S J R

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Alaska State Legislature

Chairman
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Jan Faiks
Post Office Box V
Juneau, Alaska 99811

Senate Judiciary Committee

April 4, 1989

MEMORANDUM

TO: Judiciary Committee Members

FROM: C.S. Christensen
Committee Counsel

SUBJECT: Appropriate state of mind for SJR 1

The question is what state of mind to require for a violation of the open meetings amendment. The state of mind used in CSSJR1 (SA) is "wilful." The state of mind in the proposed Judiciary CS is "intentional."

As has already been noted, the term "wilful" is not specific. In North State Tel. Co., Inc. v. Alaska Public Util. Com'n, 522 P.2d 711 (Alaska 1974), the Alaska Supreme Court stated that the term wilful was not a word of art or a technical term. Instead, it has many different meanings depending on the context in which it is used.

A quick review of the definition of the term found in several law dictionaries shows the various meanings which courts have used, depending on the circumstances. These include behavior that is intentional, knowing, voluntary, stubborn, obstinate, perverse, inflexible, having a bad or evil purpose, or deliberate as opposed to voluntary.

If the committee wishes to pass out a resolution which clearly states what type of behavior is prohibited, then the term wilful should not be used, since the courts will have a tremendous amount of latitude in interpreting the word. Instead, one of the states of mind that is specifically defined in AS 11.81.900 should be used.

"Intentional" behavior is defined in the criminal code.

An application of this definition to SJR 1 would be as follows:

> A person acts "intentionally" when the person's conscious objective is to cause the prohibited result. The prohibited result in this case is to exclude the public from the decision making process.

An alternative state of mind defined in the criminal code that the committee may wish to consider involves "knowing" behavior. An application of this definition to SJR 1 would be as follows:

> A person acts "knowingly" when the person is aware that the conduct is of a certain nature or that certain circumstances exist. In this case, the conduct and circumstances would be holding a discussion, in private.

A simple way to distinguish between these two states of mind is that a person behaves intentionally when the person's purpose is to cause a harmful result (exclude the public from the process), and a person behaves knowingly when the person is aware that circumstances exist that make this harmful result substantially certain to occur.

In either case, the violation would not be limited to the persons who actually planned the meeting, as opposed to those who merely attended it. Any person who intentionally or knowingly participated in a closed meeting would be guilty of the violation.

ıp; a procurer.

a village; a castle.

:r, as in the alteration of a high-ligh § 107.

f single status because of the id. A woman who survives the was married at the time of his affen, 201 NY 205, 94 NE 626.

sband has died and who has not McArthur, 210 Cal 439, 292 P

a woman who has lost her hus-has no application to a divorced / O'Malley, 46 Mont 549, 129

/ which holds that the term, as s, may be applied to a woman ceased husband, although she his death. Re McArthur, 210 . 72 A.L.R. 1318.

n for wrongful death given by ft of a widow for the death of ivested by her subsequent mar-)th § 67.

idow of an insured to the bal-national service life insurance h of the named insured, under n giving the "widow" a prefer-nd sisters of the insured, is not rriage. Riley v United States 2d 692, 44 ALR2d 1132.

term under the Federal Long-rbor Workers' Compensation . Ed 740.

ıre to which a widow is entitled deceased husband, exclusive of

ıgle status because of the death

e statutes of descent, the word an one who has been reduced he ordinary and usual vicissi-one who, by felonious act, has e condition. Perry v Straw-. 108 SW 641.

n allowance made the widow r the laws of some states, for l support.

terest in the estate nor some-her by descent, but is a pre-the estate and is a part of the ration. Grover v Clover, 69

vidow's apparel and the furni-ber, which were given to her ndon. See 4 Bl Comm 518.

ee quarantine.

The widow's third, a widow's

A widow's right of dower.

extent of a highway laterally y prescription, or by the pro-e highway, was established. 5.

indicates that the land upon n the exclusive possession of

wife. A married woman. The spouse of a man. A woman who has a husband living. Names v State, 20 Ind App 168, 50 NE 401.

As the word is used in designating a beneficiary in a will, it is descriptive of the person of a particular individual, and unless there is something in the will indicating the contrary, a gift to the wife of a designated married man is a gift to the person who was his wife at the time when the will was made and not to a wife whom he has subsequently married. See 57 Am J1st Wills § 1385.

As a designation of the beneficiary of life insurance:—descriptio personae, so that the fact that one who otherwise answers the description does not, or did not at the inception of the insurance, have the legal status of wife of the insured does not prevent her from taking as beneficiary, if it is otherwise clear that she is the person intended, assuming that she is eligible to designation as beneficiary and that the misdescription of her as "wife" does not amount to a breach of warranty or misrepresentation avoiding the insurance. 29A Am J Rev ed Ins § 1660.

wife and children. Sometimes a designation of beneficiaries of a life insurance policy.

While some courts hold that a policy payable to the wife of the insured and "their children" includes children by another wife, the prevailing view is that the beneficiaries are limited to children common to both. 29A Am J Rev ed Ins § 1658.

wife-beating. See whipping wife.

wife's equity to a settlement. See equity for a settlement.

wife's right of survivorship. The title of a surviving wife at common law, arising upon the death of her husband, to choses in action which belonged to her at the time of the marriage or came to her during coverture, and were not reduced to possession by the husband. 26 Am J1st H & W § 59.

wife's separate equitable estate. See separate estate of wife.

wife's separate estate. See separate estate of wife.

wife's society. See society of wife.

Wigglesworth Mortality Table. A life expectancy table once recognized as standard. 29 Am J2d Ev § 895.

wild animal. An animal ferae naturae; an animal wild by nature. 4 Am J2d Ani § 2. An animal such as a deer in the forest, a quail in the air, or a fish in public waters. Fleet v Hegeman (NY) 14 Wend 42, 45.

wild beast test. The test of insanity, as a defense in a criminal case, according to whether or not the defendant was wholly deprived of understanding and memory. Anno: 44 ALR 584.

wildcat engine. A railroad locomotive running "wild"; that is, without an engineer or other attendant. Mars v Delaware & Hudson Canal Co. (Sup) 8 NYS 104, 105.

wildcat leases. Oil and gas leases secured on lands situated in undeveloped territory in the hope that oil or gas will be found there. Germer v Donaldson (CA3 Pa) 18 F2d 697.

wildcat strike. A strike of laborers not authorized by the union which represents them.

wild fowl. Birds wild by nature, especially game birds such as ducks, geese, or pheasants. 4 Am J2d Ani § 2.

wild grass. A grass plant growing without cultivation, valuable in use for forage.

wild land. Land in a state of nature, never having been cultivated. Conner v Shepherd, 15 Mass 164.

Wild's Case. See first resolution in Wild's Case; second resolution in Wild's Case.

wild train. A railroad train which is run as an extra train or without any reference to the regular schedule time. Larson v St. Paul, Minneapolis & Manitoba Railway Co. 43 Minn 423, 424, 45 NW 722.

See wildcat engine.

wild well. An oil or gas well that is producing oil or gas but which has not been brought under control so that the product can be captured for use.

wilful. A word of several meanings, the meaning in the particular case often being influenced by the context. Spies v United States, 317 US 492, 87 L Ed 418, 63 S Ct 364. Voluntary, as distinguished from accidental. 21 Am J2d Crim L § 87. Intentional or deliberate, yet not necessarily with an evil purpose in mind. Fulton v Wilmington Star Mining Co. (CA7 Ill) 133 F 193; Kite v Hamblen, 192 Tenn 643, 241 SW2d 601. Stubborn, obstinate, perverse. United States v Murdock, 290 US 389, 78 L Ed 381, 54 S Ct 223. Inflexible. Refractory. Wick v Gunn, 66 Okla 316, 169 P 1087, 4 ALR 107. Intentional and with a bad purpose. State v Clifton, 152 NC 800, 67 SE 751. Having a bad purpose, evil intent, or legal malice. Caldwell v State, 55 Tex Crim 164, 115 SW 597.

The word wilful as used in a statute which denies compensation to an employee for an injury sustained when due to a wilful failure or refusal to perform a duty required by statute imports, not only the mere exercise of the will in failing to comply with the statute, but also an intention to do an act that he knows, or ought to know, is wrongful or forbidden by law, and involves the idea of premeditation and determination to do such act. 58 Am J1st Workm Comp § 203.

It has been said that "wilfulness", as used in the Federal internal revenue statutes imposing criminal penalties, includes some element of evil motive and want of justification in view of the financial circumstances of the taxpayer, and as used in statutes imposing civil penalties it may, while often connoting a bad purpose, be used to characterize an act which is intentional, or knowing, or voluntary, as distinguished from accidental. Paddock v Siemonet, 147 Tex 571, 218 SW2d 428, 7 ALR2d 1062.

wilful act. An act done intentionally, or on purpose, and not accidentally. Leicester v Hoadley, 66 Kan 172, 71 P 318.

See wilful.

wilful and malicious act. See malicious act; wilful act.

wilful and malicious injury. An injury to property inflicted intentionally and in disregard of duty. Re Dixon (DC NY) 21 F2d 565. Within the meaning of the exception of certain liabilities from discharge in bankruptcy: injury to person or property inflicted intentionally and deliberately without cause or excuse and with no regard for the legal rights of the injured one. An injury inflicted by an act against good morals and wrongful in itself, committed with indifference to the safety of the injured person, and without just cause or excuse. Anno: 13 ALR2d 170; 9 Am J2d Bankr § 786.

A misappropriation of partnership funds by a

intention, for the purpose of disposing of their several interests in property owned by them in common, or of their separate property treated as a common fund, to a third person or persons.

Living will. A living will is a short document that basically states: "If the situation should arise in which there is not reasonable expectation of my recovery from physical or mental disability, I request that I be allowed to die and not be kept alive by artificial means or heroic measures." A living will is not considered a legal document in the majority of states.

Mutual and reciprocal will. See *Joint and mutual will, supra;* also *Mutual will, infra.*

Mutual will. One in which two or more persons make mutual or reciprocal provisions in favor of each other. "Mutual wills" are the separate wills of two persons which are reciprocal in their provisions, and such a will may be both joint and mutual. Sometimes called a "reciprocal," "double," or "counter" will. See also *Joint and mutual will,* above.

Mystic will. See Testament.

Non-intervention will. In some jurisdictions, one authorizing the executor to act without bond and to manage, control, and settle the estate without the intervention of any court whatsoever.

Nuncupative will. See that title.

Reciprocal will. One in which two or more persons make mutual or reciprocal provisions in favor of each other. Also known as a "mutual," "double," or "counter" will. See *Joint and mutual will; Mutual will, supra.*

Renunciation of will. See Renunciation.

Self-proved wills. A will which eliminates some of the formalities of proof by execution in compliance with statute. It is made self-proved by affidavit of attesting witnesses in the form prescribed by statute. Most statutes provide that, unless contested, such a will may be admitted to probate without testimony of subscribing witnesses. See *e.g.* Uniform Probate Code, § 2–504.

Statute of will. See Wills Act, *infra.*

Unofficious will. In the civil law, *testamentum inofficium.* One made in disregard of natural obligations as to inheritance. 2 Bl.Comm. 502. It has no place in the common law.

Criminal Law

The power of the mind which directs the action of a man. See Intent; Motive; Willful and wanton act.

Willa /wílə/. In Hindu law, the relation between a master or patron and his freedman, and the relation between two persons who had made a reciprocal testamentary contract.

Will contest. A proceeding sui generis, a suit in rem, having for its purpose determination of questions of construction of will or whether there is or is not a will. McCrary v. Michael, 233 Mo.App. 797, 109 S.W.2d 50, 51. Any kind of litigated controversy concerning the eligibility of an instrument to probate as distinguished from validity of the contents of the will. In re Hesse's Estate, 62 Ariz. 273, 157 P.2d 347, 349. Will contests are commonly governed by state statutes; *e.g.* Uniform Probate Code § 3–407, burden of proof.

Willful. Proceeding from a conscious motion of the will; voluntary. Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary.

An act or omission is "willfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

Willful is a word of many meanings, its construction often influenced by its context. Screws v. United States, 325 U.S. 91, 101, 65 S.Ct. 1031, 1035, 89 L.Ed. 1495.

The word [willfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal context it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful or conduct marked by a careless disregard whether or not one has the right so to act. United States v. Murdock, 290 U.S. 389, 394, 395, 54 S.Ct. 223, 225, 78 L.Ed. 381.

Whatever the grade of the offense the presence of the word "willful" in the definition will carry with it the implication that for guilt the act must have been done willingly rather than under compulsion and, if something is required to be done by statute, the implication that a punishable omission must be by one having the ability and means to perform. In re Trombley, 31 Cal.2d 801, 807, 193 P.2d 734, 739.

A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently. A willful act differs essentially from a negligent act. The one is positive and the other negative.

Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification.

Willful and malicious injury. For such to exist there must be an intent to commit a wrong either through actual malice or from which malice will be implied. Such an injury does not necessarily involve hatred or ill will, as a state of mind, but arises from intentional wrong committed without just cause or excuse. In re Wernecke, D.C. N.Y., 1 F.Supp. 127, 168. It may involve merely a willful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally.

Willful and wanton act. In order to constitute "willful and wanton" misconduct, act or omission must be not only negligent, but exhibit conscious disregard for safety of others. Turner v. Commonwealth Edison Co., 35 Ill.App.3d 331, 341 N.E.2d 488, 493.

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See also Murder; P

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Article 6. Definitions.

Section
900. Definitions

Sec. 11.81.900. Definitions. (a) For purposes of this title, unless the context requires otherwise,

(1) a person acts "intentionally" with respect to a result described by a provision of law defining an offense when the person's conscious objective is to cause that result; when intentionally causing a particular result is an element of an offense, that intent need not be the person's only objective;

(2) a person acts "knowingly" with respect to conduct or to a circumstance described by a provision of law defining an offense when the person is aware that the conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless the person actually believes it does not exist; a person who is unaware of conduct or a circumstance of which the person would have been aware had that person not been intoxicated acts knowingly with respect to that conduct or circumstance;

(3) a person acts "recklessly" with respect to a result or to a circumstance described by a provision of law defining an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation; a person who is unaware of a risk of which the person would have been aware had that person not been intoxicated acts recklessly with respect to that risk;

(4) a person acts with "criminal negligence" with respect to a result or to a circumstance described by a provision of law defining an offense when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

(b) In this title, unless otherwise specified or unless the context requires otherwise,

(1) "affirmative defense" means that

(A) some evidence must be admitted which places in issue the defense; and

(B) the defendant has the burden of establishing the defense by a preponderance of the evidence;

sion of law defining an offense when his *conscious objective is to cause that result;* [Emphasis added.]

In the Commentary to AS 11.81.900(a)(1), the legislature indicated:

> When a statute in the Code provides that a defendant must intentionally cause a result, *the state must prove that it was the defendant's conscious objective to cause that result.* This culpable mental state is comparable to the existing form of culpability commonly referred to as "specific intent." Bribery, for example, requires that the defendant confer a benefit upon a public servant with intent to influence him; *the state must prove that it was the conscious objective of the defendant to cause the public servant to be influenced.*

Commentary on the Alaska Revised Criminal Code, Senate J. Supp. No. 47, at 140–41, 1978 Senate J. (emphasis added). When we read the strict definition of intentionally into the attempt statute, we conclude that for the state to prove the crime of attempted murder it must show that the defendant intended to commit the crime of murder in the sense that the defendant must intend to kill. He must intend to commit *that* crime —murder.

[4–6] When we apply that analysis to the instructions which were given in this case, we believe that it is clear that Huitt's conviction for attempted second-degree murder was not proper. Judge Schulz charged the jury that:

> Murder in the Second Degree is defined, in pertinent part, in AS 11.41.-110(a)(1) as follows:
>
> (a) A person commits the crime of Murder in the Second Degree if (1) ... knowing that his conduct is substantially certain to cause death or serious physical injury to another person, he causes the death of any person.

Under those instructions the jurors could convict Huitt of attempted second-degree murder if they merely found that Huitt performed certain acts knowing that his conduct was substantially certain to cause serious physical injury to another person. This flaw in the instructions alone would require a reversal of Huitt's conviction. *See People v. Harris,* 72 Ill.2d 16, 17 Ill. Dec. 838, 841–843, 377 N.E.2d 28, 31–33 (1978). In our view the only substantial question is whether a person can be convicted of attempted second-degree murder if he acted "knowing that his conduct was substantially certain to cause death."[3] However, given our interpretation of the revised code that to be convicted of attempted murder a person must intend to kill, we conclude that Huitt cannot be convicted of attempted second-degree murder even under this section of the second-degree murder statute.[4] A defendant who

3. At common law intent-to-kill murders included those situations where the defendant either subjectively intended death, or performed an act or acts which he knew were substantially certain to result in death. W. LaFave & A. Scott, *Criminal Law,* § 68 at 535 (1972). But as LaFave points out:

> [T]he modern view is to limit "intent" to instances where it is the actor's purpose to cause the harmful result, and the word "knowledge" is used to cover instances where the actor knows that the harmful result is substantially certain to occur. In a criminal code utilizing such definitions, what is here called intent-to-kill murder may be described as intentionally or knowingly killing another.

Id. at 535 n. 3. The "modern view" has been adopted in Alaska. *See* AS 11.81.900(a)(1) defining intent and AS 11.81.900(a)(2) defining knowledge.

4. We note that the language of former AS 11.31.-100 may be indicative of the legislature's original intent to apply criminal attempt to second-degree murder.

Former AS 11.31.100(d)(1) provides:

> (d) An attempt is a
>
> (1) class A felony if the crime attempted is *murder in any degree* or kidnapping. [Emphasis added.]

This would in fact have been compatible with the definition of "intentionally" proposed in the Tentative Draft to the Revised Code which reads in pertinent part:

> *Definitions.* (a) For purposes of this title, unless the context otherwise requires,
>
> (1) a person acts "intentionally" with respect to a *result or to conduct* described by a provision of law defining an offense when his conscious objective is to cause that result or to engage in the conduct;

Alaska Criminal Code Revision Part II, at 5 (Tent. Draft 1977) (Commentary to AS 11.11.-

Patrick M. Rodey
Senator

Alaska State Legislature

Senate

311 C. St., Suite 510
Anchorage, Alaska 99503
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During Session:
P.O. Box V
Juneau, Alaska 99811
(907) 465-3793

March 13, 1989

TO : Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: Senator Pat Rodey

RE : CSSJR 1 (State Affairs) - proposing an amendment to the Constitution of the State of Alaska relating to open meetings.

This will confirm my recommendation to propose a committee substitute for the above-referenced resolution.

Attached is a copy of the memo which addresses the proposal to change the work "wilful" to "intentional" (page 1, line 21). I have discussed this change with the sponsor, Senator Sturgulewski, and it meets with her approval.

In an effort to expedite discussion of this resolution, I respectfully request that it be scheduled for committee consideration as soon as possible.

Attachment

COMMITTEE FOR AN OPEN LEGISLATURE
c/o League of Women Voters of Alaska, 3605 Arctic Blvd., Suite 797, Anchorage, AK 99503

March 13, 1989

Sen. Tim Kelly
Senate President
Rep. Sam Cotten
Speaker of the House
Members, 16th Alaska Legislature
Box V
Juneau, AK 99811

Dear Sen. Kelly, Rep. Cotten, Legislators:

As you know, the Committee for an Open Legislature has been aggressively pursuing an amendment to the state constitution that would require all substantive business of the legislature to be conducted publicly. The Committee, which includes the Alaska Public Interest Research Group; the League of Women Voters of Alaska; the Alaska Press Club and the Anchorage Daily News is far more broadly representative than some have asserted. Not only do we want to correct any false impressions you may have about the participants in this effort, but we also want to clarify our escalating problems with HJR 1 and SJR 1.

As we expressed during our testimony to the House and Senate State Affairs committees, we have extreme reservations about anything that does not make a good faith attempt to embrace the substantive activities of sub-committees and, if somehow possible, of "ad hoc" groups of influential leaders (such as the leadership of either body).

We are also extremely concerned at the move to eliminate the public interest provisions for attorneys' fees contained in the companion legislation. And finally, we believe that the most meaningful enforcement mechanism is to maintain the option of judicial voidability. Otherwise, the public, even when found to have been truly wronged by a violation, will have no recourse to undo the damage. We believe that the court is the appropriate place to determine whether or not voiding the relevant action is the proper remedy.

We have taken no position on the feature of ensuring government representation for legislators. However, the notion that legislators should be financially shielded from costs of representation while at the same time taking away the public interest provisions for attorneys' fees in meritorious public interest suits is unacceptable. Further, it tips the balance unfairly against the citizens whose rights these measures are designed to protect. The idea that lawsuit upon lawsuit will be filed is just not supported by the historical facts. Few lawsuits have been filed against any governing bodies since the Open Meetings Act was adopted and further, there is already provision for the dismissal of frivolous suits.

We are generally sympathetic to your concerns about how the amendment would apply to sub-committees (especially those with four or fewer members where two members meeting randomly would constitute a quorum). But first and foremost we are defending the public's right of access. We maintain that it is appropriate to explicitly provide, within the resolution, for meaningful one-on-one discussions while still clearly including sub-committees otherwise. Remember, we are not seeking major changes in notice requirements. We are only expecting that the meetings be adequately noticed locally (within the capitol) and that they be open to anyone who wants to attend. That seems neither onerous nor unreasonable.

It is important to remember a fundamental point. Until the question was raised through the League of Women Voters of Alaska/Anchorage Daily News lawsuit, there was universal assumption by the public that the current Open Meetings statute applied fully to the legislature. The fact that the law proved not to be enforceable against the legislature does not change the long-standing public perception that you should be conducting the public's business in public. The public expects you to be providing a constitutional equivalent of the statute that will eliminate the problem of its non-justiciability. We do not expect you to be offering anything less.

The resolutions in their current form are a far cry from the clear treatment found in the statute. They appear to provide constitutional protection for the abuses which have lead to the visibility of this issue. The Committee will continue its efforts to achieve a meaningful amendment and to respond to the separate actions of the legislature. However, we view legislative "progress" at this point as negative, not positive. Current language retreats substantially from the strong and positive effort undertaken by Rep. Kay Brown and Sen. Arliss Sturgulewski during the 1988 session.

We sincerely hope that HJR 1 and SJR 1 can be revamped to include the important provisions cited above. To that end and to the principle of keeping "the public's business public," we pledge to work cooperatively with you.

Sincerely,

Jeff Bohman, Exec. Director
Alaska Public Interest
Research Group

Jeff Bohman

Carol Murkowski Sturgulewski
Pres., Alaska Press Club

Carol J. Murkowski Sturgulewski

Cheryl D. Anderson
League of Women Voters
of Alaska

Cheryl D. Anderson

Rosemary Shinohara
Anchorage Daily News

Rosemary Shinohara

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Moreover, the chairman of the Commission stated at the outset of the hearing:

> "The Commission's opening case will be presented by Mr. Louis Agi, Assistant Attorney General and legal counsel for Alaska Public Utilities Commission. To the extent of any contested factual issues that will develop in this hearing, the *burden* will be on the Commission to establish its contentions unless otherwise indicated." [Emphasis added]

To us the real issue is who, in fact, had the burden, not the nature of the order to show cause.

As to what constitutes "good cause" to revoke a certificate, the Alaska Public Utilities Commission Act provides in AS 42.05.271

> ". . . . Good cause for amendment, modification, suspension or revocation of a certificate includes. . . .
>
> (4) wilful failure to comply with the provision of this chapter or the rules, regulations or orders of the commission;
>
> (5) wilful failure to comply with a term, condition, or limitation of the certificate."

The Commission found North State in wilful violation of the conditions of the certificate under the following definition:

> "These circumstances also establish the basis for a finding that the failure was "wilful" under AS 42.05.271(4) and (5), which the commission *construes as requiring only a showing that the failure to comply was with knowledge of the consequences of such failure.* [Emphasis added]

North State argues that by adopting this construction, a "presumption of wilfullness" was established merely by a showing that there was a failure and knowledge that sanctions would follow. Thus, it maintains that "the burden of attempting to justify its conduct was then shifted to the utility."

North State also buttresses this by various references to the Commission's discussion of the failure to show such justification.

> "The Commission is of the opinion that North State *has not demonstrated* a quality of management and performance under regulations sufficient to overcome its responsibility for failure to provide service as required under the Order Granting Certificate. [Emphasis added]. *North State has not presented* sufficient excuse to be released from failure to comply with ordering paragraph (2) of the Order Granting Certificate. [Emphasis added]
>
> Any failure by North State to introduce evidence of immediate and substantial exchange need may be properly considered against it at this point."

North State neglects to state, however, that the Commission's definition of "wilful" was followed by a statement that the Commission would waive noncompliance if there were "sufficient excuse for non-compliance" and that "an excuse will be acceptable if based on factors beyond the control or responsibility of the party seeking relief". The Commission went on to add that such discretionary determinations as to "control" or "responsibility" were to be made in "accordance with the standard of conduct expected of a reasonably prudent businessman under similar conditions", the "quality of performance under regulation", and the "public interest". And the three quotations cited by North State merely refer to the fact that North State had failed in its attempt to "demonstrate" or "present" evidence on the issues, not that it carried the ultimate burden of doing so.

Thus, the Commission was not saying that North State suffered the burden of showing justification but was simply stating what it would consider as a justification so as to make the failure "excusable". In this regard, it seems to have been well within the accepted meaning of "wilful" in interpreting administrative statutes. The term itself is not a "word of art" or a "technical term". It has many different

meanings, depending upon the context in which it is used. In Spies v. United States, 317 U.S. 492, 497–498, 63 S.Ct. 364, 367, 87 L.Ed. 418, 422 (1943), the U. S. Supreme Court stated:

> "Willful, as we have said, is a word of many meanings, its construction often being influenced by its context."

In Goodman v. Benson, 286 F.2d 896, 900 (7th Cir. 1961), the court stated:

> "We think it clear that if a person (1) intentionally does an act which is prohibited,—irrespective of evil motive or reliance on erroneous advice, or (2) *acts with careless disregard* of statutory requirements, the violation is wilful."

In holding that the actions of petitioner in violating the Commodities Exchange Act by failing to file some required reports and holding a speculative position in futures in excess of a prescribed maximum were "wilful", and thus deserved sanction by the Department of Agriculture, the *Goodman* court rejected petitioner's argument that he did not know the reports had not been filed and that he had incorrect information from a broker. The court went on to say:

> "The *responsibility* for making the reports was on the petitioner. Admittedly, he made no effort to determine whether the reports were being filed. It is immaterial whether a mistake was made by the secretary. The fact is, the reports were not made, and it was the *responsibility of the petitioner* that the regulations be carried out." [Emphasis added]

A similar definition of "wilful failure" was adopted in Union Transfer Co. v. Beeline Motor Freight, 150 Neb. 280, 34 N.W.2d 363 (1948), in holding that a carrier's failure to provide service to a certain route over three years was "wilful failure" even though the carrier maintained that it was owing to a lack of personnel, equipment and business.

> "The word 'willful' like many other words in our language has varied meanings which are dependent upon the nature of the subject under discussion. The word often denotes an act which is voluntary, knowingly or permissively done as distinguished from one which is accidental or otherwise beyond the control of the person to be charged. The general notion that a willful act implies a bad purpose is derived from criminal statutes. It has no such meaning when used in a statute to denounce an act not in itself wrong. 'Willful failure' as used in Section 75–238, R.S.1943, is such behavior through acts of commission *or omission* which justifies a belief that there was an intent entering into and characterizing the failure complained of. *A failure to perform an act for a long period of time, which is required by law to be performed, generally constitutes a willful failure to perform.* . . . The willful failure or refusal of a carrier to obtain permission from the railway commission to discontinue in whole or in part the service authorized under a certificate of convenience and necessity constitutes sufficient grounds to suspend, change, or revoke the certificate under general rules adopted by the railway commission." [Emphasis added]

[6] At the outset of the hearing, the Commission clearly stated that the burden of proof was to be on it. Contrary to North State's contention, the Commission's definition of "wilful" in finding that there was a "wilful failure" to meet the condition in the certificate, i. e., "good cause", did not shift the burden of justification to North State. The concept of wilfulness, i. e., failure to meet responsibility and exercise control, which was utilized by the Commission is in accordance with case law. Goodman v. Benson, *supra*; Union Transfer Co. v. Beeline Motor Freight, *supra*. Rather than stating that North State had the duty of proving justification for the failure, the Commission was merely delineating the nature of what would be reasonable justification, so as to render a failure to meet the condition non-wilful and, thus, the nature of the case that had to be made out by the evidence. We find no error.

Stanley NEITZEL, Appellant,

v.

STATE of Alaska, Appellee.

No. 6243.

Court of Appeals of Alaska.

Nov. 19, 1982.

Defendant was convicted in the Superior Court, Third Judicial District, Seaborn J. Buckalew, Jr., J., of second-degree murder, and he appealed. The Court of Appeals, Singleton, J., held that: (1) intoxication was not a defense to second-degree murder; (2) insofar as second-degree murder statute precluded consideration of intoxication in determining recklessness, it was not so irrational as to violate due process; (3) reckless murder was sufficiently distinguished from reckless manslaughter to satisfy equal protection; and (4) any error arising from trial court's failure to instruct on diminished capacity was harmless beyond a reasonable doubt.

Affirmed.

1. Homicide ⇐9, 28

Word "intentionally," as used in statute providing that to be guilty of second-degree murder defendant must intentionally perform an act, does not mean intent to cause a result; rather, it means knowingly; therefore, intoxication is not a defense to second-degree murder. AS 11.41.110(a)(2), 11.81.900(a)(2).

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

2. Homicide ⇐23(1)

Second-degree murder statute requires that the actor must knowingly engage in conduct causing the death of another which in light of the circumstances is reckless to the point that it manifests an extreme indifference to the value of human life. AS 11.41.110(a)(2).

3. Homicide ⇐23(1)

To be guilty of second-degree murder, defendant had to know he was firing a gun and being reckless regarding the circumstances, i.e., the location of the victim, her vulnerability, the direction in which he was shooting, and the result, i.e., her death. AS 11.41.110(a)(2).

4. Homicide ⇐74

Recklessness regarding the consequences is the required culpable mental state for reckless murder. AS 11.41.110(a)(2).

5. Constitutional Law ⇐258(3)
Homicide ⇐8

Insofar as second-degree murder statute precludes consideration of intoxication in determining recklessness, it is not so irrational as to violate due process. AS 11.41.110(a)(2); U.S.C.A. Const.Amends. 5, 14.

6. Constitutional Law ⇐250.1(2)

Reckless murder is sufficiently distinguished from reckless manslaughter to satisfy equal protection. AS 11.41.110(a)(2); U.S.C.A. Const.Amends. 5, 14.

7. Criminal Law ⇐1173.2(3)

In prosecution in which defendant was convicted of second-degree murder, any error arising from trial court's failure to instruct on diminished capacity was harmless beyond reasonable doubt. AS 11.41.110(a)(2).

Susan Orlansky, Asst. Public Defender, and Dana Fabe, Public Defender, Anchorage, for appellant.

William H. Hawley, and Elizabeth Sheley, Asst. Attys. Gen., Office of Special Prosecutions and Appeals, Anchorage, and Wilson L. Condon, Atty. Gen., Juneau, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

SINGLETON, Judge.

Stanley Neitzel shot his girlfriend, Irene Reedy, in the head causing her death. The

undisputed evidence establishes that Neitzel fired a number of shots directly at Reedy while she sat on the ground. Many of these earlier bullets struck the ground within an inch of Ms. Reedy before the fatal shot entered her head. Eyewitnesses were unsure of whether Neitzel fired at Reedy to discipline her for drinking vodka which belonged to him, to frighten her, to demonstrate his marksmanship by seeing how close he could come without hitting her, or to just have fun with his rifle. Neitzel denied any recollection of the incident. Two hours after the shooting his blood alcohol level was .15%. The state offered expert testimony suggesting that Neitzel's blood alcohol level could have been as high as .18% at the time of the crime. Neitzel was convicted of second degree murder in violation of AS 11.41.110(a)(2), which provides in relevant part:

> *Murder in the Second Degree.* (a) A person commits the crime of murder in the second degree if
>
> ....
>
> (2) he intentionally performs an act that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life ....

The trial court held that this statute did not require a specific intent and consequently Neitzel's intoxication at the time of Reedy's death was not a defense. Neitzel raises a number of objections in his appeal, but it is clear that these objections simply restate the propositions that he could only be convicted if (1) he intended to shoot *at Reedy*, and (2) he was reckless in evaluating the circumstances, *i.e.*, knew that shooting at Reedy endangered her life. According to the first prong of Neitzel's argument, he was entitled to an instruction that required the jury to consider his intoxication in determining whether he intended to shoot at Reedy. The trial court instructed the jury that intoxication was not a defense. According to the second prong of his argument, he was entitled to an instruction telling the jury that he personally must have known of the danger to Reedy before he could be convicted. In other words, a jury determination that the reasonably prudent person similarly situated would have been aware of the risk to Reedy was insufficient for conviction. We reject the first prong of Neitzel's argument but accept in part the second prong. We determine, nevertheless, that any error was harmless beyond reasonable doubt and therefore affirm the decision of the trial court.

To be guilty of second degree murder, the defendant must *inter alia* "intentionally" perform an act, such as intentionally shooting a gun. AS 11.81.900 provides in relevant part:

> (a) for purposes of this title, unless the context requires otherwise,
>
> (1) a person acts "intentionally" with respect to a result described by a provision of law defining an offense when his conscious objective is to cause that result ....

[1] After carefully reviewing the code and considering the history of its enactment, we are convinced that the word "intentionally" in AS 11.41.110(a)(2) was not used "with respect to a result" and therefore was not governed by AS 11.81.900(a)(1). We conclude it should be given the meaning assigned to "knowingly" in the code definitions. "Knowingly" is defined as follows:

> [A] person acts "knowingly" with respect to conduct or to a circumstance described by a provision of law defining an offense when he is aware that his conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless he actually believes it does not exist; a person who is unaware of conduct or a circumstance of which he would have been aware had he not been intoxicated acts knowingly with respect to that conduct or circumstance
>
> ....

AS 11.81.900(a)(2).

In order to understand the legislature's intentions in enacting AS 11.41.110(a)(2), it

is necessary to briefly trace the evolution of what can best be described as reckless murder through the common law, the Model Penal Code, upon which our current statutes are modeled, the tentative draft prepared by the Alaska Code Revision Commission, Subcommission on Criminal Law (hereafter referred to as the Tentative Draft), and the Alaska Revised Criminal Code ultimately enacted by the legislature (hereafter referred to as the Revised Code). When such a study is completed, we believe the legislature's intent is clear.

At common law, murder was homicide committed with "malice aforethought." R. Perkins, *Criminal Law* § 1, at 34 (2d ed. 1969). "Aforethought" suggests planning but this term fell into disuse leaving "malice" the significant term differentiating murder from other forms of culpable homicide. *Id.* at 34–35. Malice was primarily defined to mean an intent to kill in the absence of (1) justification, (2) excuse, or (3) mitigation. *Id.* at 35.

This definition was subject to an exception which is central to the issue before us. Common law courts permitted a jury to find malice in the absence of a specific intent to kill where "in the absence of any circumstance of exculpation or mitigation an act [was] done with such heedless disregard of a harmful result, foreseen as a likely possibility, that it differs little in the scale of moral blameworthiness from an actual intent to cause such harm." *Id.* at 768. To distinguish such a crime from intentional murder, it is useful to call it "reckless murder," and to distinguish its *mens rea* from an intent to kill by calling it "constructive malice."

Typical examples of this kind of murder are: shooting, regardless of the consequences, into a home, room, train, or automobile in which others are known to be or might be. *Id.* at 36. Perkins calls the mental state accompanying such an act "a man-endangering-state-of-mind." *Id.* at 759.

The Tentative Draft prepared by the Subcommission on Criminal Law was based on a number of recent state codifications of criminal law. These codes in turn were substantially derived from the New York Revised Penal Code of 1965 which was based on the Model Penal Code.

A number of common law concepts underwent substantial modification in the American Law Institute's Model Penal Code (proposed official draft) which was published in 1962 (hereafter referred to as Model Penal Code). The Model Penal Code in turn underwent modification in the enactment of the New York Penal Code of 1965, at the hands of the Subcommission on Criminal Law which published its Tentative Draft in 1977, in the Revised Code enacted in 1978, and in the additional amendments added to our code in 1980. Nevertheless, the Model Penal Code is the foundation upon which our code rests and a researcher interested in discovering the meaning of a given Alaskan criminal statute must begin with the Model Penal Code and its comments and follow the evolution of the statute in question through the New York Penal Code of 1965 and the Alaska Tentative Draft to its place in the Revised Code. Having completed such a study, we are satisfied that the legislature intended to retain "reckless murder" essentially as it existed at common law. As always with statutory construction, what the legislature altered, modified, or eliminated from the Model Penal Code is often as important as what was retained. But, in evaluating modifications and comparing corresponding sections, it is wise to remember that the arrangement of sections and subsections sometimes differs between the Model Penal Code and its successors even though the substance remains the same. It is therefore necessary to review the code as a whole to make certain that what appears to be a substantial change in the Revised Code is not merely a minor variation in phrasing.

In this case we must review three Model Penal Code concepts: (1) culpable mental states; (2) the Model Penal Code definition of reckless murder (particularly the differences between reckless murder, as conceived by the drafters of the Model Penal Code, and manslaughter); and (3) finally, the treatment of intoxication as a defense

in the Model Penal Code, the Tentative Draft, and our Revised Code. Such a review will clarify the legislature's intent in defining reckless murder and the part intoxication plays in defending against a charge of reckless murder.

CULPABLE MENTAL STATES

The Model Penal Code provides that with the exception of violations and other strict liability offenses, with which we are not here concerned, a person is not guilty of an offense unless "he acted purposefully, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." Model Penal Code § 2.02. This requirement is also found in the Tentative Draft, proposed AS 11.11.100 and .110, and in the Revised Code, AS 11.81.600 and .610.[1]

The Model Penal Code, the Tentative Draft, and the Revised Code segregate ma-

1. AS 11.81.600 and .610 as originally enacted provided:

Sec. 11.81.600. *General requirements of culpability.*

(a) The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is capable of performing.

(b) A person is not guilty of an offense unless he acts with a culpable mental state with respect to each element of the offense, except that

(1) no culpable mental state must be proved with respect to any element of an offense if the description of the offense does not specify a culpable mental state and the offense is

(A) a violation; or

(B) designated as one of "strict liability";

(2) no culpable mental state must be proved with respect to a particular element of the offense if an intent to dispense with the culpable mental state requirement for that element clearly appears.

Sec. 11.81.610. *Construction of statutes with respect to culpability.*

(a) When only one culpable mental state appears in a provision of law defining an offense, it is rebuttably presumed to apply to every element of the offense unless an intent to limit its application clearly appears.

(b) Except as provided in § 600(b) of this chapter, if a provision of law defining an offense does not prescribe a culpable mental state, the culpable mental state that must be proved with respect to

(1) conduct is "knowingly"; and

(2) a circumstance or a result is "recklessly."

(c) When a provision of law provides that criminal negligence suffices to establish an element of an offense, that element is also established if a person acts intentionally, knowingly, or recklessly. If acting recklessly suffices to establish an element, that element also is established if a person acts intentionally or knowingly. If acting knowingly suffices to establish an element, that element is also established if a person acts intentionally. These sections were amended in 1980 to provide:

Sec. 11.81.600. *General requirements of culpability.*

(a) The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is capable of performing.

