been taken in the following cases that a perfunctory ratification at a later meeting open to the public will not suffice to cure the original defective meeting so as to validate the action.

It appeared in Kramer v Board of Adjustment (1963) 80 NJ Super 454, 194 A2d 26, that a zoning board of adjustment conducted a public hearing concerning the refusal of a building inspector to grant a permit; that, thereafter, the board met three times in executive session, and at the final session voted to recommend that the variance be granted; that 2 weeks later the mayor and council voted to adopt the board's recommendation at a public meeting; that some 3 months later the case of Wolf v Zoning Board of Adjustment (1963) 79 NJ Super 546, 192 A2d 305, supra § 7[b], caused the board to be concerned over the legality of its vote taken in executive session, and it resubmitted its earlier resolution and again voted to recommend that the variance be granted; and that at a regular public meeting the next day, the governing body again adopted the board's recommendation and granted the variance. Granting plaintiff's motion for summary judgment in an action challenging the validity of the variance, the court held that the original resolution of the board was void for failure to comply with the "public meeting" statute and the mandate of Wolf. The defendant board, governing body, and person granted the variance unsuccessfully contended that there was a sufficiently impelling counterinterest in the immediate case, by virtue of the language in Wolf, that the question need not then be decided that "no discretion [was] ever to be reserved to the court to save the validity of official action taken in contravention of the statute [since that] may be left to await a case where a sufficiently impelling counter-interest may be argued to bespeak sustaining the action impugned." Stating that a formal "rerun" of the board's vote nearly 4 months later could not possibly be in the spirit of the "public meeting" statute, the court commented that just as the board was obligated to act within its jurisdictional powers, it was also obligated to comply with the statute, and in this sense, compliance was not to be construed as a patchwork attempt to rectify or supplement proceedings which were clearly deficient. The court concluded that if it were to permit the actions of the board to stand, it would be tantamount to an express sanction to circumvent the requirements of the "public meeting" statute, for every commission, board, and

public authority who can be invited to vote in executive session and take the risk that the proceedings would go unchallenged, and if challenged on appeal, the administrative tribunal simply could meet the objection by hastily revoting at a public meeting. Such a procedure, even if taken in good faith, could not be condoned, the court concluded.

Concluding that the fact that at a public meeting concerning a proposed lease of certain town property, the five town councilmen retired to a private room and then returned to the council chambers and announced their tentative approval of the lease, indicated that the councilmen discussed in private the subject matter that was discussed in the open council chambers, and that the failure to allow the public to hear their discussion and how they voted was in violation of the "public meeting" statute, the court in Scott v Bloomfield (1967) 94 NJ Super 592, 229 A2d 667, affd 98 NJ Super 321, 237 A2d 297, app dismd 52 NJ 473, 246 A2d 129, stated that even though there was a formal passage of the resolution at a public meeting 1 week later, that meeting was merely a perfunctory rerun of the action that the council had already determined to follow and did not cure any defect of the previous meeting. Plaintiffs' motion for summary judgment in their action challenging not only the validity of the resolution adopted at the second meeting, but also the execution of the lease itself, was accordingly granted.

§ 8. Who is, under statute, entitled to relief against its violation

The courts in the following cases were concerned with the question of who came within the class of persons authorized by the particular "public meeting" statute to seek relief from its violation.

Observing that the "public meeting" statute authorized any "interested person" to seek legal restraint against its violation or threatened violation, and that a complaint alleged that a newspaper guild was a labor organization composed of professional working newspapermen, the court in Sacramento Newspaper Guild, etc. v Sacramento County Board of Supervisors (1968) 263 Cal App 2d 41, 69 Cal Rptr 480, stated that whether that allegation made out adequate standing to sue was at least questionable; the court specifically pointed out, however, that the defendant county board of supervisors and its members did not question the guild's standing to sue. Pointing out that the right to disclosure was an attribute of citizenship not possessed in any increased degree by persons or groups whose interest in access to news was economic and that the right should logically extend standing to any county elector, the court concluded that had the issue been raised in the trial court, amendment of the complaint to add appropriate parties and allegations would have been little more than a matter of mechanics, and under the circumstances there was substantial compliance with the statute.

Although the state's "public meeting" statute provided for the issuance by a circuit court of injunctions against violations of the statute upon application by "citizens," the court in Board of Public Instruction v Doran (1969, Fla) 224 So 2d 693, held that a circuit court could properly entertain the application of one "citizen" since, in the construction of words found in the state statutes, the singular included the plural and vice versa.

§ 9. Propriety of particular injunctive relief

Under "public meeting" statutes authorizing the entry of injunctive relief against a public entity to restrain future violations of the statutes, the courts, evidently relying upon rules generally appli-

cable in determining the propriety of the scope of injunctive relief granted,[15] have on occasion found fault with the particular injunctive relief granted as against a public entity.

Thus, in the following case the court was of the opinion that too-narrow injunctive relief had been awarded as against the public entity involved.

Having noted that a final judgment enjoined a board of public instruction from the holding of any meeting or conference session "at which are held any discussions on current, or foreseeably so, matters, not privileged, pertaining to the duties and responsibilities" of the board, the court in Board of Public Instruction v Doran (1969, Fla) 224 So 2d 693, stated that the "public meeting" statute contained no exception, and that the final judgment would be amended to enjoin any such meetings "at which are held any discussions on matters pertaining to the duties and responsibilities" of the board. Although the board complained that certain matters could no longer be discussed in private, the court answered that the causes of complaint, if deserving, were matters for the legislature, not the courts.

On the other hand, the courts in the following cases found that the injunctive relief awarded against the public entities involved was too broad.

The "public meeting" statute did not abolish the statutory opportunity of boards of supervisors to confer privately with their attorney on occasions properly requiring confidentiality, stated the court in Sacramento Newspaper Guild, etc. v Sacramento County Board of Supervisors (1968) 263 Cal App 2d 41, 69 Cal Rptr 480, holding that a preliminary injunction which, aside from the statutory exceptions for national security and personnel matters, prohibited nonpublic meetings of three or more of the five supervisors "for whatever purpose" was too broad. The court accordingly modified the injunction by adding a new paragraph providing that it should not prevent the board from consulting privately with the county counsel or other attorney representing the board under circumstances in which the statutory lawyer-client privilege might lawfully be claimed.

And in Selkowe v Bean (1968) 109 NH 247, 249 A2d 35, 38 ALR3d 1066, supra § 6[e], the court, having found that an injunction which would preclude a municipal finance committee from considering in closed session any matter not specified in one subsection of the "public meeting" statute, would have the effect of nullifying the provisions of an earlier subsection which also allowed certain closed sessions, vacated the injunction.

§ 10. Miscellaneous

In the following case, the court considered the rights of those attending meetings required to be open to the public by mandate of the state's "public meeting" statute.

Having observed that it was clear that the purpose of the state's "public meeting" statute was to prohibit secret or "star chamber" sessions of public bodies, to require such meetings be open, and to permit the public to be present unless within the statute's exceptions, the court in Dobrovolny v Reinhardt (1970, Iowa) 173 NW2d 837, observed that the statute did not require the public body to allow any individual or group to be heard on the subject being considered.

✦

Notwithstanding that a "public meeting" statute subjecting a public officer to criminal prosecution for failing to adhere to its mandate failed to make the officer's scienter an element of the offense, the court in the following case took the view that scienter was required to be both charged and proved.

15. See 42 Am Jur 2d, Injunctions § 297.

That portion of the "public meeting" statute providing that any public officer who violated the provisions of the statute "by attending a meeting not held in accordance with the provisions hereof," was guilty of a misdemeanor was unsuccessfully attacked on grounds that scienter was not made a specific element of the offense, in Board of Public Instruction v Doran (1969, Fla) 224 So 2d 693, the court holding that the statute was to be construed as impliedly requiring a charge and proof of scienter.

State of Alaska

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1972

CONVENED January 10, 1972
ADJOURNED June 18, 1972

LAWS OF ALASKA

1972

Source: SB 253

Chapter No.: 98

AN ACT

Relating to public agency meetings.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 44.62.310(a) is amended to read:

(a) All meetings of a legislative body or of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of its political subdivisions, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations, advisory or otherwise, of the state or local government supported in whole or in part by public money or authorized to spend public money, are open to the public except as otherwise provided by this section.

* Sec. 2. AS 44.62.310(c)(1) is amended to read:

(1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit;

* Sec. 3. AS 44.62 is amended by adding a new section in Article 6 to read:

Sec. 44.62.312. STATE POLICY REGARDING MEETINGS. (a) It is the policy of the state that

(1) the governmental units mentioned in sec. 310(a) of this chapter exist to aid in the conduct of the people's business;

(2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;

(3) the people of this state do not yield their sovereignty to the agencies which serve them;

(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

(5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created.

(b) Sec. 310(b)(1) of this chapter shall be construed narrowly in order to effectuate the policy stated in (a) of this section and avoid unnecessary executive sessions.

Approved by governor: June 2, 1972
Actual effective date: August 31, 1972

Source

SB 280

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MESSAGES FROM THE SENATE

SB 206 am H — A message from the Senate dated February 1, 1972 was read, stating the Senate has concurred in the House amendment to SENATE BILL 206 and the enrolled copy of SENATE BILL 206 amended by the House (relating to fees for duplicate sport fishing and hunting licenses; and providing for an effective date) is transmitted herewith for the signatures of the Speaker and Chief Clerk. It was signed by the Speaker and the Chief Clerk and returned to the Senate.

REPORTS OF STANDING COMMITTEES

HB 555 — The Labor and Management Committee has had HOUSE BILL NO. 555 (establishing the official state plumbing code) under consideration and a majority of the Committee members recommends it do pass with the following amendment:

amendment No. 1 by the Labor and Management Committee:

Page 1, line 14: Delete "15" and insert "13"

The report was signed by Mr Orbeck, Chairman, and concurred in by Orbeck, McGill, Banfield and Ferguson.

HOUSE BILL NO. 555 was referred to the Finance Committee.

SB 253 — The Judiciary Committee has had SENATE BILL NO. 253 (relating to public agency meeting) under consideration and a majority of the Committee members recommends it do pass. The report was signed by Mr. Moran, Chairman, and concurred in by Moran, Hillstrand, Randolph, Flynn, Rose, Barber and Banfield.

SENATE BILL NO. 253 was referred to the Rules Committee for placement on the calendar.

The Speaker stated that without objection, the reading of the Judiciary Committee Chairman's report on SB 253 would be waived and it would be printed in the journal. There being no objection, the report appears as follows:

"Judiciary Committee Report

on

SENATE BILL NO. 253

This bill makes clear that state law requiring that meetings of public agencies be open to the public applies to the legislature and its subordinate units. The bill also reemphasizes state policy against closed meetings of public bodies. In sec. 3, AS 44.62.312(a) is based on California Government Code Annotated, sec. 54950.

William J. Moran

William J. Moran, Chairman"

Article 6. Agency Meetings Public.

Section
310. Agency meetings public
312. State policy regarding meetings

Sec. 44.62.310. Agency meetings public. (a) All meetings of a legislative body, of a board of regents, or of an administrative board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of its political subdivisions, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations, advisory or otherwise, of the state or local government supported in whole or in part by public funds or authorized to spend public money, are open to the public except as otherwise provided by this section. Except when voice votes are authorized, the vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote. This section does not apply to any votes required to be taken to organize the aforementioned bodies.

(b) If excepted subjects are to be discussed at a meeting, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss matters that come within the exceptions contained in (c) of this section shall be determined by a majority vote of the body. No subjects may be considered at the executive session except those mentioned in the motion calling for the executive session unless auxiliary to the main question. No action may be taken at the executive session.

(c) The following excepted subjects may be discussed in an executive session:

(1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit;

(2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;

(3) matters which by law, municipal charter, or ordinance are required to be confidential.

(d) This section does not apply to

(1) judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding;

reasonable public notice shall be given for all meetings required under this section.

(f) Action taken contrary to this section is void. (§ 1 art VI ch 1 ch 52 SLA 1959; am § 1 ch 48 SLA 1966; am § 1 ch 78 SLA 1968; am § 1 ch 124 SLA 1969; am §§ 1, 2 ch 98 SLA 1972; am § 2 ch 100 SLA 1972; am § 189 SLA 1976)

Effect of amendment. — The 1976 amendment added the second and third sentences of subsection (a).

Meeting of the board of governors of the Alaska Bar Association in June 1978 was not subject to the requirements of this section. Horowitz v. Alaska Bar Ass'n, Sup. Ct. Op. No. 2059 (File Nos. 4310, 4311), ___ P.2d ___ (1980).

Am. Jur. 2d reference. — 2 Am. Jur. 2d, Administrative Law, §§ 281, 282.

Sec. 44.62.312. State policy regarding meetings. (a) It is the policy of the state that

(1) the governmental units mentioned in AS 44.62.310(a) exist to aid the conduct of the people's business;

(2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;

(3) the people of this state do not yield their sovereignty to the agencies which serve them;

(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

(5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created.

(b) AS 44.62.310(c)(1) shall be construed narrowly in order to effectuate the policy stated in (a) of this section and avoid unnecessary executive sessions. (§ 3 ch 98 SLA 1972)

Revisor's note. — AS 44.62.312(a) is based on Cal. Gov't C.A., sec. 54950.

Cross reference. See note under AS 44.62.310.

Legislative history report. — For report on ch. 98, SLA 1972 (SB 253), see 1972 House Journal, p. 158.

Article 7. Legislative Review of Rules.

Section
320. Legislative annulment of regulations and review

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OPEN MEETING STATUTES: THE PRESS FIGHTS FOR THE "RIGHT TO KNOW"

"The people have a right to know!" — that is the battle cry in the crusade to ensure that government operate in public. Organized activities to this end began in 1950 when the Freedom of Information Committee of the American Society of Newspaper Editors directed its attention to problems of domestic news suppression,[1] and the press, assisted on occasion by various civic groups, has remained the principal moving force behind the campaign.[2] There are many varied objectives: elimination of closed trials, admission of photographers to courtrooms, greater access to government records, more frequent and exhaustive presidential press conferences, television and radio coverage of sessions of Congress, fewer closed congressional committee meetings, and less restriction on the release of information by government officials. One important achievement of this campaign has been the recent enactment by state legislatures of "open meeting" laws, which grant the public a legal right to attend meetings of state, county, and local governmental bodies. The struggle for these statutes has been motivated by a feeling that an unnecessarily large amount of state and local government business is conducted behind closed doors.[3] The greatest number of complaints about unjustifiable exclusion has been directed at municipal bodies; a survey released in 1957 by the *Worcester* (Massachusetts) *Telegram*, for example, reported that of seventy-seven communities in central Massachusetts and northern Connecticut there were ten in which the meetings of all boards and commissions were closed.[4] Although such exclusion was not a new phenomenon,[5] its persistence and possible increase, the press felt, called for corrective legislation. Twenty-six states now have open meeting statutes applicable to state and local governmental bodies; [6] ten years ago only one of these laws existed in its

[1] See *Preface* to CROSS, THE PEOPLE'S RIGHT TO KNOW at xiv-xv (1953); Address by James S. Pope, Executive Editor of the *Courier-Journal* (Louisville), Dec. 11, 1958, in SCHOOL OF JOURNALISM, UNIVERSITY OF MISSOURI, SPEECHES OF THE FIRST ANNUAL FREEDOM OF INFORMATION CONFERENCE 3 (1959).

[2] See WESTERN GOVERNMENTAL RESEARCH ASS'N, CONFERENCE PROCEEDINGS 39-40 (1956); Address by Richard Carpenter, Executive Director & General Counsel of the League of California Cities, Meeting of the County Supervisors Ass'n of California, Oct. 5, 1961. See generally Pickerell, *Secrecy and the Access to Administrative Records*, 44 CALIF. L. REV. 305-12 (1956).

The House Committee on Government Information, headed by the late Representative Moss, and the Senate Subcommittee on Constitutional Rights, chaired by Senator Hennings, were instrumental in assuring greater access to information concerning the federal government. See Hennings-Moss Act, 72 Stat. 547, 5 U.S.C. § 22 (1958).

