SJR

1

SENATE STATE AFFAIRS COMMITTEE

BILL NUMBER SJR 1

SPONSOR Sturgulewski

BILL TITLE Open Meetings

SJR1B.TXT – other Constitutions

SJR1C.TXT – ~~[illegible]~~

SJR1COM.TXT – compare bill versions

DATE REFERRED 1/9/89

HEARING SCHEDULED 1-25-89

FISCAL NOTE PREPARED ~~req.~~ of McKai 1-20-89

SPONSOR CONTACTED McKai 3818

INTERESTED PARTIES CONTACTED

yes ✓ League Women Voters, Vicki Borego work AAS Arbitz Admin H 789-1764 W 789-4402

yes ✓ Dick Bradley, Legal Services x2450

yes ✓ Mr. Gene Storm, Open Mtngs. Coalition Anch 274-4853 } campaign mgr for petition initiative will notify others.

Jeff Bowman, AKPIRG Box 101093 Anch 99510 278-3601

Linda Edgeworth 4611

OTHER see also SB 3

ALASKA STATE LEGISLATURE

Sen. Pat Pourchot, Chairman

Sen. Jan Faiks, Vice Chairman
Sen. Al Adams
Sen. Tim Kelly
Sen. Rick Uehling

P.O. Box V
Juneau, AK 99811

907-465-3712

Senate State Affairs Committee

MEMORANDUM

TO: Senate State Affairs Committee Members

FROM: Senator Pat Pourchot, Chairman

RE: February 3 Committee Meeting

DATE: February 2, 1989

On Friday, February 3 the Senate State Affairs Committee will hold a work session on SJR 1, Proposing an amendment to the Constitution of the State of Alaska relating to open meetings. The session will be held at 1:30 p.m. in the Beltz Room.

The following information is attached for your review:

- A copy of SJR 1
- A comparison of various open meetings proposals
- A summary of constitutional provisions in other states
- A memo from Dick Bradley, legislative counsel, on laws of other states and court challenges of those laws
- A copy of the ballot initiative
- The steps involved in amending the Constitution through the initiative process
- Uniform Rule 22, Open and Executive Sessions
- Alaska's existing open meetings law

Also on Friday SB 59, Relating to mandatory use of safety devices in motor vehicles will be back before the committee.

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).

Note: This data does not distinguish between legislative open meetings, and open meetings of the executive branch, municipal government, etc.

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 than $100
MISSISSIPPI		Y		None
MISSOURI	Y	Y		Civil fine, $100
MONTANA	Y		Y	Offense of civil misconduct
NEBRASKA	Y	Y	Y	Misdemeanor, not more than $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	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* 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	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%	75.8%

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 when 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

Sen. Pat Pourchot, Chairman

Sen. Jan Faiks, Vice Chairman
Sen. Al Adams
Sen. Tim Kelly
Sen. Rick Uehling

P.O. Box V
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Juneau, Alaska 99811

907-465-3712

Senate State Affairs Committee

MEMORANDUM

TO: Senate State Affairs Committee Members

FROM: Senator Pat Pourchot, Chairman

RE: February 10 Committee Hearing on SJR 1

DATE: February 9, 1989

On Friday, February 10 at 1:30 p.m. in the Beltz Room the Senate State Affairs Committee will take up SJR 1, Proposing an amendment to the Constitution of the State of Alaska relating to open meetings.

In response to questions raised at our last meeting on SJR 1, please find attached a general discussion of other states' open meeting laws, a comparison of penalty provisions in other states, and a legal opinion on the ability of the court to impose sanctions absent any implementing legislation.

Questions regarding separation of powers, legislative immunity, and enforcement also were raised. These, of course, are the very heart of the proposed constitutional amendment and I am of the opinion that they cannot be addressed without defeating the purpose of the bill.

The purpose of the constitutional amendment, as stated in the accompanying intent language and reiterated by the bill sponsor, is to provide a basis for judicial enforcement of the state's open meetings law. It seems clear that judicial enforcement must, by definition, sacrifice some degree of separation of powers and legislative immunity.

It is my understanding after discussions with legal counsel that the reference to legislative immunity in the intent section of SJR 1 is not what establishes the waiver of immunity. It is the language of the constitutional amendment itself authorizing the court to issue fines. If we were to delete the authorization language in the amendment we would likely protect our right to immunity, but we may well defeat the purpose of SJR 1.

Opinions on the ability or willingness of the court to enforce the constitutional provision absent specific authorization to do so vary. One opinion is that the court would give great deference to legislative immunity and leave it to the legislature to sanction its members. Another opinion is that the court would get involved, and absent language limiting their ability to sanction, would proscribe very strict and far reaching rules. This has been the outcome in several states with broad open meeting definitions.

IN THE SENATE

CS FOR SENATE JOINT RESOLUTION NO. 1 St Aff adopted 2-3-89

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 a wilful 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.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

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

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. 49.

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 the government that represents them in order for a democracy to function.[2] 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 more stringent and made penalties for violations harsher. As late as 1979, 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 committees 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 149.43.1
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.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907 465 3800

M E M O R A N D U M February 8, 1989

SUBJECT: Open meetings: civil penalties and other sanctions [CSSJR 1( )]

TO: Senator Pat Pourchot

FROM: Richard A. Bradley
Legislative Counsel

McKie Campbell has asked that I comment to you on an aspect of the draft committee substitute that has been prepared (though the question was equally present in SJR 1 as introduced).