(b) A person is not guilty of an offense unless he acts with a culpable mental state, except that no culpable mental state must be proved

(1) if the description of the offense does not specify a culpable mental state and the offense is

(A) a violation; or

(B) designated as one of "strict liability"; or

(2) if a legislative intent to dispense with the culpable mental state requirement is present.

Sec. 11.81.610. *Construction of statutes with respect to culpability.*

(a) Repealed by § 44 ch 102 SLA 1980.

(b) Except as provided in AS 11.81.600(b), if a provision of law defining an offense does not prescribe a culpable mental state, the culpable mental state that must be proved with respect to

(1) conduct is "knowingly"; and

(2) a circumstance or a result is "recklessly."

(c) When a provision of law provides that criminal negligence suffices to establish an element of an offense, that element is also established if a person acts intentionally, knowingly, or recklessly. If acting recklessly suffices to establish an element, that element also is established if a person acts intentionally or knowingly. If acting knowingly suffices to establish an element, that element is also established if a person acts intentionally.

In explaining the amendments to AS 11.81.-600, the responsible legislative committee stated:

terial elements of offenses into three categories: (1) the nature of the conduct; (2) the circumstances surrounding the conduct; and (3) the results of the conduct. The Senate Committee Report which accompanied the enactment of the Revised Code describes these terms as follows:

> The Code distinguishes between three elements of offenses to which the culpable mental states apply
>
> . . . .
>
> The first element, conduct, involves the nature of the proscribed act or the manner in which the defendant acts. Kidnapping, for example, requires that one person restrain another. The conduct might be the locking of the only door to a windowless room. Knowingly is the culpable mental state applicable to conduct. The second element, circumstances surrounding the conduct, refers to a situation having a bearing on the actor's culpability. Kidnapping requires that the person inside the room not consent to being restrained. Lack of consent is an example of a circumstance surrounding the actor's conduct, and is an element of the crime. Knowingly, recklessly, and criminal negligence are the culpable mental states associated with the existence of circumstances. The result of the actor's conduct constitutes the final element. Kidnapping can occur if the victim is exposed to a substantial risk of serious physical injury. Intentionally, recklessly and criminal negligence are the culpable mental states associated with results.

2 Senate Journal Supplement No. 47, at 140 (June 12, 1978). *See* Tentative Draft Part 2, at 14–15 (1977).

The culpable mental states referred to in the Tentative Draft are essentially the same as those mentioned in the Model Penal Code: purposefully, knowingly, recklessly, or negligently. *Compare* Model Penal Code § 2.02 *with* Tentative Draft 11.11.110 (the Tentative Draft substitutes the word "intentionally" for the word "purposefully"). The Tentative Draft defines "intentionally" using almost the same words that the Model Penal Code uses to define "purposefully," except that "purposefully" in the Model Penal Code can relate to the surrounding circumstances while the Tentative Draft restricts "intentionally" to conduct and results. *Compare* Model Penal Code § 2.02(a) *with* Tentative Draft 11.11.140(a)(1), which is substantially identical to New York Penal

> This amendment makes two changes regarding the code's general rules on culpability. The first is to clarify the general rule concerning culpability and to make clear that, with certain specified exceptions, a culpable mental state *must* be proven for every crime. For example, to commit Burglary in the Second Degree the state must establish that the defendant entered or remained unlawfully in a building with intent to commit a crime. The culpable mental state in this case is the intent to commit a crime. If the state establishes a voluntary act by the defendant in entering or remaining in a building, and in addition shows he acted with the intent to commit a crime, the crime of Burglary in the Second Degree has been established.
>
> The second change provides that culpability need not be established if a legislative intent to dispense with the culpability requirement appears. While the decision to eliminate the culpable mental state requirement must comport with constitutional due process guarantees, the courts should be specifically authorized to consider the legislature's intent (and most importantly, the commentary accompanying passage of the code) in determining whether the legislature intended to dispense with the culpability requirement in a particular statute.

2 Senate Journal Supplement No. 44, at 18–19 (May 29, 1980).

The amendment to AS 11.81.610 was explained as follows:

> The second amendment repeals AS 11.81.610(a) which provides that the use of one culpable mental state in a statute rebuttably presumes that the mental state applies to all elements of the crime. This rule is inappropriately broad and ignores the fact that, by definition, particular mental states only apply to particular elements of a crime. For example, "intentionally" only applies to elements of crimes that can be classified as "results" as opposed to "circumstances" or "conduct" to which the culpable mental state "knowingly" applies. Because of the requirement set forth in AS 11.81.600(b) . . . that ordinarily only one culpable mental state is required to be established for each crime, this section is superfluous and misleading.

2 Senate Journal Supplement No. 44, at 28 (May 29, 1980).

These amendments and the state's arguments based upon them will be discussed hereafter.

Code § 15.05(1). "Knowingly" is defined similarly in the Model Penal Code and the Tentative Draft except that the Tentative Draft limits "knowingly" to conduct and circumstances while the Model Penal Code permits "knowingly" to govern a result. *Compare* Model Penal Code § 2.02(2)(b) *with* Tentative Draft 11.11.140(a)(2).

"Recklessly" and "negligently" are defined in essentially the same way in both the Tentative Draft and the Model Penal Code. *Compare* Model Penal Code § 2.02(2)(c) *with* Tentative Draft 11.11.140(a)(3) and Model Penal Code § 2.02(2)(d) *with* Tentative Draft 11.11.140(4). As we shall see, both the Model Penal Code and the Tentative Draft require knowledge of the risk presented by the actor's conduct before he can be found to have acted "recklessly," but both preclude consideration of "intoxication" in determining whether he had the requisite knowledge. *Accord* New York Penal Code § 15.05(3).

The foregoing provisions were incorporated into the Alaska Revised Code with only minor stylistic changes. The code retains from the Tentative Draft the three-fold division of elements of an offense into conduct, surrounding circumstances, and results. It also retains the four culpable mental states: intentionally, knowingly, recklessly, and criminal negligence. Knowingly, recklessly, and criminal negligence are defined as in the Tentative Draft. *Compare* AS 11.81.900(a)(1), (2), and (3) *with* Tentative Draft 11.11.140(a)(1), (2), and (3). The Revised Code, however, limits the scope of the term "intentionally" to govern only results while the Tentative Draft allows "intentionally" to govern conduct and results and the Model Penal Code uses the synonymous term "purposefully" to govern conduct, circumstances, and results. *Compare* Model Penal Code § 2.02(2)(a) *with* Tentative Draft 11.11.140(a)(1) and AS 11.81.900(a)(1).

For our present purposes, the primary difference between the Model Penal Code, the Tentative Draft, and the Revised Code (if we reserve for later discussion their respective treatment of intoxication) lies in the progressive narrowing of the scope of the term "intentionally." With this background we can now undertake an analysis of the code's treatment of "intoxication" as a defense.

INTOXICATION

The Model Penal Code contains the following provision regarding intoxication:

> (1) Except as provided in Subsection (4) of this Section [relating to involuntary intoxication], intoxication of the actor is not a defense unless it negatives an element of the offense.
>
> (2) When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.

Model Penal Code § 2.08. The Tentative Draft is substantially the same. It provides:

> (a) Voluntary intoxication or drug use does not, as such, constitute a defense to a criminal charge, but in a prosecution for an offense, evidence that the defendant used drugs or was intoxicated may be offered whenever it is relevant to negate an element of the crime that requires a culpable mental state.
>
> (b) When recklessness establishes an element of the offense, if the defendant, due to voluntary intoxication or drug use, is unaware of a risk of which he would have been aware had he not been intoxicated or not using drugs, that unawareness is immaterial.

Tentative Draft 11.11.130. The defense is substantially narrowed in the Revised Code. AS 11.81.630 provides in relevant part:

> Voluntary intoxication is not a defense to a prosecution for an offense, but evidence that the defendant was intoxicated may be offered whenever it is relevant to negate an element of the offense that requires that the defendant intentionally cause a result.

Thus, in the Tentative Draft, as in the Model Penal Code, intoxication is relevant

with regard to any offense that requires knowledge or intent as the culpable mental element. Only where the culpable mental element is recklessness do these codes preclude jury consideration of intoxication. It should be noted that the Model Penal Code commentary makes it clear that the rule barring evidence of intoxication is a rule of substantive law, not of evidence. Thus, the drafters of the Model Penal Code recognized that as a matter of evidence intoxication is relevant wherever a mental state including recklessness is an issue. What the drafters have done is resolve, as a matter of policy, to define offenses to exclude consideration of intoxication. The reasons for this decision will be discussed later in connection with Neitzel's contention that such a determination violates due process of law. It is important to recognize that the Revised Code went beyond the Tentative Draft and the Model Penal Code in excluding evidence of intoxication where an offense required that the offender act "knowingly." Thus, under the Revised Code, evidence of intoxication is only admissible where the offense requires that a person act "intentionally" as defined in AS 11.81.-900(a)(1). In conclusion, the Model Penal Code and the Tentative Draft provide that recklessness may be found despite unawareness of a risk where intoxication accounts for the failure to perceive the risk. Model Penal Code § 2.08(2); Tentative Draft 11.-11.130(b). This provision is also found in the Revised Code. AS 11.81.900(a)(3). In addition, the Revised Code provides that "a person who is unaware of conduct or a circumstance of which he would have been aware had he not been intoxicated acts knowingly with respect to that conduct or circumstance." AS 11.81.900(a)(2). This provision which does not occur in either the Model Penal Code or the Tentative Draft reinforces the modification to what is now AS 11.81.630 in establishing a legislative determination that only intent to cause a result can be negated by evidence of intoxication.

RECKLESS MURDER

We may now proceed to review "constructive malice murder" as it progressed from the Model Penal Code through the Tentative Draft to the Revised Code. Since this form of murder is closely related to manslaughter, it is necessary to discuss that crime as well.

The Model Penal Code and the Tentative Draft establish one offense of murder which can be committed purposefully, knowingly, or, under limited circumstances, recklessly. The Tentative Draft differs from the Model Penal Code in substituting the word "intentionally" for "purposefully." *Compare* Model Penal Code § 210.2 *with* Tentative Draft 11.41.110. The Model Penal Code also differs from the Tentative Draft in requiring that felony murder be committed "recklessly" while the Tentative Draft permits an accidental felony murder. *Compare* Model Penal Code § 210.2(b) *with* Tentative Draft 11.41.110(a)(3). The Tentative Draft also follows the common law in making an act motivated by an intent to cause serious physical injury resulting in death sufficient for murder. Tentative Draft 11.41.110(a)(1). The Model Penal Code apparently treats this as a possible example of reckless murder. Model Penal Code § 210.2(b); A.L.I., *Model Penal Code and Commentaries,* Part II § 210.2, at 28–29 (1980).

The Model Penal Code and the Tentative Draft generally define manslaughter in the same way. *Compare* Model Penal Code § 210.3 *with* Tentative Draft 11.41.110(b) and 11.41.120. They include reckless homicide as well as intentional and knowing homicide where mitigated.

The Revised Code departs from both the Model Penal Code and the Tentative Draft in retaining two degrees of murder. Intentional murder (and inducing suicide) is first degree murder, AS 11.41.100, while homicide resulting from an intent to cause serious physical injury or knowledge that the actor's conduct is substantially certain to cause death or serious physical injury is second degree murder, AS 11.41.110(a)(1). Felony murder is carried over from the Tentative Draft into the Revised Code but

reduced to second degree murder, AS 11.41.110(a)(3).

In addition, the Revised Code contains, with some modifications, the reckless murder provision currently under consideration. The Model Penal Code states that, subject to mitigation to manslaughter, "criminal homicide constitutes murder when [*inter alia*] it is committed recklessly under circumstances manifesting extreme indifference to the value of human life ...." Model Penal Code § 210.2(1)(b). The Tentative Draft states that: "A person commits the crime of murder if ... he recklessly causes the death of another person under circumstances manifesting an extreme indifference to the value of human life ...." Tentative Draft 11.41.110.(a)(2). Finally, the Revised Code states: "A person commits the crime of murder in the second degree if ... he intentionally performs an act that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life ...." AS 11.41.110(a)(2).

Neitzel and the state both note the slight variation in language between the Model Penal Code and the Tentative Draft on the one hand and the Revised Code on the other. They infer substantial differences in legislative meaning.

Neitzel argues that the legislature intended to require a specific intent to do the act evidencing a "man-endangering-state-of-mind," such as shooting at Ms. Reedy, and that intoxication is relevant to negate this intent. The state counters that the intent mentioned in the murder statute refers to conduct, not to the result, rendering the statutory definition inapplicable. The state further argues that the legislature, in deleting a reference to recklessness regarding the surrounding circumstances, *i.e.*, the presence of Ms. Reedy and her vulnerability, wished an objective standard similar to negligence rather than a recklessness standard to apply to these circumstances.

The state relies primarily on the 1980 amendments to AS 11.81.600 which eliminate the requirement that a culpable mental state must be proved "with respect to each element of the offense" and the requirement that a legislative intent to dispense with a culpable mental state "clearly appear." The legislative history indicates that the legislature expected that most statutes would only require one mental state and that the courts should consider legislative history in determining the meaning of statutes whether the statutes themselves are clear or not. We note, however, that these amendments came two years after enactment of AS 11.41.110(a)(2) which establishes the elements of reckless murder, and consequently cannot be viewed as establishing the legislature's intent in 1978 when the code was originally adopted. *Wright v. State*, 651 P.2d 846 (Alaska App. 1982).

[2] While the positions of the parties are forcefully argued, we reject both. In so doing, we recognize that among the advantages of adopting a Model Penal Code provision is recourse to the commentary which accompanies it. The commentary is frequently an invaluable aid in statutory construction. Further, where identical statutes are adopted in a number of jurisdictions, judicial decisions in each jurisdiction are available to all, and where a common interpretation is given identical statutes, the public interest in certainty and predictability in the laws is advanced. Where, as here, minor modifications are made in the language of a model act, the parties understandably assume that the legislature intended major modifications in meaning. In the instant case, we find that assumption to be unsound and conclude that the legislature intended AS 11.41.110(a)(2) to have the same meaning as Model Penal Code § 210.2(b). In our view, the difference in terminology, *i.e.*, substituting "intentionally" for "recklessly" resulted from an attempt to consistently apply other changes which the legislature made in the scope of such Model Penal Code terms as "intentionally," "knowingly," and "recklessly." As we interpret it, AS 11.41.110(a)(2) requires that the actor must knowingly engage in conduct causing the death of another which in light of the circumstances is reckless to the

point that it manifests an extreme indifference to the value of human life. This is what we understand Model Penal Code § 210.2(1)(b) to mean as well.

We believe the Senate comment to this section, which we will discuss momentarily, viewed in the light of other sections of the Revised Code, compels this conclusion. As mentioned before, the Model Penal Code, the Tentative Draft, and the Revised Code divide elements of offenses into three categories: conduct, surrounding circumstances, and results. Applying this structure to AS 11.41.110(a)(2), we find:

1. *Conduct:* performing an act.
2. *Surrounding Circumstances:* under circumstances manifesting an extreme indifference to the value of human life.
3. *Result:* the death of another person.

It is to these elements that we must apply the culpable mental states described in the code. As we do so, we must bear in mind that the legislature, in enacting the Revised Code, departed from the Model Penal Code and the Tentative Draft in narrowing the scope of those culpable mental states. Thus, "intentionally" applies only to results, AS 11.81.900(a)(1), "knowingly" applies only to conduct and circumstances, AS 11.81.900(a)(2), and "recklessly" applies only to results and circumstances, AS 11.81.900(a)(3). *See* 2 Senate Journal Supplement No. 44, at 28 (May 29, 1980). Further, AS 11.81.610(b) provides:

> Except as provided in AS 11.81.600(b) [relating to violations and strict liability offenses], if a provision of law defining an offense does not prescribe a culpable mental state, the culpable mental state that must be proved with respect to
>
> (1) conduct is "knowingly"; and
>
> (2) a circumstance or a result is "recklessly."

In light of these provisions, the legislative comment to AS 11.41.110(a)(2) becomes clear:

> Subsection (a)(2) describes conduct that is very similar to the "substantially certain" clause in subsection (a)(1). Under this provision, however, the defendant need not necessarily know that his conduct is substantially certain to cause death or serious physical injury. An example of conduct covered by this provision would be shooting through a tent under circumstances where the defendant did not know a person was inside or persuading a person to play "russian [sic] roulette". The defendant is only required to intend to perform the act; there is no requirement that he intend to cause death or that he know that his conduct is substantially certain to cause death.

2 Senate Journal Supplement No. 47, at 10 (June 12, 1978).

[3] The Tentative Draft allowed "intentionally" to govern conduct as well as results. The Revised Code confines "intentionally" to results leaving conduct to be governed by "knowingly." Apparently overlooking this change in the scope of the culpable mental states, the legislature used the word "intentionally" in AS 11.41.110(a)(2) to govern conduct, *i.e.*, performing the act, when by the definitions adopted by the legislature only "knowingly" can govern conduct.[2] The comment makes it clear that "recklessness" rather than knowledge or intent was to govern the "surrounding circumstances" and "the result." No mental element is specifically established for the result ("death") and the surrounding circumstances ("under circumstances mani-

2. The Tentative Draft provided:

> (a) For purposes of this title, unless the context otherwise requires,
>
> (1) a person acts "intentionally" with respect to a result or to conduct described by a provision of law defining an offense when his conscious objective is to cause that result or to engage in the conduct ....

Tentative Draft 11.11.140.

This provision was based on New York Penal Code § 15.05(1) (1965). The reference to "intentionally" with respect to conduct was deleted when the Revised Code was enacted. *See* AS 11.81.900(a)(1). Thus, AS 11.81.900(a)(1) is distinguishable from the statutes which permit "intentionally" to govern conduct. *See People ex rel. Russel v. District Court*, 521 P.2d 1254, 1256-57 (Colo.1974) (analyzing Colorado Revised Statute 40-3-102(1)(d) (1963)).

festing extreme indifference to the value of human life") in AS 11.41.110(a)(2). Consequently, "recklessly" governs those elements. It is clear that if Neitzel fired at Ms. Reedy intending her death and killed her, he would be guilty of first degree murder, not second degree murder. *See* AS 11.41.100(a)(1). The victim's death is the only result mentioned in AS 11.41.110(a)(2). In conclusion, applying the statutory terminology as defined in the code, to be guilty of second degree murder Neitzel had to know he was firing a gun and be reckless regarding: (1) the circumstances, *i.e.*, the location of Ms. Reedy, her vulnerability, and the direction in which he was shooting; and (2) the result, *i.e.*, her death. Under the Revised Code, intoxication is not relevant in evaluating the culpable mental states of "knowingly," AS 11.81.900(a)(2), or "recklessly," AS 11.81.900(a)(3).

The state concedes that the word "intentionally" modifies conduct and not a result. It nevertheless argues that silence regarding the surrounding circumstances should be construed to establish either strict liability or an objective test similar to criminal negligence. We reject this argument. The Model Penal Code provides in substance that if one mental element is provided for an offense, it applies to all the material elements of the offense in the absence of a contrary purpose. *See* Model Penal Code § 2.02(4). This provision was carried over in the Tentative Draft and the Revised Code (*see* AS 11.81.610(a)), but was repealed in 1980. *See supra* note 1.

[4] AS 11.81.600(b) specifies that strict liability must be expressly designated. Further, in the commentary to AS 11.81.-610, the drafters stated:

> Under subsection (b), if a statute does not specify any culpable mental state, conduct is required to be engaged in "knowingly" and results and circumstances are required to be engaged in "recklessly." "Criminal negligence" will not apply unless the term is expressly included in the statute defining the offense.

2 Senate Journal Supplement No. 47, at 144 (June 12, 1978). Under these circumstances, we conclude that "recklessly" governs the surrounding circumstances and the result in reckless murder.

In addition to his statutory construction arguments, Neitzel objects to this analysis on two grounds. First, he contends that holding an intoxicated person to the same standard as a sober person deprives the intoxicated person of due process of law. He relies upon *Kimoktoak v. State*, 534 P.2d 25, 33–35 (Alaska 1978). Secondly, he contends that reckless murder is insufficiently distinguished from reckless manslaughter so that his conviction deprives him of the equal protection of the law. He relies, *inter alia*, on *Keith v. State*, 612 P.2d 977, 986 n. 31 (Alaska 1980).

Kimoktoak is inapposite. There the court interpreted former AS 11.70.030 to permit evidence of intoxication to negate knowledge where knowledge was an element of an offense. The court relied on cases from California similarly interpreting California Penal Code § 22, which at that time was identical to former AS 11.70.030. The court did not base its holding on the constitution. Current Alaska law expressly precludes this result with regard to offenses established in the Revised Code. *See* AS 11.81.630, .640 and .900(a)(2).

[5] Neitzel does not dispute his ability to know he was firing a gun. The focus of his due process attack is on the claim that he recklessly disregarded the surrounding circumstances. In this regard, the Revised Code follows the Model Penal Code in precluding evidence of intoxication on the issue of recklessness. *See* Model Penal Code § 2.08(2). We do not consider the legislative judgment to preclude consideration of intoxication in determining recklessness so irrational that it violates due process. *Cf. Morgan v. Municipality of Anchorage*, 643 P.2d 691, 692 (Alaska App.1982) (city need not prove that person prosecuted for driving while intoxicated knew his driving was impaired). The commentary to the Model Penal Code sets out the arguments for considering intoxication on the issue of recklessness and then explains its reasons for rejecting those arguments as follows:

> The case thus made is worthy of respect, but there are strong considerations on the other side. We mention first the weight of the prevailing law which here, more clearly than in England, has tended towards a special rule for drunkenness. Beyond this, there is the fundamental point that awareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture that we believe it fair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk. Becoming so drunk as to destroy temporarily the actor's powers of perception and of judgment is conduct which plainly has no affirmative social value to counterbalance the potential danger. The actor's moral culpability lies in engaging in such conduct. Added to this are the impressive difficulties posed in litigating the foresight of any particular actor at the time when he imbibes and the relative rarity of cases where intoxication really does engender unawareness as distinguished from imprudence. These considerations lead us to propose, on balance, that the Code declare that unawareness of a risk of which the actor would have been aware had he been sober be declared immaterial.

A.L.I. Model Penal Code, Tentative Draft No. 9 § 2.08 at 8–9 (1959). We find these considerations persuasive. *Accord State v. Ramos,* 648 P.2d 119, 120–22 (Ariz.1982); *People v. LeGrand,* 61 A.D.2d 815, 402 N.Y.S.2d 209, 211, *cert. denied,* 439 U.S. 835, 99 S.Ct. 117, 58 L.Ed.2d 130 (1978).

Neitzel's equal protection argument is also unfounded. Neitzel argues that reckless murder, as we define it, is conceptually indistinguishable from reckless manslaughter. *See* B. Gegan, *A Case of Depraved Mind Murder,* 49 St. John's L.Rev. 417, 440–50 (1974) (criticizing the comparable New York statute on this ground). If intoxication is held to be a defense to murder but not manslaughter, Neitzel concludes the two offenses are kept separate and the equal protection problem disappears.

[6] We reject this argument because even without allowing intoxication as a defense to murder, the two offenses are sufficiently distinct to avoid equal protection problems. The Revised Code simply follows the Model Penal Code in distinguishing reckless murder from reckless manslaughter. The drafters of the Model Penal Code suggest the following reasons:

> Section 210.2(1)(b) also provides that criminal homicide constitutes murder when it is "committed recklessly under circumstances manifesting extreme indifference to the value of human life." This provision reflects the judgment that there is a kind of reckless homicide that cannot fairly be distinguished in grading terms from homicides committed purposely or knowingly.
>
> Recklessness, as defined in Section 2.02(2)(c), presupposes an awareness of the creation of substantial homicidal risk, a risk too great to be deemed justifiable by any valid purpose that the actor's conduct serves. Since risk, however, is a matter of degree and the motives for risk creation may be infinite in variation, some formula is needed to identify the case where recklessness may be found and where it should be assimilated to purpose or knowledge for purposes of grading. Under the Model Code, this judgment must be made in terms of whether the actor's conscious disregard of the risk, given the circumstances of the case, so far departs from acceptable behavior that it constitutes a "gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." Ordinary recklessness in this sense is made sufficient for a conviction of manslaughter under Section 210.3(1)(a). In a prosecution for murder, however, the Code calls for the further judgment whether the actor's conscious disregard of the risk, under the circumstances, manifests extreme indifference to the value of human life. The significance of purpose or knowledge as a standard of culpability is that, cases of provo-

cation or other mitigation apart, purposeful or knowing homicide demonstrates precisely such indifference to the value of human life. Whether recklessness is so extreme that it demonstrates similar indifference is not a question, it is submitted, that can be further clarified. It must be left directly to the trier of fact under instructions which make it clear that recklessness that can fairly be assimilated to purpose or knowledge should be treated as murder and that less extreme recklessness should be punished as manslaughter.

Insofar as Subsection (1)(b) includes within the murder category cases of homicide caused by extreme recklessness, though without purpose to kill, it reflects both the common law and much pre-existing statutory treatment usually cast in terms of conduct evidencing a "depraved heart regardless of human life" or some similar words. Examples usually given include shooting into a crowd or into an occupied house or automobile, though they are not, of course, exhaustive.

Some indication of the content of this concept as a means of differentiating murder and manslaughter may be afforded by prior decisional law. One case involved a game of Russian roulette, where the defendant pointed a revolver loaded with a single cartridge at his friend. The weapon fired on the third try, and the fatal wound resulted. The court affirmed the conviction for murder, despite ample evidence that the defendant had not desired to kill his friend, with the statement that "malice in the sense of a wicked disposition is evidenced by the intentional doing of an uncalled-for act in callous disregard of its likely harmful effects on others." In another case, the defendant's claimed intention was to shoot over his victim's head in order to scare him. The court held that, even crediting this assertion, the jury could find the defendant guilty of murder on the ground that his act showed "such a reckless disregard for human life as was the equivalent of a specific intent to kill." A third illustration involved a defendant who fired several shots into a house which he knew to be occupied by several persons. The court affirmed his conviction of murder because the defendant's conduct was "imminently dangerous" and "evinced a wicked and depraved mind regardless of human life." Other acts held to show sufficient recklessness to justify a conviction of murder include shooting into a moving automobile and throwing a heavy beer glass at a woman carrying a lighted oil lamp. The Model Code formulation would permit a jury to reach the same conclusion in each of these cases.

A.L.I., *Model Penal Code and Commentaries*, Part II § 210.2, at 21–23 (1980) (footnotes omitted). The commentator concludes:

> Given the Model Code definition of recklessness, the point involved is put adequately and succinctly by asking whether the recklessness rises to the level of "extreme indifference to the value of human life." As has been observed, it seems undesirable to suggest a more specific formulation. The variations referred to above [various formulations from modern codes discussed in the commentary] retain in some instances greater fidelity to the common-law phrasing but they do so at great cost in clarity. Equally obscure are the several attempts to depart from the common law to which reference has been made. The result of these formulations is that the method of defining reckless murder is impaired in its primary purpose of communicating to jurors in ordinary language the task expected of them. The virtue of the Model Penal Code language is that it is a simpler and more direct method by which this function can be performed.

Id. at 25–26 (footnotes omitted).

In conclusion, jurors asked to evaluate conduct resulting in death to determine whether it was negligent, reckless or malicious must weigh four factors:

(1) The social utility of the actor's conduct,

(2) the magnitude of the risk his conduct creates including both the nature of forseeable harm and the likelihood that the conduct will result in that harm;

(3) the actor's knowledge of the risk; and

(4) any precautions the actor takes to minimize the risk.

See G. Fletcher, *Rethinking Criminal Law* § 4.3, at 259–62 (1978) (Homicide by Excessive Risk Taking); W. LaFave and A. Scott, *Handbook on Criminal Law* § 70, at 541–45 (1972) (Depraved-Heart Murder). Under the Revised Code, negligent homicide and reckless manslaughter are satisfied by conduct creating a significant risk of death absent justification or excuse. They differ only in the actor's knowledge of the risk. In differentiating reckless murder from reckless manslaughter, the jury is asked to determine whether the recklessness manifests an extreme indifference to human life. In so doing, it might pay particular attention to the social utility of the defendant's conduct and the precautions he takes to minimize the apparent risks. In evaluating the social utility of the actor's conduct, the jury must of course consider defenses such as provocation, necessity, the defense of self and of others, if supported by the evidence. Shooting at someone, by itself, is devoid of social utility and consequently has been used by the commentators as the paradigm of extreme indifference to human life. Where, however, a gun is fired at an attacking lion in an attempt to rescue the victim and the bullet strikes the victim, the social utility of the conduct may excuse it despite the magnitude of the risk. *Cf. Lee v. State*, 490 P.2d 1206 (Alaska 1971) (a civil case where the victim was shot in the course of her rescue from a lioness; jury absolved defendant of gross negligence, case remanded for trial for ordinary negligence), *overruled on other grounds, Munroe v. City Council*, 545 P.2d 165, 170 n. 11, *modified on rehearing*, 547 P.2d 839 (Alaska 1976).

In addition, the jury may evaluate any precautions taken. Thus, a person may be reckless in the sense that he knowingly engages in conduct which creates a forseeable risk of death and amounts to a gross deviation from the standard of conduct that a reasonable person would observe in the sense that the social utility of his conduct does not warrant exposing another to the risk of death. He may, however, still not manifest an extreme indifference to the life of the person endangered if he takes substantial precautions to minimize the risk.

Finally, and most importantly, the jury must consider the nature and gravity of the risk, including the harm to be foreseen and the likelihood that it will occur. For both murder and manslaughter, the harm to be foreseen is a death. Therefore, the significant distinction is in the likelihood that a death will result from the defendant's act. Where the defendant's act has limited social utility, a very slight though significant and avoidable risk of death may make him guilty of manslaughter if his act causes death. Driving an automobile has some social utility although substantially reduced when the driver is intoxicated. The odds that a legally intoxicated person driving home after the bars close will hit and kill or seriously injure someone may be as low as one chance in a thousand and still qualify for manslaughter. Where murder is charged, however, an act must create a much greater risk that death or serious physical injury will result. This is the point, in the Model Penal Code commentary "that recklessness ... can fairly be assimilated to purpose or knowledge ...."

How likely death must be before murder can be charged is not susceptible to mathematical demonstration. An examination of the classic example given to distinguish murder from manslaughter—Russian roulette—gives some guidance. If a revolver had six chambers in its cylinder and only one contains a bullet and we assume no imperfection in the revolver, then the odds are one in six that a bullet will fall under the hammer when the cylinder is spun and the trigger is pulled. Stated otherwise a participant has a 16.7% chance of being killed or seriously injured and an 83.3% chance of not being killed or seriously injured in a game of Russian Roulette each

time he puts the gun to his temple and pulls the trigger. The act is so dangerous and so lacking in social utility, however, that it demonstrates extreme indifference to human life and serves to distinguish murder from manslaughter.

The commentary to the Model Penal Code suggests that all of these concepts are adequately conveyed to the jury in the single phrase "extreme indifference to the value of human life." We therefore hold that the Revised Code sufficiently distinguishes between reckless murder and reckless manslaughter to satisfy equal protection.[3]

[7] The trial court instructed the jury on second degree murder, manslaughter and negligent homicide. The jury was specifically informed that manslaughter and negligent homicide were lesser included offenses of second degree murder. The court defined recklessness for the jury. It did not tell the jury that murder was a strict liability offense or that negligence regarding the surrounding circumstances was sufficient to establish murder. While the parties debated distinctions between "objective" and "subjective" theories of extreme indifference murder out of the jury's presence in their arguments to the court regarding jury instructions, it does not appear that the instructions actually given the jury differed materially from what we find to be the controlling law. To the extent that the Revised Code would authorize additional instructions differentiating murder from manslaughter in terms of the social utility of Neitzel's conduct measured against the gravity of the risk that Neitzel's conduct presented to Ms. Reedy, a question we do not decide, no such instructions were requested. Neitzel would be hard-put to argue that his conduct had any social utility; his conduct closely approximates the examples frequently used in the common law and in the Model Penal Code to differentiate reckless murder from manslaughter.[4] While we hold that recklessness regarding the consequences was the required culpable mental state for reckless murder, we conclude that the instructions given adequately conveyed that idea to the jury. We find no evidence other than that relating to intoxication which would support an instruction on diminished capacity and, as we have seen, intoxication cannot be considered by the jury in determining the culpable mental states of "knowingly" and "recklessly" under the Revised Code. We therefore conclude that any error in the instructions was

3. Our decision is therefore compatible with *People v. Jones*, 193 Colo. 250, 565 P.2d 1333 (Colo.), *appeal dismissed*, 434 U.S. 962, 98 S.Ct. 498, 54 L.Ed.2d 447 (1977), and *People v. Poplis*, 30 N.Y.2d 85, 330 N.Y.S.2d 365, 281 N.E.2d 167 (1972), which distinguish reckless murder from reckless manslaughter under similar statutes thereby avoiding an equal protection challenge. *People v. Marcy*, 628 P.2d 69, 78–79 (Colo.1981), would support an argument that knowingly engaging in conduct "under circumstances manifesting an extreme indifference to the value of human life," AS 11.41.110(a)(2), is virtually indistinguishable from "knowing that his conduct is substantially certain to cause death or serious physical injury to another person," AS 11.41.110(a)(1). Neitzel does not make this argument and it would do him no good if he did since both subsections constitute second degree murder and intoxication would not be relevant to preclude a finding of the relevant mental state under either. Consequently, we do not decide whether AS 11.41.110(a)(2) reaches conduct which AS 11.41.110(a)(1) does not. We note however that a game of Russian roulette is not substantially certain to cause death or serious physical injury and the legislative report clearly views the two subsections as similar but distinct. *See* 2 Senate Journal Supplement No. 47, at 9–10 (June 12, 1978) (legislative commentary on AS 11.41.110(a)(2)).

Finally, we note that Neitzel does not argue that "extreme indifference" requires more than one potential victim and therefore we do not reach that issue. *See People v. Jones*, 193 Colo. 250, 565 P.2d 1333, *appeal dismissed*, 434 U.S. 962, 98 S.Ct. 498, 54 L.Ed.2d 447 (1977).

4. The common way to distinguish between two related concepts is to give examples. Most of the examples customarily given of conduct which exhibits "extreme indifference to human life" so closely parallel Neitzel's conduct that they would have been more favorable to the state than the instructions actually given. The United States Supreme Court for this reason rejected a demand for greater clarification on the issue of causation in connection with a prosecution under the similar New York statute. *See Henderson v. Kibbe*, 431 U.S. 145, 156 n. 16, 97 S.Ct. 1730, 1738 n. 16, 52 L.Ed.2d 203, 214 n. 16 (1977).

harmless beyond reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710 (1967).

The judgment of the superior court is AFFIRMED.[5]

Joe KOGANALUK, Appellant,

v.

STATE of Alaska, Appellee.

No. 6531.

Court of Appeals of Alaska.

Nov. 26, 1982.

Defendant was convicted in the Superior Court, Second Judicial District, Barrow, Jay Hodges, J., of first-degree sexual assault, and he appealed from the imposition of a ten-year sentence of imprisonment. The Court of Appeals held that defendant's sentence was not excessive despite his contention that the sentence was equivalent to ten-year presumptive term prescribed for second-felony offender committing same class of offense and he was first-felony offender under presumptive sentencing provisions of revised criminal code where his previous convictions, although not the basis for sentencing defendant as a second or third offender, were relevant in determining appropriate sentence and defendant's conduct was among most serious within definition of offense.

Affirmed.

Rape ⇐64

Imposition of sentence of ten years' imprisonment on defendant convicted of first-degree sexual assault was not excessive despite defendant's contention that the sentence was equivalent to presumptive term prescribed for second-felony offender committing the same class of offense while he was first offender under presumptive sentencing provisions of revised criminal code where defendant's previous convictions, although not capable of being considered under sentencing provisions because more than seven years had elapsed since his unconditional discharge, were relevant to determination of sentence and where defendant's conduct was among most serious within definition of offense. AS 11.41.410(a)(1), 12.55.155(c)(5, 10).

Paul Canarsky, Asst. Public Defender, Fairbanks, and Dana Fabe, Public Defender, Anchorage, for appellant.

Randy M. Olsen, Asst. Dist. Atty., Harry L. Davis, Dist. Atty., Fairbanks, and Wilson L. Condon, Atty. Gen., Juneau, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

5. We recognize that the state obtained a protective order against testimony of "diminished capacity" and that Neitzel in his discussions with the court mentioned that he had suffered prior head injuries, alcohol blackouts, and had been treated for mental illness. The record reflects however that the defense explored the possibility of an insanity defense and one based on involuntary intoxication and rejected them. Neitzel's argument to the trial court and to this court has been phrased in terms of intoxication as the factor which established his diminished capacity. When the issue of Post-Traumatic Syndrome was broached by Neitzel, the court indicated that it did not understand what evidence Neitzel intended to offer and Neitzel did not elaborate further. Under these circumstances we cannot find that Neitzel has sustained the burden he bears, under Alaska Rule of Evidence 103(b), of offering evidence which, if believed, would raise a reasonable doubt whether Neitzel's mental health was such that even if sober he would not have appreciated the risk his conduct posed to Ms. Reedy.

Our disposition of this appeal would not, however, preclude Neitzel from bringing a motion pursuant to Criminal Rule 35(c) and attempting to show that he was in possession of evidence of diminished capacity unrelated to intoxication, but failed to offer it in reasonable reliance on the trial court's prior rulings. Such a showing might warrant a new trial.

Alaska State Legislature

SENATOR
ARLISS STURGULEWSKI
Senate President Pro Tempore
Chairman, Senate Rules Committee

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Senate

M E M O R A N D U M February 17, 1989

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: Senator Arliss Sturgulewski, Chair
Senate Rules Committee

RE: CSSJR 1 (State Affairs) Proposing an amendment to the Constitution of State of Alaska relating to open meetings.

Thank you for your work on SJR 1 in the State Affairs Committee and your commitment to move the resolution through the Judiciary Committee. I have attached back up material to this memo which you may find helpful.

1 - a copy of CSSJR 1 (State Affairs)
2 - a sectional on CSSJR 1 (S.A.)
3 - a fiscal note for SJR 1 (F.N. for CSSJR 1 (S.A.), which you should have attached to the original bill, is identical - a one time expense of $2.2 thousand for the election)
4 - a series of commonly asked questions and answers on open meetings
5 - a briefing paper on the initiative process in regard to constitutional amendments
6 - a copy of the more restrictive wording preferred by the Coalition for an Open Legislature
7 - several papers prepared by House Research and Legal Services on open meeting statutes and constitutional provisions in other states
8 - a copy of the existing open meeting statute and Uniform Rule 22

My staff has additional material available and looks forward to working with Chris on this issue. Thank you for your help.

Alaska State Legislature

SENATOR
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Senate

M E M O R A N D U M February 10, 1989

TO: Senator Jan Faiks, Chair
Senate Judiciary Committee

FROM: Senator Arliss Sturgulewski, Chair
Senate Rules Committee

RE: CSSJR 1 (State Affairs) Proposing an amendment to the Constitution of State of Alaska relating to open meetings.

SJR 1 is an important and balanced piece of legislation that will guarantee the public a reasonable right of access and openness in the legislative process.

The first words of the existing open meeting act (OMA) are; "All meetings of a legislative body . . . shall be open." In 1986 the League of Women voters sued after a series of closed meetings by the legislature. In that suit, the Superior Court found the legislature had violated the OMA and Uniform Rule 22, a fact the defense did not dispute, and that the OMA applied to the legislature.