[3] See Advancement of Freedom of Information Comm. of Sigma Delta Chi, Annual Reports 1957-1961. For a comprehensive report of the situation in one state, see MASS. LEGISLATIVE RESEARCH BUREAU, REPORT SUBMITTED BY THE LEGISLATIVE RESEARCH COUNCIL RELATIVE TO OPEN MEETINGS OF STATE AND LOCAL BOARDS AND COMMISSIONS 26-70 (1957).

[4] See Bull. of the American Soc'y of Newspaper Editors, March 1, 1957, p. 15.

[5] See SIEBERT, THE RIGHTS AND PRIVILEGES OF THE PRESS 66-70 (1934).

[6] ALA. CODE tit. 14, §§ 393-94 (1958); ALASKA COMP. LAWS ANN. § 2A-11-91

present form.[7] Yet success has been neither immediate nor uniform. In several states passage was achieved only after previous defeats, and in sixteen states bills introduced during the past five years have failed of final adoption.[8] Since the press is ever urging new efforts in "the continuing cold war against governmental secrecy," [9] it is clear that state legislators will continue to be confronted by open meeting legislation, either in the form of new statutes or, possibly, amendments to those already enacted but considered inadequate. Hence, it is worthwhile to consider the arguments for and against open meeting laws, to explore the statutory techniques adopted to accommodate conflicting considerations, to examine the reaction to these statutes of the press and of the officials to whom they apply, and to propose a model open-meeting statute adapted to resolving competing interests and considerations.

I. A Critique of the Open Meeting Principle

The basic argument for open meetings is that public knowledge of the considerations upon which governmental action is based is essential to the democratic process.[10] The people must be able to "go beyond and behind" the decisions reached and be apprised of the "pros and cons" involved if they are to make sound judgments on questions of

(Supp. 1959); ARK. STAT. ANN. §§ 6-602, -605 (1956), §§ 6-603, -604 (Supp. 1961); CAL. GOV'T CODE §§ 54950-60 (applicable to local bodies only); CONN. GEN. STAT. REV. § 1-21 (1958), DEL. CODE ANN. tit. 29, § 5109 (Supp. 1960); HAWAII REV. LAWS §§ 7A-1 to -3 (Supp. 1960); IDAHO CODE ANN. § 59-1024 (Supp. 1961) (applicable to local bodies only); ILL. REV. STAT. ch. 102, §§ 41-44 (1961); IND. ANN. STAT. §§ 57-601 to -609 (1961); LA. REV. STAT. §§ 42.5-.8 (Supp. 1952); ME. REV. STAT. ANN. ch. 1, §§ 36-41 (Supp. 1961); MD. ANN. CODE art. 23A, § 8, art. 25, § 5, art. 41, § 14 (1957); MASS. GEN. LAWS ANN. ch. 30A, § 11A, ch. 34, § 9F, ch 39, §§ 23A-C (Supp. 1961); MINN. STAT. §§ 10.41, 471.705 (1957); NEV. REV. STAT. §§ 241.010-.040, 244.080, 268.305, 386.335, 396.100 (Supp. 1960); N.J. REV. STAT. §§ 10:4-1 to -5 (Supp. 1961); N.M. STAT. ANN. § 5-6-17 (Supp. 1961); N.D. CENT. CODE § 44-04-19 (1960); OHIO REV. CODE ANN. § 121.22 (Page Supp. 1961); OKLA. STAT. ANN. tit. 25, §§ 201-02 (Supp. 1961); PA. STAT. ANN. tit. 65, §§ 251-54 (1959); UTAH CODE ANN. §§ 52-4-1 to -4 (1960); VT. STAT. ANN. tit. 1, §§ 311-14 (1959); WASH. REV. CODE §§ 42.32.010-.030 (Supp. 1958); WIS. STAT. § 14.90 (1959).

This Note discusses only open meeting statutes of general application and does not include statutes or charter provisions establishing open meeting requirements for a single body or single type of body; however, the same considerations seem applicable to such provisions. Open records acts, another fertile branch of "right to know" legislation, are excluded from the scope of this Note.

[7] ALA. CODE tit. 14, §§ 393-94 (1958).

[8] Arizona (three defeats); Florida, Kentucky, Michigan, New Hampshire, and Texas (two defeats each); Colorado, Kansas, Mississippi, Montana, New York, South Carolina, Tennessee, Virginia, West Virginia, and Wyoming (one defeat each). See Advancement of Freedom of Information Comm. of Sigma Delta Chi, Annual Reports 1957-1961.

[9] Material Enclosed in Letter From Chairman of the Associated Press Managing Editors Ass'n Freedom of Information Comm. to the *Harvard Law Review*, Nov. 11, 1961. (In response to inquiries soliciting information, the *Review* received correspondence from newspaper editors in twenty-five states, city managers and city attorneys of several communities, and from a number of associations of local governmental officials and national newspaper organizations. All letters cited in this note are on file at the office of the Harvard Law Review Association, where they may be inspected.).

[10] "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or Tragedy; or, perhaps both." 9 WRITINGS OF JAMES MADISON 103 (Hunt ed. 1910) (letter to W. T. Barry, Aug. 4, 1822).

policy and to select their representatives intelligently.[11] The presence of outside observers is an invaluable aid in making such information available, for official reports, even if issued, will seldom furnish a complete summary of the discussion leading to a particular course of action.[12] Even though only newspaper reporters and a few interested citizens actually are present, the benefit of granting access to governmental meetings will inure to a far larger segment of the population, because those who do attend will pass on the information obtained. It is further argued that decisions which result in the expenditure of public funds ought to be made openly so that the people can see how their money is being spent; [13] publicity of expenditures further serves to deter misappropriations, conflicts of interest, and all other forms of official misbehavior.[14] Several other considerations support the principle of open meetings. Government will be more responsive to the governed if officials are able to ascertain public reaction to proposed measures. Public meetings also may operate to provide officials with more accurate information; individual citizens will be able to correct factual misconceptions, particularly in local government where the public is apt to have greater knowledge of the issues involved. Then too, as people better understand the demands of government and the significance of particular issues, they will be better prepared "to accept necessary, and perhaps difficult and unpalatable, measures essential to the public good." [15] Finally, open meetings foster more accurate reporting of governmental activities. Even when meetings are closed, some hint of what occurs generally reaches the press; but such reports are often incomplete and slanted according to the views of the informant.[16] To restrict the press to such sources of information is a disservice both to the public, which is misled, and to the officials, who may be judged on the basis of these distorted reports.[17]

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[11] A Memorandum on Open Meetings From J. R. Wiggins to the Board of Commissioners of the District of Columbia, March 27, 1951, p. 7, on file in the office of the American Society of Newspaper Editors, Wilmington, Delaware.

[12] Even the reports of congressional debates published in *The Congressional Record* are frequently revisions of the actual remarks, although the debates are open and alterations thus subject to contradiction. See Neuberger, *The Congressional Record Is Not a Record*, N.Y. Times, April 20, 1958, § 6 (Magazine), p. 14.

[13] The governor of one state attempted to defend closed sessions for investigating the spending practices of state institutions by commenting: "You would discuss your personal finances around the dinner table, not out in the street or at your next-door neighbors"; one newspaper editorially replied: "Whose dinner table does . . . [the governor] think he's sitting at? . . . The public business is the public's business. Open up those dining room doors, governor! Let's all have a seat at the table." Material Enclosed in Letter From Chief Editorial Writer of the *Chicago Sun-Times* to the *Harvard Law Review*, Nov. 28, 1961.

[14] See Yankwich, *Legal Implications of and Barriers to the Right To Know*, 40 MARQ. L. REV. 3, 35 (1956).

[15] WIGGINS, FREEDOM OR SECRECY 20 (1956) [hereinafter cited as WIGGINS].

[16] "I do not remember a single executive session but that there was a report in the newspaper. . . . [T]he report was tinged and slanted by the personal opinion and desires of the person who had revealed what had transpired." Chamberlain, *Let's Take the Hush! Hush! Out of Local Government*, reprinted in part in Bull. of the American Soc'y of Newspaper Editors, March 1, 1958, p. 10.

[17] See WIGGINS 22.

Granting the virtue of open meetings in general, substantial objections can be made to enacting the principle as a legal requirement. Publicizing proposed governmental action may benefit citizens whose interests are adverse to the general community or harm individual reputations. In some cases, particularly when sharply conflicting interests must be accommodated, freedom from the pressure of public opinion may be desirable; the delegates to the Constitutional Convention, for example, felt constrained to work in secrecy.[18] Even in less unique circumstances "there is something to be said for open covenants, openly arrived at."[19] One public official has remarked that "there are many details, ramifications and opinions that no sound administrator . . . would care to express in public,"[20] and it appears that officials are often reluctant to request information at open meetings lest they create a public image of ignorance.[21] In addition, public officials are prone to waste time making speeches for the benefit of an audience, while in a closed meeting they "are less on their dignity, less inclined to oratory."[22] If the meeting is for preliminary consideration of action, there are additional objections. An open meeting requirement will tend to disadvantage subordinate officials by publicizing their disagreement with policies that they must administer. And publicity of proposals put forth during preliminary discussions may frustrate ultimate agreement, for an official hesitates to abandon a view that he has publicly advocated.[23] A final objection to an open meeting requirement arises from the tendency of the press toward "sensational" reporting. All too frequently newspaper stories are distorted by the bias of the reporter or his paper. Even when there is no bias, newspapers prefer to emphasize as "newsworthy" only "controversial matters about which there is some conflict or . . . those items which tend to make legislators appear substantially less than bright."[24] It has even been contended that the need

[18] "The debates were secret, and fortunately so, for criticism from without might have imperilled . . . [the] work . . . so great were the difficulties encountered from the divergent sentiments and interests of different parts of the country . . . ." 1 BRYCE, THE AMERICAN COMMONWEALTH 24 (2d ed. 1908). It has been observed, however, that because of the secrecy of the convention *The Federalist* had to be written to achieve acceptance of the Constitution. WIGGINS 9.

[19] Sommers, *Kick Against the Goad*, 48 NAT'L CIVIC REV. 15, 19 (1959).

[20] *Ibid.*

[21] A Letter From Chief Editorial Writer of the *Chicago Sun-Times* to the *Harvard Law Review*, Nov. 28, 1961, states:

> [I]t is not so much an unwillingness to express public views that accounts for the desire for secrecy as it is the need to cover up just plain ignorance that so many public officials have. That is the basis for the one argument for secret meetings that might have some validity. . . . In a secret meeting a public official can honestly confess ignorance of a subject and seek enlightenment from his fellow committee members and witnesses. He would not be able to bring himself to do this in a public meeting and such reluctance might have an adverse effect on the proceedings.

[22] THE INTERNATIONAL CITY MANAGERS' ASS'N, THE TECHNIQUE OF MUNICIPAL ADMINISTRATION 23 (4th ed. 1958).

[23] See PICKERELL & FEDER, OPEN PUBLIC MEETINGS OF LEGISLATIVE BODIES—CALIFORNIA'S BROWN ACT 26 (1957) [hereinafter cited as PICKERELL & FEDER]; Peterson, *The Legislatures and the Press*, 27 STATE GOV'T 223, 224 (1954).

[24] Letter From Richard Carpenter, Executive Director & General Counsel of the League of California Cities, to the *Harvard Law Review*, Nov. 16, 1961.

for "right to know" laws has been exaggerated, as "editorials and news articles on star chamber sessions and the like have long been an easy, inevitably irrefutable, and popularly accepted part of every experienced, and frequently cynical, news editor's bag of tricks." [25] Although these arguments cannot be ignored, they do not compel the conclusion that a legal requirement of open meetings is untenable. Some have urged that the benefits of requiring that all governmental activity be done openly outweighs any disadvantages that may result; [26] perhaps a more rational approach would be to seek to devise a legal standard affording the fullest possible degree of openness while recognizing the interests promoted by governmental secrecy.

II. The Common Law and Constitutional Background

It is clear that the public has no common law right to attend meetings of government bodies.[27] In seventeenth and eighteenth century England publication of parliamentary debates was frequently visited with harsh punishment. The motive for secrecy originally lay in protection from the Crown, but later it was thought useful to conceal the debates from the electorate as well. As put by a member of the House of Commons in 1738: "To print or publish the speeches of gentlemen in this House looks very like making them accountable without doors for what they say within." [28] Beginning in the late eighteenth century publication of debates was tolerated, but reporters had no privilege to attend and could be excluded upon the request of a single Member. Since 1874 a majority vote has been required to exclude the public, and Parliament has increasingly encouraged dissemination of information about its proceedings in an effort to exert greater influence on the people and to enlarge their role in the process of enacting or rejecting legislation.[29] In the United States, the House of Representatives has customarily met in public since its inception, and the Senate since 1794; most congressional work is now done in committee, however, and approximately one-third of the committee meetings have been closed in recent years.[30] Thirty-four of the states have constitutional requirements that the legislature meet in public; in the others legislative sessions are open as a matter of custom.[31] Apparently no state, however,

[25] Western Governmental Research Ass'n, Conference Proceedings 30–31 (1956).

[26] See, *e.g.*, Advancement of Freedom of Information Comm. of Sigma Delta Chi, Annual Reports 1957–1961.

[27] See Cross, The People's Right to Know 180–82 (1953).

[28] Taswell-Langmead, English Constitutional History 588 (11th ed. Plucknett 1960).

[29] See *id.* at 588–91.

[30] See Wiggins 9–10, 12–16; Advancement of Freedom of Information Comm. of Sigma Delta Chi, Annual Report 1961, at 11.

[31] In Idaho and New Mexico the constitutional requirement is without exception, while in the other thirty-two states the legislature is permitted closed meetings for executive sessions or where secrecy is otherwise required. *E.g.*, Vt. Const. ch. II, § 8; see Cross, The People's Right to Know 183–84 (1953). The constitutions of Alaska and Hawaii do not require open meetings of their legislatures, but presumably the pattern will be followed.

has a constitutional requirement of open meetings applicable to any governmental body other than the legislature.[32]

Advocates of the "right to know" frequently insist that access to information about governmental activities is guaranteed by the Constitution of the United States.[33] They argue that the primary objective of the constitutional guarantees of free speech and a free press was to make government responsible to the governed by ensuring that the people would be informed about its conduct; thus they declare: "It is obvious that the freedom of the press implies the right to gather news and the right of those who possess information to impart news."[34] To the objection that the framers of the Bill of Rights were concerned with abolishing prior restraints to publication and not with guaranteeing access to sources of information, they answer that the Constitution is a "living" document and that "freedom of the press and speech under contemporary conditions includes the right to gather information from government agencies . . . ."[35] Even the most ardent proponents of this view admit that the constitutional right of access, like the more traditional right of free speech, would not be absolute but instead subject to such limitations as might be necessary in the public interest.[36] Thus delimited, it does not seem unreasonable to extend constitutional guarantees to include matters of access as well, especially in light of the close interrelation between the arguments supporting the right of access and principles deemed fundamental to democratic government. However, no court — state or federal — has as yet accepted such an extension, although at least one judge has expressed his willingness to do so.[37] In view of this judicial reluctance, legislative enactment appears a much surer means of establishing a legal principle requiring open meetings.

the Burger Court disagrees

III. The Statutes

At present twenty-six states have open meeting laws applicable to a broad range of state, county, and local governmental bodies, both elective and appointive.[38] The novelty of the statutes and consequent scarcity of judicial interpretation, together with the wide variance in statutory language, pose obstacles to an overall evaluation of open meeting legislation; nevertheless, it is possible to consider some of the more basic problems presented: the scope of coverage, the extent to

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[32] See *id.* at 188, 192.

[33] See *id.* at 124–32; Thayer, Legal Control of the Press 178 (3d ed. 1956); Parks, *The Open Government Principle: Applying the Right To Know Under the Constitution*, 26 Geo. Wash. L. Rev. 1 (1957); Note, *Access to Official Information: A Neglected Constitutional Right*, 27 Ind. L.J. 209 (1952).

[34] Parks, *supra* note 33, at 10 (all italicized in original); see Note, 27 Ind. L.J. 209, 212, 218–19 (1952).

[35] Parks, *supra* note 33, at 12 (all italicized in original).