In the draft committee substitute, Sec. 24(d) provides:

> (d) A court may impose a civil fine upon a member of the legislature for a wilful violation of this section and may impose other sanctions imposed by law.

The question has arisen whether a court may impose a civil fine even if the legislature fails to enact any authorizing legislation.

In my opinion, the wording of the subsection leads to that conclusion. The court may impose a civil fine without any implementing legislation. Any other remedy could be imposed on a member of the legislature only if the remedy were authorized by the legislature.

If the legislature wished to limit all sanctions to those authorized by law, I would suggest:

> (d) A court may impose sanctions authorized by law upon a member of the legislature for a wilful violation of this section.

If I may be of further assistance, please advise.

RAB:gc
WKG6/111

Alaska State Legislature

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

2957 SHELDON JACKSON STREET
ANCHORAGE, ALASKA 99508

While in Juneau
P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-3818

Senate

M E M O R A N D U M February 9, 1989

TO: Senator Pat Pourchot, Chairman
Senate State Affairs Committee

FROM: Senator Arliss Sturgulewski, Chairman
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.

Alaska State Legislature

Official Business

P.O. Box V
State Capitol
Juneau, Alaska 99811

MEMORANDUM

TO: Senate State Affairs Committee Members

FROM: Senator Pat Pourchot, Chairman

RE: January 25 Committee Hearing

DATE: January 24, 1989

On Wednesday, January 25 at 1:30 p.m. in the Beltz Room the Senate State Affairs Committee will hear the following bills:

SJR 1, Proposing an amendment to the Constitution of the State of Alaska relating to open meetings.

SJR 1 would place before the voters at the next general election a Constitutional amendment regarding open meetings. If the amendment were to pass, all private and substantive discussions and debates on legislation under its jurisdiction by a quorum of a house of the legislature or a committee would be prohibited. The exception to this would be executive sessions as authorized by statute. If the amendment were violated, the court could impose civil fines and other sanctions authorized by statute, but could not invalidate legislation.

In 1986 the League of Women Voters sued after a series of closed meetings by the legislature. The Supreme Court ruled that although the legislature had violated existing statute and its own Uniform Rules governing open meetings, the court could not enforce compliance because the statute and rule fall within the legislature's rule making authority. Adoption of a constitutional amendment would provide a basis for judicial enforcement.

A fiscal note, indicating a cost of $2,200 to put the amendment on the ballot, is attached. Also attached is a summary sheet comparing SJR 1 to existing law and to SB 3.

SB 3, Relating to meetings held by the legislature or a committee of the legislature.

SB 3 proposes statutory amendments, rather than a Constitutional amendment, regarding open meetings. Other than this basic

difference, many of its provisions are similar to those of SJR 1 (see attached chart).

SB 127, Relating to the private manufacture of and the definition of an alcoholic beverage.

SB 127 would exempt privately produced alcoholic beverages ("homebrew") from most statutes governing alcohol, mainly those related to licensing. Homebrewing would still be prohibited in both "damp" and "dry" local option areas; municipalities would continue to have the authority to regulate homebrewing; sale to and possession or consumption by a person under age 21 would still be prohibited.

The current definition of alcoholic beverage was rewritten in 1986 to encompass privately produced alcoholic beverages to eliminate a perceived loophole in the local option statutes. Although it is within the ABC Board's authority to issue a license for homebrewing, the Board has declined to do so.

The Great Northern Brewers Club has requested the statute changes contained in SB 127 in time for this year's annual Fur Rondezvous wine and beer judging competition. The competition has been temporarily cancelled awaiting statutory clarification.

As introduced, SB 127 included a change in the definition of alcoholic beverage to exclude from state regulation beverages that contain less than one-half percent of alcohol by volume. This section has been dropped from the committee substitute due to concerns that it would allow the manufacture and possession of beverages such as "near beer" in local option areas.

sjr 1

RECEIVED MAR 16 1989

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 (esperially 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

Carol Murkowski Sturgulewski
Pres., Alaska Press Club

Cheryl D. Anderson
League of Women Voters
of Alaska

Rosemary Shinohara
Anchorage Daily News

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

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

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.

---

[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. Article 4, Section 12.
Public sessions; journals. All sessions of each house shall be public. Each house shall keep a journal...

NEW YORK. Article 3, Section 10.
Journals; open sessions; adjournments. Each house of the legislature shall keep a journal of its proceedings, and publish the same, except such parts as may require secrecy. The doors of each house shall be kept open, except when the public welfare shall require secrecy. Neither house shall, without the consent of the other, adjourn for more than two days.

NORTH DAKOTA. Article 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.

Bradley Memo Sandra

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907 465-3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM January 26, 1989

SUBJECT: Open meetings: the laws from other states (SJR 1)

TO: Senator Arliss Sturgulewski

FROM: Richard A. Bradley
Legislative Counsel

Const - OR + CAL only

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).

citations only

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.

Cal Const

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.

Dick Bradley has Const. of the States Annotated

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).

Cal penalties

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.

Cal statute

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.

OR Const

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).

OR penalty

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.

court voiding

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.

caucus

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.