When the Supreme Court reviewed the case, it held that though both the OMA and Uniform Rule 22 had been violated and were intended to apply to the legislature, this statute and rule fall within the legislature's rule making authority, and court could not enforce compliance. The matter was nonjusticiable.

The legislature is left in the position of requiring very stringent open meetings standards of other governmental bodies throughout the state, but being exempt from enforcement of any such requirements for the legislature. It can only be remedied by adoption of constitutional amendment which will provide a basis for judicial enforcement.

The standard for openness set in SJR 1 is reasonable and workable. It is the practice currently followed by the legislature in less ambiguous wording. Its presence in the constitution will establish a basis for enforcement of that standard.

SJR 1 is substantially the same as last year's Senate State Affairs committee substitute which was developed after a great deal of work. This year's State Affairs CS restructures Section 1 to further reduce any ambiguity of language.

The resolution is divided into three sections. Section 1 is the actual language that will be added to the constitution. Section 2 is legislative intent. Section 3 places the amendment before the voters at the next general election.

SECTION 1

Section 1(a) states that except for the executive sessions authorized in 1(b), private and substantive discussions and debates on legislation under its jurisdiction by a quorum of a house of the legislature or a committee is prohibited. This is the heart of the amendment.

Private and substantive discussions and debates on legislation under its jurisdiction by a quorum of a house or its committee is prohibited under all circumstances other than executive sessions, but this is the only thing that is prohibited.

The treatment of a caucuses has been a difficult issue in the drafting of this amendment. SJR 1 handles this problem successfully by making clear that a quorum of a committee or of a house is prohibited from holding substantive debate on a legislation under its jurisdiction in any private setting, whether that private setting is a caucus, an informal meeting in the chairman's office, or on the bench during a legislative softball game.

Any grouping of legislators that is not a quorum, however, may discuss anything they wish in private and a quorum of legislators may discuss anything in private except substantive discussion and debate on legislation under the jurisdiction of their particular committee or house.

Section 1 (b) allows the legislature or its committees to hold executive sessions to consider matters authorized by law.

Section 1 (c) specifies that a court may not prescribe rules or procedures for the conduct of the legislature nor may it invalidate legislation because of a violation of open meeting requirements.

Section 1(d) allows the court to impose civil fines (not civil damages) and other sanctions authorized by the legislature upon individual legislators for wilful violations. This section is a limited grant of authority to the courts. It grants them the authority to impose the sanctions authorized by law (civil fines), but prevents the imposition of any other sanctions.

The imposition of a civil fine on an individual legislator, the amount of which can be set by the legislature, is the only

intrusion by the court into the legislative process this amendment allows. This is less draconian than invalidation of legislation which is the penalty prescribed in the OMA and which this amendment prohibits.

Section 1(e) specifies that the legislature may implement this section. Implementing legislation would be the appropriate place if the legislature wished to define "legislation," "under its jurisdiction," or other terms, establish a specific fine amount, or require courts to delay consideration of any open meeting law suit filed during the legislative session until the end of the session.

SECTION 2

This section is legislative intent. It does not go into the constitution nor on the ballot but will be considered by the Legislative Affairs Agency in its preparation of the neutral summary which will be placed in the voter's pamphlet.

Section 2(a) states the purpose of the amendment is to make openness in government the rule and secrecy the exception and to ensure the public is not excluded during substantive deliberative and decision making stages of the budgetary and lawmaking process.

Section 2(b) states that the amendment provides a basis for judicial enforcement of the existing open meeting law to the extent it is consistent with this amendment, notwithstanding article II, section 6 (legislative immunity) or section 12 (rule making authority). The last sentence makes clear that if the legislature adopts a fine amount or schedule, the court must follow that schedule.

Section 2(c) states that the amendment is not intended to prevent the free flow of ideas among legislators or their participation in public forums, community events, site visitations, or social events.

Section 2(d) is instructions to the Legislative Affairs Agency.

Section 3 puts the amendment on the ballot at the next general election.

The constitutional amendment proposed in SJR 1 is balanced, workable, and needed. Thank you for your support.

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: SJR 1
PUBLISH DATE: 2/13/89

FISCAL NOTE

REQUEST:

Revision Date:
Title: Const. Amend.- Open Meetings

Agency Affected: Office of the Governor
BRU: Division of Elections

Sponsor: Sturgulewski
Requestor: Sturgulewski

Components: 1 Elections

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	-0-	-0-	2.2*	-0-	-0-	-0-
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	2.2*	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	2.2*	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	2.2*	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

* Costs included cover 2 to 3 pages in each Official Elections Pamphlet, for printing and typesetting, and costs estimated to cover computer program-ing requirements for vote (Continued)

Prepared by: Linda Edgeworth
Division: Elections
Phone: 465-4611
Date: 1/17/89

Approved by Commissioner: Sandra Stuart
Agency: Division of Elections
Date: 1/17/89

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SJR 1

2/13/89

counting purposes. However, these costs are based on the assumption that all candidates and issues will fit on three ballot cards, which is the norm. It should be noted, however that should the inclusion of this issue require a 4th ballot to be printed, the cost increase would have to be calculated at 16 cents per ballot x approximately 320,000 voters. The total cost of printing the additional ballot card would be $51.2.

Under these circumstances the fiscal note would be:

53.4

Senator Sturgulewski's Office

ALASKA SUNSHINE
SJR 1 Questions and Answers

1)
Q - Shouldn't SJR 1 contain definitions of all its terms and be more detailed and precise in specifying when legislators are required or not required to hold open meetings?

A - The language in section 1 of SJR 1 will become part of the Alaska constitution and the language is "constitutional" in nature rather than "statutory". To the greatest extent possible, SJR 1 uses plain english and unambiguous words. The proper place for definition of terms is in statute.

2)
Q - Won't the existence of a open meetings section in the constitution invite frivolous lawsuits from citizens who are unhappy with a particular piece of legislation?

A - No. Until the Supreme Court's 1986 decision in the suit by the League of Women Voters and the Daily News, it was commonly thought that the legislature was subject to the existing open meetings act which is much stricter than the proposed amendment. During that time there were no open meeting related suits against the legislature.

There are also 160 municipal governments in Alaska and a host of state, municipal, and school related commissions and boards, all of which are subject to suit under the open meetings law. Despite the possibilities, there have been only a handful of open meeting lawsuits against these entities. SJR 1 also prohibits invalidation of legislation which further decreases the motivation for someone who dislikes a particular law to file a frivolous suit.

3)
Q - Why doesn't the amendment make a specific exemption for caucuses and specify what can be discussed in them?

A - How to deal with caucuses has been the most difficult issue in the history of this legislation. Most early drafts contained specific exemptions for caucuses and references to what type of discussion was allowed in them. Most drafts (there have been 41 so far), would have allowed discussion on "organizational matters", "strategy", or "procedure".

Unfortunately there has never been agreement on what these terms mean. Constitutional language does not contain definitions and while it would be appropriate to leave the definitions to implementing legislation, this approach would leave the legislature vulnerable to these terms being redefined in statute by initiative

at a later date.

In the Senate State Affairs Committee last year, the committee resolved the problem by specifying that only one type of discussion is prohibited and it doesn't matter where it occurs; "private and substantive discussions or debates on legislation under its jurisdiction by a quorum of a house of the legislature or of a committee." Any other discussion is permitted anytime, anywhere, including in caucuses.

4)
Q - Will this amendment be the "camel's nose under the tent" which allows the courts to tell the legislature how to conduct its business?

A - No. This has been a favorite argument of persons opposed to the amendment, but the amendment has been amended to specifically prohibit the court from prescribing rules or procedures for the conduct of legislative business or invalidating legislation because of a violation of open meeting requirements.

5)
Q - Should there be a companion bill that amends the existing open meetings statute?

A - The proposed amendment provides that the legislature may implement it. This would appropriately be done by amending the existing open meeting statute and a bill doing so will be desirable once we know the final form of the amendment. The earliest the amendment can become part of the constitution is in time for the 1991 legislative session. This leaves plenty of time to work out the technical aspects of implementing legislation.

6)
Q - Will courts pay attention to the intent contained in section 2 of SJR 1?

A - If a court case arose where Court needed to look at the legislative history of the open meetings amendment the court would look first at the explanations that were before the voters in the official election pamphlet when they voted to ratify the amendment.

Section 2(d) of the intent instructs Legislative Affairs to consider the statement of legislative intent contained in Section 2 in the preparation of its neutral statement for the pamphlet. We would also include the statement of legislative intent in the statement in support of the measure which we are allowed to include in the pamphlet. If the court needed to look beyond that, the intent contained in the resolution itself, would be the preeminent piece of legislative history.

7)
Q - Would passage of this amendment leave the legislature vulnerable to the public passing a very restrictive open meetings statute by initiative?

A - No. The open meetings amendment will provide a basis for judicial enforcement of the existing open meetings law or subsequent amendments to that law to the extent the provisions of the statute are consistent with the amendment. While future statutory changes can and probably will take place, whether they are done by the legislature or the initiative process there can be any enforcement of any provision that does not conform to the amendment.

The best prevention of an initiative process is the public perception that by passing this resolution and obeying it, there is no need for an initiative.

8)
Q - What are Sections 6 and 12, Article II of the state constitution and why does the intent language say "notwithstanding" these sections?

A - Section 6 is legislative immunity and Section 12 is the legislative rule making authority. The proposed amendment is a limitation on the authority of the legislature. When it gives the court the right to enforce a rule in this one specific area and to impose civil fines on individual legislators who willfully violate the law, it creates a tension between Article I and Article II. This intent makes clear how that tension is resolved and avoids unnecessary litigation.

9)
Q - SJR 1 provides for civil fines for violation of the open meetings statute. Is there a limit on the size of the fines and why isn't invalidation of legislation retained as a penalty?

A - A limit on the amount of the civil fines may be established by the legislature in statute. The reason the amendment prohibits invalidation of legislation is because it is a draconian penalty which does not directly penalize the individuals who were responsible for the violation. If the invalidation was used, it could invalidate legislation which has had a whole series of public hearings and was the subject of only one secret meeting. There are also doubts whether invalidation is constitutionally enforceable.

Senator Sturgulewski's Office
February 1, 1989

Amending Alaska's Constitution - Step by Step

Amending Alaska's Constitution requires that a joint resolution be passed by two thirds vote in each house and the question then be approved by a majority of voters at the next general election. The public can express its desire to amend the constitution through a rather convoluted initiative process and advisory vote, but can not force the legislature to adopt the required joint resolution. There is no requirement for public action before the legislature proposes or acts on a resolution proposing an amendment to the constitution.

1) Initiative Drive
Initiative Drive would place question on ballot - Should there be a temporary law to instruct the Lt. Governor to place on the ballot at the following general election, an advisory vote asking whether there should be a constitutional open meetings amendment?

2)
If initiative drive is successful the directive to the Lt. Governor becomes temporary law and he places the advisory vote on next ballot.

3) 1st Vote
If Ballot issue passes -

4)
Lt. Governor places advisory vote on next general ballot (two years later).

5) 2nd Vote
If advisory vote passes -

6)
We are where we are right now, with the legislature considering the issue, no action is mandated.

7)
If legislature passes resolution by two thirds vote in each house -

8)
Proposed amendment goes on the ballot of the next general election.

9) 3rd Vote
If voters approve -

10)
Alaska Constitution is amended.

A TEMPORARY LAW OF THE STATE OF ALASKA

(6)

Initiative Rec'd from Jeff Bowman, AKPIRG 1-25-89

Directing the Lieutenant Governor to place an initiative on the next general election ballot advising the legislature to place on the ballot an amendment to the Constitution of the State of Alaska relating to open meetings.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF ALASKA:

* Section 1. The Lieutenant Governor of the State of Alaska is directed to place before the voters at the next general election, as allowed by law, an initiative which reads:

Shall the people of the State of Alaska advise the legislature to place a constitutional amendment on the ballot requiring the legislature to conduct its business publicly, amending Article I of the Constitution of the State of Alaska by adding a new section to read:

SECTION 23. MEETINGS OPEN. All collective information gathering, deliberation, and decision making of each house of the legislature and of all sub-units of the legislature and each house of the legislature shall be open to the public unless a legislative body is meeting in executive session to consider matters authorized by law. If a matter is appropriate to a particular legislative body, nonpublic consideration of the matter by a quorum of that legislative body is a violation of this section. Legislators may otherwise meet collectively in private only to consider matters of procedure, organization, or strategy. Action taken in violation of this section may be voided and the legislature shall prescribe additional penalties for violation of this section. This section shall be interpreted to provide maximum public access to legislative deliberation.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

P.O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3100
(907) 465-3991

December 18, 1986

MEMORANDUM

TO:

FROM: Ginny Fay
Legislative Analyst

RE: Alaska Open Meetings Law
Research Request 87.049

You requested that we provide information to clarify the applicability of Alaska's open meetings law (Attachment A). You asked which public bodies and what meetings are covered and if there are provisions for spontaneous meetings. With regard to legislative meetings, you asked us to discuss uniform rules as well as the open meetings law. You also wanted to know if there is a relevant model law (either state or federal).

Applicability of the Alaska Open Meetings Law

Alaska Statute 44.62.310(a) broadly identifies meetings that are required to be open to the public.

> 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 [emphasis added].

The wording of this section, especially the phrases in bold, makes it clear that all public bodies that receive or are authorized to spend public money are required to have open meetings unless they are specifically exempted. What is unclear, however, is what constitutes a meeting and, thus, the level of applicability of the law to public bodies. The

Alaska law provides no guidance regarding the definitions of a meeting, openness, and group or body. In other states as well as Alaska, these terms and their definitions comprise the three basic issues regarding the applicability of open meetings laws.

In other states, applicability is generally specified in statements which tell the purpose of the legislatures in enacting them. Statements of intent also aid judges in interpreting relatively vague sections of open meetings laws. Often these intent statements are part of the meetings laws. Many states have fairly broad statements of legislative intent or policy, but also write into their laws very specific definitions of terms such as meeting, public body, public business, formal and informal, deliberation, decision making, quorum, public notice, and action taken. These definitions determine whether the law applies in a particular instance, thus rendering the activities of public bodies subject to the requirements of openness and thereby made known to the general public.[1,2]

Alaska Statute 44.62.312 provides State policy regarding open meetings. Neither AS 44.62.312 nor the available legislative history provide definitions of pertinent terms or other specific information concerning the applicability of the law. General language leaves specification of relevant terms to the court or Attorney General.

Alaska Attorney General and Supreme Court opinions which help clarify the applicability of the open meetings law are attached (Attachment C). A May 11, 1981 Attorney General opinion (summarized in Geldolf, May 19, 1983) regarding the application of the law to informal meetings may be of particular interest. It concludes that the open meetings law applies only 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 the law to exercise governmental power or provide advice through a vote. According to the opinion, the open meetings law does not apply to meetings of

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[1]National Association of Attorney Generals, "Open Meetings: Actions and Meetings Covered" (Raleigh, N.C.: NAAG), 1979, p.1.

[2]The statement of policy and intent contained in Hawaii's meeting law is representative of such general declarations (Hawaii Rev. Stat. Section 92-1). An example of a very detailed definition of "meeting" is contained in the Connecticut meeting law (Conn. Gen. Stat. Ann. Section 1-18(6). The state of Nevada open meetings law provides an understanding of what is meant by "meeting" in language that is common to many such laws. Pertinent language from these statutes is found in Attachment B.

individuals who are public officers or employees, such as cabinet members, who are not empowered collectively to exercise power or advice as a body. A January 30, 1985 Attorney General opinion states that court's interpretations of comparable open meetings laws identify an applicable public body as being a multi-membered, tax-supported entity which possesses the power and authority to reach policy-making decisions which affect the rights of citizens. These opinions indicate that staff level meetings of the executive branch, as opposed to an appointed board, are not subject to the open meetings law.

In an Alaska Supreme Court opinion (Attachment C), "meeting" under the Open Meetings Act includes every step of the deliberative and decision making process when a governmental unit meets to transact public business. In summary, except for the May 11, 1981 and January 30, 1985 Attorney General opinions, the Alaska Supreme Court and Attorney General opinions have ruled application broadly and exceptions narrowly.

Applicability to the Legislature

The Alaska open meetings law explicitly includes **all** meetings of members of the legislative body with the exception of organizational meetings. Rule 22 of the Uniform Rules (Attachment D) is very similar to State law in that it also opens all legislative meetings to all legislators and to the public. Rule 22 criteria for executive sessions are also similar to State law. The Uniform Rules are more explicit in setting meeting notification requirements; State law requires only "reasonable public notice" while Rule 23 provides specific timeframes. The applicability of the state's meeting law to the legislature is explicitly stated in the available legislative history (Attachment E). The February 2, 1972 Judiciary Committee Report on Senate Bill 253 stated:

> 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.

A comparative study on state open meetings laws states that Alaska legislative caucus meetings are not subject to the Alaska open meetings law. I found no statements in the law itself or court or Attorney General opinions which exempt legislative caucuses once the organizational unit is established. Therefore, I cannot establish the basis for the study's conclusion (however, caucus meetings have traditionally been closed in Alaska). All information I examined indicates that all meetings of the legislative body or subordinant units are covered by the law, regardless of whether or not meetings are formal, action is taken, or a quorum is present. I presume that the law applies only to meetings in which official business is discussed, but this point is not addressed in the law. The laws of some states specifically identify what is not a meeting, such as the chance meeting between two or more members of a public body where no official business is discussed or conducted.

Spontaneaous Meetings

Alaska Section 44.62.310(e) states that "reasonable public notice must be given for all meetings required to be open under this section." This implies that there are no provisions for spontaneous meetings. There is also no reference to emergency meetings in the Alaska law. The Washington state meetings law contains a section which specifically addresses emergency meetings under fairly grave circumstances (Attachment F).

Model Laws

Proponents of open meetings laws--such as the Society of Professional Journalists, Common Cause, and the Freedom of Information Center--generally advocate increasing public accessibility to public information and processes. From this viewpoint, these groups have described model laws. Common Cause believes a model law contains the following characteristics:

- All meetings of legislative, executive, administrative, and advisory bodies of state and local government should be open whether or not that meeting is formal or informal.
- At least 72 hours of notice should be provided.
- Laws should avoid the use of general language that may be misinterpreted.
- Detailed minutes of all meetings should be made available to the public.
- Meaningful sanctions for violations should be written into the statute.

Studies which examine the provisions of state open meetings laws and rank states on the basis of the number of provisions they contain have identified 23 provisions. Conceptually, the more provisions a law contains, the "better" the law. This is true, however, only if the provisions are readily applicable as a result of a clearly specified law. Tables 1 and 2 identify some of the major provisions of open meetings laws and which state laws contain these provisions. Based on the ranking of these provisions, precise writing, and restrictions on closed executive sessions, these studies have concluded that the Tennessee open meetings law (Attachment F) is a model, strong law. The Washington state law is also attached. It provides another example of a law with a definitions section which helps to clarify applicability.

From the standpoint of public bodies that are required to comply with open meetings laws, a model law is probably one that stikes a balance between

TABLE I
OPEN MEETING AND RECORDS STATUTES

STATES	NO EXPLICIT EXEMPTIONS	OPEN COMMITTEE MEETINGS	SPECIFIC CRIMINAL PENALTIES	INCLUDES INFORMAL MEETINGS	OPEN MEETING WITH OR WITHOUT QUORUM	REQUIRED FOR PERSONNEL MATTERS	ATTORNEY GENERAL INTERPRETATION	REVIEWED BY STATE COURT
Alabama	x		x	x				
Alaska						x		a
Arizona			x			x		
Arkansas	x		x	x			x	x
California			x				x	x
Colorado	x	x	x	x	x		x	
Connecticut			x				x	
Delaware								
Florida			x	x	x	x	x	x
Georgia		x					x	x
Hawaii							x	
Idaho			x					x
Illinois				x	x			
Indiana	x							
Iowa	x			x			x	x
Kansas			x	x	x		x	
Kentucky				x				
Louisiana			x			x	x	
Maine	x						x	x
Maryland				x				
Massachusetts						x	x	x
Michigan			x	x	x	x		x
Minnesota				x		x	x	x
Mississippi								
Missouri	x			x				x
Montana	x					x	x	x
Nebraska			x	x		x		
Nevada			x			x	x	
New Hampshire							x	x
New Jersey							x	x

TABLE 1
OPEN MEETING AND RECORDS STATUTES

STATES	NO EXPLICIT EXEMPTIONS	OPEN COMMITTEE MEETINGS	SPECIFIC CRIMINAL PENALTIES	INCLUDES INFORMAL MEETINGS	OPEN MEETING WITH OR WITHOUT QUORUM	REQUIRED FOR PERSONNEL MATTERS	ATTORNEY GENERAL INTERPRETATION	REVIEWED BY STATE COURT
New Mexico	x		x				x	x
New York				x				
North Carolina				x			x	
North Dakota			x	x				
Ohio	x				x		x	x
Oklahoma			x	x				
Oregon				x			x	
Pennsylvania	x						x	x
Rhode Island						x		
South Carolina	x	x	x	x			x	x
South Dakota	x	x	x				x	
Tennessee	x			x	x	x	x	x
Texas			x				x	x
Utah	x					x	x	x
Vermont			x				x	x
Virginia	x			x	x			
Washington								x
West Virginia			x				x	x
Wisconsin								x
Wyoming								

a--occurring at this time.

SOURCE: Council of State Governments, Backgrounder, "Government in the Sunshine," (Lexington, Kentucky) June 1986.

Prepared by the House Research Agency, November 1986.

TABLE 2

Summary of Open-Meeting Laws—Part I This Study

State	Includes statement of public policy	Provides for open legislature	Provides for open legislative committees	Opens state agencies	Opens county local agencies	Opens county board	Opens city councils	Forbids closed executive sessions	Exceptions[a] and/or reasons for executive session	Legal recourse to halt secrecy	Actions in meetings in violation void	Provides penalties for violation	Score
	1	2	3	4	5	6	7	8		9	10	11	
Alabama				y	y	y	y		•[d]			y	5
Alaska	y	y	y	y	y	y	y		x		y		8
Arizona	y	y	y	y	y	y	y		x	y	y	y	10
Arkansas	y			y	y	y	y		•			y	6
California	y	y	y	y	y	y	y		-	y		y	9
Colorado	y	y	y	y	y	y	y		•[e]	y	y		9
Connecticut		y	y	y	y	y	y		•				6
Delaware		y	y	y	y	y	y			y	y	y	9
Florida		y	y	y	y	y	y	y	•	y		y	9
Georgia				y	y	y	y		•		y	y	6
Hawaii	y			y	y	y	y		-	y	y	y	8
Idaho	y		y	y	y	y	y		x		y		7
Illinois	y			y	y	y	y		-	y	y	y	8
Indiana	y			y	y	y	y		-	y	y		7
Iowa	y			y	y	y	y		-	y	y	y	8
Kansas	y	y	y	y	y	y	y		x	y	y	y	10
Kentucky			y	y	y	y	y		-	y	y	y[b]	8
Louisiana	y	y	y	y	y	y	y		x[f]	y	y		9
Maine	y	y	y	y	y	y	y		x		y	y	9
Maryland	y	y	y	y	y	y	y		-	y	y	y	10
Massachusetts				y	y	y	y		x	y	y		6
Michigan		y	y	y	y	y	y		-	y	y	y	9
Minnesota				y	y	y	y		•			y	5
Mississippi	y		y	y	y	y	y		-	y			7
Missouri		y	y	y	y	y	y		x	y	y	y	9
Montana	y	y	y	y	y	y	y		•		y		8
Nebraska	y			y	y	y	y		x	y	y	y	8
Nevada	y			y	y	y	y		•	y	y	y	8
New Hampshire	y	y	y	y	y	y	y		x	y			8
New Jersey	y	y	y	y	y	y	y		x	y	y	y	10
New Mexico		y	y	y	y	y	y		x	y	y	y	9
New York	y	y	y	y	y	y	y		x	y	y	y	9
North Carolina	y	y	y	y	y	y	y		-	y		y	9
North Dakota		y	y	y	y	y	y		•[c]			y	7
Ohio				y	y	y	y			y	y	y	7
Oklahoma	y			y	y	y	y		•		y	y	7
Oregon	y	y	y	y	y	y	y		-	y	y	y[g]	10
Pennsylvania		y	y	y	y	y	y		•	y	y	y	9
Rhode Island	y		y	y	y	y	y		x	y	y		8
South Carolina		y	y	y	y	y	y		x[d]	y		y[h]	8
South Dakota				y	y	y	y		•			y	5
Tennessee	y	y	y	y	y	y	y	y	•	y	y	y	11
Texas		y	y	y	y	y	y		-	y		y	8
Utah	y	y	y	y	y	y	y		•	y	y		9
Vermont	y			y	y	y	y		x		y	y	7
Virginia	y	y	y	y	y	y	y		-	y	y	y	10
Washington	y			y	y	y	y		y	y	y	y	8
West Virginia	y	y	y	y	y	y	y		-	y	y	y	10
Wisconsin	y	y	y	y	y	y	y		y	y	y	y[i]	10
Wyoming	y			y	y	y	y		-		y		6
Totals	33	29	33	50	50	50	50	2	•=14 x=19 -=17	36	37	36	406
Percent	66%	58%	66%	100%	100%	100%	100%	4%	•=28% x=38% -=34%	72%	74%	72%	73.8

Total average percent for all categories 73.8%. Total average percent for categories 1-8: 74.3%. Total average percent for categories 9-11: 72.7%.

[a] North Dakota statute forbids executive session "unless otherwise prohibited by law." Florida and Tennessee statutes prohibit executive session "except as otherwise provided in the Constitution."

[b] This adjunct category indicates stated exceptions and/or reasons allowed for closed session. • indicates five or fewer; x, six to ten; -, more than ten.

[c] Denotes an encompassing phrase. For example, Alabama's law provides for executive session "When the character or good name of a woman or man is involved." (Ala. Code tit. 13-1-14-2) Phrases such as this one could be used to allow any number of subjects to be discussed in executive session.

[d] Indicates laws which permit the court to grant equitable relief.

[e] Indicates the only penalty is for smoking in open meeting.

public access and public body efficiency. The trend over the past ten years in the United States has been toward increasingly strong open meetings and public information legislation. Within that climate, a model law for public bodies would be clearly and precisely written so that its applicability in a particular instance would be evident.

The Alaska open meetings law as written requires interpretation to establish applicability because it lacks definition of terms. However, I have attempted to avoid interpretation of the law because that is not this agency's expertise or function. I have provided background information regarding the applicability Alaska's and other states' open meetings laws, Alaska legislative history, and relevant court and Attorney General opinions to help clarify a very broadly written law. I hope this information is useful to you. Please do not hesitate to contact this agency if you have additional questions.

GF

Attachments

ATTACHMENT A

Alaska Open Meetings Law

Article 5. Judicial Review.

Sec. 44.62.300. Court review.

NOTES TO DECISIONS

Showing of "possible harm" sufficient for standing. — Fishermen who challenged an agency regulation setting a maximum number for entry into a fishery were "interested parties" even though no actual harm had yet resulted (since they had not yet been finally denied entry) and even though they had not shown that any future harm was inevitable; their showing of possible future harm was sufficient. Johns v. Commercial Fisheries Entry Comm'n, Sup. Ct. Op. No. 2934 (File No. S-139), 699 P.2d 334 (1985).

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 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 for meetings of a house of the legislature, attendance and participation at meetings by members of the public or by members of a body may be by teleconferencing. Agency materials that are to be considered at the meeting shall be made available at teleconference locations. 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. The vote at a meeting held by teleconference shall be taken by roll call. This section does not apply to any votes required to be taken to organize a public body described in this subsection.

(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. The notice must include the date, time, and place of the meeting, and if the meeting is by teleconference the location of any teleconferencing facilities that will be used.

(f) Action taken contrary to this section is void. (§ 1 art VI (ch 1) ch 143 SLA 1959; am § 1 ch 48 SLA 1966; am § 1 ch 78 SLA 1968; am § 1 ch 7 SLA 1969; am §§ 1, 2 ch 98 SLA 1972; am § 2 ch 100 SLA 1972; am § 1 ch 189 SLA 1976; am §§ 2, 3 ch 54 SLA 1985)

Effect of amendments. — The 1985 amendment in subsection (a) added the second, third, and next-to-last sentences and in the last sentence substituted "a public body described" for "the bodies specified" and added the last sentence of subsection (e).

NOTES TO DECISIONS

"Meeting". — A private meeting between a quorum of the Anchorage Municipal Assembly and a developer to discuss in detail the developer's application for rezoning violated this section; a "meeting" for purposes of the Open Meetings Act includes every step of the deliberative and decision-making process when a governmental unit meets to transact public business. The rezoning ordinance later passed by the assembly that allowed a modified plan of development was therefore held void. Brookwood Area Homeowners Ass'n v. Municipality of Anchorage, Sup. Ct. Op. No. 2953 (File Nos. S-573, S-629), 702 P.2d 1317 (1985).

Applied in Meiners v. Bering Strait School Dist., Sup. Ct. Op. No. 2857 (File Nos. S-125, S-140), 687 P.2d 287 (1984); in Abood v. Gorsuch, Sup. Ct. Op. No. 2958 (File No. S-706), 703 P.2d 1158 (1985).

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 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;

(6) the use of teleconferencing under this chapter is for the convenience of the parties, the public, and the governmental units conducting the meetings.

(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; am § 4 ch 54 SLA 1985)

Effect of amendments. — The 1985 amendment added paragraph (6) of subsection (a).

NOTES TO DECISIONS

Quoted in Brookwood Area Homeowners Ass'n v. Municipality of Anchorage, Sup. Ct. Op. No. 2953 (File Nos. S-573, S-629), 703 P.2d 1158 (1985).

Article 7. Legislative Review of Rules.

Sec. 44.62.320. Legislative annulment of regulations and review.

Editor's notes. — The Alaska Const., art. II, § 22 amendment proposal that was mentioned in the notes to decisions was defeated in the November, 1984 election.

Article 8. Administrative Adjudication.

Sec. 44.62.330. Application of AS 44.62.330 — 44.62.630. (a) The procedure of the state boards, commissions, and officers listed in this subsection or of their successors by reorganization under the constitution shall be conducted under AS 44.62.330 — 44.62.630. This procedure, including, but not limited to, accusations and statements of is-

ATTACHMENT B

Hawaii, Conneticut and Nevada

Open Meetings Law Language

Hawaii REV. STAT. Section 92-1

In a democracy, the people are vested with the ultimate decision-making power. Governmental agencies exist to aid the people in the formation and conduct of public policy. Opening up the governmental processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore, the legislature declares that it is the policy of this State that the formation and conduct of public policy--the discussions, deliberations, decisions and action of governmental agencies--shall be conducted as openly as possible.

Connecticut GEN. STAT. ANN. Section 1-18(6)

"Meeting" means any hearing or other proceeding of a public agency and any convening or assembly of or a quorum of a multi-member public agency, and any communication by or to a quorum of multi-member public agency, whether in person or by means of electronic equipment, to discuss or act upon a matter over which the public agency has supervision, control jurisdiction or advisory power [but] "meeting" shall not include: any chance meeting, or social meeting neither planned nor intended for the purpose of discussing matters relating to official business. ["Meeting" shall not include]; strategy or negotations with respect to collective bargaining [nor]; a caucus of members of a single political party notwithstanding that such members also constitute a quorum of a public agency; an administrative or staff meeting of a single-member public agency; and communication limited to notice of meetings of any public agency or the agendas thereof.

Nevada REV. STAT. Section 241.015 (i)

"Meeting" means the gathering of members of a public body at which a quorum is present to deliberate toward a decision or to make a decision on any matter over which the public body has supervision, control, jurisdiction or advisory power.

ATTACHMENT C

Alaska Attorney General and Supreme Court Opinions
on the Alaska Open Meetings Law

OPEN MEETINGS ACT

07/24/86: Mertz - Applicability of the Open Meetings Act (AS 44.62.310) to the Placer Mining Advisory Group (Placer Mining Advisory Group is subject to O.M.A. because it doesn't fit any of the narrow exception)

07/17/86: Spengler- Fish and Game Advisory Committee Procedures (exchange of phone calls to set up committee meeting does not constitute a private meeting)

03/27/86: Figura - Adjudicative Proceedings of the Alaska Public Utilities Commission (All proceedings of the APUC for determining disputes between parties or rights of a party that are not rulemaking proceedings are adjudicatory proceedings and not subject to the Open Meetings Act, even if legislature passes an amendment that makes the APUC subject to the Open Meetings Act. Certification and ratemaking proceedings are adjudicatory)

02/21/85: Rubini - Application of Open Meetings Act (application to Permanent Fund Corporation)

01/30/85: Rubini - Evaluation of Anchorage Office Complex Proposals (committee evaluating RFPs subject to O.M.A.)

10/09/84: Bush - Confidentiality of Records (Judicial Council is subject to O.M.A.)

02/09/84: Fox - November 3, 1983 Board Meeting (Alaska Resources Corp. should reconvene to consider and vote again on proposal acted upon at improperly convened executive session)

05/19/83: Caldof - Various "Open Meeting" Opinions (summarized)

02/16/83: Mertz - Various Questions Regarding the Water/Wastewater Advisory Board (meetings of this board are subject to O.M.A. and minutes of meetings are public records that must be disclosed)

09/20/82: Rubini - Improper Executive Session for Fish & Game Advisory Committee (board members can still be reimbursed for per diem and travel

expenses for meeting improperly held in executive session)

02/17/82: Vassar - Open Meetings of Alaska Seafood Marketing Inst. (executive session cannot be held for purpose of choosing an advertising agency for Institute)

02/08/82: Cummngs - Procedure for Notice of Teleconference Meetings (teleconference meetings are okay, but specific notice of topics must be given)

08/21/81: Kavshrv - Conduct and Records of Board Meetings to Assure Compliance with AS 44.62.310 and AS 44.62.312 (meetings of Board of Psychologist & Psychological Associate Examiners subject to O.M.A.)

05/[illegible] Pegues - Application of Open Meetings Law to Informal Meetings (Open Meetings Law applies to informal meetings as well as formal meetings, even if no action taken) ([illegible] cussion)

see geldoff Summary 5/19/83

03/18/81: Pegues - Inapplicability of Open Meetings Law to Private Groups ("unequivocally: Nyet")

02/11/81: Davis - Rural Development Council By-laws (telephone polls of members violates O.M.A.)

02/03/81: Davis - Closed Deliberations by PERS Board (is okay when hearing an appeal from a decision of the administrator)

01/02/81: Pegues - By-Laws of Alaska Energy Center (Alaska Energy Center is subject to O.M.A.) (MOA is worthless because it does not set out underlying facts)

10/15/79: Koester - Public Meetings by Conference Call (telephone conferences can be used only in "emergency situations")

08/22/79: Pegues - Secret Ballot for Electing the Commission's Officers (APOC may conduct its elections by secret ballots without violating O.M.A.)

08/10/79: Pegues - Official Records of Agency Proceedings (records of APOC's meetings are open to public inspection)

03/15/79: Pegues - Executive Sessions (legislature may go into executive session to discuss hiring, firing or transfer of a person, but that person should be given 10 days notice of intent to discuss that subject so can decide whether he or she wants meeting held in public)

02/15/79: Pegues - Executive Sessions of School Boards, Borough Assemblies, and City Councils (law should be read broadly and the exceptions narrowly)

02/08/79: Donohue - Applicability of AS 44.62 to the Rate-making Proceedings; Participation of Absent Board Members in the Proceedings; Ex Parte Contacts (rate-making proceeding is an adjudicatory proceeding exempt from O.M.A.)

04/07/78: Lorensn - Board Meetings by Phone (should be limited to "emergency situations"; note that public discussion is not required by O.M.A., only public knowledge) (good MOA)

02/06/78: Pegues - Alaska Industrial Development Authority (this entity is subject to the O.M.A. and its records are subject to disclosure under AS 09.25.110)

02/03/78: Koester - Confidentiality of TAT Project (any individual may voluntarily relinquish their right to privacy entirely or for a specific purpose)

MEMORANDUM State of Alaska

TO: Honorable Bill Ross
Commissioner
Department of Environmental Conservation

THRU:

DATE: July 24, 1986

FILE NO.: 663-86-0565

TELEPHONE NO.: 465-3600

SUBJECT: Applicability of the Open Meetings Act (AS 44.62.310) to the Placer Mining Advisory Group

FROM: Harold M. Brown
Attorney General

By:
Douglas K. Mertz
Assistant Attorney General
Department of Law

You have asked for our opinion on the propriety of executive sessions during meetings of the Placer Mining Advisory Group (PMAG). The Placer Mining Advisory Group is a board set up by the Department of Environmental Conservation to give advice to the state government on placer mining matters. Its membership is composed of representatives of both the placer mining industry and environmentalists, and its meetings are attended by both state and federal officials.

We conclude that, beyond any question, meetings of the Placer Mining Advisory Group are subject to the Open Meetings Act (AS 44.62.310). That Act requires meetings of almost all bodies of state and local government in Alaska to be open to the public. There are only a very few narrow exceptions. The Open Meetings Act applies to any body agency or other organization of the state or of local government, whether "advisory or otherwise," "supported in whole or in part by public money." AS 44.62.310. The fact that an organization has no actual decision-making powers does not exempt it from the Open Meetings Act. University of Alaska v. Geistauts, 666 P.2d 424 (Alaska 1983). The Act applies to mere discussions and informational meetings as well as to decisional meetings. Brookwood Area Homeowners Assoc. v. Anchorage, 702 P.2d 1317 (Alaska 1985). The Open Meetings Act was drafted to be broad in scope, and we find nothing in the Act which would allow PMAG to be excepted from its terms.

Under the Open Meetings Act, PMAG meetings must be open to the public (AS 44.62.310), and "reasonable public notice" must be given before all meetings (AS 44.62.310(e)). There are a few limited exceptions to the requirement that all meetings be held in public. Those exceptions are: (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; and (3) matters which by law, municipal charter, or ordinance are required to be confidential. AS 44.62.312(b) requires that those exceptions be construed narrowly, however. It will be rare that any of the exceptions apply to PMAG meetings.

When a member of PMAG considers that an agenda item may fall within one of these three exceptions, the following procedure must be utilized. In an open meeting, a motion must be made to go into executive session for a particular agenda item. A majority vote must be taken (again in open session) on whether to go into executive session. If a majority votes for an executive session, the session shall be limited to the particular item for which the executive session was called. Finally, no votes may be taken in executive session but must be done in public after open session is resumed. These requirements are found at AS 44.62.-310(b).

Finally, we understand that PMAG received some funding through the U.S. Environmental Protection Agency. If so, PMAG may also be subject to the requirement in 40 C.F.R. § 25.7 that all meetings of advisory groups funded in whole or in part by EPA shall be open to the public. Given the detailed requirements of the state Open Meetings Act, the EPA requirement is redundant, but it provides an independent basis for the right of the public to be present at all PMAG meetings except for the narrowly defined exceptions noted above.

If you have any more questions on this subject, please let us know.