[36] See Address by Harold L. Cross, Maine State Bar Ass'n Meeting, Aug. 21, 1952, in 41 Me. S.B.A. Rep. 33 (1952).

[37] See Mack Appeal, 386 Pa. 251, 273, 126 A.2d 679, 689 (1956) (Musmanno, J., dissenting): "A print shop without material to print would be as meaningless as a vineyard without grapes, an orchard without trees, or a lawn without verdure. Freedom of the press means freedom to gather news, write it, publish it, and circulate it."

[38] See statutes cited note 6 *supra*.

which executive sessions are authorized, and the methods for enforcing the statutory directives.

A. *Coverage*

Statutory provisions for coverage fall into three broad categories. The first simply lists certain types of governmental organizations – for example, "all boards and commissions" [39] — without any additional phrase expressing a general principle of coverage. The danger in such an approach is that the list of enumerated organizations will be read restrictively, thereby excluding from coverage a number of bodies properly comprehended within the open meeting philosophy; "all boards and commissions," for example, might be held to exclude city councils and public authorities. Perhaps cognizant of this danger, some legislatures have enacted introductory clauses directing that the act should be liberally construed in light of the declared policy of the state that its citizens are entitled to complete information about governmental affairs and the actions of public officials; [40] but when the enumerative clause is drafted more narrowly than the policy declaration, the former might well be held to control. A second group of statutes covers all bodies "established by law to serve a public purpose," [41] or "exercising legislative, regulatory or directive powers"; [42] they thus seem to exclude any organization not explicitly authorized by statute, such as a subordinate organization established *ad hoc* by the parent itself. A third group refers to bodies "transact[ing] . . . governmental functions affecting any . . . [citizen]" [43] or includes a catchall provision embracing all state or local organizations that are either supported by or authorized to spend public funds.[44] These appear to represent the broadest possible approach and to include any official organization that plays a significant role in public affairs. In articulating the principle of broad coverage a public funds test seems most desirable; it affords a more certain and easily applicable criterion than a standard such as "governmental functions affecting any citizen."

The most difficult coverage problem is whether the statutes apply to a governmental body's subordinate agencies or committees whose only function is to make recommendations to the parent organization.[45] In *Adler v. City Council* [46] members of the city planning commission attended a private factfinding dinner given by a potential applicant for a zoning change; the planning commission's sole function was to make recommendations to the city council, which then determined

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[39] DEL. CODE ANN. tit. 29, § 5109 (Supp. 1960); see, *e.g.*, VT. STAT. ANN. tit. 1, § 312 (1959).

[40] *E.g.*, IND. ANN. STAT. § 57-601 (1961).

[41] *E.g.*, HAWAII REV. LAWS § 7A-1 (Supp. 1960).

[42] WASH. REV. CODE § 42.32.010 (Supp. 1958).

[43] *E.g.*, IND. ANN. STAT. § 57-602 (1961).

[44] See, *e.g.*, ILL. REV. STAT. ch. 102, § 41 (1961); LA. REV. STAT. § 42.5 (Supp. 1952).

[45] This problem does not arise under the second class of statute referred to above — "established by law to serve a public purpose" — unless the subordinate body is expressly authorized by statute.

[46] 184 Cal. App. 2d 763, 7 Cal. Rep. 805 (Dist. Ct. App. 1960).

after a public hearing whether or not zoning changes would be granted. In an action brought to set aside the zoning change on the ground that the planning commission had improperly met in secret, the court held that the California statute had not been violated, ruling that the law did not apply to subordinate agencies with purely advisory functions.[47] Previously, the California attorney general had declared that the statute did not apply to committees that "consist of less than a quorum of the members of the . . . body."[48] Shortly after the *Adler* decision, the California act was amended to cover any group, apparently including committees, which is supported by funds from the parent agency and on which officers of the agency serve in their official capacity; official advisory commissions have also been explicitly included.[49] Similarly, the Massachusetts legislature recently amended its statute to cover "every board, commission, committee and sub-committee, however elected, appointed or otherwise constituted, of any district, city or town."[50] Whether the courts will construe less explicit statutes as applying to subordinate committees and agencies is problematical. Since such groups have no power to make governmental decisions and since their recommendations must be considered in open session by the parent body, the need for public meetings is less compelling; indeed, privacy may facilitate the gathering of information as well as preliminary discussion. But if in practice recommendations are adopted with only perfunctory consideration by the parent group, the public will be deprived of information about the actual process of decision. And since there seems to be no particular reason for leaving subordinate groups always free to meet in private, the preponderant interest in informing the public seems sufficient to justify their inclusion.[51]

Certain governmental bodies are excluded from the operation of most statutes. The most important exceptions are founded on a determination that the business conducted by the body is such that the interests served by maintaining secrecy are more important than those promoted by informing the public. This is clearly the explanation for excluding juries and grand juries;[52] even where such an exemption is not explicit it almost certainly would be implied. A similar appraisal

[47] *Id.* at 771–72, 7 Cal. Rep. at 810–11.

[48] 32 OPS. CAL. ATT'Y GEN. 240, 242 (1958). Even if the statute were not applicable to committees, permitting closed sessions of a committee of the whole organization would vitiate the purpose of an open meeting law. Such a meeting was held to violate a statute requiring city council meetings to be open to the public. Accord v. Booth, 33 Utah 279, 93 Pac. 734 (1908).

[49] See CAL. GOV'T CODE § 54952. *But see* Carpenter, Bull. of League of Cal. Cities on the Brown Act — Public Meeting Law, Sept. 19, 1961, p. 5, which concludes that the amendment was intended "to apply only to those publicly supported boards, commissions or committees of private organizations on which public officials served in their official capacity."

[50] MASS. GEN. LAWS ANN. ch. 30, § 23A (Supp. 1961).

[51] *But see* Memorandum From Assistant Managing Editor to Publisher of the *St. Louis Post-Dispatch*, copy on file in the office of the Harvard Law Review Association: "[It] would be nice to be able to attend all committee sessions, but I do not think much would be gained necessarily by doing so."

[52] See, e.g., ALASKA COMP. LAWS ANN. § 2A-11-91 (Supp. 1959) (exempting juries); N.M. STAT. ANN. § 5-6-17 (Supp. 1961) (exempting grand juries). Most of the statutes, however, do not state these exemptions.

underlies exemptions for parole and pardon boards[53] or for meetings "of a quasi-judicial board or commission held for the sole purpose of making a decision required in an adjudicatory proceeding brought before it."[54] State legislatures are also excluded from some statutes,[55] presumably because their meetings already are open by virtue of custom or a state constitutional requirement;[56] and other state and local organizations are not covered because the state constitution either explicitly authorizes them to meet in closed session or exempts them from the legislature's control.[57] A final group of exemptions seemingly has no justification other than political expediency. Both California and Idaho failed to include state governmental organizations within their statutes,[58] apparently because inclusion would have antagonized interest groups having sufficient influence in the legislature to endanger passage of the statute. A similar explanation has been offered for the Massachusetts statute's exemption of public authorities.[59]

B. *Notice Provisions*

An "open meeting" is open only in theory if the public has no knowledge of the time and place at which it is to be held; yet only six of the open meeting statutes contain provisions requiring public notice.[60] The effect of such omissions may be serious; in one state there is evidence that "some are evading the statute by merely meeting at times and places unknown to the public and news media. When they are challenged, they explain that it was an 'open meeting.'"[61] While regularly scheduled meetings held at the same time and place would

[53] See, *e.g.*, MINN. STAT. § 1.41 (1957); OHIO REV. CODE ANN. § 121.22 (Page Supp. 1961).

[54] MASS. GEN. LAWS ANN. ch. 30A, § 11A (Supp. 1961). *But see* ALA. CODE tit. 14, § 393 (1958) ("no executive or secret session shall be held by any . . . body . . . to which is delegated any legislative or judicial function").

[55] *E.g.*, LA. REV. STAT. § 42.5 (Supp. 1952).

[56] See p. 1203 *supra*.

[57] See MASS. GEN. LAWS ANN. ch. 30A, § 11A (Supp. 1961) (excepting the governor's executive council); ILL. REV. STAT. ch. 102, § 42 (1961) (applies "except . . . where the constitution provides that a governmental unit can hold secret meetings").

[58] In California so many state boards and commissions pressured the legislature for exemption that coverage was not extended beyond local bodies. See PICKERELL & FEDER 40-42. In 1957, however, the California legislature enacted sixty-six bills requiring specific boards and agencies of the state to meet in public, thus reducing an unjustified disparity. See CROSS, THE PEOPLE'S RIGHT TO KNOW (Supp. 1959, at 101).

[59] See MASS. NEWSPAPER INFORMATION SERVICE, THE MASSACHUSETTS "OPEN MEETING" LAW 9 (1959). Sponsors of the law would like it extended to cover public authorities because the authorities spend vast amounts of public funds. Interview With David Brickman, Editor of the *Malden Evening News* and the *Medford Daily Mercury*, Nov. 1, 1961.

[60] ARK. STAT. ANN. § 6-604 (Supp. 1961); CAL. GOV'T CODE §§ 54954-56; LA. REV. STAT. § 42.7 (Supp. 1952); MASS. GEN. LAWS ANN. ch. 30A, § 11A, ch. 34, § 9F, ch. 39, § 23A (Supp. 1961); PA. STAT. ANN. tit. 65, § 253 (1959); WASH. REV. CODE § 43.32.010 (Supp. 1958).

[61] Letter From Editor of the *Burlington* (Vermont) *Free Press* to the *Harvard Law Review*, Nov. 7, 1961; see Bull. of the American Soc'y of Newspaper Editors, March 1, 1958, p. 10: "[I]n tiny Essex Junction, Vt., the town trustees gave the municipal manager strict orders not to tell the press when the trustees were going to meet, and to tell town residents only upon specific request."

seem immune to this objection, it is desirable to enact some notice provision to cover other situations. In states having notice requirements, twenty-four hour's notice is typically required to hold a special meeting or a rescheduled session of a regular one.[62] Four of the six states are silent with regard to emergency sessions, in Massachusetts they are explicitly exempted from the notice requirements,[63] and in Arkansas they can be held only after two hour's advance notice to the press.[64] The Arkansas approach appears sound. It permits rapid action when necessary while preventing the invocation of trumped-up emergencies which exclude the press from meetings that would otherwise be open.

C. *Executive Sessions*

All but two of the statutes explicitly recognize the need for closed sessions in certain circumstances.[65] However, the statutes exhibit two distinct approaches toward determining when such sessions will be allowed.

1. The Subject-Matter Approach. — In several states the legislature has explicitly set forth the various subjects that may be discussed behind closed doors.[66] Most commonly listed is the appointment or discharge of, or the investigation of charges against, governmental employees.[67] Permitting such matters to be handled in secret surely is sound. Privacy in the screening of potential appointees is often necessary if people of high caliber are to apply for governmental positions. In one instance where a board of regents was seeking a new university chancellor, newspaper publicity of the candidates resulted in several of the prospects withdrawing their names.[68] When possible disciplinary action or dismissal is being considered, premature publicity can cause great and often unjustified damage to personal reputations. To be sure, secrecy in such matters may increase the likelihood of irresponsible character assassination or political favoritism,[69] but a number of statutes afford the employee some protection by granting him an option to demand a public hearing.[70] In any event the danger of such abuses seems outweighed by the need to protect the individual's reputation and the interest of the public in maintaining efficient personnel management and employee morale. One legislature has apparently considered the interest of the public to be so strong that it has extended the provision for executive sessions beyond hiring and firing to include such matters as promotion, demotion, and compensation as well.[71]

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[62] See, *e.g.*, Pa. Stat. Ann. tit. 65, § 253 (1959).
[63] Mass. Gen. Laws Ann. ch. 30A, § 11A, ch. 34, § 9F, ch. 39, § 23A (Supp. 1961).
[64] Ark. Stat. Ann. § 6-604 (Supp. 1961).
[65] Minn. Stat. §§ 10.41, 471.705 (1957); N.D. Cent. Code § 44-04-19 (1960).
[66] See, *e.g.*, Nev. Rev. Stat. § 241.030 (Supp. 1960); Wis. Stat. § 14.90(3) (1959).
[67] *E.g.*, Ark. Stat. Ann. § 6-602 (1956).
[68] Peterson, *supra* note 23, at 224.
[69] See Wiggins 21–22.
[70] *E.g.*, Cal. Gov't Code § 54957.
[71] Wis. Stat. § 14.90(3)(b) (1959).

Some statutes listing the subjects that may be considered in executive session make no reference to personnel matters; they generally include, however, a provision authorizing executive sessions for "matters which if made public might adversely affect . . . the reputation of any person." [72] While such clauses will probably be construed to include some personnel problems, the failure of these statutes to recognize explicitly a public interest in personnel management may prevent their extension to questions of promotion, demotion, and compensation, where the likelihood of adverse effects on reputation is less clear. At the same time, however, clauses of this type apparently authorize executive sessions not only for discussion of personnel problems but whenever the reputation of any citizen would thereby be protected, as for instance in the processing of welfare claims or the investigation of a businessman charged with violating state regulatory controls.[73]

Executive sessions are also commonly authorized where premature publicity would be detrimental to the interest of the community, as by revealing information to individuals who might profit at public expense.[74] Such an exception is particularly necessary when a government body decides to negotiate for the purchase of land. Although the opportunity for officials to make a personal profit at public expense is thus enhanced,[75] this danger could be minimized by requiring full disclosure of all data once the transaction is completed and full review by an independent auditing agency. Another provision, found in two states, allows executive sessions to discuss questions concerning the "public security" [76] or "the security of the state." [77] If limited to problems of subversion or defense, secrecy is clearly justified; [78] but it is doubtful that state and local governments have much occasion to consider such measures, and the exceptions are stated in ambiguous terms that might be construed to equate public "security" with the public welfare. Finally, some statutes allow private sessions if federal regulations so require.[79] Since these regulations, intended to ensure privacy in handling welfare cases, must be complied with if the state is to continue receiving federal funds,[80] the right to deal with such matters in closed session would presumably be implied even where it is not explicitly granted.

2. The Final-Action Approach. — The second statutory approach toward executive sessions is to permit them "provided no final or bind-

Alaska has some of both approaches

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[72] *E.g.*, MASS. GEN. LAWS ANN. ch. 30A, § 11A (Supp. 1961).

[73] The statutory language appears broad enough to permit executive sessions because an official fears that publicizing his vote would harm his reputation, but such a construction would clearly be unjustified.

[74] See, *e.g.*, N.J. REV. STAT. § 10:4–4(g) (Supp. 1961); WIS. STAT. § 14.90(3)(f) (1959) (executive sessions authorized when organization confers with an attorney about its legal rights).

[75] See PICKERELL & FEDER 35-36.

[76] MASS. GEN. LAWS ANN. ch. 30A, § 11A (Supp. 1961).

[77] See VT. STAT. ANN. tit. 1, § 313 (1959).

[78] CAL. GOV'T CODE § 54957 allows executive sessions to consider "matters affecting the national security."

[79] See, *e.g.*, ILL. REV. STAT. ch. 102, § 42 (1961).

[80] See 53 Stat. 1397 (1939), as amended, 42 U.S.C. § 1203(a)(9) (1958), 64 Stat. 555 (1950), 42 U.S.C. § 1352(a)(9) (1958).

ing action shall be taken,"[81] or alternatively, to provide that "no ordinances, resolutions, rules, regulations, contracts, or appointments shall be finally approved at . . . executive sessions."[82] On their face these statutes seem to present public officials with an invitation to frustrate the purpose underlying open meeting laws; the body can give full consideration to possible courses of action behind closed doors and then convene in public simply to take formal action on decisions already made.[83] And it is difficult to see how the courts could prevent such evasion without resorting to arbitrary distinctions between those executive sessions contemplated by the legislature and those which contravene the statute's policy if not its literal terms. In leaving public officials with broad discretion to decide when their deliberations shall be kept secret, these statutes give salutary recognition to the undesirability of precluding officials from ever meeting privately to gather information or carry on preliminary consultations.[84] But they fail to ensure the public an open meeting in which the officials conduct full discussions of the issues, resolve any differences, and come to a conclusion.