CO

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.

none

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
C6/049

SENATE COMMITTEE REPORT

FIRST COMMITTEE OF REFERRAL

Date of 5-DAY NOTICE _____
IN ACCORDANCE WITH UNIFORM RULE 23

FURTHER JUDICIARY
FINANCE

**FISCAL NOTE(S) MUST BE ATTACHED
IN ACCORDANCE WITH AS 24.08.035

DATE TURNED INTO OFFICE 2-10-89

1/9/89
Mr. President:

STATE AFFAIRS Committee considered SJR 1

amending the Constitution of the State of Alaska relating to open meetings

and recommended:

[X] replace with CS SJR 1 (St Aff) [X] same title
[ ] new title

[ ] attached amendment(s) and

[ ] _____ letter of intent adopted

[ ] do pass

[ ] do not pass

[ ] no recommendation

[X] individual recommendations

[ ] further referral to _____

FISCAL NOTE(S) attached [ ] zero [ ] fiscal impact
[ ] appropriation no FN attached [ ] Gov. FN introduced w/ bill

MEMBERS SIGNING DO PASS

Tim Kelly

Rick Halford (DO PASS)

OTHER RECOMMENDATIONS

John Torgerson No Rec

Pat Lawlor DO PASS
Chairman signature and recommendation

[ ] Committee backup attached

adopted St Aff
2-3-89

6-0013E
Bradley
2/2/89

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 a wilful 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.

Introduced: 1/9/89
Referred: State Affairs, Judiciary and Finance

6-0013A

this bill result of last year's State affairs work.

Sandra

BY STURGULEWSKI, FISCHER, KERTTULA, PEARCE, SZYMANSKI, KELLY, RODEY, DUNCAN

IN THE SENATE

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.

Sec. 24 a) all formally called meetings b) whenever not formally called

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:

apply to all discussions of house & committees

when meeting called

SECTION 24. MEETINGS OPEN. (a) Unless the legislature or a committee of the legislature is meeting in executive session to consider matters authorized by law, the discussions and debates of each house of the legislature and its committees shall be open to the public.

meetings

briefing sessions, inquiries, etc.

addresses "accidental quorum" — the halls, restaurants, etc. — can't discuss legislation

when meeting not called

(b) Except as provided in (a) of this section, 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. A court may not prescribe rules or procedures for the conduct of legislative business or invalidate legislation because of a violation of this section. A court may impose a civil fine upon a member of the legislature for a wilful violation of this section and may impose other sanctions authorized by law.

(c) 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.

Alaska State Legislature
Senate

Official Business

P.O. BOX V
State Capitol
Juneau, Alaska 99811

M E M O R A N D U M January 19, 1989

TO: Senator Pourchot
Chairman, State Affairs Committee

FROM: Senator Arliss Sturgulewski

RE: Senate Joint Resolution 1
Proposing an amendment to the Constitution of State of Alaska relating to open meetings.

Thank you for scheduling a hearing on SJR1. This 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.

no - implied Const right

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 the 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 itself. I believe this position erodes the respect of the people for the legislature. It can only be remedied by adoption of constitutional amendment which will provide a basis for judicial enforcement.

Senate Joint Resolution 1 provides a reasonable and workable standard for when meetings in the legislature must be open and also provides a basis for enforcement of that standard. This resolution is substantially the same as last year's Senate State Affairs committee substitute which was developed after a great deal of work.

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

The first sentence of **Section 1(b)** states that except for the executive sessions authorized in 1(a), 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 sentence 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 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, whetner that private setting is a caucuses, 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.

The rest of Subsection 1(b) specifies that a court may not prescribe rules or procedures for the conduct of the legislature, may not invalidate legislation because of a violation of this section, but may impose civil fines (not civil damages) and other sanctions authorized by the legislature upon individual legislators for wilful violations.

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 .

Subsection 1(c) 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, or establish a specific fine amount.

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.

This amendment is balanced, workable, and appropriate. Thank you for your consideration of SJR 1.

OPEN MEETINGS (SJR 1, SB 3)

LEAGUE OF WOMEN VOTERS, ANCHORAGE DAILY NEWS, AND FAIRBANKS DAILY NEWS MINER V. AL ADAMS, ET AL

BOTTOM LINE: THE COURT CAN ENFORCE ONLY IF A CONSTITUTIONAL RIGHT OR REQUIREMENT HAS BEEN VIOLATED. THERE IS NO IMPLIED RIGHT OF PUBLIC ACCESS TO MEETINGS. SO THE CONSTITUTION MUST BE AMENDED BEFORE JUDICIAL ENFORCEMENT CAN OCCUR.

Superior Court Ruling, October 1986
Justiciability depends on a determination that a constitutional right or requirement has been violated.

Closed meetings violate an implied constitutional right of public access to meetings of legislative units (Article I, Section 5 - freedom of speech and press).

Fact that closed meetings may have violated the statutory Open Meetings Act and Uniform Rule #22 is nonjusticiable, on grounds that legislature has constitutional right to establish its own rules of procedure.

Supreme Court Ruling, September 1987
Contrary to Superior Court decision, there is no implied constitutional right of public access to legislative meetings.

NOTE: At least 35 states have constitutional requirements that their legislatures meet in public. All fifty states, D.C., and the federal government have some form of an open meetings act.

10-1-86 Superior Ct.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

LEAGUE OF WOMEN VOTERS OF ALASKA, ANCHORAGE DAILY NEWS, and FAIRBANKS DAILY NEWS-MINER, on Behalf of the People of Alaska,

Plaintiffs,

v.