DKM:md

MEMORANDUM State of Alaska

TO: Honorable Don Collinsworth
Commissioner
Department of Fish and Game

DATE: July 17, 1986

FILE NO.: 663-86-0567

THRU:

TELEPHONE NO.: 465-3600

SUBJECT: Fish and Game Advisory Committee procedures (officer removal)

FROM: Harold M. Brown
Attorney General

By: Larri I. Spengler LIS
Assistant Attorney General
Commercial-Juneau

Your department forwarded to this office a letter from a member of the Gastineau Channel Fish and Game Advisory Committee which expressed concerns about the validity of the removal of the committee chairman from office on April 24, 1986; you have asked this office to evaluate these concerns. While it is generally true that, if a meeting of a public body is held invalidly, action taken at that meeting is also invalid, this does not appear to be the case here. If I understand the facts correctly, the removal of the chairman from office at the April 24 meeting was carried out under the proper procedures, as discussed below.

Under 5 AAC 96.060 .)(3), a fish and game advisory committee may replace an officer if:

> a quorum of the committee meets and a majority of the full committee membership votes to remove the committee member from office, after giving the officer written notice at least 14 days before the meeting.

As I understand the facts, on April 9, 1986, the chairman of the Gastineau Channel Fish and Game Advisory Committee was notified by letter that under 5 AAC 96.060(m)(3) some of the committee membership desired to discuss removing him from office at a meeting to be held on April 24, 1986, at 7:30 p.m. Thus, the written notice requirement appears to have been complied with. Further, it is my understanding that at the April 24 meeting a quorum was present and a majority of the full committee voted to remove the chairman from office, complying with the other requirements of 5 AAC 96.060(m)(3).

Fish and game advisory committee meetings must be open to the public, and reasonable public notice must be provided.

AS 44.62.310(a) and (e). */ As I understand it, the April 24 meeting was open to the public and was advertised in the usual fashion for fish and game advisory committees; that is, local radio stations were asked to announce the meeting, and notice of the meeting was placed in the free, local-events section of the Juneau daily paper.

The letter from the Gastineau Channel Advisory Committee member implies that a meeting was also held on April 9, 1986, over the telephone, and suggests that if that meeting were illegal, then the chairman's removal from office on April 24 was invalid. However, as I understand it, there was no meeting on April 9 but, rather, an exchange of phone calls among various committee members, who discussed the need to have a meeting on the subject of the chairmanship. Some of the committee members did indeed request a meeting, and informed the chairman of the subject of their concern, as required by 5 AAC 96.060(m)(3). No action was taken on April 9 nor was any decision made over the phone; rather, the telephone calls were simply the mechanism for setting up the April 24 meeting.

On the facts as I understand them, the procedures relating to advisory committee meetings and removal of officers were followed, and the committee's April 24, 1986, action appears to be valid.

HMB:LIS:cck

cc: see attached

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*/ The 1985 pamphlet containing the regulations for local fish and game advisory committees and regional councils specifies under 5 AAC 96.060(o)(3) that all committee meetings "are open to the public and must be advertised in the area where the committee is organized." Further, that pamphlet cites 5 AAC 96.060(o)(4) as requiring that "whenever feasible, notice should be given at least ten days before a regular meeting and three days before a special meeting." Evidently the pamphlet is in error, because those two provisions do not appear in the codified version of 5 AAC 96.060(o). However, even if they have been repealed, the statutory public meeting requirements contained in AS 44.62.310 apply. If the provisions have not been repealed, and were inadvertently dropped from the codified regulations, a memorandum should be written to that effect to Art Peterson, Department of Law, requesting that they be reinserted.

Chuck Porter
P.O. Box 270
Juneau, AK 99811

Elizabeth Stewart, Director
Division of Boards
Department of Fish and Game

Liza McCracken
Department of Law Anchorage

MEMORANDUM State of Alaska

TO Marvin R. Weatherly, Chairman
Alaska Public Utilities Commission

DATE March 27, 1986

FILE NO 661-86-0494

TELEPHONE NO 276-3550

FROM Harold M. Brown
Attorney General

By: MLF
Mark L. Figura
Assistant Attorney General
Commercial Section-Anchorage

SUBJECT Adjudicative proceedings of the Alaska Public Utilities Commission

On March 24, 1986, the commission in the course of an open meeting requested advice concerning the scope of adjudicatory activities of the commission. The request arises from a proposed amendment to AS 42.05 that would make all activities of the commission subject to the Open Meetings Act, AS 44.62.310 - 44.62.312. Currently, the Open Meetings Act does not apply to "judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding." AS 44.62.-310(d)(1). The House Labor and Commerce Committee considered inserting the relevant section into HB 314, but did not do so.

The committee has asked for a letter from the commission indicating the activities that the commission considers to be adjudicatory. Apparently the committee feels comfortable with its interpretation of the remainder of the language in AS 44.62.310(d)(1), but is concerned about the scope of adjudicative proceedings. Since the Open Meetings Act exception only applies to certain administrative actions taken in adjudicative proceedings, the definition of "adjudicative proceedings" is central to the analysis of the existing exception.

The short legal answer is that "adjudicatory proceedings" include all proceedings of the commission for determining disputes between parties or determining the rights of a party, including all formal dockets of the commission with the exception of rulemaking proceedings.

Relevant Authorities

The Open Meetings Act is codified at AS 44.62.310 - 44.62.312. It provides generally that meetings of state agencies are to be open to the public except as otherwise provided. AS 44.62.310(d)(1) states that the Open Meetings Act does not apply to "judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding."

In common usage, the word "adjudication" includes any dispute resolution procedure. Generally, an adjudication is any

proceeding for determining facts or the rights of parties. "Litigation" is probably the most useful synonym in this context. Whenever parties litigate, the decisionmaker adjudicates. The purpose of the administrative adjudication provisions is to "prescribe a fair procedure for determinations of fact." 1963 Op. Att'y Gen. No. 10 (April 9).

Administrative adjudication has, however, taken on the more limited meaning of all decisionmaking except rulemaking. The Open Meetings Act is found in AS 44.62, the Administrative Procedure Act (APA). AS 44.62.010 - 44.62.300 concerns the enactment and review of regulations. AS 44.62.330 - 44.62.630 are entitled "Administrative Adjudication," and provide the procedure for all proceedings involving the expansion or contraction of state granted rights, authorities, licenses, or privileges. AS 44.62.360, AS 44.62.370. Under the APA scheme of things, there are thus two classes of formal agency action, rulemaking and administrative adjudication.

The definition of adjudication as everything other than rulemaking is also reflected by the recent Alaska Supreme Court opinion in Amerada Hess Pipeline Corp. v. Alaska Public Utilities Commission, 711 P.2d 1170 (Alaska 1986). In Amerada Hess, the court considered whether the commission was required to establish its cost allocation policy by rulemaking. The court noted, "As a general rule, absent statutory restrictions and due process limitations, administrative agencies have the discretion to set policy by adjudication instead of rulemaking." 711 P.2d at 1178. The court affirmed the commission's adjudication of costs.

The dichotomy of rulemaking and adjudication proceedings is further reflected in AS 42.05.161. The section requires the commission to follow the Administrative Procedure Act in the adoption of regulations, but exempts the commission from the adjudication procedures of the Act. Final administrative determinations, however, are subject to review under the Administrative Procedure Act. The legislature did not appear to be concerned with any third alternative to rulemaking and adjudication.

The conclusion is that all formal dockets of the commission, with the exception of rulemaking dockets, involve administrative adjudication as that term is generally used and as that term is used in the Administrative Procedure Act. In addition, the commission engages in informal adjudication, which is discussed briefly below.

Certification and Ratemaking

The commission has asked specifically for advice concerning whether its certification and ratemaking proceedings are adjudicatory. Since each of these types of proceedings meet the requirements set out above, they are adjudicatory. Certification is the grant of a "right, authority, license or privilege." AS 44.62.370(a). Commission procedures to determine certification dockets generally involve determinations of fact. For example, the commission must determine in each case that the applicant for certification is "fit, willing and able" and that the utility services are required for the "convenience and necessity of the public." AS 42.05.241. The commission must also determine what conditions are necessary to protect the public interest, and must often decide between applicants. Certification is precisely the type of decisionmaking at which the adjudication provisions of the Administrative Procedure Act are directed.

Ratemaking is not as easily analogized to the types of proceedings handled under the APA's administrative adjudication provisions, but ratemaking is plainly adjudication. The court in Alaska Public Utilities Commission v. Greater Anchorage Area Borough, 534 P.2d 549, 559 (Alaska 1975), referred to a "final rate order" as a "final adjudication." The fact that this sort of adjudication is not readily handled under the administrative adjudication provisions of the APA is the likely reason for the exemption of the commission from those provisions. 1979 Inf. Op. Att'y Gen. (Feb. 8; J-66-458-79).

What Adjudication Is Not

While courts and commentators often refer to administrative action as involving either rulemaking or adjudication, there are a number of other things that agencies do. Davis has suggested that the commentators focus perhaps unwisely on formal agency proceedings, which generally do involve rulemaking or adjudication. 2 K. C. Davis, Administrative Law Treatise § 10.2 (1979). In addition to rulemaking, there appear to be a number of (mostly informal) actions that the commission takes which are not adjudication:

1. General policies. Any agency will have occasion to discuss its policies and directions. This will often not occur in the context of a specific rulemaking or adjudicatory proceeding.

2. Investigation/negotiation. Commission investigation of utility practices, generally performed

by the commission staff, is not adjudication. However, investigation can lead to adjudicatory proceedings.

3. Business or management activities. The commission is required to operate a substantial agency with a number of employees. The internal management of the agency is neither rulemaking nor adjudication.

These actions do not fall within the Open Meetings Act exception set out in AS 44.62.310(d)(1).

Formal and Informal Adjudication

While the more visible adjudication is the formal adjudication in commission dockets, informal adjudication is both commonplace and important. Commission action on TA letters, for example, might not get to docket status, yet it is still adjudication. It is the agency's practice to comply with the Open Meetings Act in this type of informal adjudication, even though this is not required by the Act. This seems appropriate since the purpose for the adjudication exception to the Open Meetings Act appears to be to allow unfettered discussion among the commissioners of the evidence taken in a formal proceeding. This is generally not necessary at the initial, informal adjudication stage. In addition, the record developed in a formal proceeding, and the requirement that the decision be based upon the record, provide protection to parties in a formal proceeding that may be lacking at the informal decisionmaking stage.

Conclusion

The commission's adjudicatory responsibilities include all formal dockets (except rulemaking) and any informal decisionmaking involving the rights of parties or the resolution of disputes between parties.

MLF:and

MEMORANDUM State of Alaska

TO: David Rose, Executive Director
Alaska Permanent Fund Corporation

DATE: February 21, 1985

FILE NO: 366-364-85

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: Application of open meetings Act

By: Jonathan B. Rubini
Assistant Attorney General
Governmental Affairs-Juneau

We address by this memorandum the scope and application of the Open Meetings Act, AS 44.62.310 -- 44.62.312, to meetings of the Alaska Permanent Fund Corporation (corporation). In particular, you ask whether a work session attended by the trustees is subject to the Act. You further ask whether a subcommittee established by the trustees is subject to the Act. Finally, you ask whether meetings of the board, or of a subcommittee, to consider proposed real estate investments are subject to the Act.

The Alaska Open Meetings Act (OMA) broadly provides that meetings of public bodies in the state be conducted as open meetings. An open meeting requires reasonable public notice, and, unless the body votes to adjourn into executive session to discuss one of several narrowly proscribed matters, an opportunity for the public to observe the proceedings. On each occasion that coverage of the OMA has been at issue, the Alaska Supreme Court has broadly construed the parameters of the OMA. E.g., University of Alaska v. Geistauts, 666 P.2d 424 (Alaska 1983)(advisory university tenure committee subject to the OMA); Hammond v. North Slope Borough, 645 P.2d 750 (Alaska 1982)(advisory task forces subject to OMA). Action taken at a meeting not in conformance to the Act may be declared void, AS 44.62.310(f), though the court has recognized that a judicial declaration of nonconformance is, at times, the more significant enforcement mechanism. Alaska Community College's Federation of Teachers, Local No. 2404 v. University of Alaska, 677 P.2d 886 (Alaska 1984).

As you know, the OMA applies to the corporation. 1982 Inf. Op. Att'y Gen. (Dec. 2; 366-269-83). We recognize, in this regard, that regularly scheduled meetings of the trustees have been conducted in a manner consistent with the OMA. We further recognize that the corporation has undertaken other efforts to assure broad public knowledge of and access to the activities of the corporation. You ask, though, whether a "work session" meeting of the trustees is subject to the OMA. By "work session" we mean a meeting at which the trustees and staff discuss public matters on an informal, background basis, but at which no formal action is taken.

While the Alaska Supreme Court has not as yet addressed the applicability of the Act to "work sessions" of a covered public body, we think it extremely likely that the court would conclude that the Act applies to all meetings where a quorum of a public body is present, regardless of whether the conduct of "formal action" is contemplated. 1/ The critical prerequisite in terms of applicability of the OMA is the existence of a "public body," generally defined to include any multi-membered, publicly financed entity which performs a government function. See 1985 Inf. Op. Att'y Gen. (Jan. 30; 366-330-85). See also In Re Sciolino v. Ryan, 431 N.Y.S.2d 664 (N.Y. Sup. Ct. 1980. See generally Open Meetings: Types of Bodies Covered, National Ass'n of Attorneys General (1979). Given the existence of a "public body," courts in other jurisdictions uniformly held that Acts comparable to the OMA apply to "work sessions" or other informal meetings, however labeled, where "public business" is discussed. E.g., Sacramento Newspaper Guild v. Sacramento County Board of Supervision, 69 Cal. Rptr. 480 (Cal. App. 1968); Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974); Grein v. Board of Educations, 343 N.W.2d 716 (Neb. 1984); In Re Pombroske, 462 N.Y.S.2d 146 (N.Y. Sup. 1983). In large part, courts adopt an expansive application of sunshine laws to limit the potential of secretive decision-making. As the California court observed in Sacramento Newspaper Guild, "[A]n informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a non-public pre-meeting conference except to conduct some part of the decisional process behind closed doors." 69 Cal. Rptr. at 487.

We believe an Alaska court would reach a similar conclusion. The Alaska Supreme Court employed a literal test to determine application of the OMA in Geistauts, and the OMA applies, by its terms, to "any" meeting of a covered body. Indeed, the Alaska version of an OMA is somewhat unusual in its broad application to advisory as well as decisional bodies. Further, any implied restriction of the OMA to exclude "work sessions" would not be readily reconcilable with the broad purposes stated in AS 44.62.312. In short, we believe that any "work session" at which a quorum is in attendance is a public meeting under the OMA, and should therefore conform to OMA procedures.

1/ We do note that a superior court recently ruled that the Board of Fisheries violated the OMA where the Board of Fisheries discussed proposed regulations at a dinner meeting which followed the adjournment of a regular board meeting. Johnson v. State of Alaska, Board of Fisheries, No. 3KN-83-386 CIV (Alaska Super., Feb. 11, 1985).

You next ask whether a subcommittee consisting of a limited number of trustees is subject to the OMA. If the subcommittee is not established by formal action, and therefore does not enjoy any delegated authority, the OMA would not apply unless a quorum of the full body is present at a subcommittee meeting. In contrast, where the subcommittee is formally established as an entity with specific responsibilities -- even if advisory in nature -- the OMA likely applies, though we are aware that one court concluded that a comparable OMA applied to a subcommittee work session only because of the scope of the delegation to the subcommittee. See Journal Publishing Company of Rockville, Inc. v. Town of Enfield, 372 A.2d 193 (Conn. Sup. 1974). It is thus arguable -- though not in our view a preferable interpretation -- that application of the OMA to subcommittee meetings depends on the scope of the delegation to the subcommittee.

You finally ask whether meetings to discuss proposed real estate transactions must be conducted in public meetings. Comparable statutes in other jurisdictions oftentimes include as a specific basis to adjourn into executive session to discuss the sale or acquisition of public property. The OMA does not include a general "transactional" exception, and it is unlikely that a court would imply a general exception. See, e.g., City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971). 2/ That no general exception is provided does not, however, suggest that the trustees, or a constituent subcommittee, may not elect to adjourn into executive session to discuss the matters stated in AS 44.62.310-(c)(1) -- (3):

> (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;

2/ Following the Berns case, the Florida Attorney General advised that even where the authority to lease or purchase had been delegated to a single individual, the Florida statute prohibited the negotiations from taking place in secret. 1974 Op. Fla. Att'y Gen. 974-294.

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

AS 44.62.310(c). To adjourn into executive session, the body must vote to do so in a public forum, and if an executive session is conducted, no action may be taken.

As you note, in most instances where a particular real estate transaction is discussed, it is likely that a compelling need to adjourn into executive session exists. If nothing else, consideration of a proposed transaction in a public forum may jeopardize the negotiating posture of the corporation to the detriment of the corporation. See AS 44.62.310(c)(1). Similarly, since the corporation may only purchase a limited interest in a real property purchase, the proposed bid of any participating partners may well be confidential. See Wood and Rhode, Inc. v. State, 565 P.2d 139 (Alaska 1977).

We recognize that strict adherence to OMA procedures may place APFC in the awkward position of providing notice of a public meeting, only to then assemble and vote to adjourn into executive session. Given the substantial public interest in APFC proceedings, you may wish to consider segregating the agenda to the extent possible between "public" and "executive session" issues. "Public" issues can be discussed at regularly scheduled and noticed meetings of the trustees. In contrast, where meetings are convened to discuss material which will likely be addressed in executive session, the public notice may state that the substance of the meeting will likely take place in executive session. And since the consideration of proposed real estate investments typically is conducted on a spontaneous basis as investment possibilities arise, not on a regularly scheduled basis, it may be appropriate to consider the regular publication of a "generic" public notice which states that information regarding the specific time and location of the meeting may be obtained through the corporation. If these suggested procedures do not offer a workable accommodation of the corporation's business necessities and OMA requirements, it remains possible to avoid application of the OMA if real estate investment proposals are not addressed at a meeting at which a quorum of a public body is present. Thus, the trustees may elect to articulate general investment guidelines, and to then delegate to staff the authority to consider whether specific proposals meet the stated investment criteria.

If you have any further questions regarding OMA requirements, please feel free to contact me.

JBR/pjg

MEMORANDUM State of Alaska

TO: Anselm Staack, Deputy Commissioner
Department of Administration

DATE: January 30, 1985

FILE NO: 366-330-85

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: Evaluation of Anchorage Office Complex proposals

By: Jonathan B. Rubini
Assistant Attorney General
Governmental Affairs-Juneau

Proposals submitted in response to the outstanding request for proposals (RFP) for the Anchorage Office Complex (AOC) are due on or before February 7, 1985. You have asked whether all or part of any AOC proposals are subject to public disclosure, and if so, at what point in the proceedings. You have also asked whether the meetings of the evaluation committee, a body established by the RFP to evaluate the proposals for aestetic considerations, are subject to the requirements of the Open Meetings Act (OMA), AS 44.62.310 -- 44.62.312.

As we discuss below, we believe that all materials received pursuant to the RFP are "public documents" subject to disclosure, but that disclosure of certain records may be delayed until a tentative contract award. We further recommend that proceedings of the evaluation committee conform to the OMA requirements, though our advice in this respect should be recognized as a prudent, conservative response to a legal question which is not clearly resolved under the current status of the law.

I.

We first address whether materials received in response to the RFP are public records subject to disclosure upon request. AS 09.25.110 provides in part that "[u]nless specifically provided otherwise the [records] of all agencies and departments are public records and are open to inspection by the public...." Regulations implementing the statutory disclosure mandate are set out at 6 AAC 95.010 -- 6 AAC 95.900. The statute and the accompanying regulations are broadly construed to effectuate the public's access to governmental documents and related records. See City of Kenai v. Kenai Peninsula Newspapers, Inc., 642 P.2d 1316 (Alaska 1982. See also Carter v. Alaska Public Employees' Association, 663 P.2d 916 (Alaska 1983). 1/

1/ An expansive statement of the state's policy with respect to the public's access to public documents is provided in 6 AAC 95.010.

We think it clear that all materials received in response to the RFP are within the ambit of AS 09.25.110 and 6 AAC 95. The definition of a "record" subject to disclosure is comprehensive in scope, and includes documents, designs or models "received under law or in connection with the transaction of official business." 6 AAC 95.900(4). We have previously advised that documents received in response to an RFP are records subject to disclosure in appropriate instances. See 1982 Inf. Op. Att'y Gen. (Sept. 21; 166-231-83); 1982 Inf. Op. Att'y Gen. (Feb. 2; J66-424-82). Architectural models of a respondent's proposed design are as much a public record as are the written proposals, and are thus similarly subject to disclosure.

The regulations recognize, however, that the disclosure of certain records received in the course of official business may detrimentally affect other legitimate concerns. 6 AAC 95.-090(a)(4) thus provides that disclosure is not required if nondisclosure is authorized by a specific statute, regulation, or judicially recognized privilege. The most typical privilege which warrants nondisclosure arises where a record contains confidential personal or proprietary information, the disclosure of which would impermissibly compromise an individual's or firm's constitutionally protected privacy interest. See Falcon v. Alaska Public Offices Commission, 570 P.2d 469 (Alaska 1977); Wood and Rhode, Inc. v. State, 565 P.2d 139 (Alaska 1977). In the context of a public procurement, we also previously recognized that nondisclosure is warranted if disclosure would substantially affect the integrity of the pending solicitation and evaluation process. See 1982 Inf. Op. Att'y Gen. (Feb. 2; J66-424-82).

In the present instance, we are advised that respondents to the RFP will submit to William King and Associates, the state's consultant, certain documents and a work model of the ACC. Safeguards are provided to assure that the aesthetic evaluators and staff do not know the identity of the respondents. Evaluation of the financial data is an objective process in accordance with a defined formula. The financial evaluation will follow the aesthetic evaluation. Upon receipt of a response to the RFP, the packet containing financial data will be segregated and held by a security agent until the financial evaluation. The project model and related documents will be assigned a number to assure that the identity of the proponent will not be known throughout the evaluation process.

During the evaluation process, we believe that the financial component of the proposal is not subject to disclosure before contract award. Further, the state or its agents may properly decline to disclose records which would compromise the

anonymity of the aesthetic evaluation process. In both instances, nondisclosure is necessary to preserve the integrity of the evaluation process.

It is our understanding that public disclosure of the models and related documents would not impair the evaluation process. Accordingly, those records are subject to disclosure upon an appropriate written request. (You have no affirmative obligation -- i.e., absent a request -- to make the models available for public viewing.) Further, you may establish reasonable rules to govern public viewing of the documents. For example, you may schedule limited viewing opportunities, and advise persons who request to view the models that they will be available for public viewing on only those scheduled occasions.

II.

We next address whether meetings of the evaluation committee are subject to the requirements of the Open Meetings Act, AS 44.62.310 -- 44.62.312. We understand that the RFP provides for the appointment of a five-person committee to evaluate the proposals for aesthetic considerations. The committee will consist of three executive branch appointees, a representative of the Municipality of Anchorage, and a private architect appointed by the state. Each committee member will separately evaluate the proposals, and the composite aesthetic score will constitute 40 percent of the evaluation. The proponent who receives the highest point total through the aesthetic and financial evaluation will be awarded the AOC contract.

The general requirement of the OMA is stated in extremely broad terms. This statute provides in pertinent part:

> 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.

AS 44.62.310(a). On each occasion that coverage of the OMA has been at issue, the Alaska Supreme Court has recited the broad policy objectives stated in AS 44.62.312 to broadly construe the parameters of the OMA. E.g., University of Alaska v. Geistauts, 666 P.2d 424 (Alaska 1983)(advisory university tenure committee subject to OMA); Hammond v. North Slope Borough, 645 P.2d 750 (Alaska 1982)(advisory task force subject to OMA). The Alaska court has not had occasion to specifically address whether an RFP evaluation committee is subject to the Act.

In Geistauts, the court employed a literal test to determine whether meetings of the university tenure committee are subject to the Act. The court concluded that the committee was "a subordinate unit of the state, or an advisory board, or council, supported in whole or in part by public money." 666 P.2d at 427. The Geistauts court did not inquire into the nature of the entity's composition, its scope of responsibility, or the political effect of its actions on the public. Applying the Geistauts literal test would support application of the OMA in this instance. The evaluation committee is supported by public funds, if only because four of the committee members, as well as the support staff, are employed by the state or are contractual agents of the state. And, in literal terms, the committee is an entity whose existence derives from the commissioner of administration's authority to award the contract for development of the AOC.

In other jurisdictions, courts construing comparable open meeting laws -- oftentimes referred to as sunshine laws -- determine applicability of the Act upon an analysis of the functions and composition of the entity. To be labeled a "public body" within the meaning of an open meeting law, that body usually must be a multi-membered, tax-supported entity, which possesses the power and authority to reach policy-making decisions which affect the rights of citizens. See generally Open Meetings: Types of Bodies Covered, National Association of Attorneys General (1979); Annot., Statutes - Proceedings Open to Public, 38 A.L.R.3d 1070 (1971). To our knowledge, no court has specifically addressed the question of whether an RFP evaluation committee is subject to a sunshine law, though one court has cited with approval the opinion of the Florida attorney general that Florida's Act would not apply to an evaluation committee. Godheim v. City of Tampa, 426 So. 2d 1084 (Fla. App. 1983) (citing Fla. Op. Att'y Gen. 081-51). It bears noting that the evaluation committee under review in the Florida opinion was a staff level body which merely offered recommendations to a formal body, which in turn awarded the contract. The Florida attorney general reasoned that subjecting ad hoc advisory staff meetings to the requirements of Florida's Sunshine Act would harbor the potential to drastically disrupt the orderly process of government.

Indeed, we think it likely that an Alaskan court would similarly conclude that a staff level advisory RFP evaluation committee is not subject to the OMA. By "staff level" we mean a group of individuals who serve in an advisory and administrative capacity but who do not have the power to make policy decisions requiring the exercise of discretion. In those instances where a staff level evaluation committee is formed to present recommendations with respect to a specific RFP, we doubt whether a "public body" within the ambit of the Act has been established. See 1981 Inf. Op. Att'y Gen. (May 11; J66-655-81). 2/

In contrast to the typical staff-level advisory RFP evaluation committee, the AOC evaluation committee has a more formalized membership which extends outside of state government and a more substantive scope of responsibility. While the body exists only for the limited purposes of evaluating AOC proposals, the results of the committee's evaluation are directly incorporated in the final evaluation. And while not legally determinative, we observe that the committee's deliberations concern a matter of substantial public concern.

In short, we believe that if raised in litigation, a court would more likely than not conclude that the AOC evaluation committee is subject to the OMA. Absent compliance with the OMA procedures, a court could invalidate the committee's evaluation, a result which, in turn, may well invalidate the entire procurement. See AS 44.62.310(f). But see Alaska Community College's Federation of Teachers, Local No. 2404 v. University of Alaska, 677 P.2d 886 (Alaska 1984). Given the uncertain status of the law and the potential effect of a determination of noncompliance, it is our recommendation that the meetings of the AOC evaluation committee conform to the OMA.

Application of the Act entails three principal features:

(1) Reasonable public notice of committee proceedings must be provided. Reasonable public notice is a variable

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2/ One potential consequence of an unduly expansive application of the OMA would be to pose barriers to the use of staff level RFP evaluation committees. There is no legal requirement to evaluate proposals received in response to an RFP through the committee process. Where the contracting entity forms a staff level RFP evaluation committee, committee members are, in practical terms, simply undertaking typical staff functions. There is no indication that the legislature intended to subject such informal, staff-level meetings to the requirements of the OMA.

concept, and in this instance, would be satisfied through a public advertisement which identifies the first scheduled meeting of the committee, and further provides that additional meeting information is available through the offices of William King & Associates.

(2) Meetings of the committee must be public unless the committee determines by majority vote to adjourn into executive session to discuss one of the limited matters identified in AS 44.62.310(c). 3/ Members of the public have no statutory right to participate in the proceedings. The statute only assures that the public may observe the proceedings, and you may adopt reasonable rules to assure that public observers do not disrupt the evaluation process.

One of the stated grounds for adjourning into executive session is to discuss "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). Committee members may conclude that full discussion of some or all of the architectural models may entail comments which would tend to prejudice the reputation of one or more proponents. However, since the evaluation process is structured to maintain anonymity, the identity of the person or firm impugned would not be known until after the evaluation is complete. In this unique context, we believe the committee may properly vote to adjourn into executive session, even though the person or firm to be discussed would not be accorded an opportunity to elect that the discussion proceed in public.

3/ AS 44.62.310(c) provides:

(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.

(3) Members of the committee should sign their evaluation sheets, but may vote in private. This procedure will allow the public to know how each of the evaluators voted.

If you have any further questions regarding the disposition of documents or the application of the Open Meeting Act, please contact me at your earliest convenience.

JBR/pjg

cc: William King & Associates

MEMORANDUM State of Alaska

TO:
James Hagowan
Executive Director
Alaska Real Estate Commission

DATE
October 9, 1984

FILE NO
166-154-85

TELEPHONE NO
276-3550

FROM:
Norman C. Gorsuch
Attorney General

By:
David T. LeBlond
Assistant Attorney General
Commercial Section-Anchorage

SUBJECT
Confidentiality

This is in response to your memorandum of September 27, 1984, requesting our advice regarding the confidentiality of documents and files of the Alaska Real Estate Commission. We understand that the commission has directed the staff to limit access to information according to a policy which identifies certain information as confidential and certain information as public. You have provided us with a list of the kinds of information involved and the commission's policy as to each.

In our view the commission's policy determinations regarding confidentiality of information are, for the most part, contrary to law and unenforceable. This memorandum will discuss the Alaska law regarding confidentiality of information with respect to the kinds of information with which the commission is concerned and its policy as to this information.

The starting place for any inquiry about confidentiality of public records 1/ is Alaska's so-called "sunshine law," AS 09.25.110, which provides:

> 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.

1/ "Public" as used here means "of a public agency or public official."

AS 09.25.120 sets forth limited exceptions to this general requirement, providing that every person has a right to inspect a public writing or record except as specifically made confidential thereunder. The exceptions, which are not relevant to the Alaska Real Estate Commission, are for (1) records of vital statistics and adoption proceedings, (2) records pertaining to juveniles, (3) medical and related public health records, (4) records required by law to be kept confidential. Section 120 provides, in part, as follows:

> Every public officer having the custody of records not included in the exceptions shall permit the inspections, 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.

AS 09.25.125 provides:

> A person having custody or control of a public record who obstructs or attempts to obstruct, or a person not having custody or control who aids or abets another person in obstructing or attempting to obstruct, the inspection of a public record subject to inspection under AS 09.25.110 or 09.25.120 may be enjoined by the superior court from obstructing, or attempting to obstruct, the inspection of public records subject to inspection under AS 09.25.110 or AS 09.25.120.

These hallmark provisions of Alaska law have been interpreted and applied on numerous occasions by Alaska courts and in formal and informal opinions of the Attorney General. For a discussion of the history of AS 09.25.110 -- 09.25.120, see City of Kenai v. Kenai Peninsula Newspapers, Inc., 642 P.2d 1316 (Alaska 1982), copy attached.

The only statutory exception to the rule that requires public disclosure of public information which could be applicable to the documents and files of the commission is (4) of AS 09.25.120, where records are required by law to be kept confidential. However, the Alaska real estate statutes and administrative regulations do not make any information confidential.

Another hallmark of Alaska law, however, is the constitutional right of privacy. Article I, section 22, of the Alaska Constitution provides:

> The right of the people to privacy is recognized and should not be infringed. The legislature shall implement that section.

This office has consistently taken the position that the constitutional right of privacy is a "state law" for the purposes of the exception under AS 09.25.120(4).

The legislature has not comprehensively dealt with the constitutional right of privacy, 2/ and there are very few reported cases defining the limits of the right. Falcon v. Alaska Public Offices Commission, 570 P.2d 469 (Alaska 1977), is instructive, however. Although the holding of that case provides little guidance here, the analysis used by the court at least provides a framework for analyzing confidentiality questions arising under the right of privacy. The analysis provides a two-step process. First it must be determined whether the information is of the type that would be protected by the right of privacy. In this regard, the question to be determined is whether the information is "sensitive"; that is, information "which a person desires to keep private and which, if disseminated, would tend to cause substantial concern, anxiety or embarrassment to a reasonable person." 570 P.2d at 479. The kind of information at issue in Falcon involved purely personal privacy interests. It is clear, however, that Alaska's right of privacy also covers commercial as well as personal interests. See Woods and Rohde, Inc. v. State, 565 P.2d 138 (Alaska 1977). If the information is not "sensitive" it is not protected by the right of privacy, and the information is subject to public disclosure.

If, on the other hand, it is determined that the information is "sensitive" and thus protected, then the second step in the analysis is required. This step involves a balancing process in which the nature and extent of the harm to the individual that would be caused by public disclosure is balanced against the public interest furthered by disclosing the information. We do not undertake here to address the application of this balancing test to particular kinds of information contained

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2/ The fact that the legislature has not "implemented" the constitutional right of privacy does not detract from its force and effect. Article XII, section 6, of the Alaska Constitution provides that the provisions of the constitution shall be "self-executing whenever possible."

in documents and files of the commission. Ordinarily, we would expect that it would be the unusual circumstance in which such "sensitive" information would be involved that the balancing process would need be employed, or that the balance would not be struck in favor of disclosure. This is particularly true in light of the important public purposes of the Real Estate Commission. However, when a particular request presents a close question, we will provide more particular advice and assistance in the analysis.

We believe that as to such information as the commission reasonably believes to be "sensitive" within the constitutional right of privacy that such policy determinations should be made through the promulgation of administrative regulations. In this way, persons who have an interest in the disclosure of information, as well as persons who have an interest in keeping the information private, would have an opportunity to make their views known. However, we wish to emphasize that we do not believe that any of the documents or files of the commission ordinarily would contain confidential information. 3/

In previous informal discussions of confidentiality we have discussed whether current ongoing investigations are confidential. We have expressed the view that, in an appropriate case, such investigation and thus related investigative files, might be treated as confidential in order to protect the integrity of the investigation. However, again we would not expect that this situation would ordinarily arise and we have not been presented with such a case to date. We do not undertake here to explore the law in this regard. Again, we will advise and assist the commission in a particular case if this issue arises.

You should be aware of and familiar with the administrative regulations at 6 AAC, 95.010 -- 6 AAC 95.900 dealing with public information. These regulations set forth policy and procedure for disclosure of agency records.

3/ We wish to distinguish the documents and files of the commission from the books and records of licensees which the commission through its staff may have occasion to inspect and audit. Certainly the inspection and audit is likely to delve into otherwise confidential information, but ordinarily such information would not come into the commission's custody as a commission document or file and hence would not be subject to a request for public disclosure.

Referring briefly to the specific kinds of information identified by the commission for treatment as "confidential," we believe that ordinarily none of the information may be withheld from public disclosure in the absence of specific provisions of law rendering such information confidential. Thus, complaints (both licensing and surety fund), investigative files (to the extent that they do not contain constitutionally protected private information and insofar as the integrity of the investigation is not compromised), closed license files, hearing officer's proposed decisions, and subpoenas are public information and may not be kept confidential. Hearing officer's proposed decisions are public record under AS 44.62.500(b).

The words of the Alaska Supreme Court in Kenai provide a fitting note upon which to conclude our memorandum of advice:

> 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.
>
> . . . .
>
> There is a strong public interest in disclosure of the affairs of government generally . . . . AS 44.62.312(a) powerfully expresses the philosophy underlying this:
>
> > 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

public 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.

642 P.2d 1323-24.

DTL:ihr

Enclosure

BILL SHEFFIELD, GOVERNOR

REPLY TO:

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STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

October 3, 1984

Mr. Francis L. Bremson
Executive Director
Alaska Judicial Council
1031 West 4th Ave, Suite 301
Anchorage, AK 99501

Re: Confidentiality of records of
the Alaska Judicial Council
Our file No: 366-625-84

Dear Mr. Bremson:

You have requested our advice on a number of issues regarding the confidentiality of records of the Alaska Judicial Council (Council). As a general rule, we conclude that the Council is subject to the same confidentiality rules and disclosure requirements as any other state agency. We will answer each of your specific questions in turn.

1. To what extent is the Judicial Council bound by, or exempt from, the provisions of AS 09.25.120 ?

AS 09.25.120 sets forth the statutory requirement that government records are generally subject to public disclosure, subject to certain specified exceptions, and a public officer in custody of public records must permit inspection of the records upon demand.

The Council is established by the Constitution as a part of the judicial branch of the State government. Alaska Constitution, art. IV, § 8; 1980 Inf. Op. Att'y Gen. (Jan. 28; J-66-417-80). As such, the Council is a public agency, and its records are public records subject to the provisions of AS 09.25.120. 1/

1/ We also note that Administrative Rule 37.5 provides that public records of the Alaska Court System are subject to inspection by any member of the public, and then defines "public records" to include most of the records of the court system, with certain exceptions. In light of our opinion that the Judicial

2. Does the Council have the power and authority to issue rules and/or regulations regarding the confidentiality of its own records?

Alaska Constitution art. IV, § 8, which establishes the Judicial Council, states in relevant part:

> The Judicial Council shall act by concurrence of four or more members and according to rules which it adopts.

(Emphasis added.) We interpret this provision to authorize the Judicial Council to adopt rules or regulations regarding the confidentiality of its own records, provided they are consistent with state statutes, including AS 09.25.120.

As more fully discussed below, certain records of the Council are public records subject to disclosure, while others could clearly be kept confidential under either the constitutional right to privacy (Alaska Const. art. I, § 22) or the "deliberative process privilege". For those close cases where considerations favoring disclosure are nearly equal to those favoring confidentiality, we believe that rules or regulations may and indeed should be adopted to set guidelines for use in deciding whether disclosure should be made. Because the Council is in a better position to recognize and weigh the relative interests involved in these close cases, we believe it would be more appropriate for the Council, rather than our department, to consider and adopt these confidentiality rules.

3. Which of the Alaska Judicial Council records may be kept confidential?

Your request for advice lists a number of general types of Council records, such as records relating to judicial selection and those relating to judicial retention, and asks which should be kept confidential. Instead of responding to each general class of records, we believe it would be more beneficial to simply set forth the rules regarding confidentiality applicable

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Council is subject to AS 09.25.120, and because the exceptions provided in the statute are virtually identical to the exceptions set forth in Rule 37.5, we need not decide if Rule 37.5 applies to the Council.

to all public records, and leave it to the Council to determine in each case whether the particular record at issue is confidential or not. 2/

As a general rule, records held by a State agency must be made available for public inspection and copying. AS 09.25.110 provides:

> 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.

AS 09.25.120 sets out limited exceptions to this general rule, providing in part as follows:

> Every person has a right to inspect a public writing or record in the state, including public writings and record 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

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2/ This approach is taken for two reasons. First, it is clear that within each general class of records listed in your request, some records in the class are probably confidential while others should be available for public inspection. Second, as noted above, we believe that in the close cases the Council should be the agency which determines if a particular document is confidential or not.

We do discuss the specific question whether letters addressed to the Council concerning judicial appointments are confidential. It has been the consistent view of this office that personal letters regarding such selection addressed to the Governor are confidential, and in our view, the same rationale would apply to the Council. See Sec. 5, infra.

state law.

Although there are no State statutes specifically dealing with the confidentiality of information contained in Council records, the constitutional principles of the right to privacy and separation of powers are "state laws" for purposes of exception (4) to the public records statutes. In determining whether or not a particular document should remain confidential, the Council should analyze the situation with respect to each of these constitutional principles.

Regarding the right to privacy, first it must be determined whether the information is of the type that would be protected under art. I, § 22 of the Alaska Constitution, which provides that:

> The right of the people to privacy is recognized and shall not be infringed.