The two statutory approaches seem to represent fundamentally differing attitudes toward the role of the legislature in prescribing open meeting requirements. In the first type of statute the legislature itself has specified the subject matter which may be considered in closed sessions; in all other situations there is seemingly an absolute requirement to meet openly. Statutes of the second type do not significantly alter the prestatutory situation — where officials are free to determine whether meetings will be open — beyond requiring that all final action be taken in public and expressing a policy in favor of admitting the public. While the specific-listing approach appears the more satisfactory of the two, it would seem desirable to give some recognition to the need for privacy in factfinding and preliminary discussions. The California statute has attempted to do so by providing that no official may be convicted of a misdemeanor for violating the act unless he "knowingly" attends a closed session at which there is "a collective decision made by a majority of the members . . . , a collective commitment or promise by a majority of the members . . . to make a positive or a negative decision, or an actual vote by a majority of the members . . . when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance."[85] This approach is a reason-

[81] LA. REV. STAT. § 42.6 (Supp. 1952); see, *e.g.*, OHIO REV. CODE ANN. § 121.22 (Page Supp. 1961).

[82] UTAH CODE ANN. § 52-4-3 (1960); see, *e.g.*, MD. ANN. CODE art. 23A, § 8, art. 25, § 5, art. 41, § 14 (1957); VT. STAT. ANN. tit. 1, § 313 (1959). The Delaware requirement that the meeting be open if business is transacted, DEL. CODE ANN. tit. 29, § 5109 (Supp. 1960), is probably equivalent to a prohibition against final action. The Connecticut law appears to place no limit on executive sessions. See CONN. GEN. STAT. REV. § 1-21 (1958).

[83] Letter From Executive Editor of the *Salt Lake Tribune* to the *Harvard Law Review*, Nov. 14, 1961.

[84] See pp. 1202–03 *supra*.

[85] CAL. GOV'T CODE § 54952.6. "[W]hen the public interest would not obviously suffer, . . . even these informal sessions should be open to all who want to attend." Carpenter, Bull. of League of California Cities on the Brown Act — Public Meeting Law, Sept. 19, 1961, p. 4.

able attempt at compromise between permitting executive sessions whenever no final action is taken and completely denying the right to use closed meetings for preliminary consideration, while at the same time minimizing the danger that the closed session will "develop into a meeting of greater importance than the one open to the public." [86]

D. *Enforcement and Penalties*

The most common methods by which open meeting laws are enforced are provisions for criminal penalties, invalidation of action taken at the closed meeting, and injunctions prohibiting officials from excluding the public. Approximately half the open meeting statutes specify one or a combination of these sanctions, but there is some indication that the courts will not view the statutory sanctions as exclusive.[87] Where the statute provides no method for enforcement, the burden of developing a means to prevent violations necessarily falls upon the courts.

1. Criminal Penalties. — In eleven states a violation of the open meeting statute is punishable by fine and/or imprisonment for a short term.[88] While such misdemeanor penalties are a typical means of punishing minor infractions of the law, caution should be exercised when criminal sanctions are imposed in the open meeting context. Threatened with a criminal prosecution for violating the statute by meeting in closed session with members of the state highway board, the governor of Nevada, who had believed the act inapplicable, contended that "the deprivation of human liberty is too important to be sacrificed merely for a test." [89] Even though it is likely that prison sentences would be suspended and fines remitted in "test" cases, this view has substantial merit. Open meeting laws in general abound with ambiguities as to the scope of coverage and the privilege of meeting in executive session, and in some states complicated provisions for notice further enhance the probability of unwitting violations. To submit public officials to the risk of the moral opprobrium of a criminal conviction in order to get clarification of the statute seems both unjust and inappropriate. On the other hand, in many statutes the penalties seem too inconsequential to deter willful violators.[90] A criminal penalty, if included at all, should be restricted to "knowing" or "intentional" violators, and some other procedure should be available for resolving statutory ambiguities.

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[86] THE INTERNATIONAL CITY MANAGERS' ASS'N, THE TECHNIQUE OF MUNICIPAL ADMINISTRATION 23 (4th ed. 1958).

[87] See Hamrick v. Town of Albertville, 219 Ala. 465, 122 So. 448 (1929) (statute provided only for a fine, but the court utilized invalidation as a sanction).

[88] See, *e.g.*, ILL. REV. STAT. ch. 102, § 43 (1961); OKLA. STAT. ANN. tit. 25, § 202 (Supp. 1961). Where the statute makes a violation a misdemeanor but prescribes no penalty, see, *e.g.*, CAL. GOV'T CODE § 54959, the normal penalty for misdemeanors presumably applies.

[89] Advancement of Freedom of Information Comm. of Sigma Delta Chi, Annual Report 1961, at 22–23. At least one Nevada newspaperman apparently agrees with the governor: "Probably the law should have been entered in the civil code rather than criminal." Letter From Editor of the *Nevada State Journal* (Reno) to the *Harvard Law Review*, Nov. 16, 1961.

[90] See PA. STAT. ANN. tit. 65, § 254 (1959) ($10 to $25 fine; no jail sentence).

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2. Invalidation — Only two of the statutes reflect any legislative consideraton of, as a sanction for violation, invalidation of action taken. New Jersey provides that any official determination made by vote at a meeting held in violation of the open meeting law shall be voidable in a court proceeding.[91] The Massachusetts statute, previously silent on the question of invalidation, was recently amended to provide that action otherwise duly taken at a meeting shall not be invalidated for failure to fulfill the statutory requirements of public notice.[92] Adopted to ensure that important measures, such as bond issues, would not be held invalid for an infraction of the detailed notice requirements, the amendment seemingly was not intended to foreclose invalidation as a possible sanction for improperly closing a meeting to the public.[93] In *Elmer v. Board of Zoning Adjustment*,[94] however, the amendment was held to preclude invalidation of zoning modifications granted at a meeting for which proper statutory notice had not been given and which the defendants admitted was "not open to the public or to the press."[95] The court reasoned that "it would be unlikely that any of the public would be in attendance at a meeting of which no notice was given; [hence] it would be arbitrary to let the validity of [such] a meeting . . . depend upon whether the meeting was declared 'open.'"[96] Such reasoning appears to overlook the real possibility that members of the public may still be aware of a meeting and seek to attend even though the statutory requirements for notice have not been satisfied. Moreover, in so far as the decision rests solely on the amendment, it leaves the sanction of invalidation available in Massachusetts where a meeting is illegally closed but proper notice has in fact been given. Yet it seems highly unlikely that the Massachusetts court, faced with such a situation, would apply the invalidation remedy, since to do so would tend to encourage officials not to comply with the notice requirements. Thus *Elmer* in effect seems to represent a judicial determination — without statutory authorization — to foreclose the sanction of invalidation for all improperly closed meetings, regardless of compliance with the notice requirements. That the *Elmer* court in fact contemplated this result is suggested by its statement that "there are enough prospective difficulties in the implementation of [the open meeting law] . . . without putting otherwise valid action at the risk of subsequent determination that the particular deliberations were required to be held under public scrutiny."[97]

In other states where the statutes are silent on invalidation, the courts might permit a person affected by a measure adopted at a closed meeting to contest the measure's validity.[98] In *Hamrick v. Town of*

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[91] N.J. REV. STAT. § 10:4-5 (Supp. 1961).

[92] See MASS. GEN. LAWS ANN. ch. 30, § 23C (Supp. 1961).

[93] Interview With William A. Waldron, 1958-1961 Chairman of the Boston Bar Ass'n's Comm. on Administrative Law, Nov. 2, 1961.

[94] 176 N.E.2d 16 (Mass. 1961).

[95] Record, pp. 119, 128.

[96] 176 N.E.2d at 18.

[97] *Ibid.*

[98] A person clearly has standing to contest the validity of official action that affects him directly, such as termination of his employment or imposition of a tax

Albertville[99] the court held that a city council assessment for street improvements would be null and void if considered at a meeting held in violation of the open meeting statute. Apparently there are no other cases in which this approach has been taken under a generally applicable open meeting law,[100] but under older statutes directing a specific body to meet in public the courts have invalidated such measures as a licensing tax ordinance [101] and a zoning determination [102] solely because adopted in closed session. The rationale of these cases is exemplified by *Green v. Beste*,[103] where the court, enjoining the city from entering into a contract authorized at a city council meeting in violation of the statute establishing the date of city council meetings and requiring that they be open, declared: "If the council were allowed to adjourn the regular meeting without a date certain then it could meet in secret . . . . The public then would be deprived of the protection guaranteed by the statute. It would leave the door wide open for fraud . . . ." [104]

But the use of invalidation as a sanction is open to serious question. Its effectiveness appears limited to meetings at which final official action is taken. While the courts could invalidate measures formally approved in public on the ground that previous consideration had taken place at meetings improperly closed, it seems unlikely that they will do so.[105] In *Adele W. Kramer*,[106] for example, where the plaintiff contended that a school board decision to cease its practice of admitting children to kindergarten at mid-year was void because discussed at an execu-

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assessment. Many actions by public bodies, though not touching a property interest peculiar to the plaintiff, will require expenditure of public funds, thus providing the basis for a taxpayer's suit to challenge the legality of the measure. These actions are available in most jurisdictions, but in some cases a court may find no standing because the allegedly illegal act has no adverse effect on the treasury. See Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1293 (1961). *But see* Adler v. City Council, 184 Cal. App. 2d 763, 7 Cal. Rptr. 805 (Dist. Ct. App. 1960) (the court did not question the right of a taxpayer seemingly unaffected by a zoning change to challenge its validity).

[99] 219 Ala. 465, 474, 122 So. 448, 456 (1929).

[100] The failure to do so in Campbell v. Commissioners of the Town of Bethany Beach, 139 A.2d 493 (Del. 1958), seems inexplicable. Seeking an injunction against the construction of a highway, plaintiff alleged that the consent of the town commissioners to the proposal of the state highway department was in bad faith because given in a closed meeting. The court rejected this argument: "It is true that the formal action of the Commission as a Board was done in executive session from which the public was excluded, but there is no requirement in the Charter of the Town of Bethany Beach that proposed action by the Commissioners within their admitted powers should be . . . acted upon in public." *Id.* at 497. The court did not advert to the Delaware statute requiring that action by such boards be taken in public. See DEL. CODE ANN. tit. 29, § 5109 (Supp. 1960).

[101] See City of Lexington v. Davis, 310 Ky. 751, 221 S.W.2d 659 (1949).

[102] See Blum v. Board of Zoning & App., 1 Misc. 2d 668, 149 N.Y.S.2d 5 (Sup. Ct. 1956): "Action taken by the board while in executive session with the public excluded is illegal and void." *Id.* at 671, 149 N.Y.S.2d at 8.

[103] 76 N.W.2d 165 (N.D. 1956).

[104] *Id.* at 168.

[105] See Barnes v. City of New Haven, 140 Conn. 8, 98 A.2d 523 (1953). *But see* Cullum v. Board of Educ., 15 N.J. 285, 104 A.2d 641 (1954) ("the open meeting they held was nothing more than a sham and . . . ought be dealt with, as if it had never occurred"); Hamrick v. Town of Albertville, 219 Ala. 465, 122 So. 448 (1929) (semble).

[106] 72 N.Y. Dep't R. 114 (Educ. Dep't 1951).

tive session in violation of the statute, the court refused to grant relief on the ground that an open session had been convened for final determination. Even in California, where the statute explicitly calls for open deliberations as well as open actions,[107] the court has indicated that a violation at some early stage of the proceedings will not justify invalidation of action formally taken in public.[108] The strongest objection to using invalidation as a sanction is that its salutary effect does not seem worth its heavy costs.[109] Both citizens and officials rely on governmental decisions in planning their everyday affairs, and to allow the subsequent invalidation of such decisions simply because they were made in violation of ambiguously drawn open meeting laws would create a substantial amount of undesirable uncertainty.[110] Moreover, the deterrent effect of invalidation may seriously be doubted, for the officials who violate the statute will seldom be affected by the consequences of such a remedy.[111]

3. Injunctions. — Three statutes explicitly authorize the courts to issue injunctions or writs of mandamus to enforce their provisions.[112] In both Massachusetts and Illinois proof of a prior violation is required before an order can issue. California merely authorizes "an action either by mandamus or injunction for . . . preventing violations or threatened violations,"[113] but the practical difficulties of proving a threat of violation would seem in most instances to require a showing that the defendants had committed at least one violation in the past. If a violation is proved, issuance of an order is mandatory in Massachusetts, whereas in Illinois, and presumably also in California, the granting of relief is discretionary. The availability of injunctive relief where not authorized by statute is somewhat uncertain. No case has been reported in which an injunction was granted,[114] but *State ex rel. Adams*

[107] CAL. GOV'T CODE § 54950.

[108] Adler v. City Council, 184 Cal. App. 2d 763, 775, 7 Cal. Rptr. 805, 813 (Dist. Ct. App. 1960).

[109] "In one case, a school district submitted a bond issue to the electorate, receiving an affirmative vote; later the validity of the bond issue was overturned because of a legal decision that the prior notice specification had not been met." Letter From Editorial Page Editor of the *Seattle Times* to the *Harvard Law Review*, Nov. 10, 1961.

[110] See Elmer v. Board of Zoning Adjustment, 176 N.E.2d 16, 18 (Mass. 1961).

[111] *But see* CROSS, THE PEOPLE'S RIGHT TO KNOW (Supp. 1959, at 45-46); Letter From Editor of the *Times-Picayune* (New Orleans) to the *Harvard Law Review*, Nov. 9, 1961: "I believe that the fear of nullification of official actions taken in closed sessions is the greatest deterrent to violation of the Louisiana law." The Louisiana statute does not authorize invalidation but simply provides that "it shall be unlawful for [covered organizations] . . . to hold meetings under any conditions contravening the provisions of . . . [this act]." LA. REV. STAT. § 42:8 (Supp. 1952).

[112] See CAL. GOV'T CODE § 54960; ILL. REV. STAT. ch. 102, § 43 (1961); MASS. GEN. LAWS ANN. ch. 39, § 23C (Supp. 1961).

[113] CAL. GOV'T CODE § 54960.

[114] PICKERELL & FEDER 19, refers to an unreported and unnamed case in which a lower California court, at the behest of a taxpayer excluded from meetings of the county planning commission, issued a permanent order that future sessions be conducted in public. At the time the California statute did not contain its present provision authorizing injunction or mandamus.

It is arguable that the standing requirement in suits for injunctions or mandamus should be less stringent than in actions for invalidation, since less drastic relief is sought. See note 98 *supra*.

v. Rockwell [115] suggests that closed meetings violative of the statute can be enjoined without an enabling provision. There, electors and residents of a school district, alleging that the school board had willfully ignored the open meeting statute and their requests for public sessions, sought a writ of mandamus; the court sustained a demurrer to the petition on the sole ground that there was an adequate ordinary remedy available by injunction.

The weakness of the injunction procedure lies in the necessity of proving a prior violation and hence of enduring at least one instance of illegality. One school board chairman reports that he held an executive session in contravention of the statute -- no exemption was provided for a discussion of wage scales, which he thought might adversely affect teacher morale if publicized prematurely — upon advice of counsel that the worst that could happen would be the issuance of a court order forbidding him to hold such a meeting in private again; in fact no court order was sought.[116] On the other hand, the prospective operation of the injunction procedure is also its great advantage. It recognizes that violations are often likely to occur through inadvertence or ignorance, and provides a gentler means of obtaining judicial clarification; at the same time the severe penalties for contempt ensure future compliance. Perhaps supplemented by some provision for criminal penalties in the event of "knowing" or "intentional" violation, the injunction appears the most satisfactory method of enforcing an open meeting policy.