ALBERT P. ADAMS, JOHNE BINKLEY, H.A. BOUCHER, BETTE M. CATO, DONALD E. CLOCKSIN, SAM COTTEN, MIKE DAVIS, JIM DUNCAN, STEVE FRANK, JOHN G. FULLER, PETER GOLL, MAX F. GRUENBERG, JR., BEN F. GRUSSENDORF, ADELHEID HERRMANN, KATHERINE T. HURLEY NIILO E. KOPONEN, RONALD L. LARSON, M. MIKE MILLER, MIKE W. MILLER, MIKE NAVARRE, PAT POURCHOT, JOHN RINGSTAD, RICHARD SHULTZ, JOHN SUND, MIKE SZYMANSKI, ROBIN L. TAYLOR, DAVID W. THOMPSON, KAY WALLIS, MITCHELL E. ABOOD, JR., DON BENNETT, JOHN B. COGHILL, EDNA DeVRIES, RICHARD I. ELIASON, BETTYE FAHRENKAMP, JAN FAIKS, FRANK R. FERGUSON, PAUL FISCHER, RICK HALFORD, TIM KELLY, JALMAR M. KERTTULA, PATRICK RODEY, JOHN C. SACKETT, ARLISS STURGULEWSKI, FRED F. ZHAROFF, ALAN AKIYAMA, SERGEANT-AT-ARMS, ALASKA HOUSE OF REPRESENTATIVES, in his official capacity, JACK GIBBONS, SERGEANT-AT-ARMS, ALASKA SENATE, in his official capacity, IRENE CACHEN, CLERK OF THE ALASKA HOUSE OF REPRESENTATIVES, in her official capacity, PEGGY MILLIGAN, SECRETARY OF THE ALASKA SENATE, in her official capacity,

Defendants,

and

STATE OF ALASKA,

Defendant-Intervenor.

FILED IN THE TRIAL COURTS
STATE OF ALASKA, FIRST DISTRICT
AT JUNEAU

OCT - 1 1986

Clerk of Court

By PB Deputy

No. 1JU-86-986 Civil

MEMORANDUM OF DECISION AND ORDER

The plaintiffs have filed a complaint for declaratory and injunctive relief against the twenty-eight members of the majority caucus of the Alaska State House of Representatives, the sixteen members of the majority caucus of the Alaska State

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Senate, and four House and Senate employees.[1] The plaintiffs argue that they are entitled to relief because the "members of both the House and Senate have improperly met in violation of state statutes, common law and state and federal constitutional guarantees, to collectively gather information about, consider, debate, and act upon the state budget for Fiscal Year 1987." [Plaintiffs' Complaint, p. 1.]

The Senate defendants have moved to dismiss this complaint with prejudice (or alternatively for this court to enter a summary judgment in their favor). Alaska Civil Rules 12(b) and 56. Likewise, the House defendants have moved for a judgment on the pleadings in their favor. Alaska Civil Rule 12(c). Finally, the State of Alaska has intervened in the suit and has moved to dismiss this complaint with prejudice (or alternatively that a summary judgment be entered in the defendants' favor). Alaska Civil Rules 12(b) and 56.

These motions are based on three main legal arguments by the defendants and the intervenor. First, they contend that the complaint raises issues that are nonjusticiable political questions, in part because the public or press have no constitutional right to have notice of nor to attend legislative meetings. Second, they argue that legislative immunity guaranteed by the Alaska Constitution bars this suit entirely, or at a minimum protects a legislator and staff employees from being called to answer in court about legislative acts done during a session. Thus, they argue that to allow this suit to proceed would impermissibly require defendants to waive their immunity in

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1. These employees are the House Sergeant-at-arms, Senate Sergeant-at-arms, Clerk of the House, and the Secretary of the Senate.

order to defend. Finally, they contend that plaintiffs' 42 U.S.C. 1983 claim cannot proceed because it is barred by that immunity or alternatively that dismissal is appropriate because the defendants acted in good faith and because the law was not clearly established at the time.

The plaintiffs oppose the motions and seek summary judgment in their favor. The plaintiffs urge this court to recognize that the public and the press have a constitutional right, among others, to have notice of and to attend substantive meetings, such as the budget meetings involved in this case. Therefore, plaintiffs argue that this claim is justiciable because it involves a constitutional right. Additionally, plaintiffs contend that immunity is not a bar to proceeding with this suit and that defendants' defenses to 42 U.S.C. 1983 claim do not bar the declaratory relief requested.

FACTS

The plaintiffs' case centers around allegations contained in seven affidavits filed with the court. The plaintiffs contend that the allegations show a pattern of violation of the plaintiffs' rights through a number of closed door sessions of majority caucuses and finance committees during which substantive budget decisions were made without being subject to scrutiny by the public, by the press, and at times by certain members of the legislature.

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These allegations concerning particular "meetings" are as follows:

(1) Senate Majority Caucuses

Senator Arliss Sturgulewski[2] affirmed that "decisions have been made in these closed caucus meetings on specific budget cuts and levels of funding. These votes have been taken by a show of hands and not been recorded. Many times the votes were close, and it is sometimes hard to remember afterwards how individual senators voted on specific issues." [Sturgulewski Aff., p. 2.] Additionally, she noted that "[t]here is significant pressure from the caucus that all of its members must adhere to the budget decisions made in caucuses." [Id., p. 3.]

Senator Patrick Rodey[3] affirmed that "[t]he caucus has met numerous times in sessions closed to the public, the press, and to legislators who are not members of the caucus." [Rodey Aff., p. 1.] He affirmed that in these "closed caucus sessions, the senators have discussed the FY 1987 budget at length, and have taken numerous votes about specific budget items . . . . Votes taken by the caucus [were] considered binding upon the Finance Committee." [Id (emphasis added).]

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2. Senator Sturgulewski has been a member of the Alaska State Senate since 1978 and is presently a member of the majority caucus.