In this regard, the issue is whether the information is "sensitive"; that is, information

> . . . which a person desires to keep private and which, if disseminated, would tend to cause substantial concern, anxiety or embarrassment to a reasonable person.

Falcon v. Alaska Public Offices Commission, 570 P.2d 469, 479 (Alaska 1977). If the information is not "sensitive" it is not protected by the right to privacy.

If it is determined that the information is "sensitive", and thus protected by the constitutional amendment, then the second step in the analysis must be taken. This step involves a balancing process, in which the nature and extent of the harm to the individual that would be caused by public disclosure is balanced against the public interest furthered by disclosing the information. We believe this particular balancing process must be performed by the Council, utilizing its own experience and expertise. However, in performing any such analysis, the Council should keep in mind that the Alaska Supreme Court has recently indicated a preference for public disclosure, stating that "[t]here is a strong public interest in disclosure of the affairs of government." City of Kenai v. Kenai Peninsula

Newspapers, 642 P.2d 1316, 1323 (Alaska 1982).

Some Council records which are not confidential under privacy considerations may nonetheless be confidential under the common law doctrine of the "deliberative process privilege" often referred to as "executive privilege". The deliberative process privilege protects from public disclosure those pre-decisional documents prepared by governmental agencies that reflect the "decision-making" of the agency. Although the privilege has yet to be recognized by the Alaska Supreme Court, there is little reason to believe that the court will not do so, at least to some extent, when presented with the issue.

The rationale for the privilege was discussed in Ryan v. Department of Justice, 617 F.2d 781 (D.C. Cir. 1980), in which the court stated:

> The [privilege] was created to protect the deliberative process of the government, by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision-makers without fear of publicity. In the course of its day-to-day activities, an agency often needs to rely on the opinions and recommendations of temporary consultants, as well as its own employees. Such consultations are an integral part of its deliberative process; to conduct this process in public view would inhibit frank discussions of policy matters and likely impair the quality of decisions.

617 F.2d at 789-90; see also, Carl Zeiss Stiftung v. E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966). Factual information is not protected by this privilege, even though the information is part of a "deliberative" document, unless it is "inextricably intertwined with policy-making processes." Environmental Protection Agency v. Mink, 410 U.S. 73 (1973).

Exercise of this privilege is consistent with the purpose behind the judicial selection process chosen by framers of the Alaska Constitution and set out in Alaska Const. art. IV. The Convention chose the present process to avoid, as much as possible, political influences on the selection of judicial candidates

for referral to the governor. 3/ To preserve this independence, much of the Council's actions must remain confidential.

This privilege would protect intra-council and inter-agency communications which are part of the council's decision-making process. Documents which could be kept confidential pursuant to this privilege would include such items as letters from private citizens (if not already confidential under privacy considerations), internal memoranda stating the author's opinions concerning Council activities, including judicial selection, and any documents obtained by the Council for the purpose of aiding in its decision-making functions where confidentiality is promised to the organization providing them. 4/ Of course, this is only a partial list of those documents which may fall under this particular privilege, and we leave it to the Council to develop guidelines and make a final determination in each case.

4. Does the Council have subpoena power to compel testimony or the production of records?

The Council does not have the power to issue administrative subpoenas. Such power must be specifically authorized by statute, and no such authority currently exists for the Council. The legislature has chosen to provide this authority to a number of state agencies, boards and commissions, including, within the judicial branch, the Commission on Judicial Qualifications. AS 22.30.066. 5/ Although there is no doubt that such power could be granted to the Council by the legislature, unless and

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3/ Minutes of Alaska Constitutional Convention, Part 1 at 583 et. seq.

4/ We caution, however, that such promises of confidentiality should not be granted as a matter of course, but should be given only when the Council determines that the documents are necessary and confidentiality is insisted upon by the provider.

5/ Other agencies include the Commission for Human Rights (AS 18.80.060), the Public Offices Commission (AS 15.13.045), the Department of Labor (AS 23.20.060), the Legislative Council (AS 24.20.060), the Ombudsman (AS 24.55.170), the division of Banking and Securities (AS 45.55.190), the Transportation Commission (AS 42.07.141), the Violent Crimes Compensation Board (AS 18.67.040), and any agency conducting hearings under the Administrative Procedures Act (AS 44.62.430).

until this authority is specifically granted it does not exist.

5. Can the Council transmit confidential reference letters regarding judicial selection to the governor without breaching its assurances of confidentiality to persons providing such references?

It has been the consistent position of this office that letters to the governor concerning a judicial appointment are confidential and should not be disclosed to the public. As we stated in our 1984 Inf. Op. Att'y Gen. (Jan. 5; 366-350-84):

> A governor must be able to assure citizens with relevant information about a judicial candidate that their remarks will not result in press accounts, litigation, or harassment. The prospect of public outcry or lawsuits would dissuade some of these citizens from giving the governor the candid information required to make informed appointments to the judiciary.

Id. at 2. See also 1982 Inf. Op. Att'y Gen. (April 12; J99-011-80).

Case law supports the view that letters expressing the author's opinions on a candidate for employment or promotion are confidential. In Hafermehl v. University of Washington, 628 P.2d 846 (Wash. App. 1981), involving a request to disclose letters from faculty members regarding a professor's consideration for promotion, the court stated:

> The letters here clearly express the authors' opinions and evaluations. Exempting them from public disclosure will further one of the primary aims of the deliberative process privilege, viz., to further the giving of uninhibited opinions and recommendations without fear of later public ridicule or criticism.

Id. at 848.

In a somewhat different context, the Alaska Supreme Court has recently lent its support to this position. The court recognized that the privacy of a government official's sources must be protected to assure candid communication, thus guaranteeing that the sources will provide their valuable information to the decision-maker. Kerttula v. Abood, ___ P.2d ___, Op. No. 2858 at 18 (Alaska, July 27, 1984). We therefore conclude that

any letters concerning judicial applicants which are transferred by the Council to the governor would remain confidential in the hands of the governor.

The remaining issue, however, is whether the transfer from the Council to the governor in and of itself constitutes a breach of confidentiality. Although the Council is an agency of the judicial branch of government, much of its work, including the selection of judicial candidates, is essentially executive in nature, assisting the governor in his constitutional power to make judicial appointments. Alaska Const. art. IV, § 5. In our opinion, the transfer of letters would not constitute a breach, because the receipt and consideration of the letters by the Council and the subsequent transfer of these letters to the governor is all part of a single executive function, the selection of a judge or judges. 6/ The letters were submitted for the purpose of assisting in this executive function and may be used for that function. Of course, if the Council receives a letter which expressly requests that it not be forwarded to the governor, we would recommend that the writer's wishes be honored in that case. Otherwise, letters to the Council regarding judicial applicants may be submitted to the governor without violating any confidentially principles.

We also believe, however, that submission to the governor of these letters, or any other confidential contents of Council records or files, is not mandated but instead is within the discretion of the Council. Although performing an executive function, the Council retains its character as an organization within the judicial branch, and separation of powers considerations compel the Council to maintain its independence. In performing its executive function pursuant to the constitutional mandate, it only is required to submit names to the governor; however, it may submit more, should it choose to do so. We recommend that the Council adopt rules and regulations, available to the public, which delineate the nature and extent of the cooperation it intends to extend to the governor's office.

6/ For a discussion of the effect of the separation of powers doctrine on the performance of a strictly executive function by two branches of government jointly, see Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).

We hope this answers your questions, and we apologize for the delay in responding to your request.

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: Jeffrey W. Bush
Assistant Attorney General

NCG:JWB:cct:

MEMORANDUM State of Alaska

TO: Perry Eaton, Chairman
Clark Gruening
Commissioner Richard Lyon
Board of Directors
Alaska Resources Corporation

DATE: February 9, 1984

FILE NO: 366-417-84

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General

By: Martha A. Fox
Assistant Attorney General

SUBJECT: November 3, 1983
Board meeting

Lauri Adams, staff attorney for the Sierra Club, has raised several questions regarding the propriety of the procedures followed during the calling of an executive session at the November 3, 1983, board meeting of the Alaska Resources Corporation (ARC). At that meeting the Board approved a financing proposal submitted by Michael Chittick and U.S. Forest Products, Inc., for the Schnabel Lumber Mill. After examining the transcript of that meeting and talking to participants at the meeting, we conclude that the board did not use proper procedures to call the executive session which was held prior to the initial vote on the financing proposal.

While the financing proposal was discussed in detail before the calling of the executive session, and had been a subject of extensive discussion and some action by the board at earlier meetings during the year, the failure to follow proper procedures in calling an executive session does cast a cloud over the legality of the approval of the proposal. On the basis of the recent supreme court decision in Alaska Community Colleges' Federation of Teachers v. University of Alaska, ___ P.2d ___, Op. No. 2779 (Alaska, Feb. 3, 1984), we recommend that the board reconvene to consider and vote again on the proposal.

FACTS

U.S. Forest Products' financing proposal was first considered by the Board in early 1983. At its meeting of May 24, 1983, the board approved a memorandum of intent in which ARC indicated its intent to agree to U.S. Forest Products' financing proposal provided certain conditions were met. The financing proposal was a topic of discussion at the June 16 and August 19, 1983, board meetings, and the term of the agreement was extended several times. There was opportunity for public comment at the May, June, and August meetings, although no one ever testified.

The memorandum of intent apparently expired on August 30, 1983. A subsequent board meeting scheduled for September 16, 1983, to discuss the U.S. Forest Products proposal was rescheduled until November 3, 1983, because of the lack of a quorum.

The financing proposal presented to the board in November differed somewhat from the earlier proposal approved in the memorandum of intent. However, all conditions set out in the memorandum of intent were met. At the meeting, the public was given opportunity to comment on the Schnabel Lumber Mill and the proposed financing venture by ARC, but there was no public testimony. The board then went through each item of the revised proposal. There was considerable discussion of the provisions of the proposal, as well as of the supply of timber and the markets available for that timber, which would affect the performance of the business and the security of ARC's investment. The board then went into the executive session which is the subject of Ms. Adams' inquiry. The executive session was called to discuss the data received. Immediately after the discussions in executive session the board unanimously voted in favor of the U.S. Forest Products proposal without further public discussion. The meeting adjourned for lunch after that vote.

There was a reconsideration of the vote when the meeting reconvened later in the afternoon. Upon reconsideration, the board voted 2 - 1 in favor of the proposal. At that time Terry Elder stated his reasons for changing his vote. There was no other discussion of the proposal. There had been no notice of a motion for reconsideration of the proposal at the time the board recessed for lunch. Apparently because of the long break before the board reconvened, few persons who had attended the morning session were present when the reconsideration vote was taken.

The financing agreement for the Schnabel Lumber Mill was signed in mid-December. Funds were distributed shortly thereafter in accordance with the agreement.

DISCUSSION

Proper procedures for calling an executive session are set out in AS 44.62.310(b) and have been summarized by the court in City of Kenai v. Kenai Peninsula Newspaper, 642 P. 2d 1316, 1326 n.29 (Alaska 1982).

> 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.

The executive session was not convened by the majority vote required in AS 44.62.310(b). The purpose for the executive session stated during the meeting, to "discuss the data we have had today," was also not within the expressly excepted subjects which may be discussed in an executive session under AS 44.62.310(c). Proper procedures were clearly not used by the ARC board in calling this executive session. The issue now is what effect the improper executive session had on the approval of the financing proposal.

AS 44.62.310(f) provides that "[a]ction taken contrary to this section is void." However, in Hammond v. North Slope Borough, 645 P.2d 750, 765-66 (Alaska 1982), the court held that the decision by the Commissioner of Natural Resources to allow a lease sale was not voided by the failure of two lease sale advisory committees to comply with the open meetings laws, even when the commissioner was co-chairman of one of the advisory committees. In reaching its conclusion that the commissioner had made his decision independently from the committees, the court focused on the fact that the commissioner had also received advice and studies from various state resource agencies, and that there had been ample opportunity for substantial public participation on the issue.

By the time of the November 3, 1983, board meeting, the ARC board had had a number of public discussions about the financing proposal. It had also allowed substantial opportunity for public comment on the issue, although none was ever given. The terms of the revised financing proposal were discussed in some detail by the board prior to the executive session in question. These factors lend themselves to the Hammond argument that the violation of the open meetings laws was harmless error. However, there are some basic differences between this situation and the factual circumstances in the Hammond case.

In Hammond, the committees were advisory. It was not the ultimate decision-making body, like the ARC board, which failed to comply with the open meeting requirements. Also, the ARC board took its action on the financing proposal immediately after conducting the improperly convened executive session. An inference which could be drawn from this is that the vote took place as a direct result of discussions which were held in the executive session. The reconsideration vote taken later in the

afternoon could arguably serve as a ratification of the earlier approval; however, the transcript of the board meeting does not indicate that the second vote was the "true reconsideration" required by the court to cure a decision made in nonconformity with the open meeting laws. Alaska Community Colleges' Federation of Teachers v. University of Alaska, ___ P.2d ___, Op. No. 2779 (Alaska, Feb. 3, 1984). Rather, it was convened so that individual votes for or against could be recorded and so that Terry Elder could state the reasons for changing his vote.

In University of Alaska v. Geistauts, 666 P.2d 424, 428 (Alaska 1983), the court stated that "the Hammond 'harmless violation' doctrine should be invoked only in very limited circumstances." According to the court, "Hammond presented a compelling fact situation in which a relatively insignificant violation of AS 44.62.310 was coupled with overwhelming prejudice which would have resulted from a conclusion that the five-year procedure leading up to the lease sale was void." Id. We cannot conclude that that kind of situation exists here. Thus, we recommend that the board reconvene and vote again on the financing proposal.

In Alaska Community Colleges' Federation of Teachers v. University of Alaska, the court discusses "when voluntary ratification of a decision made in nonconformity with the requirements of AS 44.62.310 may be effective." Op. No. 2779 at 7. "The effectiveness of any later meeting designed to cure an OMA violation obviously depends on the seriousness of this violation." Id. at 5. As discussed earlier, ARC's violation of the open meetings laws may not be that serious because of its prior public consideration of the financing proposal. This means that the board should be able to cure the defect by following the guidelines set out in Alaska Community Colleges:

> (1) The reconsideration of the financing proposal must function as a true de novo consideration of the defective action. Id. at 13. This means that the board should look at the situation as it existed at the time the original decision was made. It must also respond to information and developments arising since the time of the November 3 meeting. Id. at 9.
>
> (2) When the open meetings laws is violated it is "'the people's right to remain informed' which sustains the injury. There is no inherent damage stemming from the substantive action which is taken; it is the manner of action which offends." Id. at 11. Therefore, the board should publicly review the information which

was available to it at the time of the decision and the history of the financing proposal before the board. The merits of the action proposed should be publicly discussed.

We hope this memo gives you adequate guidance on the future action we recommend. Please let us know if we can be of any further assistance.

MAF/mg

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

taxes should be deducted from any award for loss or impairment of earning capacity. In *Yukon Equipment, Inc. v. Gordon*, 660 P.2d 428 (Alaska 1983), we specifically held that taxes should not be considered in determining future damages. *Id.* at 434–435. Thus, the superior court did not err.

The judgment below is AFFIRMED.

BROOKWOOD AREA HOMEOWNERS ASSOCIATION, INC., Area G Home and Landowners Organization, Inc., Bruce Chadwick and Peter Johnson, Appellants/Cross-Appellees,

v.

MUNICIPALITY OF ANCHORAGE, Appellee,

and

Q & O #2, a Partnership, Appellee/Cross-Appellant.

Nos. S–573, S–629.

Supreme Court of Alaska.

July 19, 1985.

Homeowners' association brought action under the Open Meetings Act, alleging that meeting between developer and quorum of the municipal assembly violated the Act and that rezoning ordinance should be held void. The Superior Court, Third Judicial District, Anchorage, Mark C. Rowland, J., held there was no violation of the Act, remedies of the Act did not apply, meeting was harmless error, or subsequent hearing cured any violation of the Act. Association appealed, and developer cross-appealed, disputing refusal to award it attorney fees on ground that association was public interest litigant. The Supreme Court, Moore, J., held that: (1) policy of the Act required that deliberations such as meeting between assembly and developer be conducted publicly; (2) meeting was not "harmless violation" of the Act; (3) developer failed to show that subsequent public meeting validated rezoning action, in that it failed to show "substantial reconsideration" was made; (4) invalidation of rezoning ordinance was necessary prerequisite to actual reconsideration; (5) rezoning ordinance was void; and (6) association qualified as public interest litigant and should have been awarded attorney fees.

Reversed and remanded.

1. **Administrative Law and Procedure ⇐124**

Language of AS 44.62.310(a), providing scope for the Open Meetings Act [AS 44.62.310 et seq.] mandates that the Act not be limited to decision-making bodies only.

2. **Administrative Law and Procedure ⇐124**

Question under Open Meetings Act [AS 44.62.310 et seq.] is whether activities of public officials have effect of circumventing the Act, not whether quorum of governmental unit was present at private meeting. AS 44.62.312.

3. **Zoning and Planning ⇐194**

AS 44.62.312, providing policy regarding meetings of governmental units under the Open Meetings Act [AS 44.62.310 et seq.] required that meeting between quorum of municipal assembly and developer to discuss in detail its application for rezoning, with rezoning ordinance scheduled for public hearing one week later, be conducted publicly.

4. **Administrative Law and Procedure ⇐124**

"Meeting," under the Open Meetings Act [AS 44.62.310 et seq.] includes every step of the deliberative and decision-making process when governmental unit meets to transact public business.

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

5. Zoning and Planning ⇐194

Developer's representatives could have met with each member of municipal assembly individually to discuss their development project and to lobby for passage of rezoning ordinance without violating the Open Meetings Act. AS 44.62.310 et seq.

6. Municipal Corporations ⇐92

"Action," under the Open Meetings Act [AS 44.62.310 et seq.] encompasses municipal assembly's fact-gathering and deliberative sessions relating to public business. AS 44.62.310(f).

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

7. Zoning and Planning ⇐194

Fact that homeowners' association had opportunity to present testimony relating to rezoning ordinance at subsequent public hearing did not render presentation by developer to quorum of municipal assembly members at private meeting harmless error under the Open Meetings Act. AS 44.62.-310 et seq.

8. Zoning and Planning ⇐194

Presentation by developer to quorum of municipal assembly members at private meeting, relating to rezoning ordinance was not "harmless violation" of the Open Meetings Act [AS 44.62.310 et seq.], where homeowners' association contended it would have presented different testimony at public hearing if it had known content of developer's presentation, facts did not demonstrate that municipal assembly's ultimate decision on rezoning ordinance was independent of presentation, and association filed expedited challenge to the assembly's action in rezoning.

9. Administrative Law and Procedure ⇐124

Plaintiff complaining of violation of the Open Meetings Act [AS 44.62.310 et seq.] must show by preponderance of evidence that violation occurred.

10. Administrative Law and Procedure ⇐124

If violation of the Open Meetings Act [AS 44.62.310 et seq.] is shown, burden shifts to defendant to show that "substantial reconsideration" of issue was made at a subsequent public meeting; that is, whether validation meeting functioned as true de novo consideration of the defective action.

11. Administrative Law and Procedure ⇐124

If defendant in action under the Open Meetings Act [AS 44.62.310 et seq.] fails to show "substantial reconsideration" of issue at public meeting, after violation of the Act has been shown, court must decide whether invalidation of governmental action is proper remedy.

12. Administrative Law and Procedure ⇐124

To determine that invalidation of governmental action is proper remedy for violation of the Open Meetings Act [AS 44.62.-310 et seq.], court must determine that invalidation is necessary prerequisite to actual reconsideration of issue by government, and that invalidation will serve public interest.

13. Administrative Law and Procedure ⇐124

In deciding issue of whether invalidation of governmental action under the Open Meetings Act [AS 44.62.310 et seq.] will serve public interest, court should weigh remedial benefits to be gained in light of goals of the Act against prejudice likely to accrue to public.

14. Zoning and Planning ⇐194

Developer failed to show that substantial reconsideration of rezoning issue was made by municipal assembly after assembly's deliberations at developer's presentation which constituted "meeting" in violation of the Open Meetings Act [AS 44.62.-310 et seq.], where developer could not demonstrate that public meeting was offered as remedial measure to reconsider any action or deliberation by assembly members at developer's private presentation in that assembly members stated they

saw nothing wrong with prior meeting, and members did not disclose any matters discussed at meeting.

15. Zoning and Planning ⇐191

Invalidation of rezoning ordinance was necessary prerequisite to municipal assembly's actual reconsideration of the issue, required because of assembly's violation of the Open Meetings Act [AS 44.62.310 et seq.], where municipal assembly could not further restrict zoning without developer's express agreement, making "substantial reconsideration" by assembly impossible unless rezoning ordinance was first voided.

16. Zoning and Planning ⇐194

Rezoning ordinance was to be voided under AS 44.62.310(f), providing policy of the Open Meetings Act [AS 44.62.310 et seq.], where invalidation of ordinance was necessary prerequisite to reconsideration, decision voiding ordinance would serve the Act's remedial purpose, homeowners' association had not delayed in bringing the issue before court, and voiding ordinance did not result in prejudice to public comparable to that posed in *ACCFT*, involving validation of university merger.

17. Zoning and Planning ⇐729

Homeowners' association, which brought action under the Open Meetings Act [AS 44.62.310 et seq.] against municipal assembly and developer based on grant of rezoning ordinance by assembly, qualified as "public interest litigant," for purposes of award of attorney fees, where there was strong public policy behind effectuating the Act, declaration that municipal assembly violated the Act would protect public's right to be informed by encouraging public meetings, only private citizens would sue to enforce the Act with respect to rezoning because government was defendant, and association claimed that proposed development would not result in economic injury to its members causing association to lack requisite economic incentive to bring suit; thus, action would be remanded to determine attorney fees for association as "public interest litigant." AS 44.62.312; Rules Civ.Proc., Rule 82.

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

James T. Brennan, Hedland, Fleischer & Friedman, Anchorage, for appellants/cross-appellees.

Jerry Wertzbaugher, Mun. Atty., Thomas F. Klinkner, Asst. Mun. Atty., Anchorage, for appellee, Municipality of Anchorage.

Peggy A. Roston, W. Richard Fossey, Bankston & McCollum, Anchorage, for appellee/cross-appellant, Q & O # 2, a Partnership.

D. John McKay, Middleton, Timme & McKay, Anchorage, for amici curiae, Anchorage Daily News and Alaska Press Club.

Russell A. Nogg, Henderson & Nogg, P.C., Anchorage, for amici curiae, Builders Industry Ass'n of Anchorage, Inc. and J & P Investments, Inc.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

MOORE, Justice.

In this case, a quorum of the Anchorage Municipal Assembly met privately with a developer, the Quadrant Development Company (Quadrant),[1] to discuss in detail its application for rezoning. The application for rezoning was scheduled for a public hearing one week after the private discussion at the Quadrant offices. After the

1. Anpellee Q & O # 2, a partnership, owned 60 acres of property in south Anchorage. Quadrant Development Company acted as the partnership's agent for development purposes.

ATTACHMENT D

Alaska Uniform Rules - Rule 22 and 23

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joint committee which acts between legislative sessions constitutes a subcommittee of the Legislative Council for administrative purposes. A special or joint committee may expend money only in accordance with an appropriation made for the work of the committee.

(d) A committee may not be established unless authorized by law or by the Uniform Rules.

OPEN AND EXECUTIVE SESSIONS

RULE 22. OPEN AND EXECUTIVE SESSIONS. (a) All meetings of a legislative body are open to all legislators, whether or not they are members of the particular legislative body that is meeting, and to the general public except as provided in (b) of this rule.

(b) A legislative body may call an executive session at which members of the general public may be excluded for the following reasons:

(1) discussion of matters, the immediate knowledge of which would adversely affect the finances of a government unit;

(2) discussion of subjects that tend to prejudice the reputation and character of a person;

(3) discussion of a matter that may, by law, be required to be confidential.

(c) When a legislative body desires to call an executive session in accordance with (b) of this rule, the body shall first convene as a public meeting and the question of holding an executive session shall be determined by a majority vote of the members present.

(d) The provisions of this rule may not be interpreted as permitting the exclusion of a legislator from an executive session, whether or not the legislator is a member of the body that is meeting. A legislator not a member of the body holding an executive session shall, however, be subject to the same rules of confidentiality and decorum as pertain to regular members of the body.

COMMITTEE MEETINGS

RULE 23. COMMITTEE MEETINGS. (a) Written notice of the time, place and subject matter of all meetings of standing, special, and joint committees during a week shall be provided by the person who chairs the committee to the chief clerk or secretary by 4:00 p.m. on the preceding Thursday. The person who chairs the committee to which a bill or resolution is first referred shall provide to the chief clerk or secretary written notice of the time and place of the first public hearing on the bill or resolution at least five days before the hearing. However, this requirement may be waived by motion of the person who chairs the committee to which a bill or resolution is first referred if concurred in by majority vote of the full membership of the house. The chief clerk or secretary shall publish and distribute copies of the weekly schedule of committee meetings and of the five-day notice of hearing.

(b) The person who chairs a standing, special, or joint committee shall provide the chief clerk or secretary written notice of the change in the time, place or subject matter of a meeting. At the next daily legislative session, notice of the schedule change shall be announced by the chief clerk or secretary and published as a notice in the journal of the house.

(c) A scheduled meeting of a standing, special, or joint committee may be cancelled at any time. If possible, notice of the cancellation shall be given in the same manner as provided for notice of change in (b) of this rule.

(d) The provisions of (a) and (b) of this rule do not apply to a standing, special, or joint committee meeting scheduled after the date a conference committee has been chosen to consider amendments to or differences between versions of the general appropriation act. However, a person who chairs a standing, special, or joint committee shall post written notice of the time, place and subject matter of a meeting at least 24 hours before the meeting.

(e) The provisions of (a) - (d) of this rule do not apply to meetings of

(1) the Rules Committee when it meets for the purpose of preparing the daily calendar;

(2) the Committee on Committees referred to in Rule 1(e); or

(3) standing, special, or joint committees when the committee meets during the interim between sessions.

(f) Each standing, special, and joint committee

(1) shall record its meetings electronically and prepare a log of the recording adequate to locate specific testimony;

(2) shall prepare minutes of each meeting of the committee on a standard form prescribed jointly by the Rules Committees of the house and the senate; the minutes shall include

(A) a list of the names of each member present during the meeting;

(B) a list of the name and affiliation of each witness testifying before the committee;

(C) a brief statement of the position of the witness on the subject testified upon; and

(D) each amendment formally considered by the committee, the name of the member moving adoption of the amendment, the action taken on the amendment, and the yeas and nays if a committee member has requested a roll call vote on adoption of an amendment;

(3) shall maintain a chronological file of minutes, copies of which shall be made available upon

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request to committee members and the public; committee minutes, tapes and other materials of research value shall be delivered by the committee at the end of each session or each legislature to the legislative reference library for appropriate disposition;

(4) may make available to the Legislative Affairs Agency a copy of all minutes of committee meetings during the session for entry of the minutes as a data base on the legislative computer system.

COMMITTEE REFERRAL AND ACTION

RULE 24. COMMITTEE REFERRAL AND ACTION. (a) A committee acts on all bills referred to it and reports its actions and recommendations to the house as soon as practicable. Committee reports must be in writing and the report must be signed by a majority of the members of the committee. The report will note the recommendation of each member signing the report.

(b) When a bill is reported back by a committee without at least one "Do Pass", unless the bill has a subsequent referral or referrals of record, the presiding officer shall put the question "Shall the bill be referred to the Rules Committee for placement on the calendar for second reading notwithstanding the report of the committee(s)?" If the bill has a subsequent referral or referrals of record, the question shall not be put until the last committee has reported and unless all reports are without at least one "Do Pass". The question is debatable and if a majority of the membership of the house votes in the negative, the bill is lost.

(c) If a committee has more than one bill on the same subject or if it finds it necessary to revise a bill substantially, it may report out a substitute bill and recommend that the substitute be accepted for second reading in the place of the original bill. A committee of the second house may not report a committee substitute for a bill or an amendment to a bill that requires a change in the title of the bill, other than a clerical or technical change, as the title was enacted in the house of origin. Substitute bills are duplicated and distributed when they are reported out by the committee. Committee substitute bills carry a notation of the source or sponsor of the original bill in the manner prescribed by the drafting manual unless the sponsor objects to the name so appearing.

(d) All bills involving appropriations, revenues or bonding must be referred to the Finance Committee before they can be advanced to second reading.

COMMITTEE OF THE WHOLE

RULE 25. COMMITTEE OF THE WHOLE. When the house forms itself into a Committee of the Whole the presiding officer vacates the chair and calls upon a member to preside. The Uniform Rules are observed in the Committee of the Whole but no member shall be recognized a second time until every member wishing to speak has spoken. When a bill is considered in the Committee of the Whole it shall be read and debated by sections and amendments adopted shall be noted on paper separate

ATTACHMENT E

Alaska Open Meetings Law Legislative History

LAWS OF ALASKA

1972

Source

SB 253

Chapter No.

28

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

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, McOill, 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, Chairman"

LAWS OF ALASKA

1972

Source

CSHB 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

COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 288 amended, by the Commerce Committee, entitled: CSSB 288 am

"An Act relating to the use of state equipment for private purposes."

was read the first time and referred to the Committee on State Affairs.

COMMUNICATIONS

A letter dated March 28, 1972 to Speaker Guess from Chief Justice George F. Boney, Chairman of the Alaska Judicial Council was read, announcing the annual meeting of the Judicial Council to be held in the Governor's Conference Room, Capitol Building, at 1:00 p.m., Friday, March 31, 1972.

REPORTS OF STANDING COMMITTEES

The Health, Welfare and Education Committee has filed HOUSE BILL NO. 605 (relating to the meetings of the Board of Regents of the University of Alaska; and providing for an effective date) under consideration a second time and a majority of the members of the Committee recommends it be replaced with COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 605 (same title) and that COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 605 do pass. The report was signed by Mrs. Chance, Chairman, and concurred in by Chance, Moore, Whittaker and Naughton. HB 605

HOUSE BILL NO. 605 was referred to the Rules Committee for placement on the calendar.

The Speaker stated that without objection, the reading of the Health, Welfare and Education Committee Chairman's report on HOUSE BILL NO. 605 would be waived and it would be printed in the journal. There being no objection, it was so ordered. The report appears as follows:

"Health, Welfare and Education Committee
Report on House Bill 605

The Committee Substitute for House Bill 605 makes no substantive change in the bill as introduced. It was drafted to avoid a potential technical conflict between the bill as introduced and existing law and, at the same time, to incorporate the basic policy thrust of the bill as introduced.

As introduced, HB 605 would have added a new section (sec. 202) to AS 14.40 applying the "Open Meeting Law" to the Board of Regents without making any change in sec. 160. Enactment takes precedence over an existing statute; technical conflicts probably would have arisen between the two because of differences in language even though there is no

HB 605 basic policy difference between the two statutes. Thus it was advisable to eliminate a potential legal conflict by combining the proposed section and existing law into one of Regents of the University of Alaska that includes the best features of both.

AS 14.40.160 provides that the Board of Regents may determine the time and place of its meetings and the manner of giving notice; as introduced, HB 605 provides for 30 days notice for regular meetings and 10 days for special meetings. The Committee Substitute adopts the specific proviso of HB 605, as introduced. While existing sec. 160 also provides that the board's meetings are open to the public and press, it does not clearly state that the state's present "Open Meeting Law", AS 44.62.310, applies to the meetings of the Board of Regents which, in the judgment of the Committee, it should. AS 14.40.160 stipulates that the Regents' meeting records and proceedings are open to the public and press at reasonable times, a salutary provision not included in the "Open Meeting Law", but which is presently applicable to the Board and should be retained. The existing section also authorizes the Board to hold executive sessions but does not specify for what purpose, as does AS 44.62.310(c), a provision that should be uniform throughout state government. Present law requires that the findings of these executive sessions be made a part of the Board's record of its proceedings, a provision retained by the Committee Substitute.

Finally, the Committee Substitute deletes Section 3 of the bill as introduced. This section picked up identical language in Sec. 3 of Senate Bill 253 that would apply the state's "Open Meeting Law" to the Legislature and its proceedings. SB 253 has passed the Senate and is before the House Rules Committee. The language was added to HB 605 solely to avoid a subsequent legal problem known as "chaptering out" had HB 605 been enacted after SB 253, because sec. 2 of HB 605 and sec. 1 of SB 253 amend the same section: AS 44.62.310(a). That problem, if it exists at all, can be resolved by the Revisor of Statutes after the close of the current session of the Legislature; hence there is no need for Section 3 of the bill.

Genie Chance
Genie Chance, Chairman"

HB 596 The Local Government Committee has had HOUSE BILL NO. 596 (providing for boroughs in the unorganized borough; and providing for an effective date) under consideration and a majority of the members of the Committee recommends it do pass with the following amendment:

amendment No. 1 by the Local Government Committee:

Page 1, line 22: After the period add: "The Local Boundary Commission shall hold hearings at appropriate places within the unorganized borough before proposing tentative divisions of the unorganized area into unorganized boroughs. Following the publication of tentative boundaries of

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 board, 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

HB 830 AN ACT RELATING TO A CONTEST AMONG SCHOOL CHILDREN TO DESIGN LICENSE PLATES; AND PROVIDING FOR AN EFFECTIVE DATE

AMENDED TITLE: CS *

PRIME SPONSORS: PARKER

DATE	SEQ. NO.	JOURNAL PAGE	HOUSE ACTION
03/17/76	01	0344	FIRST READING -- COMMITTEE REPORTS
02/26/76	02	0420	S.A. -- CS06
03/11/76	03	0564	SECOND READING
03/11/76	04	0564	S.A. CS ADOPTED BY UNAN CONSENT
03/11/76	05	0564	ADVANCED TO 3RD READING BY UNAN CONSENT
03/11/76	06	0564	THIRD READING
03/11/76	07	0565	PASSED BY DIV 36-00-04
03/11/76	08	0565	EFFECTIVE DATE VOTE SAME AS PASSAGE

DATE	SEQ. NO.	JOURNAL PAGE	SENATE ACTION
** 03/12/76	09	0526	FIRST READING -- COMMITTEE REPORTS
			STATE AFF.
			RULES

[redacted] AN ACT RELATING TO PUBLIC MEETINGS

AMENDED TITLE: * AM S

PRIME SPONSORS: PARKER

DATE	SEQ. NO.	JOURNAL PAGE	HOUSE ACTION
02/17/76	01	0345	FIRST READING -- COMMITTEE REPORTS
04/12/76	02	0899	JUD -- DP05, DNP01, NR01
04/16/76	03	0959	SECOND READING
04/16/76	04	0959	AM01 NOT ADOPTED BY DIV 18-19-03
04/16/76	05	0959	ADVANCED TO 3RD READING BY UNAN CONSENT
04/16/76	06	0959	THIRD READING
04/16/76	07	0960	PASSED BY DIV 31-06-03
05/26/76	16	1611	CONCURRED IN SENATE AMS BY VOICE VOTE
05/27/76	17	1668	TRANSMITTED TO GOVERNOR
** 07/02/76	18	1884	SIGNED BY GOVERNOR-CH0189, EFF 09/16/76

DATE	SEQ. NO.	JOURNAL PAGE	SENATE ACTION
04/19/76	08	0846	FIRST READING -- COMMITTEE REPORTS
04/23/76	09	0906	S.A. -- DP02, NR02
05/25/76	10	1363	SECOND READING
05/25/76	11	1363	AM01 ADOPTED BY UNAN CONSENT
05/25/76	12	1364	AM02 ADOPTED BY VOICE VOTE
05/25/76	13	1364	ADVANCED TO 3RD READING BY UNAN CONSENT
05/25/76	14	1364	THIRD READING
05/25/76	15	1364	PASSED BY DIV 16-02-02

HB 832 AN ACT RELATING TO CONSTRUCTION CONTRACTOR EXEMPTION FROM REGULATION BY THE ALASKA TRANSPORTATION COMMISSION

PRIME SPONSORS: PARKER

DATE	SEQ. NO.	JOURNAL PAGE	HOUSE ACTION
** 02/17/76	01	0345	FIRST READING -- COMMITTEE REPORTS
			COMMERCE
			RULES

DATE	SEQ. NO.	JOURNAL PAGE	SENATE ACTION

ATTACHMENT F

Open Meetings Laws of Tennessee and Washington

Compiler's Notes. The provisions formerly contained in § 8-42-107 have been transferred to § 8-42-108.

This section may be affected by § 9-1-116, concerning entitlement to funds, absent appropriation.

8-42-108. Board actions not reviewable. — All decisions and determinations of the board shall be final and shall not be reviewable by any court. [Acts 1973, ch. 128, § 7; T.C.A., §§ 8-4207, 8-42-107; Acts 1984, ch. 972, § 19.]

CHAPTER 44

PUBLIC MEETINGS

SECTION.

PART 1—GENERAL PROVISIONS

8-44-102. Open meetings — "Governing body" defined — "Meeting" defined.

SECTION.

8-44-104. Minutes recorded and open to public — Secret votes prohibited.

8-44-107. Board of directors of performing arts center management corporation.

PART 1—GENERAL PROVISIONS

8-44-101. Policy — Construction.

Compiler's Notes. The application of this section to certain attorney-client discussions has been held unconstitutional. See Notes to Decisions, 1. Constitutionality, Smith County Educ. Ass'n v. Anderson, 676 S.W.2d 328 (Tenn. 1984).

Cross-References. Confidentiality of proceedings under hazardous chemical right to know law, § 50-3-2013.

Section to Section References. This title is referred to in §§ 4-5-204, 4-17-109, 64-5-203.

This chapter is referred to in §§ 2-1-113, 4-5-312, 10-1-102, 38-6-101, 49-5-610, 64-1-308, 64-5-103, 68-52-105.

Law Reviews. Government — Smith County Education Association v. Anderson: An Exception Under the Tennessee Open Meetings Act, 15 Mem. St. U.L. Rev. 116 (1984)

Regulation of Collective Bargaining in Public Employment in Tennessee: The Education Professional Negotiations Act (Patrick Hardin), 47 Tenn. L. Rev. 241.

Remedies other than the Tennessee Uniform Administrative Procedures Act "Contested Case" Approach to Dealing with State and Local Governmental Action (John Beasley), 13 Mem. St. U.L. Rev. 619 (1984).

Attorney General Opinions. Human rights commission meetings and orders, OAG 84-104 (3/26/84).

Applicability of sunshine law to local beer boards, OAG 84-240 (8/9/84)..

Applicability to county councils on aging, senior citizen center boards, and related committees, OAG 84-310 (11/19/84).

Applicability to state board of equalization meetings, OAG 85-105 (4/8/85).

Applicability to utility district commission meetings, OAG 85-161 (5/16/85).

Cited: Board of Educ. v. Memphis Publishing Co., 585 S.W.2d 629 (Tenn. Ct. App. 1979); Olmstead v. Community Action Services of Morgan County, Inc., 494 F. Supp. 699 (E.D. Tenn. 1980).

NOTES TO DECISIONS

ANALYSIS

1. Constitutionality.
3. Coverage.
4. Construction with other acts.
5. Jury trial.

1. Constitutionality.

The Tennessee Public Meetings Act was not unconstitutional as applied to the attorney-client communications, and did not constitute an invalid encroachment upon the inherent power of the judiciary, specifically the Supreme Court of the State of Tennessee, to supervise the practice of law in clear violation of the separation of powers provisions of Tenn. Const., art. II, § 2. Van Kirk v. Board of Mayor & Aldermen, 668 S.W.2d 299 (Tenn. Ct. App. 1983).