4. Other Remedies. — In addition to the more common sanctions, several other means of enforcement have on occasion been adopted or suggested. One is dismissal of violators from public office. The Arkansas statute formerly provided that public officials whose appointments must be confirmed by the state senate are subject to dismissal for participating in an improperly closed meeting; [117] recent amendments have modified the act so that all officials are subject to dismissal, but only if they are responsible for giving notice to the public and willfully fail to do so.[118] The change presumably reflects a feeling that dismissal is too severe a penalty for illegally meeting in private. Another possibility is to permit an action for damages against the public officials. In *Acord v. Booth* the court awarded a citizen one cent damages for deprivation of his right to be present at a city council meeting in order to effect the legislative purpose "that the public might know what the councilmen thought about the matters in case they expressed an opinion upon them." [119] Since substantial damages will rarely be recoverable, the effectiveness of this sanction is limited to the publicity value of the legal proceeding. Brief mention may be made of two other suggestions for penalizing illegal closing of meetings, both dependent upon a person's defiance of an order to leave the meeting. For forcible ejectment an action of assault and battery could be brought against the officer doing

[115] 167 Ohio St. 15, 145 N.E.2d 665 (1957).
[116] Interview With a Massachusetts School Board Chairman, Dec. 1, 1961.
[117] Ark. Acts 1949, No. 75, § 2.
[118] ARK. STAT. ANN. §§ 6-605 (1956), 6-603 (Supp. 1961).
[119] 33 Utah 279, 284, 93 PAC. 734, 735-36 (1908).

the ejecting or the board itself if it authorized the action; a determination by the court that the closing was illegal would remove privilege as a defense.[120] Similarly, if resistance led to arrest, a suit for false imprisonment would lie.[121]

Finally, it is notable that many newspaper editors do not regard the penalties for violation as "too important" open meeting legislation is considered desirable for "its educational effect, rather than its effect as a legal weapon."[122] The statutes are viewed primarily as serving "to exemplify a public attitude," to tell "the politicians that the moral sentiments of the people are for open meetings. . . . [They are] a tool for the public — and the press on behalf of the public — to use in prying open doors, not to use in punishing public officials."[123] In the opinion of most editors compliance depends largely on the "good faith of public officials, or their fear of political consequences of bad [illegible] the vigilance of the press and the public."[124]

IV. Assessment of the Statutes

A. The Press

The overwhelming consensus of newspaper editors in states in which open meeting laws have been adopted is that the statutes are "effective" in that they have "made it easier for reporters to be admitted to meetings, particularly when a controversial issue was to be discussed."[125] Some papers reported that "arming" reporters with a copy of the statute "to flourish when needed" had enabled them to gain admittance to meetings of agencies that had formerly met behind closed doors.[126] Such visual aids may be dispensable, however, for some editors indicated that "the simple statement that a reporter believed a closed meeting would violate the law has resulted in it being opened to the public and the press."[127] In the few instances where such warnings have not proved sufficient, the law is used as a "club" in editorial attacks that

[120] See Garner, *The Public Bodies (Admission to Meetings) Act, 1960*, 105 SOL. J. 191 (1960).

[121] See CROSS, THE PEOPLE'S RIGHT TO KNOW (Supp. 1959, at 47).

[122] *E.g.*, Letter From Chairman of the Maine Comm. on Freedom of Information to Managing Editor of the *Portland Press Herald*, quoted in Letter From Managing Editor to the *Harvard Law Review*, Nov. 30, 1961.

[123] Letter From Chief Editorial Writer of the *Chicago Sun-Times* to the *Harvard Law Review*, Nov. 28, 1961.

[124] *E.g.*, Letter From Editor of the *Milwaukee Journal* to the *Harvard Law Review*, Nov. 9, 1961.

[125] *E.g.*, Letter From Executive Editor of the *Cincinnati Enquirer* to the *Harvard Law Review*, Nov. 24, 1961. In addition to "effective," the laws were described as "useful," "very helpful," or having a "wholesome effect."

A few editors, while expressing no opposition, were rather noncommital about the statutes, apparently because they had had no difficulty in gaining access to meetings prior to enactment. See Letter From Editor of the *Bismarck* (North Dakota) *Tribune* to the *Harvard Law Review*, Jan. 10, 1962; Letter From Editorial Page Director of the *Philadelphia Inquirer* to the *Harvard Law Review*, Nov. 14, 1961; Letter From Executive Editor of the *World-Herald* (Omaha) to the *Harvard Law Review*, Nov. 15, 1961.

[126] *E.g.*, Letter From Editor of the *Milwaukee Journal* to the *Harvard Law Review*, Nov. 9, 1961.

[127] Letter From Managing Editor of the *Indianapolis News* to the *Harvard Law Review*, Nov. 18, 1961; see Letter From Assistant Managing Editor of the *Oklahoma City Times* to the *Harvard Law Review*, Dec. 12, 1961 ("usually, all

apparently have been successful in eliminating practices of closed meetings.[128] The editors give credit to the law for opening the meetings of specific city, local, and state organizations ranging from school boards and city councils to state boards of health, state highway departments, and university boards of trustees. In response to a query regarding scope of coverage, most editors thought it was "adequate"; only one complained of the failure to cover committees.[129] With regard to the conduct of public officials at open sessions, every editor who expressed an opinion echoed the view that "our experience . . . disproves the contention that officials are unwilling to express their views and that they are likely to 'grandstand' excessively." [130]

Most editors agreed that there was at least "some evasion" by "executive sessions or informal meetings," but felt it was neither "serious" nor "substantial." [131] Most complaints referred to instances where "votes have been taken in public meetings . . . with little or no discussion of measures which have been agreed on previously in private." [132] There were some indications that this situation might be only temporary, for if the press demonstrates its capacity for fair and accurate reporting at open meetings, public officials will feel less compelled to meet in secret; [133] but all editors concurred in the view that "no law will ever do away with sneak executive sessions or informal meetings of public officials who don't want to work in public." [134]

Despite the general feeling that evasion is not a serious problem, two editors voiced dissatisfaction with the statutes because of their provisions allowing executive sessions. One reported that the "law hasn't been too effective . . . because . . . both City and State boards have used . . . secret meetings quite frequently in order to discuss

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that has been necessary is for the reporter to call the attention of officials to the law").

[128] See, *e.g.*, Letter From Paul Simon, Sponsor of the Illinois Act, to Chief Editorial Writer of the *Chicago Sun-Times*, Nov. 20, 1961, copy on file in the office of the Harvard Law Review Association.

[129] *Ibid.* A few editors felt the law should be "stronger" but were not explicit as to how. *E.g.*, Letter From Editor of the *Burlington* (Vermont) *Free Press* to the *Harvard Law Review*, Nov. 7, 1961.

[130] *Ibid.* One editor observed: "I don't think the law has changed human nature or even affected it." Letter From Managing Editor of the *Indianapolis News* to the *Harvard Law Review*, Nov. 10, 1961.

[131] See, *e.g.*, Letter From Assistant Managing Editor of the *Oklahoma City Times* to the *Harvard Law Review*, Dec. 12, 1961. *But see* Letter From Managing Editor of the *Arkansas Democrat* (Little Rock) to the *Harvard Law Review*, Dec. 11, 1961: "[T]here are reasons to believe that there has been serious evasion through use of . . . informal meetings . . . ."

[132] Letter From President of the *Wilmington* (Delaware) *News-Journal* to the *Harvard Law Review*, Nov. 6, 1961.

[133] "As a result of the open-door policy the confidence of public officials in the press has measurably increased and their uneasiness over opening meetings to the press has largely disappeared." *Ibid.* See, *e.g.*, Letter From Editor of the *Hartford Courant* to the *Harvard Law Review*, Nov. 8, 1961 ("government authorities learn that the newspapers do have a serious interest"). *But see* Letter From Editor of the *Nevada State Journal* (Reno) to the *Harvard Law Review*, Nov. 16, 1961: "Some newsmen think it has also created an antagonism on the part of officials who feel its passage implies distrust of them . . . [The law] has also tended, perhaps, to drive officials to more sub rosa sessions."

[134] Letter From Editor of the *Bismarck* (North Dakota) *Tribune* to the *Harvard Law Review*, Nov. 11, 1961.

'hot' topics."[135] The other felt that the statute was "meaningless and in fact . . . a step backward" because "the contest to open the doors [prior to the statute] . . . was less formidable than at present when closed meetings are authorized by law."[136] A similar view was taken by one editor who approved the governor's veto of recently enacted open meeting legislation.[137] The legislator who introduced the Illinois statute, a newspaperman himself, also found newsmen "cool to the idea" at first because they feared "the law would become a stumbling block rather than an acid"; but he reports that since passage in 1957 "there has been no adverse effect."[138]

The editors divided on the question whether open meeting laws are necessary. One editor from a state which presently has no statute thought legislation desirable "to eliminate certain 'blind spots' that have been retained over the years, sometimes through custom and tradition."[139] Another, though stating no law "is needed at this time" in his city, felt that "every state should have a . . . [law to] give an editor a sense of protection should the situation suddenly change."[140] Most editors in states which do have open meeting statutes seemed to agree with this view.[141] On the other hand, a surprising number of editors seemed to feel that statutes were not necessary because "resourceful, energetic reporters need not be seriously inconvenienced or hampered by any closed-door policy on the part of public officials."[142]

B. Public Officials

Any effort to ascertain the reaction of public officials is hampered by the fact that an open meeting law "is a little like motherhood; no one wants to express himself against it publicly."[143] All officials seem

[135] Letter From a Retired Editor of the *Honolulu Star-Bulletin* to the *Harvard Law Review*, Nov. 11, 1961.

[136] Letter From Executive Editor of the *Salt Lake Tribune* to the *Harvard Law Review*, Nov. 14, 1961.

[137] Letter From Executive Editor of the *Courier-Journal* (Louisville) to the *Harvard Law Review*, Dec. 8, 1961: "I'd rather fight my way into a meeting, or dig the news about it out from someone there, than have secret meetings become sanctioned specifically by law."

[138] Letter From Paul Simon to the Chief Editorial Writer of the *Chicago Sun-Times*, Nov. 20, 1961, copy on file in the office of the Harvard Law Review Association.

[139] Letter From State Capitol Correspondent of the *Houston Post* to Frank H. King, Dec. 14, 1961, copy on file in the office of the Harvard Law Review Association.

[140] Letter From Managing Editor of the *Miami Herald* to the *Harvard Law Review*, Feb. 10, 1962.

[141] See, *e.g.*, Letter From Editor of the *Hartford Courant* to the *Harvard Law Review*, Nov. 8, 1961: "[I]t is important to get the principle of the right to know onto the statute books. Then it is there to appeal to."

[142] Letter From Managing Editor of the *New York Times* to the *Harvard Law Review*, Dec. 27, 1961: "It is up to the newspapers to force open doors that are closed . . . and expose what goes on behind those doors . . . ." See Letter From Editorial Page Editor of the *Seattle Times* to the *Harvard Law Review*, Nov. 10, 1961: "It is my observation that if news-gatherers engaged more often in energetic, tactful reporting, such laws would be largely unnecessary." See Letter From Editor of the *Bismarck* (North Dakota) *Tribune* to the *Harvard Law Review*, Jan. 10, 1962: "I have the feeling that aggressive digging by reporters is always more effective in opening . . . meetings . . . than any laws we might put on the book..."

[143] Letter From Chairman of the Maine Comm. on Freedom of Information

to agree that final decisions on policy matters ough to be reached only after discussion and votes in public and that private sessions of government agencies should be kept to a minimum. Yet a substantial number "consider 'closed' meetings . . . essential for informal discussion of controversial topics without pressure from members of the public or the press."[144] A city manager from California, which has one of the most stringent open meeting laws enacted, declared that in his city the law "has interfered with the preliminary stages of consideration," and that a "thorough discussion of a problem is sometimes sacrificed to obtain a decision."[145] Another source from the same state reports that "numerous" officials complain that "the law has had a tendency to curtail the free exchange of ideas and to hamstring the operation of city legislative bodies," but this is termed a "minority viewpoint."[146] In general, the officials who responded agreed that the law "does not interfere with the efficient operation of city government."[147] One suggested that "governmental bodies have accommodated to these statutes by some use of executive sessions,"[148] and elsewhere it was indicated that the statute "has made little if any difference," largely because past practices have been continued.[149]

C. *Conclusion*

Open meeting legislation has neither revolutionized the conduct of state and local government nor brought it grinding to a halt. Despite some evasion, the statutes have operated to break down past practices of closed meetings by making officials realize that open meetings represent not just a demand of the press but a legitimate public interest and now a legal requirement. Some disadvantages are unavoidable in any such requirement; but the presence of an audience has not in most cases restrained officials from giving full expression to their views, the problems concededly created by an irresponsible press have not been intensified where open meeting laws are in effect, and the fear that officials would waste time making speeches has proved largely unfounded. A more serious problem is that of accommodating the valid interest in secrecy for the consideration of certain subject matter or

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to Managing Editor of the *Portland Press Herald*, quoted in Letter From Managing Editor to the *Harvard Law Review*, Nov. 30, 1961.

[144] Letter From Executive Editor of The International City Managers' Ass'n to the *Harvard Law Review*, Nov. 10, 1961. The International City Managers' Association, the American Municipal Association, and the National Association of County Officials have taken no position on open meeting legislation.

[145] Letter From City Manager of Nevada City, California, to the *Harvard Law Review*, Nov. 20, 1961; see Letter From City Manager of Glendale, California, to the *Harvard Law Review*, Jan. 31, 1962: "[The law] has . . . definitely . . . interfered with the preliminary stages of consideration of a problem . . . ."

[146] Letter From Richard Carpenter, Executive Director & General Counsel of the League of California Cities, to the *Harvard Law Review*, Nov. 16, 1961.

[147] *E.g.*, Letter From City Manager of Cincinnati, Ohio, to the *Harvard Law Review*, Dec. 5, 1961.

[148] Letter From City Solicitor of Pittsburgh, Pennsylvania, to the *Harvard Law Review*, Nov. 10, 1961.

[149] See Letter From City Attorney of Enid, Oklahoma, to the *Harvard Law Review*, Nov. 13, 1961; Letter From City Manager of a California city, population 50,000, to the *Harvard Law Review*, Dec. 4, 1961.

for preliminary fact gathering and consultation, while preserving the informative values of open discussion. Press reports of evasion by secret sessions, together with officials' statements that they have had to skirt the law or occasionally sacrifice thorough discussion, make apparent the difficulties of the legal requirements. To some extent this problem is inherent in the open meeting concept, but it may stem largely from the presently inadequate statutory treatment of executive sessions, which ranges from total prohibition to virtually carte blanche approbation. Furthermore, many problems have been created solely through bad draftsmanship, resulting in ambiguities and incompleteness in many statutes. That fewer than one fourth of the statutes contain a notice provision and that only three have even attempted to establish a reasonable and workable enforcement procedure indicates the haphazard nature of the legislative approach to date. Ensuring the people access to the greatest possible amount of information about governmental activities is an unimpeachably sound concept and, as a basic tenet of democratic government, merits legislative recognition. If the limits and operation of the open meeting principle are defined with the greatest possible precision, many of the difficulties will be resolved, and both press and officials will have a more workable standard for their conduct.

APPENDIX

PROPOSED OPEN MEETING STATUTE

1. Coverage. — This act shall apply to any legislative or administrative body of the state or any subdivision thereof, including any board, commission, authority, council, agency, committee, or other organization supported in whole or in part by public funds or authorized to spend public funds, and also including subcommittees or other subordinate groups of the above bodies. Except as otherwise provided by law or specified in this act, all meetings of bodies subject to this act at which there is a collective decision by a majority of the members of the body, a collective commitment or promise by a majority of the members of the body to make a decision, or an actual vote by a majority of the members of the body upon a motion, proposed resolution, order, or ordinance, shall be open to the public.

2. Exemptions. — The following are exempted from the provisions of this act:

(a) Grand and petit juries.

(b) Parole and pardon boards.

(c) Meetings of quasi-judicial bodies, including but not limited to state licensing boards, held for the sole purpose of making a decision in an adjudicatory proceeding.

3. Executive Sessions. — A body may exclude the public when it is considering or acting upon any of the following matters:

(a) The dismissal, promotion, demotion, or compensation of any public employee, or the disciplining of such employee or investigating of charges against him, unless the employee affected shall have requested an open meeting.

(b) The hiring of any person as a public employee.

(c) Matters which, if discussed in public, would be likely to affect adversely the reputation of any person, other than a member of the body itself.

(d) Matters which, if discussed in public, would be likely to benefit a party whose interests are adverse to those of the general community. This provision shall include but not be limited to consideration of the acquisition of land.