3. Senator Rodey has been a member of the Alaska State Senate since 1974 and is a current member of the majority caucus.

Senator Vic Fischer[4] affirmed that the use of closed caucus meetings "to discuss, debate, and decide the budget is a recent development" and did not occur in 1983 and 1984, when he was a member of the finance committee. [Fischer Aff., p. 3.]

Reporter Peter Kenyon[5] affirmed that he observed the Senate Finance Committee "approving the operating budget of one third of the state's departments in less than 90 minutes. . . . The amount of debate or discussion afforded items at this session was unusually brief." [Kenyon Aff., p. 1.] As an example, Reporter Kenyon noted that "the entire discussion of the budget of the governor's office took only two minutes and three seconds." [Id.] He affirmed that "substantive and potentially controversial decisions such as elimination of the Office of Equal Employment Opportunity and the Alaska Women's Commission received no discussion whatsoever." [Id.]

(2) House Majority Caucus

Representative Pat Pourchot[6] affirmed that in closed majority caucus meetings, legislators "took notes on all of the Departmental caps, after lengthy discussion and debate on how it would affect the departments." [Pourchot Aff., p. 2.]

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4. Senator Fischer has been a member of the Alaska State Senate since 1980 and is a member of the minority caucus. Senator Fischer also was a delegate to the Alaska Constitutional Convention in 1955.

5. Peter Kenyon is a reporter for Alaska Public Radio Network who covers the Alaska Legislature.

6. Representative Pourchot has been a member of the Alaska State House since 1984. He is a member of the House Finance Committee and a member of the House Majority Caucus.

Representative Rick Uehling[7] affirmed that he understood "that budget caps were set . . . in the meetings of the majority caucus that were also closed to [Representative Uehling] and others in the minority." [Uehling Aff., p. 1.]

(3) House Finance Committee

Representative Pourchot affirmed that he "attended two meetings of the Finance Committee in the office of Committee Chairman Al Adams that were not open to the public or press, or to the two minority members of the Committee. At these meetings, Representative Pourchot stated, "budget caps" and "the level of funding for the Department of Education and the foundation formula" were discussed. [Pourchot Aff., p. 2.]

Representative Uehling agreed that "the majority members of the House Finance Committee met in closed sessions in the Office of Finance Committee Chairman Al Adams. The other minority members of the Finance Committee and [Representative Uehling] were excluded from these meetings of the majority members of the Committee." [Uehling Aff., p. 1.] Representative Uehling affirmed that budget caps were being set in these closed finance committee meetings as well as in closed caucus meetings. [Id.]

On April 29, 1986 (the 107th day of the legislative session), the plaintiffs moved for a temporary restraining order asking the court to prohibit the defendants from "(1) further engaging or participating in collective deliberations, fact-gathering, debate or votes, or otherwise conducting public

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7. Representative Uehling has been a member of the Alaska State House since 1982. He is a member of the minority and serves on the House Finance Committee.

business, except in meetings open to the public upon reasonable public notice, (2) otherwise violating the Alaska Open Meetings Act, AS 44.62.310-312, and (3) finally enacting or passing a budget for fiscal year 1987 without substantial, de novo, independent and public reconsideration of all matters pertaining to the budget that were previously discussed in sessions closed to the public and press."

At a hearing on April 30, 1986, the defendants specially appeared, arguing that legislative immunity was an absolute bar to service during the session and that the issues raised were nonjusticiable political questions.

On May 1, 1986, the court quashed the subpoena against the legislators because they were not subject to process of service during the session. However, the court found that service was effective as to the legislative employees. The court denied issuance of a temporary restraining order because it was "unable to fashion a practical and workable decree in the circumstances of this case." [Transcript of decision, p. 21.] Believing that the consequences of delay would be drastic if the state's budget, then about to be passed, were to be held void months later (after the fiscal year, July 1 to June 30, began), the court then issued final declaratory relief.

The defendants appealed to the Alaska Supreme Court on an expedited basis. On May 5, 1986, the Alaska Supreme Court heard oral argument, ruled that the defendants were not afforded the benefits of due process, and reversed and remanded the case to this court. The supreme court also allowed the state to intervene in the action at that time.

On May 12, 1986, the Alaska Legislature adjourned. The court then allowed the legislative defendants to be served with a subpoena. Answers to the complaint were filed by the defendants

on May 15, 1986. At a scheduling conference c plaintiffs withdrew those counts requesting that the court declare that the FY 1987 budget was void and to enjoin enrollment or enactment of that budget legislation.

The parties have since filed dispositive motions, which are the subject of this decision.

ANALYSIS

I. JUSTICIABILITY: DO THE PLAINTIFFS HAVE AN IMPLIED RIGHT OF ACCESS UNDER THE ALASKA CONSTITUTION TO LEGISLATIVE MEETINGS ON THE STATE BUDGET?

The defendants contend that the plaintiffs' suit cannot proceed because it raises claims which are nonjusticiable political questions. Thus, the defendants argue that an order of dismissal or, alternatively, summary judgment[8] in their favor is appropriate.

The plaintiffs disagree and argue that the public and press have a constitutional right of access to substantive meetings[9] of the legislature and its committees (in this case concerning the budget). Thus, the plaintiffs contend that their claims are justiciable and that this court has jurisdiction to rule on them.[10]

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8. Because the parties appear to be relying on matters (i.e., affidavits) outside of the pleadings, the court finds that the defendants' motions under Alaska Civil Rule 12(b)(6) should be treated as motions for summary judgment under Alaska Civil Rule 56.

*9. This court would define that term to include meetings of the members of legislative bodies, including committees, at which substantive and binding legislative decisions are made.