The Open Meetings Act, § 8-44-101 et seq. is constitutional. Smith County Educ. Ass'n v. Anderson, 676 S.W.2d 328 (Tenn. 1984).

ction may be affected by § 9-1-116, ng entitlement to funds, absent appro-

— All decisions and determi- ot be reviewable by any court. -107; Acts 1984, ch. 972, § 19.]

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. Minutes recorded and open to public — Secret votes prohibited.
. Board of directors of performing arts center management corporation.

)VISIONS

dies other than the Tennessee Uniform strative Procedures Act "Contested pproach to Dealing with State and Lo- ernmental Action (John Beasley), 13 t. U.L. Rev. 619 (1984).
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cability of sunshine law to local beer OAG 84-240 (8/9/84).
cability to county councils on aging, se- izen center boards, and related commit- AG 84-310 (11/19/84).
cability to state board of equalization gs, OAG 85-105 (4/8/85).
cability to utility district commission gs, OAG 85-161 (5/16/85).
l: Board of Educ. v. Memphis Publish- , 585 S.W.2d 629 (Tenn. Ct. App. 1979); ad v. Community Action Services of County, Inc., 494 F. Supp. 699 (E.D. 1980).

ONS

encroachment upon the inherent power udiciary, specifically the Supreme Court State of Tennessee, to supervise the e of law in clear violation of the separa- powers provisions of Tenn. Const., art. Van Kirk v. Board of Mayor & Alder- 668 S.W.2d 299 (Tenn. Ct. App. 1983). Open Meetings Act, § 8-44-101 et seq. is utional. Smith County Educ. Ass'n v. son, 676 S.W.2d 328 (Tenn. 1984).

The application of the Open Meetings Act to discussions between public bodies and their attorneys regarding pending litigation violates Tenn. Const., art. II, §§ 1, 2. Smith County Educ. Ass'n v. Anderson, 676 S.W.2d 328 (Tenn. 1984).

3. Coverage.

Tennessee law requires tenure hearings to be public. Kendall v. Board of Educ., 627 F.2d 1 (6th Cir. 1980).

Conferences between a public body and its attorney are neither constitutionally nor statutorily exempted from the provisions of the Tennessee Open Meetings Act (§ 8-44-101 et seq.). Van Kirk v. Board of Mayor & Aldermen, 668 S.W.2d 299 (Tenn. Ct. App. 1983).

4. Construction with Other Acts.

The Code of Professional Responsibility as promulgated by the Tennessee Supreme Court is not in material conflict with the provisions of the Tennessee Open Meetings Act; the effect of the Open Meetings Act is the public body, through the legislature, has waived the attorney-client privilege in all meetings within the meaning of the act. Van Kirk v. Board of Mayor & Aldermen, 668 S.W.2d 299 (Tenn. Ct. App. 1983).

Discussions between a public body and its attorney concerning pending litigation are not subject to the Open Meetings Act. Smith County Educ. Ass'n v. Anderson, 676 S.W.2d 328 (Tenn. 1984).

The holding that discussions between a public body and its attorney concerning pending litigation are not subject to the Open Meetings Act is a narrow exception, and applies only when the public body is a named party in the lawsuit. Smith County Educ. Ass'n v. Anderson, 676 S.W.2d 328 (Tenn. 1984).

The attorney-client evidentiary privilege afforded by § 23-3-105 was waived by the passage of the Open Meetings Act, § 8-44-101 et seq. Smith County Educ. Ass'n v. Anderson, 676 S.W.2d 328 (Tenn. 1984).

When discussions between a public body and its attorney are held in private for purposes other than discussing pending litigation, the attorney may violate DR 7-102 (A)(7) and (8) of the Code of Professional Responsibility. Smith County Educ. Ass'n v. Anderson, 676 S.W.2d 328 (Tenn. 1984).

5. Jury Trial.

A party to an action brought under the Education Professional Negotiations Act, (§§ 49-5-601 to 49-5-604) or the Open Meetings Act, (§§ 8-44-101 to 8-44-106) is entitled to a jury trial. Smith County Educ. Ass'n v. Anderson, 676 S.W.2d 328 (Tenn. 1984).

8-44-102. Open meetings — "Governing body" defined — "Meeting" defined. — (a) All meetings of any governing body are declared to be public meetings open to the public at all times, except as provided by the Tennessee Constitution.

(b)(1) "Governing body" means the members of any public body which consists of two (2) or more members, with the authority to make decisions for or recommendations to a public body on policy or administration and also means a community action agency which administers community action programs under the provisions of 42 U.S.C. § 2790. Any governing body so defined by this section shall remain so defined, notwithstanding the fact that such governing body may have designated itself as a negotiation committee for collective bargaining purposes, and strategy sessions of a governing body under such circumstances shall be open to the public at all times.

(2) "Governing body" shall also mean the board of directors of any nonprofit corporation which contracts with a state agency to receive community grant funds in consideration for rendering specified services to the public, provided community grant funds comprise at least thirty percent (30%) of the total annual income of such corporation. Except such meetings of the board of directors of such nonprofit corporation that are called solely to discuss matters involving confidential doctor-patient relationships, personnel matters or matters required to be kept confidential by federal or state law or by federal or state regulation shall not be covered under the provisions of this chapter, and no other matter shall be discussed at such meetings.

(c) "Meeting" means the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter. Meeting does not include any on-site inspection of any project or program.

(d) Nothing in this section shall be construed as to require a chance meeting of two (2) or more members of a public body to be considered a public meeting. No such chance meetings, informal assemblages, or electronic communication shall be used to decide or deliberate public business in circumvention of the spirit or requirements of this part. [Acts 1974 (Adj. S.), ch. 442, § 2; 1979, ch. 411, §§ 1, 2; T.C.A., § 8-44-2; Acts 1985, ch. 290, § 1, 2; 1986, ch. 594, § 1.]

Compiler's Notes. The application of this act to certain attorney-client discussions has been held to be unconstitutional. See Notes to Decisions, 1. Constitutionality, Smith County Educ. Ass'n v. Anderson, 676 S.W.2d 328 (Tenn. 1984).

Amendments. The 1985 amendment added (b)(2) as it existed prior to the 1986 amendment. See the 1986 amendment note.

The 1986 amendment in (b)(2) added "of the board of directors of such nonprofit corporations" in the second sentence.

Effective Dates. Acts 1985, ch. 290, § 3. July 1, 1985.

Acts 1986, ch. 594, § 2. March 24, 1986.

Cross-References. Attendance at meetings by commission on aging, § 4-3-123.

Closed meetings of patient qualifications review board authorized, § 68-52-105.

Elk regional resource authority meetings, § 64-5-104.

Section to Section References. This section is referred to in § 4-3-123.

Attorney General Opinions. Informal discussion among city councilmen, OAG 83-033 (1/24/83).

County hospital committee, OAG 83-039 (1/28/83).

Cited: Curve Elementary School Parent & Teacher's Organization v. Lauderdale County School Bd., 608 S.W.2d 855 (Tenn. Ct. App. 1980).

NOTES TO DECISIONS

ANALYSIS

1. Constitutionality.
2a. Construction with other provisions.
4. Attorney-client conferences.

1. Constitutionality.

The application of the Open Meetings Act to discussions between public bodies and their attorneys regarding pending litigation violates Tenn. Const., art. II, §§ 1, 2. Smith County Educ. Ass'n v. Anderson, 676 S.W.2d 328 (Tenn. 1984).

2a. Construction with Other Provisions.

The Code of Professional Responsibility as promulgated by the Tennessee Supreme Court is not in material conflict with the provisions of the Tennessee Open Meetings Act; the effect of the Open Meetings Act is the public body, through the legislature, has waived the attorney-client privilege in all meetings within the meaning of the act. Van Kirk v. Board of Mayor & Aldermen, 668 S.W.2d 299 (Tenn. Ct. App. 1983).

When discussions between a public body and its attorney are held in private for purposes other than discussing pending litigation, the attorney may violate DR 7-102 (A)(7) and (8) of the Code of Professional Responsibility. Smith County Educ. Ass'n v. Anderson, 676 S.W.2d 328 (Tenn. 1984).

4. Attorney-Client Conferences.

Conferences between a public body and its attorney are neither constitutionally nor statutorily exempted from the provisions of the Tennessee Open Meetings Act (§ 8-44-101 et seq.). Van Kirk v. Board of Mayor & Aldermen, 668 S.W.2d 299 (Tenn. Ct. App. 1983).

Discussions between a public body and its attorney concerning pending litigation are not subject to the Open Meetings Act. Smith County Educ. Ass'n v. Anderson, 676 S.W.2d 328 (Tenn. 1984).

The holding that discussions between a public body and its attorney concerning pending litigation are not subject to the Open Meetings Act is a narrow exception, and applies only when the public body is a named party in the lawsuit. Smith County Educ. Ass'n v. Anderson 676 S.W.2d 328 (Tenn. 1984).

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8-44-103. Notice of public meetings.

Attorney General Opinions. Adequacy of public notice, OAG 83-119 (3/21/83).

8-44-104. Minutes recorded and open to public — Secret votes prohibited. — (a) The minutes of a meeting of any such governmental body shall be promptly and fully recorded, shall be open to public inspection, and shall include but not be limited to a record of persons present, all motions, proposals and resolutions offered, the results of any votes taken, and a record of individual votes in event of roll call.

(b) All votes of any such governmental body shall be by public vote or public ballot or public roll call. No secret votes, or secret ballots, or secret roll calls shall be allowed. As used in this chapter, "public vote" shall mean a vote in which the "aye" faction vocally expresses its will in unison and in which the "nay" faction, subsequently, vocally expresses its will in unison. [Acts 1974 (Adj. S.), ch. 442, § 4; T.C.A., § 8-4404; Acts 1980 (Adj. S.), ch. 800, § 1.]

Cross-References. Confidentiality of proceedings under hazardous chemical right to know law, § 50-3-2013.

Law Reviews. A Review of Contested Case Provisions of the Tennessee Uniform Administrative Procedures Act (William P. Kratzke), 13 Mem. St. U.L. Rev. 551 (1984).

The Pre-Hearing Stage of Contested Cases under the Tennessee Uniform Administrative Procedures Act (L. Harold Levinson), 13 Mem. St. U.L. Rev. 465 (1984).

8-44-105. Action nullified — Exception.

Law Reviews. A Review of Contested Case Provisions of the Tennessee Uniform Administrative Procedures Act (William P. Kratzke), 13 Mem. St. U.L. Rev. 551 (1984).

Cited: Curve Elementary School Parent & Teacher's Organization v. Lauderdale County School Bd., 608 S.W.2d 855 (Tenn. Ct. App. 1980); Smith County Educ. Ass'n v. Anderson, 676 S.W.2d 328 (Tenn. 1984).

8-44-106. Enforcement — Jurisdiction.

Attorney General Opinions. Applicability to committees of general assembly, OAG 83-072 (2/23/83).

Cited: Smith County Educ. Ass'n v. Anderson, 676 S.W.2d 328 (Tenn. 1984).

NOTES TO DECISIONS

ANALYSIS

1. Right to sue.
2. Standing.

1. Right to Sue.

Where lawsuit was brought under the provisions of the Public Meetings Act and the relief sought was as allowed by that statute, the plaintiff's right to sue was determined under the provisions of that enactment, and the court treated averment of complaint that lawsuit was brought under the provisions of the Declaratory Judgments Act as mere surplusage, so that the definition of who may sue under that statute had no bearing. Curve Elementary School Parent & Teacher's Organization v. Lauderdale County School Bd., 608 S.W.2d 855 (Tenn. Ct. App. 1980).

2. Standing.

Based upon allegations of complaint as considered on motion to dismiss for lack of a claim upon which relief can be granted, parent and teacher association had standing to sue in its own name under this section, although defendant school board could during the process of the hearing disprove essential allegations and

prove lack of standing. Curve Elementary School Parent & Teacher's Organization v. Lauderdale County School Bd., 608 S.W.2d 855 (Tenn. Ct. App. 1980).

8-44-107. Board of directors of performing arts center management corporation. — The board of directors of the Tennessee performing arts center management corporation shall be subject to, and shall in all respects comply with, all of the provisions made applicable to governing bodies by this chapter. [Acts 1981, ch. 375, § 1.]

Part 2—Labor Negotiations

8-44-201. Labor negotiations between public employee union and state or local government.

Law Reviews. Regulation of Collective Bargaining in Public Employment in Tennessee: The Education Professional Negotiations Act (Patrick Hardin), 47 Tenn. L. Rev. 241.

Remedies other than the Tennessee Uniform Administrative Procedures Act "Contested Case" Approach to Dealing with State and Local Governmental Action (John Beasley), 13 Mem. St. U.L. Rev. 629 (1984).

CHAPTER 46

IMPEACHMENT

Part 1—General Provisions

8-46-101. Officers liable — Effect of judgment.

Cross-References. Non-specified civil officers may be proceeded against by indictment for misbehavior in office, Tenn. Const., art. 5, § 5.

Power of governor to pardon does not extend to impeachment, Tenn. Const., art. 3, § 6.

8-46-102. Majority of house required.

Cross-References. House of representatives to have sole power of impeachment, Tenn. Const., art. 5, § 1.

8-46-103. Contents of impeachment — Right to counsel.

Cross-References. Impeachments to be prosecuted by members of house of representatives, Tenn. Const., art. 5, § 3.

8-46-105. Jurisdiction of trial.

Cross-References. Judgment, penalty, and relief in impeachment, Tenn. Const., art. 5, § 4.

Reviser's Note: This section was also amended by 1985 c 44 § 8 without cognizance of the repeal thereof.

42.28.080. Repealed by Laws 1973, 1st Ex.Sess., ch. 84, § 1

42.28.090. Fees of notary—Collection of fees by public officers

Notaries public may make but not exceed the following charges for their services:

Protest of a bill of exchange or promissory note, three dollars;

Attesting any instrument of writing with or without stamp, three dollars;

Taking acknowledgment, two persons, with stamp, three dollars;

Taking acknowledgment, each person over two, two dollars;

Certifying affidavit, with or without stamp, three dollars;

Registering protest of bill of exchange or promissory note for nonacceptance or nonpayment, two dollars;

Being present at demand, tender, or deposit, and noting the same, besides mileage at the rate of twenty-five cents per mile, two dollars;

Noting a bill of exchange or promissory note, for nonacceptance or nonpayment, two dollars.

All public officers who are paid a salary in lieu of fees shall collect the prescribed fees for the use of the state or county as the case may be.

Amended by Laws 1975, 1st Ex.Sess., ch. 85, § 4; Laws 1983, ch. 214, § 1; Laws 1985, ch. 44, § 9.

Repeal

This section was repealed by Laws 1985, ch. 156, § 26, eff. Jan. 1, 1986, without cognizance of its amendment by Laws 1985, ch. 44, § 9.

Reviser's Note: This section was also amended by 1985 c 44 § 9 without cognizance of the repeal thereof.

42.28.100 to 42.28.130. Repealed by Laws 1985, ch. 156, § 26, eff. Jan. 1, 1986

CHAPTER 42.30—OPEN PUBLIC MEETINGS ACT

Sec.

Cross References

Criminal justice training commission, rules and regulations to be adopted and administered pursuant to this chapter, see § 43.101.080.

Operating agency contracts, required findings in an open public meeting under this chapter, see § 43.52.505.

Law Review Commentaries

Impact of oper. meeting laws. Michael C. McClintock, 15 Gonzaga L.Rev. 65 (1980).

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42.30.010. Legislative declaration

Notes of Decisions

Chapter 42.32 (see, now, this chapter) was applicable to action of review board provided for by § 35.13.171 in determining desirability of proposed annexation; hence review board was required to give public notice of its meetings and to provide open hearings concerning proposed annexation. Meek v. Thurston County (1962) 60 Wash.2d 461, 374 P.2d 558.

An allegation that officers conducted closed, secret meetings in violation of this chapter, the open meetings statute, implicitly alleges knowingly wrongful conduct. Bocek v. Bayley (1973) 81 Wash.2d 831, 505 P.2d 814.

The purpose of the open public meetings act (this chapter) is to permit the public to observe all steps in the making of governmental decisions. Cathcart v. Andersen (1975) 85 Wash.2d 102, 530 P.2d 313.

Alleged violation of the Open Public Meetings Act (ch. 42.30) by the school board and retention of an incompetent superintendent was insufficient, without more, to establish such misfeasance, malfeasance, or a violation of the oath of office as would justify filing of a recall petition. Cole v. Webster (1984) 103 Wash.2d 280, 692 P.2d 799.

42.30.020. Definitions

As used in this chapter unless the context indicates otherwise:

(1) "Public agency" means:

(a) Any state board, commission, committee, department, educational institution, or other state agency which is created by or pursuant to statute, other than courts and the legislature;

(b) Any county, city, school district, special purpose district, or other municipal corporation or political subdivision of the state of Washington;

(c) Any subagency of a public agency which is created by or pursuant to statute, ordinance, or other legislative act, including but not limited to planning commissions, library or park boards, commissions, and agencies;

(d) Any policy group whose membership includes representatives of publicly owned utilities formed by or pursuant to the laws of this state when meeting together as or on behalf of participants who have contracted for the output of generating plants being planned or built by an operating agency.

(2) "Governing body" means the multimember board, commission, committee, council, or other policy or rule-making body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment.

(3) "Action" means the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions. "Final action" means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.

(4) "Meeting" means meetings at which action is taken.

Amended by Laws 1982, 1st Ex.Sess., ch. 43, § 10, eff. April 20, 1982; Laws 1983, ch. 155, § 1; Laws 1985, ch. 366, § 1.

Severability—Savings—Laws 1982, 1st Ex.Sess., ch. 43: See Historical Note following § 43.52.374.

Notes of Decisions

The term "pursuant to," as used in statutes, does not require an express authorization of an act or event so long as an enabling provision in a statute

implies that such act or event may come into existence at some time after enactment of the statute. Cathcart v. Andersen (1975) 85 Wash.2d 102, 530 P.2d 313.

The School of Law of the University of Washington is a public agency established pursuant to statutory authority. Cathcart v. Andersen (1975) 85 Wash.2d 102, 530 P.2d 313.

Meetings of the faculty of the School of Law of the University of Washington are meetings of the governing body of a public agency and are subject to the provisions of the open public meetings act (this chapter). Cathcart v. Andersen (1975) 85 Wash.2d 102, 530 P.2d 313.

A public agency's governing body, for purposes of the open public meetings act (this chapter), is that body which actually makes the policy and rules of the agency notwithstanding an abstract, rarely exercised, capability of a higher agency to overrule such decisions. Cathcart v. Andersen (1975) 85 Wash.2d 102, 530 P.2d 313.

Any independent examination by state transportation commission of domestic shipbuilder's plans and specifications constituted neither "action" nor "meeting" under Open Public Meetings Act, and thus commission, which took its "action" in awarding ferry construction contract to domestic rather than foreign shipbuilder in open public meeting following presentation by both firms, experts and the public, did not violate the act. Equitable Shipyards, Inc. v. State By and Through Dept. of Transp. (1980) 93 Wash.2d 465, 611 P.2d 396.

"Action" invoking requirements of Open Public Meetings Act of 1971 means transaction of official business of public agency by governing body, and does not automatically occur when majority of members of governing body gather together. Matter of Recall of Estey (1985) 104 Wash.2d 597, 707 P.2d 1338.

42.30.030. Meetings declared open and public

Attorney General's Opinions

The Washington Open Public Meetings Act (this chapter) is applicable to meetings of services and activities fees committees at state institutions of higher education. Op.Atty.Gen.1983, No. 1.

It is not clearly a violation of the Open Public Meeting Act for the board of regents of a state university to consider, and by duly adopted motion, fix the salary of its president in an executive session. Op.Atty.Gen. 1985, No. 4.

Notes of Decisions

Meetings of the faculty of the School of Law of the University of Washington are meetings of the governing body of a public agency and are subject to the provisions of the open public meetings act (this chapter). Cathcart v. Andersen (1975) 85 Wash.2d 102, 530 P.2d 313.

Any independent examination by state transportation commission of domestic shipbuilder's plans and specifications constituted neither "action" nor "meeting" under Open Public Meetings Act, and thus commission, which took its "action" in awarding ferry construction contract to domestic rather than foreign shipbuilder in open public meeting following presentation by both firms, experts and the public, did not violate the act. Equitable Shipyards, Inc. v. State By and Through Dept. of Transp. (1980) 93 Wash.2d 465, 611 P.2d 396.

A "meeting" occurs only when "action" takes place, and does not automatically occur when majority of members of governing body gathered together, for purposes of Open Public Meetings Act of 1971. Matter of Recall of Estey (1985) 104 Wash.2d 597, 707 P.2d 1338.

The Open Public Meetings Act of 1971 is declared to be remedial legislation whose provisions are to be liberally construed (§ 42.30.910) and, accordingly, any exceptions to the act must be narrowly confined. Port Townsend Publishing Co. v. Brown (1977) 18 Wash.App. 80, 567 P.2d 664.

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"Action" invoking requirements of Open Public Meetings Act of 1971 means transaction of official business of public agency by governing body, and does not automatically occur when majority of members of governing body gather together. Matter of Recall of Estey (1985) 104 Wash.2d 597, 707 P.2d 1338.

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The Open Public Meetings Act of 1971 is declared to be remedial legislation whose provisions are to be liberally construed (§ 42.30.910) and, accordingly, any exceptions to the act must be narrowly confined. Port Townsend Publishing Co. v. Brown (1977) 18 Wash.App. 80, 567 P.2d 664.

42.30.060. Ordinances, rules, resolutions, regulations, etc., to be adopted at public meetings—Notice

Cross References

Notice of intent to adopt rules under Administrative Procedure Act, see § 34.04.025.

Attorney General's Opinions

It is not clearly a violation of the Open Public Meeting Act for the board of regents of a state university to consider, and by duly adopted motion, fix the salary of its president in an executive session. Op.Atty.Gen. 1985, No. 4.

Notes of Decisions

Municipal defendants did not violate this section in connection with the termination of the plaintiff's temporary employment as a police officer. Jordan v. City of Oakville (1986) 106 Wash.2d 122, 720 P.2d 824.

A municipal corporation has no duty to give advance notice to persons who may be affected by the enactment of a proposed ordinance except as such a duty is imposed by an overriding provision of its charter, state statute or the constitution. A charter provision requiring "due notice" does not, by itself, require notice in the procedural due process sense. King County v. Olson (1972) 7 Wash.App. 614, 501 P.2d 188.

Where a governing body takes an otherwise proper action later invalidated for procedural reasons only, that body may retrace its steps and remedy the defense by reenactment with the proper formalities. Henry v. Town of Oakville (1981) 30 Wash.App. 240, 633 P.2d 892.

Although bondholder, the farmers home administration of the United States department of agriculture, had to be joined as a party defendant in declaratory judgment action challenging the validity of ordinances authorizing the issuance of municipal bonds and providing for their payment, such action was clearly not a contract action against the federal government, as to which state jurisdiction would be barred under federal statute, 28 U.S.C.A. § 1491, giving the United States court of claims jurisdiction to hear contract actions against the United States. Henry v. Town of Oakville (1981) 30 Wash.App. 240, 633 P.2d 892.

Under the Open Public Meetings Act, the primary requirement for regularly scheduled meetings is that they be open to the public; notice of the agenda is required only for special meetings. Dorsten v. Port of Skagit County (1982) 32 Wash.App. 785, 650 P.2d 220.

Where resolution increasing moorage rates was passed at regularly scheduled meeting of port district, port was not required to provide notice of the agenda of that meeting, and enactment of the resolution increasing rates did not violate the Open Public Meetings Act (§ 42.30.010 et seq.). Dorsten v. Port of Skagit County (1982) 32 Wash.App. 785, 650 P.2d 220.

The appearance of fairness doctrine did not apply to port's decision to raise the moorage charges at its marina, since port's decision was legislative rather than judicial and a public hearing was not required. Dorsten v. Port of Skagit County (1982) 32 Wash.App. 785, 650 P.2d 220.

Under the Open Public Meetings Act, the primary requirement for regularly scheduled meetings is that they be open to the public; notice of the agenda is required only for special meetings. Dorsten v. Port of Skagit County (1982) 32 Wash.App. 785, 650 P.2d 220.

42.30.070. Times and places for meetings—Emergencies—Exception

The governing body of a public agency shall provide the time for holding regular meetings by ordinance, resolution, bylaws, or by whatever other rule is required for the conduct of business by that body. Unless otherwise provided for in the act under which the public agency was formed, meetings of the governing body need not be held within the boundaries of the territory over which the public agency exercises jurisdiction. If at any time any regular meeting falls on a holiday, such regular meeting shall be held on the next business day. If, by reason of fire, flood, earthquake, or other emergency, there is a need for expedited action by a governing body to meet the emergency, the presiding officer of the governing body may

provide for a meeting site other than the regular meeting site and the notice requirements of this chapter shall be suspended during such emergency. It shall not be a violation of the requirements of this chapter for a majority of the members of a governing body to travel together or gather for purposes other than a regular meeting or a special meeting as these terms are used in this chapter: *Provided*, That they take no action as defined in this chapter.

Amended by Laws 1973, ch. 66, § 1; Laws 1983, ch. 165, § 2.

42.30.075. Schedule of regular meetings—Publication in state register—Notice of change—"Regular" meetings defined

State agencies which hold regular meetings shall file with the code reviser a schedule of the time and place of such meetings on or before January of each year for publication in the Washington state register. Notice of any change from such meeting schedule shall be published in the state register for distribution at least twenty days prior to the rescheduled meeting date.

For the purposes of this section "regular" meetings shall mean recurring meetings held in accordance with a periodic schedule declared by statute or rule.

Added by Laws 1977, Ex.Sess., ch. 240, § 12, eff. Jan. 1, 1978.

Effective date—Laws 1977, 1st Ex. Sess., ch. 240: See Historical Note following § 34.08.010.

Severability—Laws 1977, 1st Ex. Sess., ch. 240: See § 34.08.910.

Cross References

Public meeting notices in state register, see § 34.08.020.

Library References

Administrative Law and Procedure ⇐353, 395, 453.

C.J.S. Public Administrative Bodies and Procedure §§ 84, 97, 130.

42.30.080. Special meetings

Attorney General's Opinions

Section 52.12.090, rather than this section, governs the calling of a special meeting of a board of fire protection district commissioners; accordingly, such a meeting may be called "by a majority of the commissioners or by the secretary and chairman of the board". Op.Atty.Gen.1979, L.O. No. 16.

In view of the specific legislative directive in § 42.30.140, it is this section and not § 52.12.090 which governs the calling of a special meeting of the board of fire protection district commissioners; accordingly, such a meeting may be called by the presiding officer of the board or by a majority of the members of the board without any necessity for concurrence by the secretary to the board. Op.Atty.Gen.1979, L.O. No. 18.

Notes of Decisions

An unscheduled meeting of a school board for purposes of acting on a resolution is a special meeting within the Open Public Meetings Act of 1971 (ch. 42.30). Mead School Dist. v. Mead Education Asso. (1975) 85 Wash.2d 140, 530 P.2d 302.

The "emergency" contemplated by this section, which permits convening a special meeting without required notices being given to deal with an emergency situation, must be one involving or threatening sudden, unexpected, and severe physical damage and requiring immediate action. Mead School Dist. v. Mead Education Asso. (1975) 85 Wash.2d 140, 530 P.2d 302.

Section 34.04.025, which contains detailed notice requirements regarding meetings to adopt administrative rules, is not rendered inapplicable by this section, which is a part of the Open Public Meetings Act of 1971 providing notice requirements for special meetings. Hartman v. State Game Com. (1975) 85 Wash.2d 176, 532 P.2d 614.

g site other than the regular meeting site and the of this chapter shall be suspended during such emer- e a violation of the requirements of this chapter for a ers of a governing body to travel together or gather han a regular meeting or a special meeting as these his chapter: *Provided*, That they take no action as er.

, ch. 66, § 1; Laws 1983, ch. 155, § 2.

of regular meetings—Publication in state register—of change—"Regular" meetings defined

ich hold regular meetings shall file with the code f the time and place of such meetings on or before r for publication in the Washington state register. from such meeting schedule shall be published in the ribution at least twenty days prior to the rescheduled

? this section "regular" meetings shall mean recurring rdance with a periodic schedule declared by statute or

Ex.Sess., ch. 240, § 12, eff. Jan. 1, 1978.

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Administrative Law and Procedure ⇐353, 395, 453.

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Fire chief did not have standing to raise issue whether fire protection district violated Open Public Meetings Act of 1971, § 42.30.010 et seq., by filing to give one of the district commissioners notice of the special meeting at which the fire chief was dismissed; only the aggrieved commissioner could raise such issue. Kirk v. Pierce County Fire Protection Dist. No. 21 (1981) 95 Wash.2d 769, 630 P.2d 930.

Fire protection district did not violate Open Public Meetings Act of 1971, § 42.30.010 et seq., by not giving notice to the print and broadcast media of the special meeting at which fire chief was dismissed, where none of the media had filed the request required under this section for such notice. Kirk v. Pierce County Fire Protection Dist. No. 21 (1981) 95 Wash.2d 769, 630 P.2d 930.

Recall charge that school meeting not regularly scheduled violated Open Public Meetings Act of 1971 was legally insufficient, and therefore, could not constitute grounds for recall, since written notice for special meetings need be given only to each board member and to local media with request on file, where petition characterized meeting as "special meeting" and there was no allegation that its local media had requested notification of special meetings. Matter of Recall of Estey (1985) 104 Wash.2d 597, 707 P.2d 1338.

42.30.110. Executive sessions

(1) Nothing contained in this chapter may be construed to prevent a governing body from holding an executive session during a regular or special meeting:

(a) To consider matters affecting national security;

(b) To consider the selection of a site or the acquisition of real estate by lease or purchase when public knowledge regarding such consideration would cause a likelihood of increased price;

(c) To consider the minimum price at which real estate will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price. However, final action selling or leasing public property shall be taken in a meeting open to the public;

(d) To review negotiations on the performance of publicly bid contracts when public knowledge regarding such consideration would cause a likelihood of increased costs;

(e) To consider, in the case of an export trading company, financial and commercial information supplied by private persons to the export trading company;

(f) To receive and evaluate complaints or charges brought against a public officer or employee. However, upon the request of such officer or employee, a public hearing or a meeting open to the public shall be conducted upon such complaint or charge;

(g) To evaluate the qualifications of an applicant for public employment or to review the performance of a public employee. However, subject to RCW 42.30.140(4), discussion by a governing body of salaries, wages, and other conditions of employment to be generally applied within the agency shall occur in a meeting open to the public, and when a governing body elects to take final action hiring, setting the salary of an individual employee or class of employees, or discharging or disciplining an employee, that action shall be taken in a meeting open to the public;

(h) To evaluate the qualifications of a candidate for appointment to elective office. However, any interview of such candidate and final action appointing a candidate to elective office shall be in a meeting open to the public;

(i) To discuss with legal counsel representing the agency matters relating to agency enforcement actions, or to discuss with legal counsel repre-

senting the agency litigation or potential litigation to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party, when public knowledge regarding the discussion is likely to result in an adverse legal or financial consequence to the agency.

(2) Before convening in executive session, the presiding officer of a governing body shall publicly announce the purpose for excluding the public from the meeting place, and the time when the executive session will be concluded. The executive session may be extended to a stated later time by announcement of the presiding officer.

Amended by Laws 1973, ch. 66, § 2; Laws 1979, ch. 42, § 1, eff. June 7, 1979; Laws 1983, ch. 155, § 3; Laws 1985, ch. 366, § 2; Laws 1986, ch. 276, § 8.

Severability—Laws 1986, ch. 276: See § 53.31.901.

Cross References

Open Public Meetings Act, see ch. 42.30.

Law Review Commentaries

Impact of open meeting laws. Michael C. McClintock, 15 Gonzaga L.Rev. 65 (1980).

Attorney General's Opinions

It is not clearly a violation of the Open Public Meetings Act for the board of regents of a state university to consider, and by duly adopted motion, fix the salary of its president in an executive session. Op.Atty.Gen. 1985, No. 4.

Notes of Decisions

A public agency's meeting to consider the amount of compensation to be offered for condemned property falls within the provision of this section which permits certain deliberations relating to acquisition of property to be held in executive session. Such exception to the requirement of a public meeting is grounded upon the attorney-client relationship which may exist between a public agency and its lawyers whenever the ordinary elements of an attorney-client relationship are present. Port of Seattle v. Rio (1977) 16 Wash.App. 718, 559 P.2d 18.

A public body's discussion regarding the availability of funds and the advisability of retaining or hiring specific employees, without mentioning them by name, is a matter "affecting" the appointment or employment of a public employee within the meaning of this section, which excepts such discussions from the requirement of an open public meeting. Port Townsend Publishing Co. v. Brown (1977) 18 Wash.App. 80, 567 P.2d 664.

Court of appeals would not consider city's argument that nondisclosure of police officers' statements detailing complaints about police chief was consistent with Open Public Meetings Act (§ 42.30.010 et seq.) which permits public body to go into closed, executive session to consider personal matters and complaints about public officer or employee, where argument was not presented to trial court. Columbian Pub. Co. v. City of Vancouver (1983) 36 Wash.App. 25, 671 P.2d 280.

42.30.120. Violations—Personal liability—Penalty—Attorney fees and costs

(1) Each member of the governing body who attends a meeting of such governing body where action is taken in violation of any provision of this chapter applicable to him, with knowledge of the fact that the meeting is in violation thereof, shall be subject to personal liability in the form of a civil penalty in the amount of one hundred dollars. The civil penalty shall be assessed by a judge of the superior court and an action to enforce this penalty may be brought by any person. A violation of this chapter does not constitute a crime and assessment of the civil penalty by a judge shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.

(2) Any person who prevails against a public agency in any action in the courts for a violation of this chapter shall be awarded all costs, including

ation or potential litigation to which the agency, the ember acting in an official capacity is, or is likely to public knowledge regarding the discussion is likely se legal or financial consequence to the agency.

; in executive session, the presiding officer of a publicly announce the purpose for excluding the g place, and the time when the executive session will ecutive session may be extended to a stated later of the presiding officer.

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Court of appeals would not consider city's argument that nondisclosure of police officers' statements detailing complaints about police chief was consistent with Open Public Meetings Act (§ 42.30.010 et seq.) which permits public body to go into closed, executive session to consider personal matters and complaints about public officer or employee, where argument was not presented to trial court. Columbian Pub. Co. v. City of Vancouver (1983) 36 Wash.App. 25, 671 P.2d 280.

reasonable attorney fees, incurred in connection with such legal action. Pursuant to RCW 4.84.185, any public agency who prevails in any action in the courts for a violation of this chapter may be awarded reasonable expenses and attorney fees upon final judgment and written findings by the trial judge that the action was frivolous and advanced without reasonable cause.

Amended by Laws 1973, ch. 66, § 3; Laws 1985, ch. 69, § 1.

Notes of Decisions

Fire chief did not have standing to raise issue whether fire protection district violated Open Public Meetings Act of 1971, § 42.30.010 et seq., by failing to give one the district commissioners notice of the special meeting at which the fire chief was dismissed; only the aggrieved commissioner could raise such issue. Kirk v. Pierce County Fire Protection Dist. No. 21 (1981) 95 Wash.2d 769, 630 P.2d 930.

42.30.130. Violations—Mandamus or injunction

Notes of Decisions

Whether laches will apply to bar an action for mandamus depends upon the particular facts of each case including any justification for delay and the effect of the remedy requested. The fact that the suit is brought in the public interest is just one of the factors to be balanced against the potential harm caused by delay in bringing the suit (overruling State ex rel. Mason v. Board of County Comm'rs, 146 Wash. 449, insofar as it is inconsistent). Lopp v. Peninsula School Dist. (1978) 90 Wash.2d 754, 585 P.2d 801.

The remedies of injunction and mandamus, which are authorized by this section to prevent violations of the open public meetings act, are both subject to the doctrine of laches. Lopp v. Peninsula School Dist.(1978) 90 Wash.2d 754, 585 P.2d 801.

Fire chief did not have standing to raise issue whether fire protection district violated Open Public Meetings Act of 1971, § 42.30.010 et seq., by failing to give one of the district commissioners notice of the special meeting at which the fire chief was dismissed; only the aggrieved commissioner could raise such issue. Kirk v. Pierce County Fire Protection Dist. No. 21 (1981) 95 Wash.2d 769, 630 P.2d 930.

42.30.140. Chapter controlling—Application

If any provision of this chapter conflicts with the provisions of any other statute, the provisions of this chapter shall control: *Provided*, That this chapter shall not apply to:

(1) The proceedings concerned with the formal issuance of an order granting, suspending, revoking, or denying any license, permit, or certificate to engage in any business, occupation or profession or to any disciplinary proceedings involving a member of such business, occupation or profession, or to receive a license for a sports activity or to operate any mechanical device or motor vehicle where a license or registration is necessary; or

(2) That portion of a meeting of a quasi-judicial body which relates to a quasi-judicial matter between named parties as distinguished from a matter having general effect on the public or on a class or group: or

(3) Matters governed by Title 34 RCW, the administrative procedure act, except as expressly provided in RCW 34.04.025; or

(4) That portion of a meeting during which the governing body is planning or adopting the strategy or position to be taken by such governing body during the course of any collective bargaining, professional negotiations, grievance or mediation proceedings, or reviewing the proposals made in such negotiations or proceedings while in progress.

Amended by Laws 1973, ch. 66, § 4.

Attorney General's Opinions

In view of the specific legislative directive in this section, it is § 42.30.080 and not § 52.12.090 which governs the calling of a special meeting of the board of fire protection district commissioners; accordingly, such a meeting may be called by the presiding officer of the board or by a majority of the members of the board without any necessity for concurrence by the secretary to the board. Op.Atty.Gen.1979, L.O. No. 18.

Notes of Decisions

School directors determining whether to renew a teacher's contract are performing a quasi-judicial function and therefore are exempt from the requirements of public access of ch. 42.30, the open public meetings statute. Pierce v. Lake Stevens School Dist. (1974) 84 Wash.2d 772, 529 P.2d 810.

42.30.200. Governing body of recognized student association at college or university—Chapter applicability to

The multimember student board which is the governing body of the recognized student association at a given campus of a public institution of higher education is hereby declared to be subject to the provisions of the open public meetings act as contained in this chapter, as now or hereafter amended. For the purposes of this section, "recognized student association" shall mean any body at any of the state's colleges and universities which selects officers through a process approved by the student body and which represents the interests of students. Any such body so selected shall be recognized by and registered with the respective boards of trustees and regents of the state's colleges and universities: *Provided*, That there be no more than one such association representing undergraduate students, no more than one such association representing graduate students, and no more than one such association representing each group of professional students so recognized and registered at any of the state's colleges or universities.

Added by Laws 1980, ch. 49, § 1.

42.30.920. Severability—1971 1st ex.s. c 250

Notes of Decisions

The Open Public Meetings Act of 1971 is remedial legislation; its provisions are to be liberally construed, and its exceptions are to be strictly construed. Mead School Dist. v. Mead Education Asso. (1975) 85 Wash.2d 140, 530 P.2d 302.

CHAPTER 42.32—MEETINGS

Cross References

Open Public Meetings Act, see ch. 42.30.

State residential schools, per capita cost of care to be adopted as a rule in accordance with this chapter, see § 72.33.660.