(e) Welfare matters where federal grant-in-aid requirements prohibit publicity.

Provided that:

(1) When a meeting is held at which matters covered by subsections (a), (b), (c), (d), or (e) are considered or acted upon, and at which matters not covered by those subsections are also considered or acted upon, this section shall not authorize exclusion of the public from any portion of the meeting devoted to matters not so covered.

(2) The results of any final action taken in executive session held pursuant to subsections (a), (b), (c), or (d) shall be made public.

4. Public Notice. — All meetings required to be open under this act shall be held at specified times and places of which public notice shall be given as follows:

(a) Every body subject to this act shall give public notice of the schedule of regular meetings at the beginning of each calendar or fiscal year and shall state the regular dates, times, and places of such meetings. Public notice of any special meeting, or of any rescheduled regular meeting, shall be given at least twenty-four hours before such meeting.

(b) Public notice shall be given by posting a copy of the notice at the principal office of the body holding the meeting or, if no such office exists, at the building in which the meeting is to be held. The body shall supply copies of the notice of its regular meetings, and of the notice of any special or rescheduled meeting, to any local newspaper of general circulation or local radio or television station that has filed an annual request for such notice.

(c) When an emergency exists requiring immediate action, the foregoing notice requirements shall not apply, and an emergency meeting may be held provided that at least two hours' advance notice of the time and place of such meeting shall have been given to every local newspaper of general circulation, and to every local radio and television station.

5. Enforcement. — (a) Any member of a body who participates in any meeting which violates this act, knowing the meeting to constitute such a violation, shall be guilty of a misdemeanor punishable by a fine of not more than $———.

(b) Any ——— registered voters of the political subdivision over which the body has jurisdiction may petition the ——— court for an injunction to prevent violation of this act. Such petition shall be given priority on the calendar of the court.

(c) Action otherwise duly taken shall not be invalidated because of a violation of any provision of this act.

ALASKA
SUPERIOR
COURT
4TH DISTRICT

CITY OF KENAI, Charles A. Brown, Acting City Manager, Sue C. Peters, City Clerk, and all current members of the council of the City of Kenai, Vincent O'Reilly, Edward Ambarian, Ronald A. Malston, Betty Glick, Phillip Aber, Charles Bailie and Michael Seaman, Appellants,

v.

KENAI PENINSULA NEWSPAPERS, INC., Appellee.

The MUNICIPALITY OF ANCHORAGE, George M. Sullivan, Mayor, Ruby Smith, Municipal Clerk, Jane Angvik, Paul Baer, Fred Chiei, Ben Marsh, Carol Masser, Rick Mystrom, Gerry O'Connor, Dave Rose, Lydia Selkregg, Don Smith, and Dave Walsh, all current members of the Anchorage Municipal Assembly, Appellants,

v.

ANCHORAGE DAILY NEWS, INC., Appellee.

Nos. 4954, 5433.

Supreme Court of Alaska.

March 26, 1982.

Appeals were taken from decisions of the Superior Court, Third Judicial District, Kenai and Anchorage, James A. Hanson and Karl S. Johnstone, JJ., which, inter alia, ordered the municipalities involved to disclose information concerning the applicants for positions of city manager and police chief. After consolidation, the Supreme Court, Matthews, J., held that: (1) records in possession of municipalities are available for public inspection, subject to exceptions based on need; (2) with the exception of those who withdrew their applications rather than have them disclosed, employment applications for positions of city manager and police chief were subject to disclosure pursuant to public records disclosure statute; (3) to extent that city's public records ordinance prohibited disclosure of applications of those seeking position of police chief, it was in irreconcilable conflict with public records disclosure statute and could not be accorded substantive effect; however, remainder of the ordinance was valid; and (4) city council was authorized by public meetings law to meet in executive session while discussing personal characteristics of the applicants for city manager position.

Order in Anchorage case affirmed; order in Kenai case affirmed in part and reversed in part.

Connor, J., filed separate opinion dissenting in part.

1. Records ⇐30

Records in possession of municipalities are available for public inspection, subject to exceptions based on need. AS 09.25.110, 09.25.120.

2. Records ⇐54

With the exception of those who withdrew their applications rather than have them disclosed, employment applications for positions of city manager and police chief were subject to disclosure pursuant to public records disclosure statute. AS 09.25.110, 09.25.120.

3. Municipal Corporations ⇐111(4), 592(1)

To extent that city's public records ordinance prohibited disclosure of applications of those seeking position of police chief, it was in irreconcilable conflict with public records disclosure statute and could not be accorded substantive effect; however, remainder of the ordinance was valid since those provisions of the ordinance were plainly meant to be severable and since existing state law was neither so detailed nor comprehensive as to permit an inference that the legislature intends to occupy the field to the exclusion of municipalities. AS 09.25.110, 09.25.120.

4. Municipal Corporations ⇐92

City council was authorized by public meetings law to meet in executive session while discussing personal characteristics of the applicants for city manager position. AS 44.62.310(c)(2).

Richard W. Garnett, III, Garnett, Klinkner & Bendell, Anchorage, for appellant, City of Kenai.

Steven H. Morrissett, Julie A. Garfield, Asst. Municipal Attys., Theodore D. Berns, Municipal Atty., Anchorage, for appellants, Municipality of Anchorage.

C. R. Baldwin, Kenai, for appellee, Kenai Peninsula Newspapers.

A. Robert Hahn, Jr., Kevin F. McCoy, Hahn, Jewell & Stanfill, Anchorage, for appellee, Anchorage Daily News.

Before RABINOWITZ, C. J., CONNOR and MATTHEWS, JJ., and VAN HOOMISSEN and TAYLOR, Superior Court Judges.*

OPINION

MATTHEWS, Justice.

These consolidated cases have as their common issue the question whether our public records disclosure statute, AS 09.25.110–.120, applies to municipalities. In both cases the superior court ruled that the statute does apply and, for the reasons expressed below, we agree. Each case also raises issues not present in the other, and these will be separately discussed.

CITY OF KENAI

During June of 1979, the City of Kenai began soliciting applications for city manager. Subsequently, the City Council met, without notice to the public and without keeping minutes, to review applications and interview applicants. Max Swearingen, the publisher of the Peninsula Clarion, a daily publication of Kenai Peninsula Newspapers, Inc., asked the City to release a list of names and a summary of credentials of the applicants. This request was considered by the City Council on August 2, 1979, and rejected. In a letter written to Swearingen, the mayor voiced a concern that such disclosures would jeopardize the applicants' personal privacy, deter future applications from qualified people concerned about public exposure, and compromise the council's moral obligation to respect the privacy interests of individual applicants.

Kenai Peninsula Newspapers filed suit to require the City to allow inspection of the applications and to enjoin the City Council from further review and action upon the applications except at a public meeting. The superior court issued a temporary restraining order enjoining "further deliberations toward the appointment of a City Manager for the City of Kenai from which the public is excluded...." After briefing and a second hearing, the superior court entered a decision which concluded that the applications were public records and that the deliberations of the city council concerning appointment of a city manager must be held in public meetings. The court thereupon ordered the city to permit the inspection and copying of the applications and to refrain from any closed deliberations concerning the selection of the new city manager.

The superior court stayed, pending appeal, that portion of its order requiring the immediate release of the applications for employment. The parties then stipulated that the order should be considered a final judgment and that the city would "deliver over to the Plaintiff copies of all resumes and applications of all applicants for city manager who do not choose to withdraw their application upon being notified of the [city's] agreement to release the same." The agreed upon release was made without prejudice to the city's right to appeal the order requiring it. Ten of the thirty-two applicants for the position withdrew their applications upon learning of the possibility of disclosure. Kenai Peninsula Newspapers subsequently moved for disclosure of the names and information concerning the withdrawn applicants. This motion was denied.

MUNICIPALITY OF ANCHORAGE

In February of 1980, the Municipality of Anchorage began soliciting applications for

* Van Hoomissen and Taylor, Superior Court Judges, sitting by assignment made pursuant to article IV, section 16 of the Constitution of Alaska.

police chief. The nationwide search was conducted through written advertisements which promised that applications would be held in confidence.

From June 1, 1980, through July 8, 1980, Don G. Hunter, a reporter for the Anchorage Daily News, sought access to the names and qualifications of the applicants. The Municipality refused to honor these requests on the grounds that disclosure was prohibited by municipal ordinance, and because confidentiality had been promised to all applicants. The Anchorage Daily News filed suit on July 9, 1980 alleging that the applications and resumes were public documents subject to disclosure and requesting injunctive relief and a temporary restraining order restraining the Municipality from appointing a police chief until a hearing on the merits. Mayor Sullivan appointed a new police chief the next day before the hearing on the temporary restraining order. After the hearing, the court ordered the Municipality to refrain from any action confirming the appointment until a hearing on the merits. The appointee subsequently declined the appointment after disclosures reflecting adversely on his qualifications were made.

The Daily News then learned that Mayor Sullivan had appointed a review committee to assist in evaluating the eighty-nine applications received by the Municipality. The review committee was comprised of local citizens and several municipal employees. The Daily News amended its complaint to allege that the selection process was in violation of Alaska's open meeting law, AS 44.62.310–.312. Following a hearing, the court entered an order for preliminary injunction, supported by findings of fact and conclusions of law, requiring the Municipality to provide the Daily News with the applicants' names and resumes.

Subsequently, the preliminary injunction was modified by stipulation of the parties to provide that the Municipality would contact all applicants to determine whether they wished to withdraw their applications rather than have them made public. The names and information concerning those applicants choosing to withdraw their applications would remain confidential. The parties also stipulated that the preliminary injunction would be considered as a final judgment so that an appeal could be taken to this court. Of the 89 original applicants, 8 withdrew their names. An additional 19 could not be reached within the time frame prescribed by the stipulation and their names were also considered to have been withdrawn.

APPLICATION OF THE PUBLIC RECORDS DISCLOSURE STATUTE TO MUNICIPALITIES

[1] The first question is whether the provisions of AS 09.25.110 [1] and AS 09.25.120 [2] are applicable to municipalities.

1. AS 09.25.110 provides:

Inspection and copies of public records. Unless specifically provided otherwise the books, records, papers, files, accounts, writings, and transactions of all agencies and departments are public records and are open to inspection by the public under reasonable rules during regular office hours. The public officer having the custody of public records shall give on request and payment of costs a certified copy of the public record.

2. AS 09.25.120 provides:

Inspection and copying of public records. Every person has a right to inspect a public writing or record in the state, including public writings and records in recorders' offices except (1) records of vital statistics and adoption proceedings which shall be treated in the manner required by AS 18.50.010–18.50.380; (2) records pertaining to juveniles; (3) medical and related public health records; (4) records required to be kept confidential by a federal law or regulation or by state law. Every public officer having the custody of records not included in the exceptions shall permit the inspection, and give on demand and on payment of the legal fees therefor a certified copy of the writing or record, and the copy shall in all cases be evidence of the original. Recorders shall permit memoranda, transcripts, and copies of the public writings and records in their offices to be made by photography or otherwise for the purpose of examining titles to real estate described in the public writings and records, making abstracts of title or guaranteeing or insuring the titles of the real estate, or building and maintaining title and abstract plants; and shall furnish proper and reasonable facilities to persons having lawful occasion for access to the public writings and records for those pur-

A. The parties' arguments focus on the terms of the statute without regard to its historical context. That historical context is illuminating.

At common law, every interested person was entitled to the inspection of public records, including those of municipal corporations. *Mushet v Department of Public Service of City of Los Angeles*, 35 Cal.App. 630, 170 P. 653 (1917); *Clement v. Graham*, 78 Vt. 290, 63 A. 146, 153 (1906); *State ex rel. Wellford v. Williams*, 110 Tenn. 549, 75 S.W. 948 (1903); *State ex rel. Colescott v. King*, 154 Ind. 62, 57 N.E. 535 (1900).

The history of §§ .110 and .120 demonstrates that the coverage of the common law has consistently been accepted by the legislators of this state. The operative language of § .120 was first enacted by Congress for the District of Alaska as section 1039 of the Act of June 6, 1900, 31 Stat. 321. It read:

> Every person has a right to inspect any public writing or record in said district, and every public officer having the custody thereof is bound to permit such inspection, and to give on demand and on payment of the legal fees therefor, a certified copy of such writing or record, and such copy shall in all cases be evidence of the original.[3]

The language of this section was similar to two sections in the laws of Oregon[4] which in turn had counterparts in the laws of California,[5] Montana,[6] Utah,[7] and Idaho.[8] Decisions in these jurisdictions construing their acts indicate that it has never been doubted that such acts cover municipal as well as state officials.[9]

Enactment of § 1039 seems to have been meant as a codification of the common law rule with the added intent, perhaps, of eliminating the requirement that the person

> poses, subject to reasonable rules and regulations, in conformity to the direction of the court, as are necessary for the protection of the writings and records and to prevent interference with the regular discharge of the duties of the recorders and their employees.

3. § 1039, pt. IV (Code of Civil Procedure), Carter's Ann. Alaska Code (1900).

4. The two sections were §§ 717 and 718 Hill's, Title V Ann. Laws of Oregon which read:

> Section 717. Every citizen of this state has a right to inspect any public writing of this state, except as otherwise expressly provided by this code or some other statute.
>
> Section 718. Every public officer having the custody of a public writing which a citizen has a right to inspect is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor, and such copy is primary evidence of the original writing.

The Oregon statute also contained four other sections which were not enacted by Congress for the District of Alaska. These sections are:

> Title IV
>
> 714. Writings are of two kinds:—(1) public; and (2) private.
>
> 715. Public writings are:—(1) the written acts, or records of the acts, of the sovereign authority of official bodies and tribunals and of public officers, legislative, judicial, and executive, whether of this state, of the United States, or a sister state, or a foreign country.
>
> 716. All other writings are private.
>
> Title V
>
> 719. Public writings are divided into four classes.—(1) Laws; (2) Judicial records; (3) Other official documents; (4) Public records kept in this state, of private writings.

5. California Code of Civil Procedure §§ 1892, 1893 (Deering's California Codes, 1967).

6. Montana R.C. § 10541; 3170-3182 Code of Civil Procedure of 1895, now codified as §§ 2-6-101, 2-6-102 Montana Revised Statutes.

7. Utah Code Section 78-26-1 through 4.

8. Idaho C.C.P. of 1881 §§ 902, 903, currently 9-301, 9-302 Idaho Code (1979).

9. *Gallagher v. Boller*, 231 Cal.App.2d 482, 41 Cal.Rptr. 880 (1964); *Whelan v. Superior Court*, 114 Cal. 548, 46 P. 468 (1896); *Mushet v. Dept. of Public Service of City of Los Angeles*, 35 Cal.App. 630, 170 P. 653 (1917); *Harrison v. Powers*, 19 Cal.App. 762, 127 P. 818 (1912); *San Francisco v. Superior Court*, 38 Cal.2d 156, 238 P.2d 581 (1951); *Coldwell v. Board of Public Works*, 187 Cal. 510, 202 P. 879 (1921); *Miller v. Murphy*, 78 Cal.App. 751, 248 P. 934 (1926), *Jessup v. Superior Court*, 151 Cal.App.2d 102, 311 P.2d 177 (1957); *Santa Monica v. Superior Court*, 204 Cal.App.2d 68, 21 Cal.Rptr. 896 (1962); *Connover v. Board of Education of Nebo School District*, 1 Utah 2d 375, 267 P.2d 768 (1954); *State v. Keller*, 143 Or. 589, 21 P.2d 807 (1933); *State ex rel. Halloran v. McGrath*, 104 Mont. 490, 67 P.2d 838 (1937).

seeking inspection have an interest. When Congress imposed a statutory duty of disclosure in § 1039 on "*every* public officer" it clearly intended to encompass both district and municipal officials; any contention that municipal officials were meant to be relieved of their pre-statutory disclosure duties would plainly be frivolous in view of this language.