10. Plaintiffs make several additional arguments concerning justiciability, among them that a legislature's violation of the "Open Meetings Act", AS 44.62.310, or of the [footnote cont'd]

* but see Amendment to Mem. Dec. & Order, Oct. 9, 1986, at 3, adding:
"but also every step of the deliberative and decision-making process when a legislative unit meets to transact public business."

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The leading case for determining whether a claim is justiciable is Baker v. Carr, 369 U.S. 186, 7 L. Ed. 2d 663 (1962).[11] Baker adopted a six element test for determining justiciability of a claim. The elements are:

(a) a "textually demonstrable constitutional commitment of the issue to a coordinate political department;"

(b) "lack of judicially discoverable and manageable standards for resolving it;"

(c) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;"

(d) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;"

(e) "an unusual need for unquestioning adherence to a political decision already made;" or

(f) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

[footnote cont'd]

Uniform Rules, would present a justiciable question. [Plaintiffs' Opposition Memorandum, pp. 28-53.] For the reasons argued by the defendants, (Defendants' Memorandum In Support of Motion to Dismiss or Alternatively for Summary Judgment, pp. 6-21; House Defendants' Memorandum in Support of Motion for Judgment on the Pleadings, pp. 3-14; State's Memorandum in Support of Motion to Dismiss or Alternatively for Summary Judgment, pp. 9-18), this court rejects those arguments of the plaintiffs. Justiciability in this case depends on a determination that there is a constitutional right alleged to have been infringed. Abood v. Gorsuch, 703 P.2d 1158, 1161 (Alaska 1985); Malone v. Meekins, 650 P.2d 351, 359 (Alaska 1982). When there is legislative action which is shown to be in violation of the constitution, the courts act. See Plumley v. Hale, 594 P.2d 497 (Alaska 1979).

11. The rationale of Baker was adopted by the Alaska Supreme Court in Malone v. Meekins, 650 P.2d 351, 356 (Alaska 1982).

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Id. at 217, 7 L. Ed. 2d at 686.[12]

If it can clearly be said that one or more of these elements is present in a given case, the matter is said to be nonjusticiable. A nonjusticiable controversy must be resolved elsewhere than in the courts, presumably in the legislature or executive, or ultimately at the polls.

A. Constitutional Commitment to a Coordinate Branch of Government

Article II, subsection 12, of the Alaska Constitution states in part:

> Section 12. Rules. The house of each legislature shall adopt uniform rules of procedure.

The defendants and intervenor contend that this provision textually commits to the legislature the right to develop rules of procedure for the internal operation of the body.[13] Therefore, any alleged failure to follow the rules of procedure of the legislature would not be justiciable, because the Alaska Constitution has assigned this issue to a coordinate political department -- the legislature -- for resolution.

The defendants and intervenor rely on Malone v. Meekins, 650 P.2d 351 (Alaska 1982), as authority for this proposition. In Malone, a former speaker of the Alaska House of Representatives who had been removed as speaker during the

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12. While this listing appears neat and precise, it is worthwhile at this point to note that the opinion in Baker referred to the attributes of the nonjusticiable political question doctrine as "attributes which, in various settings, diverge, combine, appear and disappear in seeming disorderliness." 369 U.S. at 210, 7 L. Ed. 2d at 681.

13. In this instance, the legislature has adopted a rule which addresses the issues raised in this lawsuit. Alaska State Legislature, Uniform Rules [hereinafter Uniform Rules], Rule 22.

session brought suit seeking a declaration that his removal was illegal and unconstitutional. The former speaker alleged numerous procedural irregularities including the defendants' failure to follow the uniform rules of the legislature in the meeting during which his removal occurred. The court found that this claim was not justiciable, viewing such a violation as "solely the business of the legislature." Id. at 359. It stated:

> However, except in extraordinary circumstances, as where the rights of persons who are not members of the legislature are involved, it is not the function of the judiciary to require that the legislature follow its own rules.

Id.[14] (emphasis added) (footnote omitted).[15]

The Alaska court has recognized that such "exceptional circumstances" can occur when the legislature violates a rule of procedure that has constitutional dimensions. In Abood v. Gorsuch, 703 P.2d 1158 (Alaska 1985), the court noted that the "nonjusticiability [of rules violations] doctrine would not apply

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14. This conclusion of the Alaska Supreme Court that a violation of the Uniform Rules of the legislature generally does not constitute a justiciable claim is echoed in Hayes v. Charney, 693 P.2d 831 (Alaska 1985). In discussing mootness, the Hayes court noted that:

> [T]he Alaska Constitution gives the legislature the power and duty to establish its own rules. . . . If the legislature wishes to change the notice procedure for Legislative Council meetings, it need only impose the notice requirements it deems fit.

Id. at 834-35.

15. The Alaska Supreme Court at this point in the Malone opinion cited to United States v. Smith, 286 U.S. 6, 33 L. Ed. 954, 958-59 (1932), at which the Supreme Court stated that while courts will generally not involve themselves in disputes concerning legislative rules, a legislature "may not by its rules ignore constitutional restraints or violate fundamental rights."

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to cases involving our constitutionally mandated duty to insure compliance with the provisions of the Alaska Constitution, including compliance by the legislature." Id. at 1161.

Therefore, in order for the plaintiffs' claim to survive this justiciability challenge, it must involve a right protected by either the Alaska Constitution or the United States Constitution.[16]

Nowhere in the Alaska Constitution is the public or press explicitly guaranteed the right of access to legislative meetings. But this does not end the inquiry, for courts have long recognized that constitutions protect rights that are not enumerated in specific terms if those rights are "indispensable to the enjoyment of rights explicitly defined." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580, 65 L. Ed. 2d 973, 991 (1980).