CHAPTER 42.36—APPEARANCE OF FAIRNESS DOCTRINE—LIMITATIONS

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42.36.010. Application

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Library References

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ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

P.O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3100
(907) 465-3991

March 23, 1987

MEMORANDUM

TO: Representative Fran Ulmer

FROM: Ginny Fay
Legislative Analyst

RE: Alaska State Open Meetings Act
Research Request 87.162

You requested information regarding enforcement and penalty provisions of state open meeting laws and public meeting notification requirements. You had a number of specific questions on open meeting laws. This memorandum lists each question with the pertinent information immediately following.

1. Do some states penalize violators in addition to voiding the action taken? Which states have penalties and are penalties mandatory or discretionary? Who has standing to enforce the law? What are the legal mechanisms for enforcement of these laws? Are court costs and attorney fees available to the prevailing party?

Tables 1 and 2 provide information regarding action voidableness, penalties for violations, citizen standing, and attorney fees. Action taken in illegal meetings are voided or considered invalid or not binding in 43 (86 percent) states and the District of Columbia. Also, in 43 states and the District of Columbia, citizens have standing to sue and enforce the law (Table 1). The states of Iowa, Kansas, Missouri and Oregon explicitly place the burden of proof on the alleged violators; Maryland explicitly places the burden on the plaintiff. In 37 states, legal recourse to halt secrecy is available through injunctions or writs of mandamus (Table 2).

TABLE 1
VIOLATION AND PENALTY PROVISIONS OF STATE OPEN MEETING LAWS

STATE	VOIDABLE*	CITIZEN STANDING	ATTORNEY FEES	SANCTIONS
ALABAMA		Y		Misdemeanor, not more than $500
ALASKA	Y	Y		None
ARIZONA	Y	Y	Y	Misdemeanor, not more than $100 and/or 30 days
ARKANSAS	I	Y		Misdemeanor, not more than $200 and/or 30 days
CALIFORNIA		Y	Y	Misdemeanor, for Section 54950
COLORADO	I	Y		None
CONNECTICUT	Y	Y	Y	Civil fine, not less than $20 or more than $1,000
DELAWARE	NB	Y		None
DIST. COLUMBIA	Y	Y		None
FLORIDA	NB	Y	Y	Misdemeanor, not more than $500 and/or 6 months
GEORGIA	NB	Y		Misdemeanor, not more than $100
HAWAII	Y		Y	Misdemeanor, remove from office
IDAHO	Y			None
ILLINOIS	Y	Y	Y	Misdemeanor, fine for judicial relief
INDIANA	Y	Y	Y	Misdemeanor, not more than $500 plus 30 days
IOWA	Y	Y	Y	Civil fine, not less than $100 or more than $500
KANSAS	NB	a		Misdemeanor, not more than $500
KENTUCKY	NB	Y		Misdemeanor, not more than $100 or imprisonment
LOUISIANA	NB	Y		Misdemeanor, not more than $1,000 or 7 days
MAINE	Y	Y		Not more than $500 or one year
MARYLAND	Y	Y	Y	Misdemeanor, not more than $1,000
MASSACHUSETTS	Y	b		None
MICHIGAN	Y	Y	Y	Misdemeanor, up to $1,000 1st off., $2,000 or 1 yr. 2nd off.
MINNESOTA		Y		Civil penalty not more then $100
MISSISSIPPI		Y		None
MISSOURI	Y	Y		Civil fine, $100
MONTANA	Y		Y	Offense of civil misconduct
NEBRASKA	Y	Y	Y	Misdemeanor, not more then $50
NEVADA	Y	Y		Misdemeanor
NEW HAMPSHIRE	Y	Y	Y	None
NEW JERSEY	Y	Y		Fine, $100-$500
NEW MEXICO	I	c		Misdemeanor, not more than $100
NEW YORK	Y	Y	Y	Pay legal fees and costs
NORTH CAROLINA	Y	Y	Y	None
NORTH DAKOTA	Y	Y		"Guilty of infraction on first offense"
OHIO	I	Y		Remove from office
OKLAHOMA	I			Misdemeanor, not more than $500 or one year
OREGON	Y	Y	Y	Liable for attorney fees
PENNSYLVANIA	Y	Y	Y	Fine up to $100
RHODE ISLAND	Y	Y		Civil fine up to $1,000
SOUTH CAROLINA		Y	Y	Misdemeanor, $100-$300 or 30 to 90 days
SOUTH DAKOTA				Misdemeanor
TENNESSEE	Y	Y		Court may "impose penalties"
TEXAS		Y		Misdemeanor, not more than $500 and/or 6 months
UTAH	Y	Y		Misdemeanor
VERMONT	Y			Misdemeanor, not more than $500
VIRGINIA	NB	Y	Y	Civil penalty, $25-$500
WASHINGTON	Y	Y		Civil penalty of $100
WEST VIRGINIA	Y	Y		Misdemeanor, $100-$500 and/or up to 10 days
WISCONSIN	Y	Y	Y	Fine up to $300
WYOMING	Y			None
TOTAL	44	44	20	39

* Y=yes, I=invalid, NB=not binding
a=must petition district court, b=three or more voters, c=five citizens

Source: Council of State Governments 1983, Freedom of Information Center, and state open meeting statutes.

Prepared by the House Research Agency, March 1987 (OPLAW; 861217-10).

TABLE 2

Summary of Open-Meeting Laws--Part I This Study

State	Includes statement of public policy	Provides for open legislature	Provides for open legislative committees	Opens state agencies	Opens county local agencies	Opens county board	Opens city councils	Forbids closed executive sessions	Exceptions[a] and/or reasons for executive session	Legal recourse to halt secrecy	Actions in meetings in violation void	Provides penalties for violation	Score
	1	2	3	4	5	6	7	8		9	10	11	
Alabama				y	y	y	y		+[a]			y	5
Alaska	y	y	y	y	y	y	y		x		y		8
Arizona	y	y	y	y	y	y	y		x	y	y	y	10
Arkansas	y			y	y	y	y		+		y	y	6
California	y	y	y	y	y	y	y		-	y		y	9
Colorado	y	y	y	y	y	y	y		+[a]	y	y		9
Connecticut		y	y	y	y	y	y		+	y	y	y	6
Delaware		y	y	y	y	y	y		-	y	y	y	9
Florida		y	y	y	y	y	y	y	+	y	y	y	9
Georgia				y	y	y	y		x		y	y	6
Hawaii	y			y	y	y	y		-	y	y	y	8
Idaho	y		y	y	y	y	y		x		y		7
Illinois	y			y	y	y	y		-	y	y	y	8
Indiana	y			y	y	y	y		-	y	y		7
Iowa	y			y	y	y	y		-	y	y	y	8
Kansas	y	y	y	y	y	y	y		x	y	y	y	10
Kentucky			y	y	y	y	y		-	y	y	y[b]	8
Louisiana	y	y	y	y	y	y	y		x[a]	y	y	y	9
Maine	y	y	y	y	y	y	y		x		y	y	9
Maryland	y	y	y	y	y	y	y		-	y	y	y	10
Massachusetts				y	y	y	y		x	y	y		6
Michigan		y	y	y	y	y	y		-	y	y	y	9
Minnesota				y	y	y	y		+			y	5
Mississippi	y		y	y	y	y	y		-	y			7
Missouri		y	y	y	y	y	y		x	y	y	y	9
Montana	y	y	y	y	y	y	y		+		y		8
Nebraska	y			y	y	y	y		x	y	y	y	8
Nevada	y			y	y	y	y		+	y	y	y	8
New Hampshire	y	y	y	y	y	y	y		x	y	y		8
New Jersey	y	y	y	y	y	y	y		x	y	y	y	10
New Mexico		y	y	y	y	y	y		x	y	y	y	9
New York	y	y	y	y	y	y	y		x	y	y		9
North Carolina	y	y	y	y	y	y	y		-	y	y	y	9
North Dakota		y	y	y	y	y	y	†	+[a]		y	y	7
Ohio				y	y	y	y		-	y	y	y	7
Oklahoma	y			y	y	y	y		+		y	y	7
Oregon	y	y	y	y	y	y	y		-	y	y	y[c]	10
Pennsylvania		y	y	y	y	y	y		+	y	y	y	9
Rhode Island	y		y	y	y	y	y		x	y	y	y	8
South Carolina		y	y	y	y	y	y		x[a]	y		y[b]	8
South Dakota				y	y	y	y		+			y	5
Tennessee	y	y	y	y	y	y	y	y	+	y	y	y	11
Texas		y	y	y	y	y	y		-	y		y	8
Utah	y	y	y	y	y	y	y		+	y	y		9
Vermont	y			y	y	y	y		x		y	y	7
Virginia	y	y	y	y	y	y	y		-	y	y	y	10
Washington	y			y	y	y	y		x	y	y	y	8
West Virginia	y	y	y	y	y	y	y		-	y	y	y	10
Wisconsin	y	y	y	y	y	y	y		x	y	y	y[b]	10
Wyoming	y			y	y	y	y		-		y		6
Totals	33	29	33	50	50	50	50	2	+=14 x=19 -=17	37	43	40	417
Percent	66%	58%	66%	100%	100%	100%	100%	4%	+=28% x=38% -=34%	74%	86%	80%	75.5%

Total average percent for all categories: 75.8%. Total average percent for categories 1-8: 74.3%. Total average percent for categories 9-11: 80.0%.

†North Dakota statute forbids executive session "unless otherwise prohibited by law." Florida and Tennessee statutes prohibit executive session "except as otherwise provided in the Constitution."

*This adjunct category indicates stated exceptions and/or reasons allowed for closed session. + indicates five or fewer; x, six to ten; -, more than ten.

[a]Denotes an encompassing phrase. For example, Alabama's law provides for executive session "When the character or good name of a woman or man is involved." (Ala. Code tit. 13-1-14-2). Phrases such as this one could be used to allow any number of subjects to be discussed in executive session.

[b]Indicates laws which permit the court to grant equitable relief.

[c]Indicates the only penalty is for smoking in open meeting.

Source: Sharon Hartin Iorio, "How State Open Meeting Laws Now Compare with Those of 1974," Journalism Quarterly, Winter 1985, Vol. 62 #4, pp. 741-749 and state open meeting statutes.

Thirty-nine states penalize violators in addition to voiding actions taken. Eight of these are civil penalties, 24 are criminal misdemeanors, four define the penalties as fines, Ohio removes violators from office, and two states penalize violators through the payment of attorney and court fees. In total, 20 state statutes explicitly contain provisions for the payment of attorney fees and costs to the prevailing party (Table 1). Most of these provisions provide for the payment of attorney fees to the plaintiff if indeed a violation of the an open meeting law occurred; some require payment of legal fees by the plaintiff if the accusation was "frivolous" (see North Carolina, Attachment A). In addition to Ohio, the states of Arizona, Iowa, and Minnesota provide for the removal of violators from office. Penalties in most of the 39 states are discretionary though some states do set mandatory penalties (see for example, Alabama's statute in Attachment A). A number of state statutes specifically identify legal procedures in response to alleged violations (see Rhode Island and Tennessee statutes, Attachment A). Attachment A contains penalty and enforcement provisions of 33 state statutes.

2. Have any states developed "manuals" summarizing their Open Meetings Act which includes a summary of case law, applicability, and what constitutes a violation?

The states of Arizona, Florida, Minnesota, Missouri, Nevada, New York, Utah, and Washington have manuals (Attachment B).[1] Washington's manual is actually an extensive attorney general's opinion. The manuals in most states are developed by the state's attorney general's office unless the state has a special open meetings commission (such as New York). Conversations with Susan Cox, of the Alaska Attoney General's Office, and attorney general offices in other states indicate that the writing of a manual for a broad law, such as Alaska's, is difficult because it requires the subjective judgment of how a court is likely to interpret the law.

3. Have Open Meeting Acts been applied differently to local legislative bodies acting in a quasi-judicial or administrative capacity as opposed to its usual legislative manner?

None of the three branches of government (executive, legislative, and judicial) is granted a blanket exemption from state open meeting laws. The judiciary is generally excluded, but not wher it acts in an administrative or rule-making capacity. Quasi-judicial bodies have become a subject of contention in most states; the issue is whether they are judicial or administrative bodies. Application of open meeting laws to any one of the three

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[1]This, however, is not an exhaustive list but the numbers are examples from geographically and legally varying states.

branches of government often depends on how the separation of powers doctrine is interpreted. Consequently, there are a variety of interpretations concerning the relationship between open meeting laws and quasi-judicial bodies.[2]

Open meeting laws are applicable to local legislative bodies in all 50 states (Table 2). Administrative bodies and actions are the most consistently covered by open meeting laws throughout the states. In addition, the Alaska Open Meeting Act explicitly applies to administrative bodies (AS 44.62.310, Attachment C). This suggests that a local legislative body performing an administrative function would be covered by the Alaska Open Meeting Act.

In contrast, applicability of a local legislative body acting in a quasi-judicial manner is not quite as clear. The Alaska Open Meeting Act states that it does not apply to "judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding." This indicates that these bodies are not given a blanket exemption from the law, but instead their **deliberative process** is not covered. It appears that it is much less common for local legislative bodies to act in quasi-judicial capacities in other states; there is very little case law directly applicable to Alaska. Conversations with attorneys at the National Association of Attorneys General indicate that appeals of executive branch decisions such as zoning commissions and planning boards are generally elevated to the judiciary rather than having the local legislative body act as an intermediate quasi-judicial body. Because open meeting laws apply to local legislative bodies, the question is whether an exception should be made when the local body is acting in a quasi-judicial manner.

The Alaska Open Meeting Act does not explicitly define a "public body" or give any indication that the act should apply differently to the different branches of government. In general, a court does not fit the definition of a "public body" as defined by other states' statutes, but quasi-judicial bodies often do. Therefore, the coverage of quasi-judicial bodies and functions differ from state to state, because some states view their function as more administrative than judicial.[3] Case law in Arizona, Florida, and Utah sets a precedent for not excluding quasi-judicial bodies or functions. In Canney v. Board of Public Instruction of Alachua County, the Supreme Court of Florida ruled that while judicial proceedings were clearly outside the reach of the Sunshine Law, a board exercising quasi-judicial functions was not part of the judicial branch. The court emphasized the fact that the characterization by a school board of a decision-making process as "quasi-judicial" did not make the body a judicial body.

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[2]The National Association of Attorneys General, 1979, "Open Meetings: Types of Bodies Covered, North Carolina," June, p. 47.

[3]Ibid., p. 58.

The Utah Open and Public Meeting Act Manual (see Attachment B) covers the applicability of the act to courts and administrative agencies acting in a quasi-judicial capacity. The Utah manual states that inasmuch as the judiciary is not included within the definition of "public body" in the Utah statute, and the Utah Constitution precludes legislative interference in judicial functions, the Utah Attorney General concluded that the act did not apply in the deliberation of cases before the Public Service Commission. The deliberation phase of any hearing takes place when the hearing officers retire privately to weigh the evidence and credibility of witnesses and issue a decision similar to a jury deciding a case. All other portions of the hearing are open to the public, except the deliberative phase.[4]

This Attorney General opinion was challenged in the Salt Lake County District Court (Civil Case No. 245616) where the plaintiffs sought a judgment declaring that the deliberation process should also be subject to the Open Meeting Act. The district court entered judgment that the act applies to and governs meetings of the Utah Public Utilities Commission when that public body deliberates, votes upon, establishes or otherwise evaluates existing or proposed public utility rates, tolls, charges, rentals or classifications. This decision was appealed to the Supreme Court of Utah, which reversed the lower court decision and held that the public service commission meeting should be open to the public during its "information obtaining" activities, but not during its "decision making" or judicial phase of those activities, thus sustaining the attorney general's foregoing opinion.[5]

Arizona amended its Freedom of Information Act to limit its exception for "any judicial proceeding" to exempt only "judicial proceedings of any court." This was done after the Arizona Supreme Court's decision in Arizona Press Club, Inc. v. Arizona Board of Tax Appeals, which allowed a public body acting in a quasi-judicial manner to be exempt from the law. The Arizona law now explicitly includes any quasi-judicial body of the state.

In addition, the state of Minnesota open meeting law does not apply to any state agency, board, or commission when exercising quasi-judicial functions involving disciplinary proceedings. This exemption is part of a fairly common exclusion of meetings involving the character and personal reputation of individuals. The New York statute exempts judicial and quasi-judicial proceedings, except proceedings of the public service commission and zoning board of appeals because these are public interest proceedings.

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[4]Utah Attorney General Opinion No. 77-020, August 15, 1977.

[5]Common Cause of Utah v. Utah Public Service Commission, 598 P. 2d 1312 (Utah, 1979).

4. Do municipal code of ethics address open meeting laws and if so how do these codes and open meeting acts interrelate?

The book Codes of Professional Responsibility (edited by Rena A. Gorlin, Washington: BNA, 1986) contains codes of ethics for federal officials, including members of Congress. There is no mention of open meetings. Conversations with the Freedom of Information Center and other information agencies indicate that open meeting laws are not covered in codes of ethics because these laws are more of a legal than ethical consideration.

You also asked generally about open meeting case law. Attached (Attachment D) is the most recent compilation and discussion of open meeting case law.[6]

In regard to public meeting notice requirements, Attachment E is a memorandum done by this agency in November 1986 on this topic.

I hope this information is useful; please do not hesitate to contact this agency if you have additional questions.

Attachments

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[6]If you would like more recent or additional case law, Legal Services can compile this information using the West Law computer which costs $100 per hour of computer time.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

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November 19, 1987

MEMORANDUM

TO: Representative Kay Brown

FROM: Karla Hart KH
Legislative Analyst

RE: **Other States' Constitutional Provisions for Open Meetings**
Research Request 88.061

You requested this agency to gather language from other state constitutions which provides for open meetings. You expressed a particular interest in provisions for the closure of certain types of meetings, while providing that, in general, meetings are to be open.

Following is a list of the open meeting provisions in the constitutions of 37 states; I was unable to locate provisions in those of the remaining 13 states.[1] I have copied the statutory language verbatim, emphasizing in bold the provisions for closed meetings. Of the 37 states, only six do not make any such provisions for closed meetings under certain circumstances.

ALABAMA. Article 4, Section 57.

> The doors of each house shall be opened except on such occasions as, in the opinion of the house, may require secrecy, but no person shall be admitted to the floor of either house while the same is in session, except members of the legislature, the officers and employes of the two houses, the governor and his secretary, representatives of the press, and other persons to whom either house, by unanimous vote, may extend the privileges of its floor.

ARKANSAS. Article 5, Section 13.

> Sessions to be open.--The sessions of each house and of committees of the whole shall be open, unless when the business is such as ought to be kept secret.

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[1]The states without constitutional provisions for open meetings are: Alaska, Arizona, Kansas, Kentucky, Louisiana, Maine, Massachusetts, New Jersey, North Carolina, Oklahoma, Rhode Island, Virginia and West Virginia.

CALIFORNIA. Article 4, Section 7(c).
The proceedings of each house and the committees thereof shall be public except as provided by statute or by concurrent resolution, when such resolution is adopted by a two-thirds vote of the members of each house, provided, that if there is a conflict between such a statute and concurrent resolution, the last adopted shall prevail.

COLORADO. Article 5, Section 14.
Open Sessions. The sessions of each house, and of the committees of the whole, shall be open, unless when the business is such as ought to be kept secret.

CONNECTICUT. Article 3, Section 16.
Debates to be public. The debates of each house shall be public, except on such occasions as in the opinion of the house may require secrecy.

DELAWARE. Article 2, Section 11.
Accessibility to each House and Committees of the Whole. The doors of each House, and Committees of the Whole, shall be open unless when the business is such as ought to be kept secret.

FLORIDA. Article 3, Section 4(b).
Sessions of each house shall be public; except sessions of the senate when considering appointment to or removal from public office may be closed.

GEORGIA. Article 3, Section 4, Paragraph 11.
Open Meetings. The sessions of the General Assembly and all standing committee meetings thereof shall be open to the public. Either house may by rule provide for exceptions to this requirement.

HAWAII. Article 3, Section 12, Paragraph 4.
Every meeting of a committee in either house or of a committee comprised of a member or members from both houses held for the purpose of making decision on matters referred to the committee shall be open to the public.

IDAHO. Article 3, Section 12.
Secret sessions prohibited.--The business of each house, and of the committee of the whole shall be transacted openly and not in secret session.

ILLINOIS. Article 4, Section 5(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.

INDIANA. Article 4, Section 13.

Doors to be open.--The doors of each House, and of Committees of the Whole, shall be kept open, except in such cases, as, in the opinion of either House, may require secrecy.

IOWA. Article 3, Section 13.

Doors open. The doors of each house shall be open, except on such occasions, as, in the opinion of the house, may require secrecy.

MARYLAND. Article 3, Section 21.

Doors to be kept open. The doors of each House, and of the Committee of the Whole, shall be open, except when the business is such as ought to be kept secret.

MICHIGAN. Article 4, Section 20.

Open meetings. The doors of each house shall be open unless the public security otherwise requires.

Convention Comment: This is a revision...declaring that meetings of the legislature shall be open unless public "security" otherwise requires. The new word replaces "welfare" and is more descriptive of a situation which might require secrecy.

MINNESOTA. Article 4, Section 14.

Open sessions. Each house shall be open to the public during its sessions except in cases which in its opinion require secrecy.

MISSISSIPPI. Article 4, Section 58.

The doors of each house, when in session, or in committee of the whole, shall be kept open, except in cases which may require secrecy; and each house may punish, by fine and imprisonment, any person not a member who shall be guilty of disrespect to the house by any disorderly or contemptuous behavior in its presence, or who shall in any way disturb its deliberations during the session; but such imprisonment shall not extend beyond the final adjournment of that session.

MISSOURI. Article 3, Section 20.

Regular sessions of assembly--quorum--compulsary attendance--public sessions--limitation on power to adjourn. ...The sessions of each house shall be held with open doors, except in cases which may require secrecy but not including the final vote on bills, resolutions and confirmations...

MONTANA. Article 5, Section 11, Paragraph 3.
The sessions of the legislature and of the committee of the whole, all committee meetings, and all hearings shall be open to the public.

NEBRASKA. Article 3, Section 11.
The Legislature shall keep a journal of its proceedings and publish them (except such parts as may require secrecy) and the yeas and nays of the members on any question, shall at the desire of any one of them be entered on the journal. All votes shall be viva voce. The doors of the Legislature and of the Committees of the Whole, shall be open, unless when the business shall be such as ought to be kept secret.

NEVADA. Article 4, Section 15.
Open sessions: adjournment for more than 3 days. The doors of each House shall be kept open during its session, except the Senate while sitting in executive session, and neither shall, without the consent of the other, adjourn for more than three days nor to any other place than that in which they may be holding their sessions.

NEW HAMPSHIRE. Part 2, Article 8.
Open Sessions of Legislature. The doors of the galleries, of each house of the legislature, shall be kept open to all persons who behave decently, except when the welfare of the state, in the opinion of either branch, shall require secrecy.

NEW MEXICO. Art[illegible], Section 12.
Public [illegible]ns; journals. All sessions of each house shall be publi[illegible]h house shall keep a journal...

NEW YORK. [illegible]e 3, Section 10.
Jou[illegible]; open sessions; adjournments. Each house of the legi[illegible]re shall keep a journal of its proceedings, and publish the same, [illegible]cept such parts as may require secrecy. The doors of each house [illegible]all be kept open, except when the public welfare shall requi[illegible]secrecy. Neither house shall, without the consent of the other, [illegible]journ for more than two days.

NORTH DAKOTA. [illegible]rticle 4, Section 14.
All sessions of the legislative assembly, including the committee of the whole and meetings of legislative committees, must be open and public.

OHIO. Article 2, Section 13.
When session to be public. The proceedings of both houses shall be public, except in cases which, in the opinion of two-thirds of those present, require secrecy.

OREGON. Article 4, Section 14.
Deliberations to be open; rules to implement requirement. The deliberations of each house, of committees of each house or joint committees and of committees of the whole, shall be open. Each house shall adopt rules to implement the requirement of this section and the houses jointly shall adopt rules to implement the requirements of this section in any joint activity that the two houses may undertake.

PENNSYLVANIA. Article 2, Section 13.
Open sessions. The sessions of each House and of committees of the whole shall be open, unless when the business is such as ought to be kept secret.

SOUTH CAROLINA. Article 3, Section 23.
Doors open. The doors of each house shall be open, except on such occasions as in the opinion of the House may require secrecy.

SOUTH DAKOTA. Article 3, Section 15.
Open legislative sessions--Exception. The sessions of each house and of the committee of the whole shall be open, unless when the business is such as ought to be kept secret.

TENNESSEE. Article 2, Section 22.
Open sessions and meetings--Exception.--The doors of each House and of committees of the whole shall be kept open, unless when the business shall be such as ought to be kept secret.

TEXAS. Article 3, Section 16.
Open sessions. The sessions of each House shall be open, except the Senate when in Executive session.
Interpretative Commentary: Executive sessions are those where the Senate considers matters not discreet to reveal to the public. At such times there is also considered the gubernatorial appointments which must be confirmed or rejected by the Senate.

UTAH. Article 6, Section 15.
Sessions to be public--Adjournments. All sessions of the Legislature, except those of the Senate while sitting in executive session, shall be public; and neither house, without the consent of the other, shall adjourn for more than three days, nor to any other place than that in which it may be holding session.

VERMONT. Chapter 2, Section 8.
Doors of General Assembly to be open. The doors of the House in which the General Assembly of this Commonwealth shall sit, shall be open for the admission of all persons who behave decently, except only when the welfare of the State may require them to be shut.

WASHINGTON. Article 2, Section 11.

Journal, Publicity of Meetings--Adjournments. Each house shall keep a journal of its proceedings and publish the same, except such parts as require secrecy. The doors of each house shall be kept open, except when the public welfare shall require secrecy...

WISCONSIN. Article 4, Section 10.

Journals; open doors; adjournments. Each house shall keep a journal of its proceedings and publish the same, except such parts as require secrecy. The doors of each house shall be kept open except when the public welfare shall require secrecy...

WYOMING. Article 3, Section 14.

Sessions to be open. The sessions of each house and of the committee of the whole shall be open unless the business is such as requires secrecy.

* * *

I hope this compilation is helpful. If you need additional information, please call.

ALASKA STATE LEGISLATURE
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RESEARCH AGENCY

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November 26, 1986

MEMORANDUM

TO: Representative John Sund

ATTN: John Hartle

FROM: Ginny Fay
Legislative Analyst

RE: Provisions of State Open Meeting Laws
Research Request 87-045

You requested that we identify states with open meeting laws and discuss the provisions of these laws. All states have open meeting or "sunshine" laws, however, the provisions vary considerably among states. A 1984 study of state sunshine laws identified 23 separate provisions that can be contained in these laws and found that states varied considerably in their definition of sunshine (as measured by the combinations of these provisions).[1] Tennessee and Florida led the states; their laws contain 21 and 20 of these provisions, respectively. In contrast, laws in Pennsylvania, Wisconsin and Wyoming contained only eight provisions each. Table 1 (attached) presents the 11 most common provisions of state open meeting laws and indicates the number of states' laws that contain these provisions.

Table 2 (attached) provides the citation of the open meeting and freedom of information laws in each state; Table 3 specifically identifies and contrasts eight major provisions of open meeting laws. The majority of states have had their open meeting law interpreted by the state's attorney general. Somewhat fewer than half of the states have had their laws reviewed by the courts; have laws that do not exempt informal meetings; and/or have laws which include specific criminal penalties for violations. Approximately one-third of the states' laws do not explicitly exempt any government bodies and/or require that personnel matters be discussed in open meetings. Relatively few state laws require open committee meetings or that meetings be open even if there is no quorum.

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[1]Council of State Governments, The Book of the States, 1984-1985. (Lexington, Kentucky), 1984, p. [illegible].

Table 4 (attached) provides summary information regarding public notice requirements and identifies states where actions are void if open meeting law requirements are not followed.

The basic tenet of open meeting laws is that people should be informed about '' government that represents them in order for a democracy to functi While special provisions may vary among states, almost every state's open meetings law has four basic components:

- definition of a meeting or record;
- provisions for executive sessions;
- notice requirements; and
- provisions for enforcement.

Statutes on this subject are necessary because common law has not set precedents for access to information. In 1980, the U.S. Supreme Court ruled that the First Amendment did provide a right to access to criminal trials by all citizens (Richmond Newspapers v. Virginia 100 S. Ct. 2814, 1980) but the courts have generally been unwilling to read into the First Amendment a right of access to information. Most states have opted to write laws declaring that all meetings and records are open and then write exceptions into the laws.[3]

The trend during the 1980s has continued toward more open government in the states. In recent years, many states have made open meeting laws re stringent and made penalties for violations harsher. As late as 1 9, most open meeting laws did not apply to legislatures.[4] In Kentucky.

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[2]Council of State Governments, Backgrounder "Government in the Sunshine," (Lexington, Kentucky), June 1986, p.1.

[3]According to Don R. Pember [in Mass Media Law, Second Edition (Dubuque, Iowa: Wm. C. Brown Co. Publishers), 1981, p.130] many legal experts believe that the most important component of an access law is the legislative intent. "A strong legislative declaration in favor of open access can be used to persuade a judge that if a section of the law is vague it should be interpreted to grant access, rather than to restrict access, since that is what the legislature wants," wrote William R. Wright II in the Mississippi Law Review. He points to the Washington intent section as a model: "The legislature finds and declares that all public agencies of this state and subdivisions thereof exist to aid in the conduct of public business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly."

[4]National Association of Attorney Generals, Open Meetings: Exceptions to State Laws (Raleigh, N.C.:NAAG), March 1979, p.14.

General Assembly meetings other than those of the standing commitees are closed. Legislative subcommittee and conference meetings are closed in Mississippi. Meetings of the Wisconsin legislature may be closed when the state's sunshine law conflicts with legislative rules. In Alaska, organizational meetings of the legislature are closed. A committee meeting in the New Hampshire legislature may be closed by a vote of three-fifths of the members. The North Carolina open meetings law does not apply to the Advisory Budget Commission of the Legislative Services Commission. The Georgia and Oklahoma sunshine laws do not apply to the legislature.[5]

Many states allow caucus meetings in the legislature to be closed. Those states are: Alaska, California, Delaware, Hawaii, Idaho, Illinois, Indiana, Kentucky, Montana, Nevada, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Utah, Virginia, Washington, West Virginia, and Wyoming.

Nearly all states' open meeting laws provide for remedial action if the law is violated. In 36 states, actions are voided if the open meetings law is not followed (see Table 3). Georgia legislation (1982) made it a misdemeanor for officials to willfully obstruct release of public records or information and required 24-hour notice of any public hearing. The laws in 21 states include specific criminal penalties for the violation of open meeting laws (see Table 2).

Complications with the enforcement of open meeting statutes have led several states to form independent commissions to review complaints. In New York, the Committee on Open Government was established to handle citizen appeals on denial of open meeting and information requests. The New York committee is composed of seven members, three from government and four from the public. At least two of the public members are news media representatives. The committee has the authority to provide written and oral advice and mediate controversies. Between 1974 and 1979, the committee issued 1,500 written advisory opinions.[6]

I hope this information is of use to you. If you have any questions, or would like additional information, please call.

GF

Attachments

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[5]Freedom of Information Center, "Executive Sessions: Reasons to Close." 1984.

[6]New York Department of State, "Freedom of Information and Open Meetings Opening the Door," January 1981, Pamphlet, p.1.

Table 1
Open Meetings Laws in the States: Major Provisions

Provision	Number of States
Injunctive relief or other remedial action is provided if law violated	47
Committee meetings must be open	46
Meetings of local entities must be open	46
Discussions, in addition to actual decision making, must be held in open meeting	42
No exemptions to open-meeting provisions are allowed unless specified in law	40
A policy statement says the open-meeting law should be liberally construed	37
Where closed (executive) sessions are allowed, all final actions must be taken in open meetings	37
Quasi-judicial meetings must be open	34
When the law permits closed meetings, the parties involved may request that they be open	29
There is no provision for discussing investments, donations or other financial matters in executive session	25
Labor negotiations must be open	25

Source: Council of State Governments, The Book of the States, 1985-1986, (Lexington, Kentucky), 1985, p. 49.

TABLE 2
OPEN MEETING AND RECORDS STATUTES

STATES	OPEN MEETING LAW STATUTE CITATION	OPEN RECORDS LAW STATUTE CITATION
Alabama	Code 13-14-2	Section 36-12-40, 41
Alaska	Section 44.62.310-312	Section 09.25.110 to 09.25.125
Arizona	Section 38-431	Section 39-121,41-135
Arkansas	Section 12-2801 to 2807	Section 12-2801 to 2807
California	Section 11120 to 11131	Section 6250 to 6265
Colorado	Section 24-6-401-02	Section 24-72-201
Connecticut	Section 1-15 to 1-2 K	Section 1-15 to 1-21K
Delaware	Title 29, Section 10001-05	Title 29, Sect. 10001-05
Florida	Section 286.0105 to 286.26	Section 119.01 to 119.12
Georgia	Section 50-14-1 to 50-14-4	Section 50-14-1 to 50-14-4
Hawaii	Section 92-1 to 92-13	Section 92-1 to 92-13
Idaho	Section 67-2340 to 67-2347	Section 9-301 to 9-302
Illinois	Chapter 102, Section 41-46	Ch. 116, Sect. 201 to 211
Indiana	Section 5-14-1.5-5 to 1.5-7	Section 5-14-3-1 to 5-14-3-9
Iowa	Section 28A.1 to 28A.9	Section 68A to 68A.9
Kansas	Section 75-4317 to 75-4320a	Section 45-205 to 45-213
Kentucky	Section 61.805 to 61.845	Section 61.870 to 61.884
Louisiana	Section 42:4.1 to 42:4.12	Section 44:1 to 44:37
Maine	Title 1, Sect. 401 to 410	Title 1, Sect. 401 to 410
Maryland	Art. 76A, Sect. 1-6	Art. 76A, Sect. 7-15
Massachusetts	C 30A, Sect. 11A-11A1/2	C.66, Sect. 10-18
Michigan	Section 4.1800(11) to (23)	Subsection 4.1801(1) to (13a)
Minnesota	Section 471.705	Section13.01 to 13.87
Mississippi	Section 25-41-1 to 25-41-7	Section 25-61-1 to 25-61-17
Missouri	Section 610.010 to 610.120	Section 610.010 to 610.120
Montana	Section 2-3-201 *	Section2-6-103 *
Nebraska	Section 84-1409 to 1414	Section 84-712 to 84-712-09
Nevada	Section 241.010 to 241.040	Section 239.005 to 239.330
New Hampshire	Section 91-A:1 to 91-A:8	Section 91-A:1 to 91-A:8
New Jersey	Section 10:4-6 to 10:4-21	Section 47:1A-1 to 47:1A-4
New Mexico	Section 10-15-1 to 10-15-4	Section 14-2-1 to 14-2-3
New York	Section 95 to 106 **	Section 84 to 90 **
North Carolina	Section 143-318.9 to .16	Section 132-1 to 132-9
North Dakota	Section 44-04-19 to 44-04-21	Section 44-04-18 ***
Ohio	Section 121.22 (p. 1982)	Section 149.43 to 149.43.
Oklahoma	Title 25, Sect. 301 to 314	Title 51, Sect. 24
Oregon	Section 192.610 to 192.690	Section 192-410
Pennsylvania	Title 65, Sect. 261 to 269	Title 65, Sect. 66.1 to 66.4
Rhode Island	Section 42-46-1 to 42-46-10	Section 38-2-1 to 38-2-12
South Carolina	Section 30-4-10 to 30-4-110	Section 30-4-10 to 30-4-110

TABLE 2
OPEN MEETING AND RECORDS STATUTES

STATES	OPEN MEETING LAW STATUTE CITATION	OPEN RECORDS LAW STATUTE CITATION
South Dakota	Section 1-25-4	Section 1-27-1 to 1-27-19
Tennessee	Code 8-44-101 to 8-44-106	Section 10-7-501 to 10-7-509
Texas	Art. 6252-17	Art. 6252-17a
Utah	Section 52-4-10 to 52-4-9	Section 63-2-66
Vermont	Title 1, Sect. 311 to 315	Title 1, Sect. 315 to 320
Virginia	Section 2.1-341 to 2.1-346.1	Section 2.1-341 to 2.1-346.1
Washington	Section 42.30.010 to .920	Section 42.17.250 to .340
West Virginia	Section 6-9A-1	Section 29B-1-1 to 29B-1-6
Wisconsin	Section 19.81 to 19.98	Section 19.31 to 19.39
Wyoming	Section 16-4-401 to 16-4-407	Section 16-4-201 to 16-4-205

All citations are for general state codes unless otherwise noted.

* Also Article 2, Section 9 of the 1972 State Constitution.
** New York Public Officers Code.
*** Also Article XI, Section 6 of the State Constitution.

SOURCE: Council of State Governments, Backgrounder "Government in the Sunshine," (Lexington, Kentucky), June 1986.

TABLE 3
OPEN MEETING AND RECORDS STATUTES

STATES	NO EXPLICIT EXEMPTIONS	OPEN COMMITTEE MEETINGS	SPECIFIC CRIMINAL PENALTIES	INCLUDES INFORMAL MEETINGS	OPEN MEETING WITH OR WITHOUT QUORUM	REQUIRED FOR PERSONNEL MATTERS	ATTORNEY GENERAL INTERPRETATION	REVIEWED BY STATE COURT
Alabama	x		x	x				
Alaska						x	a	a
Arizona			x			x		
Arkansas	x		x	x			x	x
California			x				x	x
Colorado	x	x	x	x	x		x	
Connecticut			x				x	
Delaware								
Florida			x	x	x	x	x	x
Georgia		x					x	x
Hawaii							x	
Idaho			x					x
Illinois				x	x			
Indiana	x							
Iowa	x			x			x	x
Kansas			x	x	x		x	
Kentucky				x				
Louisiana			x			x	x	
Maine	x						x	x
Maryland				x				
Massachusetts						x	x	x
Michigan			x	x	x	x		x
Minnesota				x		x	x	x
Mississippi								
Missouri	x			x				x
Montana	x					x	x	x
Nebraska			x	x		x		
Nevada			x			x	x	
New Hampshire							x	x
New Jersey							x	x

TABLE 3
OPEN MEETING AND RECORDS STATUTES

STATES	NO EXPLICIT EXEMPTIONS	OPEN COMMITTEE MEETINGS	SPECIFIC CRIMINAL PENALTIES	INCLUDES INFORMAL MEETINGS	OPEN MEETING WITH OR WITHOUT QUORUM	REQUIRED FOR PERSONNEL MATTERS	ATTORNEY GENERAL INTERPRETATION	REVIEWED BY STATE COURT
New Mexico	x		x				x	x
New York				x				
North Carolina				x				
North Dakota			x	x			x	
Ohio	x				x		x	x
Oklahoma			x	x				
Oregon				x			x	
Pennsylvania	x						x	x
Rhode Island						x		
South Carolina	x	x	x	x			x	x
South Dakota	x	x	x				x	
Tennessee	x			x	x	x	x	x
Texas			x				x	x
Utah	x					x	x	x
Vermont			x				x	x
Virginia	x			x	x			
Washington								
West Virginia			x					x
Wisconsin							x	x
Wyoming								x

a--occurring at this time

SOURCE: Council of State Governments, Backgrounder "Government in the Sunshine," (Lexington, Kentucky), June 1986.