Section 1039 continued in effect until 1962, unchanged except for two additions. In 1955 the reference to public writings in recorders' offices was added,[10] followed in 1957 by the addition of the exceptions relating to medical records, those of juveniles, and those records required to be kept confidential by federal or territorial law.[11]

By 1931 the District of Alaska had become an organized territory. In that year the territorial legislature enacted the forerunner of § .110. This enactment, Ch. 107, § 2 SLA 1931,[12] provided:

> The books, records, papers, files, accounts and transactions of every officer, board or institution in the territory are public records, and subject to such reasonable rules as the officer in charge may prescribe, shall be open to inspection by the public during all the time the respective offices shall be open for business.

Except for the addition of language not relevant here, this section, too, remained unchanged until 1962.[13] Since it can hardly be questioned that municipal officers were encompassed within the meaning of the language "every officer . . . in this territory," municipalities were included within the provisions of the predecessor of § .110.

In 1959 Alaska became a state. By that time the predecessors of §§ .110 and .120 had been recodified respectively as §§ 58-1-1 and 58-1-2 ACLA 1949. In 1962 these sections were repealed and re-enacted in their present form. Ch. 101, §§ 3.22, 3.23, SLA 1962. The 1962 re-enactment was accomplished as a part of a comprehensive revision of the entire territorial statutory code of civil procedure. This process was necessitated by statehood. The primary objective of the legislature was to delete procedural provisions from the Alaska statutes in deference to this court's power under the state constitution to promulgate rules of procedure governing proceedings in all courts.[14]

10. Ch 32, § 1, SLA 1955.

11. Ch 54, § 1, SLA 1957.

12. Codified initially as § 2935, CLA 1933.

13. In 1947, language concerning information in the possession of the tax commissioner was adopted. Also added at that time was the phrase "except where otherwise specified or declared." Ch. 46, § 1, SLA 1947. As a result the statute read:

> WHAT ARE PUBLIC RECORDS; INSPECTION.
>
> Except where otherwise specified or declared, the books, records, papers, files, accounts, writings and transactions of every officer, board or institution in this Territory are public records and subject to such reasonable rules as the officer in charge may prescribe, and shall be open to inspection by the public during all the time the respective offices shall be open for business. Any information in the possession of the Tax Commissioner which discloses the particulars of the business or affairs of a taxpayer, or other person, is not matter of public record, except for purposes of law enforcement and the investigation by any person of law compliance, and shall be kept confidential except when production thereof is required in an official investigation or court proceeding; provided, that nothing herein shall be construed to prohibit the publication of statistics so classified as to prevent the identification of particular reports and items thereof, or of the publication of delinquent lists showing the names of taxpayers who have failed to pay their taxes at the time and in the manner provided by law, together with any relevant information which may assist in the collection of such delinquent taxes.

14. Alaska Const. Art. IV, § 15 provides:

> *Rule-Making Power.* The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

The process of revision is alluded to in *Silverton v. Marler*, 389 P.2d 3, 5 (Alaska 1964) and is fully described in the Forward to the Alaska Rules of Court, Volume 1, pp. i-vi.

The report of the Alaska House Judiciary Committee [15] makes it clear that no substantive changes in pre-existing law were intended, except in certain enumerated areas not including the inspection and copying of public records.[16] In fact the House Judiciary Committee corrected an error in the Senate Bill concerning the right to inspect records. Existing law read:

> Every person has a right to inspect any public writing or record in said Territory, including public writings and records in recorders' offices. . . .

§ 58–1–2 ACLA (Supp.1958). The initial Senate Bill revised this to read:

> Every person has the right to inspect any public writing or record in the office of any recorder. . . .

SB 105 § 3.25, p. 18, 2d Leg., 1st Sess. (1961). The House Committee changed this to its present form:

> Every person has a right to inspect any public writing or record in the state, including public writings and records in recorders' offices. . . .

§ 3.22 HCS SB 105, p. 18, 2d Leg., 1st Sess. (1961) which differs from preexisting law only in that the term "the state" is substituted for "said Territory." The House Committee noted concerning this change: "Material re inspection and copying of public records is restored because incorrectly revised." [17]

It is therefore evident that the legislature had no intention of changing the scope of the public records law in the 1962 recodification. The common law view that municipalities are required to make their records available to the public was adopted by statute in 1900 and has not been changed.

B. Even without the evidence provided by legislative history, the municipalities' arguments on the language of the statutes could not prevail.

In arguing that §§ .110 and .120 are not applicable, appellants focus on the phrase "all agencies and departments" in the first sentence of § .110. They contend, first, that this phrase refers only to agencies and departments of the state government. There is no language in §§ .110 or .120 so limiting "agencies and departments." We will not read such a limitation into this language without evidence that it was intended.

Appellants also argue that a municipality as such is not an agency or department and is therefore not covered by § .110. This argument, too, has little to commend it. Conceding, for the purposes of argument, that the legislature would not describe a municipality as an agency or department, it is equally true that the legislature would not describe the state government taken as a whole by using those terms Municipal governments, as well as the government of the state, encompass agencies and departments. The "agencies and departments" language used in § .110 must be read as referring to the agencies and departments of the governments to which the statute applies, but that language itself does not define what the applicable level of government is.

The adjective used in §§ .110 and .120 which does define the levels of government to which these sections apply is the word "public." Thus, § .110 commands "the public officer" to make available certified copies on request. Similarly, § .120 directs "every public officer" to make unexcepted records available for inspection and copying. We construe the word public as used in these sections to refer both to state and local officials. This construction is in accordance with the ordinary meaning of the term "public" which is that the word refers to all levels of government:

> Having a civil, or official, character, authority, status, or the like; authoritatively serving or representing the public; as, a *public* official, prosecutor, or legislative body; to hold *public* office; also, as in titles of departments, agencies, etc., of the civic or state government; as, *public*

15. 62 House Journal 390–397 (1962).

16. *Ibid.* at 393–397.

17. 62 House Journal 395 (1962).

> health, relief, welfare or safety.[18] [Emphasis in original]

It would be a corruption of the generally accepted meaning of the term "public" to argue, for example, that the mayor of the municipality of Anchorage is not a public officer. Again, the dictionary agrees, defining the term "public office" as

> An office or position in the service of a nation, state, city, etc.[19]

The first sentence of § .120 provides that:

> Every person has a right to inspect a public writing or record *in* the state.... [Emphasis added].

The legislature chose to say "in the state," not "of the state." The boundaries of a statute are commonly sought and found within its terms. We think that the legislature was conscious of the fact that it was defining scope here. Had the legislature intended to limit the application of § .120 to state agencies and departments, it could easily and clearly have done so.

A more recent legislature's reading of §§ .110 and .120 is apparent in the enactment in 1977 of AS 39.51.020, which provides that no public employee may be disciplined "for communicating matters of public record or information under AS 09.25.110 and AS 09.25.120." "Public employee" was defined in Section (b) of that enactment to include any employee of any state or local government.[20]

The municipalities argue that this section was enacted not because of any legislative belief that AS 09.25.110 and .120 applied to local governments but because local government employees often come into possession of state records which are public and may wish to allow the inspection of these records and need protection from discipline by their employers in so doing. We find this to be a very strained and unnatural reading of the statute. It is far more logical to conclude that the 1977 legislature assumed that §§ .110 and .120 apply to municipalities as well as to the state and concluded that municipal as well as state employees were deserving of protection.

The strongest argument made by the appellants is that the inclusion of municipalities would lead to absurd results since there is no exception for records required to be kept confidential under a municipal ordinance while such an exception does exist for state law.[21] This exception, added by the territorial legislature in 1957, must be viewed in context. The public records disclosure statute had existed without *any* expressed exceptions for more than 50 years. There was no basis under that statute for distinguishing its application between territorial and municipal governments. As discussed *supra*, prior to the enactment of the statute the common law also required disclosure of public records at both the state and municipal levels. However, under the statute prior to the 1957 amendment, as under the common law, exceptions would have been permitted where there was a good reason for them.[22] While it is possible that the 1957 legislature may have committed an oversight in not including an express exception for municipal ordinances, the failure to include such an exception can hardly

18. Webster's New International Dictionary (2d ed. 1950).

19. *Id.*

20. AS 39.51.020 provides:

> *Obstruction of access to public information.* (a) No public employee may be dismissed, demoted or suspended, laid off or otherwise made subject to any disciplinary action for communicating matters of public record or information under AS 09.25.110 and 09.25.120.
>
> (b) As used in this section, "public employee" means any employee receiving compensation for services provided to the state (including the University of Alaska) or any political subdivision of the state.
>
> (c) A violation of this section is a misdemeanor.

21. AS 09.25.120(4) excepts from the disclosure requirement "records required to be kept confidential by a federal law or regulation or by state law."

22. *See State ex rel. Wellford v. Williams*, 110 Tenn. 549, 75 S.W. 948 (1903); *cf. State ex rel. Colescott v. King*, 154 Ind. 621, 57 N.E. 535 (1900); *Clement v. Graham*, 78 Vt. 290, 63 A. 146 (1906).

mean that the legislature intended to exclude, by implication, municipalities from the basic disclosure requirement. If that had been the legislature's intent, it would, at the least, have changed the words "public officer" in §§ 58-1-1 and 58-1-2 ACLA 1949 to "territorial officer."

In light of the common law rule, legislative history, and our reading of the sections, we will construe §§ .110 and .120, as we would have construed them prior to 1957, as a strong legislative declaration that records in the possession of municipalities shall be available for public inspection, subject to exceptions based on need.

ARE EMPLOYMENT APPLICATIONS OPEN TO INSPECTION?

[2] We turn next to the question whether the appellants were justified in refusing to disclose the employment applications involved in these cases. In general, questions such as these require a balance to be struck between the public interest in disclosure on the one hand and the privacy and reputation interests of the affected individuals and the government's interest in confidentiality, on the other. The process of balancing has been described as follows:

> In determining whether the records should be made available for inspection in any particular instance, the court must balance the interest of the citizen in knowing what the servants of government are doing and the citizen's proprietary interest in public property, against the interest of the public in having the business of government carried on efficiently and without undue interference. The initial decision as to whether inspection will be permitted must, of course, rest with the custodian of the records. And since the justification for a refusal to permit inspection will depend upon the circumstances of the particular case, we can offer no specific guide for that administrative decision.
>
> . . . .
>
> In balancing the interests referred to above, the scales must reflect the fundamental right of a citizen to have access to the public records as contrasted with the incidental right of the agency to be free from unreasonable interference. The citizen's predominant interest may be expressed in terms of the burden of proof which is applicable in this class of cases; the burden is cast upon the agency to explain why the records sought should not be furnished. Ultimately, of course, it is for the courts to decide whether the explanation is reasonable and to weigh the benefits accruing to the agency from non-disclosure against the harm which may result to the public if such records are not made available for inspection. [Citation omitted].

MacEwan v. Holm, 226 Or. 27, 359 P.2d 413, 421-22 (1961) (In Banc).

In striking a proper balance the custodian of the records in the first instance, and the court in the next, should bear in mind that the legislature has expressed a bias in favor of public disclosure. Doubtful cases should be resolved by permitting public inspection.

Appellants argue that they have an interest in "attracting the largest and most qualified applicant pool . . ." and that this can best be accomplished by not disclosing the names and resumes of applicants. Further, they argue that applicants have a constitutionally protected privacy interest[23] in keeping confidential the fact that they have applied, and the contents of their applications. They argue that this interest is especially strong under the circumstances of these cases where the applications were made with the expectation that they would remain confidential.

There is a strong public interest in disclosure of the affairs of government generally, and in an open selection process for high public officials in particular. AS 44.62.-312(a) powerfully expresses the philosophy underlying this:

23. Art. I, § 22 of the Alaska Const. states in part: "The right of the people to privacy is recognized and shall not be infringed."

It is the policy of the state that

(1) the governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the people's business;

(2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;

(3) the people of this state do not yield their sovereignty to the agencies which serve them;

(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

(5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created.

In addition, §§ .110 and .120 articulate a broad policy of open records.

Public officials such as City Managers, and Chiefs of Police have substantial discretionary authority. The qualifications of the occupants of such offices are of legitimate public concern. Disclosing the names and applications of applicants allows interested members of the public, such as the newspapers here, to verify the accuracy of the representations made by the applicants, and to seek additional information which may be relevant to the selection process.

The applicants' claim that revealing the names and applications of office seekers will narrow the field of applicants and ultimately prejudice the interests of good government is not sufficiently compelling to overcome the public's interest in disclosure. In each of these cases a majority of the applicants did not seek to withdraw their applications rather than make them public. It is not intuitively obvious that most well qualified potential applicants for positions of authority in municipal governments will be deterred from applying by a public selection process, and we have been referred to no studies tending to prove that point.

The applicants' individual privacy interests in having their names and applications not revealed are also not of an order sufficient to overcome the public's interest. The applicants are seeking high government positions. "Public officials must recognize their official capacities often expose their private lives to public scrutiny."[24] Further, the information sought is that which has been voluntarily provided by the applicants to the municipalities. It is unlikely to be particularly embarrassing if publicly revealed.[25]

It may be that in some cases an individual will not wish his current employer to know that he has applied for another job. That desire is one which cannot be accommodated where the job sought is a high public office. Even if the law did not compel disclosure of each application, at some point before the final selection, as both appellants acknowledge, prudence would require the municipality to contact the employers of those applicants whose applications are being seriously considered.

Nonetheless, in *Anchorage*, the applicants were promised confidentiality, and in *Kenai* several applicants at least assumed that their names and applications would not be divulged. Since the law does not permit a confidential application, we believe that both courts acted properly in allowing those applicants who desired confidentiality to withdraw their applications without public disclosure. There is little or no public interest in the names of withdrawn candidates. On the other hand, those candidates obviously believed that public disclosure would prejudice them in their current positions. With respect to the applicants who withdrew their names, the balance was properly struck in favor of non-disclosure.

24. Advisory Opinion on Constitutionality of 1975 PA 227, 242 N.W.2d 3, 19 (Mich.1976); quoted in *Falcon v. Alaska Public Offices Com'n*, 570 P.2d 469, 474 n.15 (Alaska 1977).

25. *Cf. Falcon v. APOC*, 570 P.2d at 479-80, where we noted that the mere fact that a named private individual had visited a doctor was not protected private information, but protection did attach if there was a basis for an inference that the person had a potentially embarrassing mental or medical condition.

THE ANCHORAGE ORDINANCE

[3] The Municipality of Anchorage has a public records ordinance codified in § 3.90 of the Anchorage Municipal Code. The ordinance announces a general policy of "the fullest and most rapid access to municipal records and information" requiring "full disclosure of all public records . . . except those specifically exempted under § 3.90.040...." AMC § 3.90.010. Part (B) of § 3.90.040 exempts from the requirement of disclosure "personnel . . . files . . . the release of which would constitute an unwarranted invasion of privacy." Another section of the Code includes an employee's application for employment as a part of his personnel file. AMC § 3.30.016A 1.

The trial court held that to the extent that the Anchorage public records ordinance prohibits disclosure of the applications of those seeking the position of Chief of Police it was in irreconcilable conflict with AS 09.25.110 and .120. We agree with this determination.

As we have explained above, state law permits municipalities to make exceptions to the rule of disclosure only on the basis of need. Evaluation of the question of need necessarily involves a balancing process which in the case of applications for a post having substantial discretionary authority results in the balance being struck in favor of public disclosure. To the extent that the Anchorage ordinance prohibits such disclosure it is directly inconsistent with state law and cannot be accorded substantive effect. It is therefore invalid.[26]

This does not mean that the remainder of AMC § 3.90 must fall. That result would be unwarranted, for the provisions of the ordinance are plainly meant to be severable.[27] Nor does this conclusion call into question the power of Anchorage to enact an ordinance dealing with the disclosure of public records which is consistent with state law. Existing state law is neither so detailed nor comprehensive as to permit an inference that the legislature intended to occupy this field to the exclusion of municipalities. *See Webster v. Bechtel, Inc.*, 621 P.2d 890, 897 (Alaska 1980). *Alaska Board of Fish & Game v. Thomas*, 635 P.2d 1191 (Alaska 1981).

DELIBERATIONS IN EXECUTIVE SESSION

[4] In *Kenai* the court enjoined the City from "any deliberations toward appointment of a city manager unless those deliberations are held in compliance" with the public meetings law, AS 44.62.310-.312.[28] The court held that such deliberations "are not within any of the exemptions of AS

26. *See* City of *Kodiak v. Jackson*, 584 P.2d 1130, 1132 (Alaska 1978).

27. AMC § 1.05.040 provides:

> The sections, paragraphs, sentences, clauses and phrases of this code are severable, and if any phrase, clause, sentence, paragraph or section of this code is declared unconstitutional by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this code.

28. AS 44.62.310 provides:

> *Agency meetings public.* (a) All meetings of a legislative body, of a board of regents, or of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of its political subdivisions, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations, advisory or otherwise, of the state or local government supported in whole or in part by public money or authorized to spend public money, are open to the public except as otherwise provided by this section. Except when voice votes are authorized, the vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote. This section does not apply to any votes required to be taken to organize the afore-mentioned bodies.
>
> (b) If excepted subjects are to be discussed at a meeting, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss matters that come within the exceptions contained in (c) of this section shall be determined by a majority vote of the body. No subjects may be considered at the executive session except those mentioned in the motion calling for the executive session unless auxiliary to the main question. No action may be taken at the executive session.
>
> (c) The following excepted subjects may be discussed in an executive session:

4 62.310(c)" relating to subjects which may be discussed in executive session. The City of Kenai appeals from this ruling, contending that § .310(c)(2) which permits the discussion in executive session of "subjects that tend to prejudice the reputation and character of any person" is applicable.

The appellee does not contend that the City Council may never go into executive session when discussing city manager applicants. It argues that generally such discussions do not have a tendency to damage the reputation of the applicants, and that the City erred in routinely convening executive sessions.

Appellee's reading of the statute is not without a degree of merit. Ordinarily an applicant's reputation will not be damaged by a public discussion of his or her qualifications relating to experience, education and background or by a comparison of them with those of other candidates. However, a discussion of personal characteristics and habits may well carry a risk that the applicant's reputation will be compromised. Such a risk is especially acute where the qualities of several applicants are being compared. We believe therefore that the City Council was authorized by § .310(c)(2) to meet in executive session while discussing the personal characteristics of the applicants.[29] To the extent that the order of the court prohibits this, it must be reversed.[30]

Accordingly, in *Anchorage*, the order of the superior court is AFFIRMED; in *Kenai*, the order of the superior court is AFFIRMED in part and REVERSED in part.

CONNOR, J., dissents in part.

RURKE and COMPTON, JJ., not participating.

CONNOR, Justice, dissenting in part.

I dissent from the majority opinion. In my view the phrase "all agencies and departments" does not encompass municipal agencies.

(1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit;

(2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;

(3) matters which by law, municipal charter, or ordinance are required to be confidential.

(d) This section does not apply to

(1) judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding;

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff; or

(5) meetings of the governing body of any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges or discipline.

(e) Reasonable public notice shall be given for all meetings required to be open under this section.

(f) Action taken contrary to this section is void.

AS 44.62.312 provides:

State policy regarding meetings. (a) It is the policy of the state that

(1) the governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the people's business;

(2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;

(3) the people of this state do not yield their sovereignty to the agencies which serve them;

(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

(5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created.

(b) AS 44.62.310(c)(1) shall be construed narrowly in order to effectuate the policy stated in (a) of this section and avoid unnecessary executive sessions.

29. Care should be taken, of course, to observe the procedures for convening executive sessions set out in § .310(b). The meeting must first be convened as public; the question of holding an executive session concerning excepted subjects must be determined by majority vote; only excepted subjects, and only those mentioned in the motion calling for the executive session, may be considered in the executive session; and no action may be taken at the executive session.

30. In *Anchorage* we are asked to review the trial court's conclusion that the selection committee of the mayor was a committee covered by AS 44.62.310. We decline to do so because no part of the order issued by the court was based on that conclusion and review would be merely advisory.

Before analyzing the language at issue, it is helpful to first set out some general rules of statutory construction. The common and approved usage of words and phrases is to be given effect, "unless such words and phrases have acquired peculiar meaning by virtue of statutory definition or judicial construction." *Lynch v. McCann*, 478 P.2d 835, 837 (Alaska 1970); 2A C. Sands, *Sutherland Statutory Construction* § 46.01, at 48-9 (4th ed. 1974).[1] "[W]here the legislative branch has expressed its intent . . . in language so unambiguous as to leave no doubt as to the meaning or scope of the result dictated, the function of the courts is simply to apply that language." *State v. City of Anchorage*, 513 P.2d 1104, 1109 (Alaska 1973). Every word of a statute should be accorded meaning, 2A C. Sands, *supra*, § 46.06, at 63; but constructions leading to absurd results are to be avoided. *Sherman v. Holiday Construction Co.*, 435 P.2d 16, 19 (Alaska 1967).

My conclusion that AS 09.25.110 does not apply to municipalities is based on four considerations: (a) the terms "agency" and "department" have acquired a particular meaning by legislative definition which is inconsistent with the majority's conclusion; (b) the legislature has always used clear language whenever it has intended a statute to apply to local governments; (c) the majority's construction can lead to absurd results in other areas; and (d) the protective provisions of AS 39.51.020 can be construed consistently with my position.

The legislature always has defined "agency" or "department" as encompassing only *state* agencies or departments. An example is found in AS 40.21, pertaining to the management and preservation of public records:

> "(1) 'agency' or 'state agency' *means* a department, office, agency, state board, commission, public corporation or other organizational *unit of or created under the executive branch of the state government*; the term does not include the University of Alaska; . . ." (emphasis added).

AS 40.21.150. Or, in AS 44.62, pertaining to adjudication procedures:

> "(1) 'agency' includes the *state* boards, commissions and officers listed in AS 44.62.330 and those to which this chapter is made applicable by law or executive order involving reorganization under the constitution; . . ." (emphasis added).

AS 44.62.640(b). Again, in AS 37.05, pertaining to fiscal procedures:

> "(2) 'state agency,' '*agency*,' 'department,' or similar term *means* a department, officer, institution, board, commission, bureau, division, or other administrative *unit forming the state government*, and includes the Alaska Pioneers' Home and the University of Alaska; . . ." (emphasis added).

AS 37.05.320.

On the other hand, whenever local application has been intended, clear language has been utilized. Legislative enactments distinguish between state departments or agencies and political subdivisions by expressly providing for application to both, or by articulating either parallel or contrasting powers or duties in separate sections.[2] Adopting the majority's construction makes

1. This rule is codified in AS 01.10.040.
> "Words and phrases shall be construed according to the rules of grammar and according to their common and approved usage. Technical words and phrases and those which have acquired a peculiar and appropriate meaning, whether by legislative definition or otherwise, shall be construed according to the peculiar and appropriate meaning."

2. For example, AS 09.50.250(1) and AS 09.65.070(d)(2) (separate provisions for state and municipal immunity from suit); AS 09.55.240(a)(2) and (3) (eminent domain powers granted separately to state and political subdivisions). Other provisions in AS 09.25 distinguish between state and local "agencies," specifying each when a statute is intended to apply to both. For example, AS 09.25.170(a)(4), concerning the assertion of certain privileges, refers to "an agency or representative of an agency of the state, borough, city or other municipal corporation. . . ."

Further, as Kenai argues, matters directly pertaining to municipal operations tend to be collected in Title 29, even though they often appear in other titles as well. (Title 29 is entitled "Municipal Government"; Title 9, the source of the asserted public disclosure requirement, is entitled "Code of Civil Procedure.") For example, AS 29.23.580 specifies that the open meetings requirement of AS 44.

such modifying language redundant and thus fails to accord all terms a definite meaning.

A review of other statutes illustrates this point. For example, when addressing records management by governmental units, the legislature delineated local and non-local application. Enacted in 1970, one purpose of AS 40.21 was "to provide for the orderly management of current state and local public records...." AS 40.21.010. The statute distinguishes between "local record," "record," and "state record,"[3] and explicitly addresses management of local records in a separate section.[4] Further, the statute limits the term "agency" to state agencies.[5]

Of greater significance is AS 44.62.310, pertaining to the analogous issue of access to governmental meetings. Enacted substantially in its present form in 1959,[6] the open meeting requirement explicitly was made applicable to the:

> "governing bodies of all State and local government agencies, including municipalities, boroughs, school boards and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations (advisory or otherwise) of the State or local government ... except juries and such other agencies as shall be expressly exempt by the Legislature...."

Ch. 143 (Ch. 1, art. VI, § 1) SLA 1959. The legislature certainly knew in 1959 how to make a statute applicable to local government; yet when it enacted AS 09.25.110-.120 three years later, language evidencing such an intent was, and remains, conspicuously absent.[7]

62.310 applies to home rule and general law municipalities, even though AS 44.62.310 makes this clear by its own terms. Another example is AS 14.12.020(a), which is substantially reiterated in AS 29.33.050.

3. AS 40.21.150 states, in part:
"*Definitions.* In this chapter, unless the context otherwise requires,
. . . . .
(4) 'local record' means a public record of a city or borough of any class, villages, district, authority or other political subdivision unless the record is designated or treated as a state record under state law;
(5) 'record' means any document, [etc.] ... developed or received under law or in connection with the transaction of official business and preserved or appropriate for preservation by an agency or political subdivision, as evidence of the organization, function, policies, decisions, procedures, operations or other activities of the state or political subdivision or because of the informational value in them; ...
. . . . .
(7) 'state record' means a record of a department, office, commission, board, public corporation, or other agency of the state government, including a record of the legislature or a court and any other record designated or treated as a public record under state law."

4. AS 40.21.070 states:
"*Records management for local records.* The governing body of each political subdivision of the state shall promote the principles of efficient records management for local public records kept in accordance with state law. The governing body shall, as far as practical, follow the program established for the management of state records. The department shall, upon request of the governing body of a political subdivision, provide advice and assistance in the establishment of a local records management program."

5. AS 40.21.150(1) states:
"'agency' or 'state agency' means a department, office, agency, state board, commission, public corporation or other organizational unit of or created under the executive branch of the state government; the term does not include the University of Alaska; ..."

6. Although the section has been amended numerous times, it has remained applicable to local governments.

7. Although not dispositive, it is interesting to note the repeated legislative efforts to enact a comprehensive public access-to-records act. Those bills always address whether the act should apply to municipalities. *See* CSHB 131 (Judiciary), 10th Legislature, First Session (1977) (making disclosure applicable to "governmental units," subsequently defined to include political subdivisions). *Compare* HB75, 11th Legislature, First Session (1979) ("governmental unit" includes political subdivisions) *with* SCS CSHB 75, 11th Legislature, First Session (1979) ("governmental units" restricted to executive branch agencies). If the current statute applies to local governments, such subsequent legislation would be unnecessary. Inferentially, the legislature has never believed that AS 09.25.110-.120 applies to municipalities.

The majority's interpretation of "agencies and departments" also has the potential of leading to absurd results. For example, AS 09.25.120 authorizes the *state* to exempt certain records from disclosure, which the state has done,[8] but does not grant municipalities the same power.[9] Thus, while state personnel records might not be public, municipal personnel records may be.

The strongest argument that AS 09.25.110 was intended to apply to municipalities is based on the language of AS 39.51.020. Enacted in 1977, that statute states:

> "(a) No public employee may be dismissed, demoted or suspended, laid off or otherwise made subject to any disciplinary action for communicating matters of public record or information under AS 09.25.110 and AS 09.25.120.
>
> (b) As used in this section, 'public employee' means any employee receiving compensation for services provided to the state (including the University of Alaska) *or any political subdivision of the state.*
>
> (c) A violation of this section is a misdemeanor." (emphasis added).

The statute clearly protects local government employees who release information under AS 09.25.110–.120. Although the newspapers argue that this evinces a legislative intent that AS 09.25.120 applies to local governments, I believe that the statute's purpose is to protect municipal employees who come into possession of state agency records and subsequently release them.

Municipal employees may come into possession of state records which are public under state law, but which are confidential under, for example, Anchorage's freedom of information ordinance. *See* AMC 3.90.010 *et seq.* Anchorage asserts that municipal employees possess state records pertaining to labor agreements, personnel classification and pay scales, demographic and work force statistics, and financial audits of state funded programs. Without the protection of AS 39.51.020, it argues, a municipal employee may be reluctant to release such information, even though public under AS 09.25.110–.120. Thus, the intent of AS 39.51.020 can be construed as that of precluding the transmutation of a document's public character due solely to a change in governmental hands. Absent a clearer legislative expression that AS 09.25.110–.120 applies to local government, I believe this argument adequately explains the intent of AS 39.51.020.

In light of the constitutional requirement that "[a] liberal construction shall be given to the powers of local government," [10] I do not believe that AS 09.25.110 should govern access to local governmental records unless the legislative intent to do so is clear. As the City of Kenai argues, "state foreclosure of local policymaking [regarding records] should not occur unless there is (1) an overriding need for a uniform state policy, or (2) reason to believe that local decisions might be unfair to a particular group which is unable to protect itself through the local political process." There is no evidence that such considerations apply here. Thus I believe that the ambiguous provisions of AS 09.25.110–.120 should be limited in application to state agencies or departments, and would, therefore, reverse the superior court's contrary conclusion.

8. *See* AS 39.25.080; State Personnel Rule § 14.07.0.

9. The cities provide another example. If "agencies and departments" in AS 09.25.110 encompasses them, it should similarly do so with respect to AS 44.62.320(a):

> "The legislature, by a concurrent resolution adopted by a vote of both houses, may annul a regulation of *an agency or department*." (emphasis added).

(Originally enacted in 1959 as ch. 143, § 1, SLA; held unconstitutional on unrelated grounds in *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980).) No one, Kenai argues, would contend that the legislature reasonably intended this provision to encompass regulations of local governmental agencies.

10. Alaska Const. art. X, sec. 1. *See Bookey v. Kenai Peninsula Borough*, 618 P.2d 567, 569 (Alaska 1980); *Liberati v. Bristol Bay Borough*, 584 P.2d 1115, 1123 (Alaska 1978); *Jefferson v. State*, 527 P.2d 37, 42 (Alaska 1974). *See also* AS 29.48.310; *Municipality of Anchorage v. Frohne*, 568 P.2d 3 (Alaska 1977).

Press barred from meeting of budget review committee

By DEAN FOSDICK
The Associated Press

JUNEAU — Reporters were turned away from a budget review presentation today between members of the Public Safety Department and Gov. Bill Sheffield's staff on the grounds that such a session was not covered under the state's open meetings law.

Sheffield press aide Pete Spivey told the reporters that the week-long series of Legislation and Budget Review Committee (LBRC) sessions did not constitute the meeting of a full committee, that no votes would be taken and that its members were those of an advisory group.

"The attorney general's office disagrees with your interpretation of the statute," Spivey said.

Under the statute (AS 44.62.310 and 44.62.312), any meetings of publicly-financed organizations or their subordinate units — including advisory groups — are open to the public except as otherwise provided.

If excepted subjects are to be discussed at a meeting, the session first must be convened as a public meeting and the question of holding an executive session must be made. Reporters were not allowed to determine if that was done.

Organizations not required to make their meetings open to the public include judicial or quasi-judicial bodies, juries, parole or pardon boards, meetings of a hospital medical staff, or meetings of a hospital committee or governing board taking action on qualifications, privileges or discipline.

The law says that governmental units "exist to aid in the conduct of the people's business," and that the actions of those units be taken openly and their deliberations be conducted openly.

The committee, chaired by Sheffield, has been listening to budget presentations since last week when the governor's Office of Management and Budget completed its reviews of proposed budgets by the state's 19 major agencies. The meetings are to continue into next week.

Sheffield was not present when today's meeting opened and was not available for comment, Spivey said.

Ronald Lorensen, deputy attorney general, said today that it was up to the governor to make the meetings open.

"In my view, if the governor believes that in order for him to make certain decisions he needs the advice of key government officials, then he can get it," Lorensen said.

Lorensen said he was preparing a similar response in writing to The Anchorage Times, whose legislative reporter had requested permission — but was barred — from attending the meetings.

The open meetings issue also surfaced last spring when members of the Senate Finance Committee abruptly ordered everyone out of a session scheduled to discuss social programs. That also drew loud protests from reporters.



04.16.175 amended to provide an exception for activities under AS05.15.030 (b)

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