Table 4
Summary of Provisions of State Open Meeting and Information Access Laws

States Which Have no Public Meeting Requirement

Alabama Mississippi South Dakota

States Where Actions are Void if Open Meeting Law is not Followed

Alaska	Illinois	Michigan	Oklahoma
Arizona	Indiana	Montana	Oregon
Arkansas	Iowa	Nebraska	Pennsylvania
Colorado	Kansas	New Hamshire	Tennessee
Connecticut	Kentucky	New Jersey	Utah
Hawaii	Louisiana	New Mexico	Virginia
Florida	Maine	New York	West Virginia
Georgia	Maryland	North Dakota	Wisconsin
Idaho	Masschusetts	Ohio	Wyoming

States Where Working Papers and Records are not Open to the Public

Arkansas	Maine	Texas
California	Massachusetts	Vermont
Connecticut	Michigan	Virginia
Illinois	Oregon	Washington
Indiana	Rhode Island	West Virginia
Kansas	South Carolina	Wyoming
Kentucky		

States Where Correspondence of State Officials is not Open

Arkansas:	governor, legislators, supreme court justices, and attorney general
California:	governor and staff
Louisiana:	records in custody of governor
Minnesota:	correspondence between individual and elected official
Nebraska:	legislators
Rhode Island:	all elected officials
South Carolina:	general assembly and staff
Virginia:	legislators, governors, lieutenant governors, attorney general and chief executive officer of any political subdivision

States Where Preliminary Drafts of Audit Reports are Closed

Arizona Texas

Source: Council of State Governments, Backgrounder "Government in the Sunshine", (Lexington, Kentucky) June 1986, p.7.

General assembly, of senate and house of delegates. Md III 1; Va IV 40.

Legislative assembly, of senate and house of representatives. Mont V 1; Ore IV 1.

Words, "legislative assembly shall provide," or similar or equivalent words in constitution or amendment, not to be construed to grant to legislature exclusive power of law-making or limit initiative and referendum powers reserved by people. Ore II 18.

LOBBYING

To enact laws and adopt rules prohibiting, on floor of either house. Ariz XXII 19.

Declared crime; legislature to enforce provision by suitable penalties. Ga I Sec II 5.

Defined and declared felony; legislature to provide by law for punishment. Person compellable to testify in lawful investigation or judicial proceedings against person charged with; testimony not to be withheld on ground that it may incriminate or subject to public infamy but not to be used against him in judicial proceedings, except for perjury in giving. Cal IV 35.

No state or county official, during term, to accept directly or indirectly fee, office, appointment, employment, reward, thing of value, or of personal advantage, or promise thereof, to lobby for or against pending measure, or to give or withhold his influence to secure passage or defeat. Ala IV 101.

Legislature to regulate. Alas II 12.

MEMBERS

Appointment of

Appointment to office prohibited, *see below, this title,* QUALIFICATIONS OF MEMBERS—DUAL OFFICE HOLDING.

Prohibited. Ky 152.

May be appointed to serve on any commission, committee or other body created by legislature to assist in legislative function. NJ IV Sec V 2.

Apportionment

See above, this title, APPORTIONMENT OF MEMBERS.

Arrest, Privilege From

See below, this subtitle, CIVIL PROCESS, PRIVILEGE FROM.

General Rule

During session. Va IV 48.

During session and in going and returning. Del II 13; Ida III 7; Ill IV 14; Iowa III 11; Kan II 22; La III 13; Mo IV Pt III 8; Ohio II 12; Okla V 22; Ore IV 9; SD III 11; Tenn II 13.

During session and in going and returning, allowing one day for every twenty miles such member may reside from place at which legislature is convened. Tex III 14.

During attendance at sessions and in going and returning. Ala IV 56; Alas II 6; Ark V 15; Colo V 16; Ga III Sec VII 3; H III 8; Ind IV 8; Ky 43; Minn IV 8; Mont V 15; NJ IV Sec IV 9; NM IV 13; ND II 42; Pa II 15; Wyo III 16.

During sessions and two days before and after. RI IV 5.

During session and for ten days before and after same. W Va VI 17.

To be protected in person and estate during attendance, going and returning, and ten days before and after session. SC III 14.

During session and for ten days next before commencement thereof. Ariz IV Pt II 6; Wash II 16.

During session, for fifteen days next preceding each session and in returning therefrom. Utah VI 8.

During session and for fifteen days next before commencement and after termination thereof. Cal IV 11; Mich V 8; Miss IV 48; Mo III 19; Nebr III 15; Wis IV 15.

Exceptions

Treason. Ala IV 56; Ark V 15; Ariz IV Pt II 6; Cal IV 11; Colo V 16; Del II 13; Ga III Sec VII 3; Ida III 7; Ill IV 14; Ind IV 8; Iowa III 11; Ky 43; La III 13; Me IV Pt III 8; Mich V 8; Minn IV 8; Miss IV 48; Mo III 19; Mont V 15; Nebr III 15; NJ IV Sec IV 9; NM IV 13; ND II 42; Ohio II 12; Okla V 22; Ore IV 9; Pa II 15; SC III 14; SD III 11; Tenn II 13; Tex III 14; Utah VI 8; Va IV 48; Wash II 16; W Va VI 17; Wis IV 15; Wyo III 16.

Felony. Ala IV 56; Alas II 6; Ark V 15; Ariz IV Pt II 6; Cal IV 11; Colo V 16; Del II 13; Ga III Sec VII 3; H III 8; Ida III 7; Ill IV 14; Ind IV 8; Iowa III 11; Kan II 22; Ky 43; La III 13; Me IV Pt III 8; Mich V 8; Minn IV 8; Miss IV 48; Mo III 19; Mont V 15; Nebr III 15; NM IV 13; ND II 42; Ohio II 12; Okla V 22; Ore IV 9; Pa II 15; SC III 14; SD III 11; Tenn II 13; Tex III 14; Utah VI 8; Va IV 48; Wash II 16; W Va VI 17; Wis IV 15; Wyo III 16.

Breach of peace. Ala IV 56; Alas II 6; Ariz IV Pt II 6; Cal IV 11; Del II 13; Ga III Sec VII 3; H III 8; Ida III 7; Ill IV 14; Ind IV 8; Iowa III 11; Kan II 22; Ky 43; La III 13; Me IV Pt III 8; Mich V 8; Minn IV 8; Miss IV 48; Mo III 19; Mont V 15; Nebr III 15; NM IV 13; Ohio II 12; Okla V 22; Ore IV 9; SC III 14; SD III 11; Tenn II 13; Tex III 14; Utah VI 8; Va IV 48; Wash II 16; W Va VI 17; Wis IV 15; Wyo III 16.

LEGISLATURE (Cont'd)
MEMBERS (Cont'd)
Arrest, Privilege From (Cont'd)
Exceptions (Cont'd)

High misdemeanor. NJ IV Sec IV 9.
Breach of surety of peace. Ark V 15; Colo V 10; Ky 43; Pa II 15.
Violation of oath of office. Ala IV 56; Colo V 10; Mont V 15; Pa II 15; Wyo III 16.
Larceny. Ga III Sec VII 3.
Theft. Miss IV 48.

Attendance at Sessions, Compelling

See below, this title, QUORUM—POWERS OF SMALLER NUMBER.

Books Not to Be Purchased For

No book, or other printed matter, not appertaining to business of session, to be purchased or subscribed for at public expense for use of members, or distributed among them. Md III 10.

Entitled to one copy of laws, journal and documents of legislature of which a member; not to receive at state expense, books, newspapers or perquisites not expressly authorized by constitution. Mich V 9.

Bribery

See below, this subtitle, CORRUPT SOLICITATION OF; as disqualification, *see below, this title,* QUALIFICATIONS OF MEMBERS—BRIBERY; power to protect members from offers of bribery, *see below, this subtitle,* PROTECTION OF.

In General

Defined; to be punished as provided by law. Ala IV 79, 80; Del XI 22.

Defined; to be felony and punishable as such. Ark V 35.

Defined; to be punished according to law and member guilty thereof to forfeit office. Tex XVI 41.

Bribery and solicitation of bribery defined; to be punished by fine or imprisonment. NM IV 39, 40.

Legislature to provide by law for punishment of; conviction to disfranchise forever and disqualify from holding office of trust or profit in state. Md III 50.

Defined; conviction to disqualify from holding office or position of trust or profit in state, in addition to punishment provided by law. SD III 28.

Same; also to disqualify from position of honor. Pa III 29, 30, 32; Wash II 30; Wyo III 43, 44.

Defined and declared to be felony; member convicted of, in addition to punishment as provided by law, to be disfranchised and forever disqualified from holding any office or public trust. Cal IV 35.

Bribery and solicitation of bribery defined; person convicted of either to be expelled, if member, and to be ineligible thereafter to legislature and liable to such further penalty as prescribed by law. ND II 40.

Bribery and solicitation of bribery defined; member convicted of either by house of which member, to forfeit office. La III 30.

Bribery and solicitation of bribery defined; member guilty of either, to be expelled and thereafter ineligible to legislature and liable to further penalty as prescribed by law. Guilty person not member to be punished as provided by law. Colo V 40, 41, XII 6; Mont V 41, 42.

Defined; person convicted thereof, by court or by house of which a member or officer, to be disqualified forever from holding any office, state, parochial or municipal, and to be forever ineligible to legislature; provision not to prevent legislature from enacting additional penalty. La XIX 12.

To provide for punishment by imprisonment of person bribing or attempting to bribe member, or member demanding or receiving bribe; person convicted of, to be disqualified forever from holding office of honor, trust or profit in state. W Va VI 45.

Each house during session may punish any person offering or giving bribe to member, or attempting by corrupt means to advise or influence member to cast or withhold vote; punishment and procedure to be prescribed by law, but imprisonment not to extend beyond session. Ky 39.

Witnesses

Any person compellable to testify in lawful investigation or judicial proceeding against person charged with; testimony not to be withheld on ground that it may incriminate or subject to public infamy, but not to be used against him in judicial proceeding, except for perjury in giving it. Cal IV 35; La XIX 13; NM IV 41; Pa III 32; SD III 28; Wash II 30; Wyo III 44.

Any person may be compelled by law to testify, but to be exempt from trial and punishment for offenses of which guilty and concerning which compelled to testify. W Va VI 45.

To provide by law for compelling any person to testify in bribery proceedings, but such person to be exempt from trial and punishment for offense of which guilty. Md III 50.

Civil Process, Privilege From

See above, this subtitle, ARREST, PRIVILEGE FROM.

Not to be arrested or held for bail on mesne process during, going to or returning from attendance upon sessions. NH II 21.

Not to be arrested or held on mesne process during session or in going to or returning from same. Mass I Sec III 10, 11.

Person to be exempt from attachment in any civil action during session and two days before commencement and after termination thereof; process served contrary hereto to be void. RI IV 5.

Privileged from arrest on, during session and for four days before commencement and after termination thereof. Conn III 13.

Not liable to, during session nor during ten days next before commencement thereof. Ida III 7.

Not subject to, during session nor for fifteen days next before commencement thereof. Ariz IV Pt II 6; Ind IV 8; Ore IV 9; Wash II 16.

Not subject to service of, during session or for fifteen days previous to its commencement. Kan II 22.

Privileged from arrest on, during session and for fifteen days next before commencement. Nev IV 11.

Not subject to, during session and for fifteen days next before commencement and after termination thereof. Cal IV 11; Mich V 8; Wis IV 15.

Not subject to arrest under, during sessions nor for fifteen days next before commencement or after termination thereof. Va IV 48.

To be protected in person and estate during attendance in going to and returning from legislature and ten days before and after session. SC III 14.

Attending, going to or returning from legislative session, not subject to civil process. Alas II 6.

Classification of Senators

Senate to be so classified that one-half of number, as nearly as practicable, elected every two years. Colo V 5; Iowa III 6; Mont V 4; Nev XVII 9, 10; NJ IV Sec II 2; ND II 30; SC III 8.

First senators divided in two classes with respect to term of office so that thereafter one-half of senate, as nearly as practicable, elected biennially. Ark V 3; Cal IV 5; Del Sched 3; Fla VII 2; Ill IV 6; Ky 31; Okla V 9; Pa Sched 3, 4; Wash II 6; W Va VI 3; Wis IV 5; Wyo III 2.

First senators divided into two classes with respect to term of office, so that thereafter one-half of senate, as nearly as possible, chosen biennially. If number increased, new senators to be annexed by lot to one of classes as equally as possible. Ind IV 3; Ore IV 4; Utah VI 4.

First senators divided into two classes: first class to consist of specified number from each district, elected with highest number of votes and to serve until third general election; remaining members constitute second class, to serve until second general election. H XVI 15.

New senate to be chosen after every apportionment and senators then elected divided by lot into two classes, one class with term of two years and other with term of four years, so that thereafter half of senate chosen biennially. Tex III 3.

One-half of senators elected every two years; specified plan for initiating overlapping terms. Alas II 3, XV 10.

One-half elected every two years for four-year overlapping terms, except senators elected to fill partial senatorial apportionment ratio elected for two years on ten-year apportionment plan. Ohio II 2, XI 6a.

Compensation

President of Senate, *see below, this title,* PRESIDENT OF SENATE — COMPENSATION; speaker, *see below, this title,* SPEAKER — COMPENSATION.

In General

As provided by law. Ind IV 20; Iowa III 25; Minn IV 7; Miss IV 46; Nev IV 33; NJ IV Sec IV 7, 8.

As provided by law, but no legislature to fix its own compensation. Mont V 5; Wyo III 6.

Fixed compensation to be prescribed by law and no other allowance or perquisites either in payment of postage or otherwise. Ohio II 31.

Such salary and allowances as prescribed by law. Until otherwise provided, to receive $2500 for each general session and $1500 for each budget session. H III 10, XVI 17.

Such salary and mileage for regular and special sessions as fixed by law and no other compensation whatever, whether for service upon committee or otherwise. Pa II 8.

No pay or perquisites other than salary and mileage. Nebr III 7.

No pay or perquisites except *per diem* and mileage. SD III 6.

No other compensation for services except salary, usual expenses of transportation, stationery allowance. Del II 15.

No additional compensation for service upon recess committee, except committee appointed to examine work of statutory revision commission. Mass Am LXV.

No legislator to receive additional compensation for services rendered in connection with decennial statutory revision. Mo III 34.

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU, ALASKA 99811
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LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M January 26, 1989

SUBJECT: Open meetings: the laws from other states (SJR 1)

TO: Senator Arliss Sturgulewski

FROM: Richard A. Bradley
Legislative Counsel

McKie Campbell asked me to provide you with a study that I did last year on the laws of the other states that have open meetings. I used in my review a listing of such laws that was initially prepared by the House Research Agency (that I regretfully seem unable to find a copy of; I assume one is available from them).

Initially, I reviewed the constitutions and laws of Oregon and California in some detail in the context of the question whether either state would void a law for a violation of open meeting requirements.

A brief summary of the provisions would be that neither state has any provision voiding laws for violations of the open meetings laws of those states.

Nor do the constitutions of those states lead to that result.

The California Constitution provides that the "proceedings of each house and the committees thereof shall be public except as provided by statute or concurrent resolution, when such resolution is adopted by two-thirds vote of the members of each house, . . ." Art. IV, sec. 7(c), California Constitution.

The enabling legislation at Secs. 11120 - 11131 of the California (Government) Code does not apply to the legislature but rather only to state executive branch agencies.

And I believe that no provision of that law provides that action taken in violation of it is void. The only remedies offered in those sections of the California law is the authorization of litigation seeking mandamus or injunctive relief (Sec. 11130), costs and attorney fees (Sec. 11130.5), and a provision making the conduct a misdemeanor (Sec. 11130.7).

California does, however, have an open meetings law specifically concerned with the legislature. See Secs. 9027 - 9031, California (Government) Code.

The legislative formulation of art. IV, sec. 7(c), quoted above, provides that all "meetings of the Assembly and Senate and the committees and subcommittees thereof, and any conference committee, shall be open and public and all the proceedings shall be conducted openly so that the public may remain informed, except as otherwise provided in this article. All meetings of any conference committee shall be open to press representatives accredited by the Joint Rules Committee." Sec. 9027.

Two sanctions are stated: (1) a knowing violation is a misdemeanor. Sec. 9030; and (2) a mandamus or injunctive action for declaratory relief may be filed. Sec. 9031.

The Oregon laws are consistent.

The Oregon Constitution provides that the "deliberations of each house, of committees of each house or joint committees and of committees of the whole, shall be open." Art. IV, sec. 14, Oregon Constitution. The section also directs each house to adopt rules to implement the section and both houses are directed to adopt joint rules relating to joint legislative activity.

ORS Secs. 192.610 - 192.690 are ambiguous as to whether they apply to legislative Acts or legislative proceedings. I can find no provision within these sections that uses terms to be expected in laws applying to the legislature. But I can find no specific provisions that do apply to the legislature; since we do not have access to the legislative rules, that may well be the the location of those provisions.

Sec. 192.680 establishes the policy that the court may order equitable relief as it considers appropriate. The law also provides that

> A decision shall not be voided if other equitable relief is available. The court may order payment to a successful plaintiff in a suit brought under this section of reasonable attorney fees at trial and on appeal, by the governing body, or public body of which it is a part or to which it reports. ORS, sec. 192.-680(1).

This remedy may be offered because it would be very unlikely that a plaintiff could prove "actual damages" for a violation of the law.

The law also provides that if the violation was a "result of wilful misconduct by any member or members of the governing body, that member or members shall be jointly and severally liable to the governing body . . . for the amount paid under subsection (1)."

Finally, the Oregon law provides that "the provisions of this section shall be the exclusive remedy for an alleged violation of ORS 192.610 - 192.690."

I believe it is accurate to note that neither California nor Oregon will void a legislative Act for a violation of their open meetings laws. The laws also suggest that sanctions against members whose conduct is wilful is a proper recourse.

In addition, I have reviewed about half of the laws of the other states. Since some kind of pattern appears in the laws of the states that I did review, I discontinued the review. Let me make some observations about the laws and then offer the individual analyses of the states from Alabama through Missouri.

First, and I think this is significant, I found no case where an Act of a legislature was avoided. It appears that no action was avoided (or challenged until Abood) where the violation was based only on the actions of a committee or subcommittee of the legislative body.

There is some logic to this point. While committee recommendations are useful, a member may vote for or against final passage based on or in spite of recommendations of a committee. What one committee does may be disregarded by a subsequent committee or used for entirely different reasons.

It should not follow that the action by a committee vitiates the final legislative action.

In probably every state, state constitutions will require votes on final enactment to be public. Whether a disregard of committee action that violates open meeting concepts (if final action is open) is a serious loophole or an unfortunate expectation may be debatable but it appears to explain why the application of open meeting concepts to legislative action does not result in the avoidance of the final legislative action. The legislature should have the power to cure the defects in legislation caused by a committee of the legislature.

While the senate and the house each seem to have their own different ideas about the amount of debate required for adoption, it is quite different for a court to order the legislature to engage in "substantial, de novo, independent and public reconsideration of those substantive matters previously discussed in private." That remedy was requested in Abood v. League of Women Voters of Alaska, 743 P.2d 333, 334 (Alaska 1987).

The amount of debate required to cure a violation is the kind of question that the courts would be required to address if a violation by a committee is permitted to taint the final legislative action fatally. If I am correct that only violations by the enacting body will cause action to be void, the cure for violations is not a problem since no violation by the legislature itself will (or can) occur.

Finally, an analysis of state laws. While it has been suggested (by the House Research Agency report) that each state has an open meeting law, it is far from true that the citations offered prove that the legislatures have uniformly subjected themselves to such laws. And let me note also that this study was done 10 months ago; it might be a little dated.

Alabama. I could find no laws at the citation suggested in the HR report. Title 13 has been repealed. No entries in the index for the topic.

Arizona. Sec. 38.431. Applies to the legislature. No case in annotation appears to have challenged legislative violations. Only applies when a quorum is present according to AG opinion. Court may impose a fine of not to exceed $500.

Sec. 431.07. Public body may not expend public money to defend action under certain circumstances. Sec. 431.07. Either house of legislature may exempt itself by adoption of rule or procedure. Sec. 431.08(B). Does not apply to conference committees of legislature or any caucus. Sec. 431.08(A); conference committees shall nonetheless be open.

Arkansas. Citation incorrect: see A.C.A. 25.19.101 et seq. Open meetings section does not apply to the legislature. Sec. 25.19.106. Misdemeanor penalty for violations of $200 or 30 days (sec. 25.29.104). Action taken not void unless adopted at a public meeting. Sec. 25.19.106.

California. Citation given (sec. 11120 et seq., Cal. Gov't Code) applies only to executive branch agencies. See above for comments on sections applicable to the legislature.

Colorado. C.R.S. sec. 24.6.401 et seq. Applies to the legislature. Sec. 24.6.402. Does not apply to "chance meeting or social gathering at which discussion of public business is not the central purpose." Sec. 24.6.402(2.1). Provisions on invalidity may not apply to the legislature: "(4) No resolution, rule, regulation, ordinance, or formal action of a board, committee, commission, or other policy-making or rule-making body shall be valid unless taken or made at a meeting that meets the requirements . . ." Note that while it applies to a committee in the legislature, a committee is not a policy making body.

Connecticut. G.S.C. sec. 1.21. Appears to apply to the legislature. Sec. 1.21(a). Establishes notice; has no provision explicitly establishing application to the legislature or providing for the implications of violations (even as to executive branch agencies).

Delaware. 29 D.C.A. sec. 10001 et seq. Includes legislature. Sec. 10002. "Any action taken at a meeting in violation of this chapter may be voided by the Court of Chancery" within 60 days of notice of the action but not more than 6 months from the action. Sec. 10005(a). No annotations regarding violations by the legislature.

Florida. Ch. 286, F.S. at 011. Does not apply to the legislature. Sec. 286.011(1). Did not determine whether other law applies to the legislature.

Georgia. O.C.G. sec 50-14-1 et seq. Not applicable to the legislature.

Hawaii. H.R.S. sec. 92.3. Does not apply to the legislature. Sec. 92.10; rather, will be subject to rules adopted by the legislature (I have not found such rules). Executive action voidable on "proof of willful violation." Sec. 92.-11.

Idaho. I.C. sec. 67-2340 et seq. General sections do not apply to the legislature. Sec. 2341. Open legislative meetings required. Sec. 2346. Curiously, there is no statutory authorization for any executive session by legislative committees: "All meeting . . . shall be open at all times"; I suggest the section cannot be taken seriously. Action taken at a meeting that violates the sections is null and void. No cases construing statute in context of suit against legislature for its violation.

Illinois. 102 Ill. A.S. sec. 41 et seq. Includes "legislative . . . bodies of the state . . . except the General Assembly and committees or commissions thereof." Sec. 41.02. Did not find any specific sections applying to the legislature.

Indiana. B.I.S.A. sec. 5-15-1.5-1. Appears to apply to the legislature. Sec. 5-14-1.5-2(a). Notice requirement do not apply to the legislature. Sec. 5-14-1.5-5(g). Citizen may enjoin action taken at an executive session or to declare void action in violation of notice requirements (not applicable to legislature). Sec. 5-14-1.5-7(a). Court may award costs and attorney fees if action was knowing and intentional. Sec. 5-14 - 1.5-7(f).

Iowa. The correct citation is chapter 21 in the 1987 code. The chapter does not apply to the legislature. Remedies include assessment of fines of $100 to $500 for participants; no fines for a person who voted against the violating meeting or acted in good faith or in reliance of legal advice. Sec. 21.6(3). Costs and attorney fees for prevailing party who establishes the violation. Sec. 21.6(3). Voids the action taken in violation if the case is brought within six months of the action on a determination that the public interest in the enforcement of the open meeting policy outweighs the public interest in sustaining the validity of the action taken; doesn't apply to an action regarding the issuance of bonds or other indebtedness of a governmental body

if a public hearing, election, or public sale has been held. The court may remove an individual who has engaged in two prior violations in which damages were assessed during the member's term. May issue a mandatory injunction punishable by civil contempt. Ignorance is no defense.

Kansas. 75 K.S.A. sec. 4317 et seq. Appears to apply to the legislature. Sec. 4318. Violators subject to a $500 civil penalty. Any binding action taken in violation is voidable in an action brought by the attorney general or county attorney. Sec. 4320. Court may award costs and attorney fees. Exceptions for impeachment are made. Sec. 4318. One annotation says that there was no "authority for private individual to bring action to void acts performed in violation of open meetings law. Stoldt v. City of Toronto, 678 P.2d 153 (Kansas 1984). Unannounced gathering prior to official meeting violates the law. Coggins v. Public Employee Relations Board, 581 P.2d 817.

Kentucky. KRS 61.805. Appears to apply to the legislature. Sec. 61.805(2), but with some "exceptions": "committees of the general assembly other than standing committees". Sec. 61.810(9). Courts may enforce by injunction. Sec. 61.845. Curiously, though there are pages of annotations of opinions of the attorney general as well as court decisions, no case involves the legislature.

Louisiana. RS 42.5 is the law; a 1981 amendment deleted the language that exempted the legislature in those words but the words now used do not include the legislature. Sec. 42.4.2(2). A specific section authorizes closed or executive sessions of legislative houses and committees. Sec. 42.6.2. The law also exempts "chance meetings, social gatherings, or other gatherings at which only presentations are made to members of the legislature or members of either house thereof or of any committee or subcommittee if no vote or other action, including formal or informal polling of members, is taken." Sec. 42.6.2(C). The legislature is exempted from requirement applicable to executive agency that meetings for the year be announced at the beginning of the year. Sec. 42.7. Suits to void action must be filed within 60 days of the action.

Maine. 1 MRSA sec. 401 et seq. Applies to the legislature. Sec. 402.2. For violations of the policy: "If any body or agency approves any ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official

action in an executive session, this action shall be illegal and the officials responsible shall be subject to the penalties hereinafter provided". I note that "Acts" are not included. The penalty is a class E crime, probably a misdemeanor. No case examines a challenge to a legislative enactment.

Maryland. 76A A.C.M., sec. 7 et seq., reorganized as 10 A.C.M., 501 et seq. in the 1984 edition. Regarding enforcement, the law says: . . . the court may declare void any final action taken at a meeting held in wilful violation of [the law] if the court finds no other remedy would be adequate under the circumstances. However, the action of a public body may not be voided because of the violation . . . by any other public body." Sec. 10- 510(a)(2); sec. 10-510(e) authorizes injunctions or other appropriate relief. The section specifically excludes actions appropriating public funds, levying taxes, or providing for the issuance of bonds, notes, or evidences of public obligation from the authority of the court to void actions. Sec. 10-510(a). No case examines a challenge to a legislative enactment.

Massachusetts. 30A M.G.L.A. sec. 11A. Does not apply to the general court (legislature) or the committees or recess committees of the general court. Sec. 11A.

Michigan. Michigan has a constitutional provision requiring open meeting unless the public welfare requires otherwise. Art. 4, sec. 20. The current citation to the general law is 15 M.C.L.A. sec 261 et seq. "Public body" is defined as "any state . . . legislative . . . body, including a . . . committee, subcommittee . . . empowered by the state constitution . . . to exercise governmental . . . authority . . . ." Sec. 15.262(a); under 15.262(d), "decision" includes a "vote . . . upon a . . . bill . . ." Attorney General opinions are consistent that committee action is covered. A reenactment complying with the act cures a prior enactment that was deficient; the effective date is on the reenactment. Sec. 15.270. No case addresses a challenge to a legislative enactment.

Minnesota. M.S. 471.705. Does not apply to the legislature.

Mississippi. Not reviewed.

Missouri. M.R.S., sec. 610.010 et seq. Applies to the legislature. Sec. 610.010(2). Violations include injunctive relief. Sec. 610.027(1). Civil fines of not more than $100 are authorized. Sec. 610.027(3). Actions may void the action on evidence that the governmental body violated the section "if the court finds under the facts of the particular case that the public interest in the enforcement of the policy . . . outweighs the public interest in sustaining the validity of the action taken at the closed meeting, record, or vote." Sec. 610.027(4). Injunctive relief is authorized. Sec. 610.030. No annotation applies a challenge to a legislative enactment.

If I may be of further assistance, please advise.

RAB:gc
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current statute

(8)

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 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 for meetings of a house of the legislature, attendance and participation at meetings by members of the public or by members of a body may be by teleconferencing. Agency materials that are to be considered at the meeting shall be made available at teleconference locations. 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. The vote at a meeting held by teleconference shall be taken by roll call. This section does not apply to any votes required to be taken to organize a public body described in this subsection.

(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. The notice must include the date, time, and place of the meeting, and if the meeting is by teleconference the location of any teleconferencing facilities that will be used.

(f) Action taken contrary to this section is void. (§ 1 art VI (ch 1) ch 143 SLA 1959; am § 1 ch 48 SLA 1966; am § 1 ch 78 SLA 1968; am § 1 ch 7 SLA 1969; am §§ 1, 2 ch 98 SLA 1972; am § 2 ch 100 SLA 1972; am § 1 ch 189 SLA 1976; am §§ 2, 3 ch 54 SLA 1985)

Effect of amendments. — The 1985 amendment in subsection (a) added the second, third, and next-to-last sentences and in the last sentence substituted "a public body described" for "the bodies specified" and added the last sentence of subsection (e).

NOTES TO DECISIONS

"Meeting". — A private meeting between a quorum of the Anchorage Municipal Assembly and a developer to discuss in detail the developer's application for rezoning violated this section; a "meeting" for purposes of the Open Meetings Act includes every step of the deliberative and decision-making process when a governmental unit meets to transact public business. The rezoning ordinance later passed by the assembly that allowed a modified plan of development was therefore held void. Brookwood Area Homeowners Ass'n v. Municipality of Anchorage, Sup. Ct. Op. No. 2953 (File Nos. S-575, S-629), 702 P.2d 1317 (1985).

Findings. — There is nothing in the Administrative Procedure Act requiring a board to make any findings when exercising its quasi-legislative function, and therefore there is nothing in the act regulating the manner in which findings must be adopted or approved. State v. Hebert, Ct. App. Op. No. 748 (File A-1743), P.2d (1987).

Legislature's alleged violation of Open Meetings Act held nonjusticiable. — The Open Meetings Act, as it applies to the legislature, like the legislature's Uniform Rule 22, merely establishes a rule of procedure concerning how the legislature has decided to conduct its business; a failure to follow a rule of procedure is not the subject matter of judicial inquiry where there are no allegations that the legislature, acting pursuant to or in violation of one of its rules of procedure, has infringed on the rights of a third person not a member of a legislature or has ignored constitutional restraints or violated fundamental rights. Abood v. League of Women Voters, Sup. Ct. Op. No. 3230 (File Nos. S-1831, S-1841, S-1957), 743 P.2d 333 (1987).

Applied in Meiners v. Bering Strait School Dist., Sup. Ct. Op. No. 2857 (File Nos. S-125, S-140), 687 P.2d 287 (1984); Abood v. Gorsuch, Sup. Ct. Op. No. 2958 (File No. S-706), 703 P.2d 1158 (1985).

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 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;

(6) the use of teleconferencing under this chapter is for the convenience of the parties, the public, and the governmental units conducting the meetings.

(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; am § 4 ch 54 SLA 1985)

Effect of amendments. — The 1985 amendment added paragraph (6) of subsection (a).

NOTES TO DECISIONS

Quoted in Brookwood Area Homeowners Ass'n v. Municipality of Anchorage, Sup. Ct. Op. No. 2953 (File Nos. S-575, S-629), 702 P.2d 1317 (1985).

Article 7. Legislative Review of Rules.

Sec. 44.62.320. Legislative annulment of regulations and review.

Editor's notes. — The Alaska Const., art. II, § 22 amendment proposal that was mentioned in the notes to decisions was defeated in the November, 1984 election.

Article 8. Administrative Adjudication.

Sec. 44.62.330. Application of AS 44.62.330 — 44.62.630.

(a) The procedure of the state boards, commissions, and officers listed in this subsection or of their successors by reorganization under the constitution shall be conducted under AS 44.62.330 — 44.62.630. This procedure, including, but not limited to, accusations and statements of issues, service, notice and time and place of hearing, subpoenas, depositions, matters concerning evidence and decisions, conduct of hearing, judicial review and scope of judicial review, continuances, reconsideration, reinstatement or reduction of penalty, contempt, mail vote, oaths, impartiality, and similar matters shall be governed by this chapter, notwithstanding similar provisions in the statutes dealing with the state boards, commissions, and officers listed. Where indi-

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joint committee which acts between legislative sessions constitutes a subcommittee of the Legislative Council for administrative purposes. A special or joint committee may expend money only in accordance with an appropriation made for the work of the committee.

(d) A committee may not be established unless authorized by law or by the Uniform Rules.

Uniform Rule #22

OPEN AND EXECUTIVE SESSIONS

RULE 22. OPEN AND EXECUTIVE SESSIONS. (a) All meetings of a legislative body are open to all legislators, whether or not they are members of the particular legislative body that is meeting, and to the general public except as provided in (b) of this rule.

(b) A legislative body may call an executive session at which members of the general public may be excluded for the following reasons:

(1) discussion of matters, the immediate knowledge of which would adversely affect the finances of a government unit;

(2) discussion of subjects that tend to prejudice the reputation and character of a person;

(3) discussion of a matter that may, by law, be required to be confidential.

(c) When a legislative body desires to call an executive session in accordance with (b) of this rule, the body shall first convene as a public meeting and the question of holding an executive session shall be determined by a majority vote of the members present.

(d) The provisions of this rule may not be interpreted as permitting the exclusion of a legislator from an executive session, whether or not the legislator is a member of the body that is meeting. A legislator not a member of the body holding an executive session shall, however, be subject to the same rules of confidentiality and decorum as pertain to regular members of the body.

COMMITTEE MEETINGS

RULE 23. COMMITTEE MEETINGS. (a) Written notice of the time, place and subject matter of all meetings of standing, special, and joint committees during a week shall be provided by the person who chairs the committee to the chief clerk or secretary by 4:00 p.m. on the preceding Thursday. The person who chairs the committee to which a bill or resolution is first referred shall provide to the chief clerk or secretary written notice of the time and place of the first public hearing on the bill or resolution at least five days before the hearing. However, this requirement may be waived by motion of the person who chairs the committee to which a bill or resolution is first referred if concurred in by majority vote of the full membership of the house. The chief clerk or secretary shall publish and distribute copies of the weekly schedule of committee meetings and of the five-day notice of hearing.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

RODOEY STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

MEMORANDUM March 9, 1989

SUBJECT: Open meetings: "wilful" v. "intentional" (CSSJR 1( ))

TO: Senator Pat Rodey

FROM: Richard A. Bradley
Legislative Counsel

You have requested a committee substitute sponsor blank that would change "wilful" in Sec. 24(d) to "intentional". It is enclosed.

You also ask that we comment on the desirability of the change.

The criminal code [see AS 11.81.900(a)(1)] uses the word "intentionally" to describe conduct "when the person's conscious objective is to cause that result" and the word is probably a synonym for the "wilful" that was used in SJR 1; in this context, "intentionally" is contrasted with "knowingly", "recklessly", and "criminally negligent" to describe other degrees of knowing conduct.

SJR 1 does not propose a rule that has any analogy to criminal laws; the provisions of Sec. 24(d) specifically provide for a civil fine.

Having said that, I do not believe that I have much to add. I do not believe that the office has a preference for "intentional" over "wilful" in this context.

The Alaska Supreme Court has suggested that the word "wilful" is not a term of art, North State Tel. Co. v. Alaska Pub. Util. Comm'n, 522 P.2d 711 (1974), and its meanings will vary according to the context.

The word "wilful" often denotes an act that was done voluntarily, knowingly, or permissively-- as distinguished from the accidental act or the act that occurs beyond the

control of an individual. The court does suggest in the North State case that in the context of the criminal codes generally, "wilful" conduct carries a connotation of a bad purpose; the court agrees that it does not have that meaning where the act in question is viewed in a civil context and is not per se wrong (but merely prohibited).

In my view, "intentional" works well if your intent is to penalize only those who facilitate the violation. On the other hand, if you wish to penalize all those who participate in a closed meeting, knowing that the meeting violates open meeting requirements "wilful" might be better..

RAB:lmb:kb
L7/028

Enclosure

6-0013H
Bradley
3/9/89

Original sponsors: Sturgulewski, Fischer, Kerttula, et al.

IN THE SENATE

CS FOR SENATE JOINT RESOLUTION NO. 1 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to open meetings.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. Article I, Constitution of the State of Alaska, is amended by adding a new section to read:

SECTION 24. MEETINGS OPEN. (a) Except as provided in (b) of this section, private and substantive discussions or debates on legislation under its jurisdiction by a quorum of a house of the legislature or of a committee are prohibited.

(b) The legislature or a committee of the legislature may meet in executive sessions authorized by law.

(c) A court may not prescribe rules or procedures for the conduct of legislative business or invalidate legislation because of a violation of this section.

(d) A court may impose a civil fine upon a member of the legislature for an intentional violation of this section and may impose other sanctions authorized by law.

(e) The legislature may implement this section.

* Sec. 2. INTENT. (a) The purpose of the amendment to art. I, Constitution of the State of Alaska, proposed in sec. 1 of this resolution is to make openness in government the rule and secrecy the exception. The amendment ensures that the public is not excluded during the substantive deliberative and decision-making stages of the budgetary and lawmaking process.

(b) This amendment provides a basis for judicial enforcement of the

existing open meetings law (AS 44.62.310 - 44.62.312) or an amendment to the extent that the provisions are consistent with the amendment proposed in sec. 1 of this resolution, notwithstanding art. II, secs. 6 and 12, Constitution of the State of Alaska. The amount of civil fines authorized by this amendment may be established by law.

(c) This amendment is not intended to prevent the free flow of ideas among legislators or their participation in public forums, community events, site visitations, or social events.

(d) In the preparation of its neutral summary under AS 15.58.-020(6)(C), the Legislative Affairs Agency shall consider the statement of legislative intent contained in (a) - (c) of this section.

* Sec. 3. The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

6-0013H
Bradley
3/28/89

Original sponsors: Sturgulewski, Fischer, Kerttula, et al.

IN THE SENATE

CS FOR SENATE JOINT RESOLUTION NO. 1 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

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(b) The legislature or a committee or a subcommittee of the legislature may meet in executive sessions authorized by law.

(c) A court may not prescribe rules or procedures for the conduct of legislative business or invalidate legislation because of a violation of this section.

(d) A court may impose a civil fine upon a member of the legislature for an intentional violation of this section and may impose other sanctions authorized by law.

(e) This section does not restrict discussion between two legislators.

(f) The legislature may implement this section.

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amendment ensures that the public is not excluded during the substantive deliberative and decision-making stages of the budgetary and lawmaking process.

(b) This amendment provides a basis for judicial enforcement of the existing open meetings law (AS 44.62.310 - 44.62.312) or an amendment to the extent that the provisions are consistent with the amendment proposed in sec. 1 of this resolution, notwithstanding art. II, secs. 6 and 12, Constitution of the State of Alaska. The amount of civil fines authorized by this amendment may be established by law.

(c) This amendment is not intended to prevent the free flow of ideas among legislators or their participation in public forums, community events, site visitations, or social events or to restrict discussions between two legislators who constitute a quorum of a committee or subcommittee, whether or not they are in attendance at a properly-called meeting of the subcommittee.

(d) In the preparation of its neutral summary under AS 15.58.-020(6)(C), the Legislative Affairs Agency shall consider the statement of legislative intent contained in (a) - (c) of this section.

* Sec. . The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.