Richmond Newspapers, which in fact involved an issue similar to that presented here -- public access to governmental proceedings (there, a criminal trial) -- addressed the question whether there were rights beyond those explicitly stated in the federal constitution and which were protected by that document. It traced the question back to the founders:

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16. This court addresses the state constitutional claim first. Defendants cite various cases, not from the United States Supreme Court and not from the Alaska Supreme Court, for the proposition that this issue is nonjusticiable and hence for the implied proposition that there is no constitutional right of access to legislative proceedings. Included are Consumers Union of the United States v. Periodical Correspondents' Assoc., 515 F.2d 1341 (D.C. Cir. 1975), cert. denied, 423 U.S. 1051, 46 L. Ed. 2d 640, and Moffit v. Willis, 459 So. 2d 1018 (Fla. 1984). These cases, while entitled to the respect and consideration which the force of their reasoning commands, are ultimately not persuasive to this court, for the reasons generally set out at pages 12-31 of this memorandum of decision. In addition, of course, they do not address Alaska constitutional law.

> The State argues that the Constitution nowhere spells out a guarantee for the right of the public to attend trials, and that accordingly no such right is protected. The possibility that such a contention could be made did not escape the notice of the Constitution's draftsmen; they were concerned that some important rights might be thought disparaged because not specifically guaranteed. It was even argued that because of this danger no Bill of Rights should be adopted. . . . James Madison [stated] that "there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude." 5 Writings of James Madison 271 (G. Hunt ed. 1904).
>
> But arguments such as the State makes have not precluded recognition of important rights not enumerated. Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees.

Id. at 579, 65 L. Ed. 2d at 991. Thus, as the Court pointed out, although the United States Constitution contains no specific provision concerning the right of privacy, the right to be presumed innocent or to proof beyond a reasonable doubt, and the right to travel, all of those rights have been recognized as constitutional rights by the Supreme Court. Stanley v. Georgia, 394 U.S. 557, 22 L. Ed. 2d 542 (1969) (right to privacy); Taylor v. Kentucky, 436 U.S. 478, 483-86; 56 L. Ed. 2d 468 (1978) (presumption of innocence); In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368 (1970) (right of proof beyond a reasonable doubt); Shapiro v. Thompson, 394 U.S. 618, 630, 22 L. Ed. 2d 600 (1969) (right to travel).

Returning to the issue raised at the time of the adoption of the Bill of Rights, the Court concluded:

> The concerns expressed by Madison and others have thus been resolved; fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.

Richmond Newspapers, Inc., 448 U.S. at 580, 65 L. Ed. 2d at 991.

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Similarly, at the state level, although the Alaska Constitution does not specifically provide a right to a jury trial for juveniles in delinquency cases, nor did it in 1971 recognize a "right to be let alone,"[17] these rights were specifically found by the Alaska Supreme Court to be protected by the Alaska Constitution. R.L.R. v. State, 487 P.2d 27, 32 (Alaska 1971) (article I, section 11, of Alaska Constitution guarantees juvenile charged with delinquency the right to jury trial); Breese v. Smith, 501 P.2d 159 (Alaska 1972) (article I, section 1 of Alaska Constitution guarantees to students the right to wear their hair in accordance with personal tastes, derivative of "right to be let alone").

The issue then before this court is whether the public and press enjoy an unenumerated right of access under the Alaska Constitution to legislative meetings at which substantive budget

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17. The Alaska Constitution was amended effective August 22, 1972, to provide specifically for the right to privacy in article I, section 22. However, Breese v. Smith, 501 P.2d 159 (Alaska 1972), discussed in the text infra, arose in 1971 and was based on the law at the time it arose, although the decision was not actually published until September 1972. Significantly for purposes of determining what law applied, the supreme court did not even advert to the newly adopted article I, section 22 in its opinion. Moreover, the court had granted injunctive relief to the student after oral argument in December 1971, long before adoption of the new constitutional provision.

decisions are made.[18] This question apparently has not been previously posed to the Supreme Court of Alaska for resolution. It may be of some assistance, then, to look to federal treatment of the general issue of the constitutional right of the public and the press to have access to the proceedings of government.

The United States Supreme Court has addressed this issue a number of times in recent years. The public's right of access to a governmental proceeding was first recognized in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 65 L. Ed. 2d 973 (1980). In that case, the Court held that the public and press had a right to attend a criminal trial, based on the First Amendment:

> We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and "of the press could be eviscerated."

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18. Plaintiffs suggest that this right should be deemed to be implied in the constitutional rights to freedom of speech, Alaska Const. art. I, § 5, to petition the government, Alaska Const. art I, § 6, and to retain rights other than those enumerated, Alaska Const. art I, § 21.

Article I, § 5 provides:

> Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

Article I, § 6 provides:

> The right of the people peaceably to assemble, and to petition the government shall never be abridged.

Article I, § 21 provides:

> The enumeration of rights in this constitution shall not impair or deny others retained by the people.

The primary focus of the following discussion is on the right to freedom of speech.

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Id. at 580, 65 L. Ed. 2d at 991-92 (citation omitted). In a footnote to this holding, the Court observed that whether the public has a right to attend civil trials was a question not raised by that case but added "we note that historically both civil and criminal trials have been presumptively open." Id. at 580 n.17.

In Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 73 L. Ed. 2d 248 (1982), the United States Supreme Court affirmed the right of public and press access to criminal trial proceedings. The Court noted that

> [u]nderlying the First Amendment right of access to criminal trials is the common understanding that a major purpose of that Amendment was to protect the free discussion of governmental affairs. By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.

Id. at 604, 73 L. Ed. 2d at 256 (emphasis added) (footnotes and citations omitted).

Globe Newspaper held that a right of access to criminal trials was encompassed in the First Amendment for two reasons. First, criminal trials had historically been open to the general public and press. Second, such a right of access improves the functioning of the system which accrues benefits both to the defendant and society as a whole. Id. at 605, 73 L. Ed. 2d at 256.

In addition to access to criminal trials, courts have found a constitutionally based right of access to civil trials,[19]

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19. In Publicker Industries v. Cohen, 733 F.2d 1059 (3rd Cir. 1984), the court recognized a public access right under the First Amendment to a closed hearing on a motion for preliminary injunction regarding whether certain proprietary information should remain confidential.

presidential press conferences,[20] formal administrative fact-finding hearings,[21] and preliminary hearings in criminal cases.[22]

The analysis utilized by the United States Supreme Court in Richmond Newspapers and the cases which followed it, and by various federal courts treating related issues, suggests that under article I, section 5, of the Alaska Constitution there should be recognized the right of public access to legislative committee meetings of the type involved in the present case. The analysis is in two parts. The first is historical, looking to the practice in effect at the time of the adoption of the Constitution to determine what the framers intended in adopting the broad language of that document,[23] and looking to historical

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20. Cable News Network v. American Broadcasting Co., 518 F. Supp. 1238 (N.D. Ga. 1981).

21. Society of Professional Journalists v. Secretary of Labor, 616 F. Supp. 569 (D.C. Utah 1985).

22. Press-Enterprise Co. v. Superior Court, ___ U.S. ___, 54 U.S.L.W. 4869 (June 30, 1986).

23. The Alaska Supreme Court has in some areas of constitutional interpretation held that contemporary social values and not historical categorizations would be determinative. For example, in Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970), the court specifically rejected historical analysis in deciding whether a prosecution was criminal for purposes of the right to jury trial, instead relying on contemporary standards:

> There is a continuing shift of moral values in society. . . . Because societal values do shift, this sort of crime . . . is peculiarly susceptible to appraisal by a jury of one's peers.
>
> In deciding as we do, we are in effect disregarding the suggestions made by those who revere history. We feel that the argument from history is not determinative because what was practical historically is not necessarily adequate to the needs of our times. To look only to history would deny a progressive development of our legal institutions.

[footnote cont'd]

developments since the adoption of the constitution both "because the Constitution carries the gloss of history" and because "a tradition of accessibility [since adoption of the Constitution] implies the favorable judgment of experience." Globe Newspaper, 457 U.S. at 605, 73 L. Ed. 2d at 256, quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 589, 65 L. Ed. 2d at 997 (Brennan, J., concurring). The second is functional, and requires a determination of the effect which the requirement of openness would have on the functioning of the particular governmental entity involved (here, legislative committees). As to the former, the historical record is not altogether clear but suggests at least a "presumption" of openness. As to the latter, there seems to be little question of the salutary effects of openness on the committee process.

[footnote cont'd]

Id. at 396. And see R.L.R. v. State, 487 P.2d 27, 32 (Alaska 1971). To the extent that the Alaska Supreme Court would adopt such an approach in the present case, the mixed historical record set out below at 19-23 is of relatively less significance. And, given the direction of the trend in recent years towards greater openness in legislative proceedings, see below at pp. 21-23, reliance on contemporary values would support the result reached in this case. But it should be emphasized that this opinion presumes that the analytical approach utilized in cases dealing with access to governmental proceedings, not other types of constitutional issues, should be followed, and it attempts to do so.

1. Historical Analysis[24]

The historical record is incomplete, especially as to the pre-statehood practice regarding the openness of committee

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24. This review is limited to the Alaska Legislature, because that body is the subject of this lawsuit. Going back to the oldest legislative body in the English-speaking world, the English Parliament, it appears that an important attribute of the earliest legislative assemblages was that the proceedings were open:

> By the end of [the thirteenth] century, England was having regular parliaments. This was not response to popular demand for a voice in government. On the contrary, the summons to assemble elicited more groans than cheers. It was a product of the needs of the king, or of the barons when they were dominant . . . . The principal need was money.
>
> . . . .
>
> A central machinery to gather taxes did not exist . . . . So representatives of countryside and town were called together, [and] the situation was discussed (thus "parley," "parliament") . . .
>
> . . . .
>
> During the second half of the thirteenth century, it was established there should be three parliaments a year, and part of the agenda should be the expression and redress of grievances. . . .
>
> . . . .
>
> [I]n 1272, . . . [t]he accession of Edward ends the struggle . . . . Parliament has been established. . . .
>
> It is now acknowledged doctrine that new law should come from statute - not from the king in private council or from his clerks and judges, but from open legislative operations in which the king himself is visibly active and Parliament takes a hand.

C. Rembar, The Law of the Land: The Evolution of Our Legal System 198-200 (1980) (emphasis added). While the earliest legislative assemblies thus differed greatly from our present ones, an [footnote cont'd]

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meetings. But a review of the available evidence suggests that, at least since statehood, the legislature has strongly tended toward openness and public access to its proceedings. It is helpful to consider some pre-statehood evidence first, for purposes of perspective.

In the decades before statehood, although neither body addressed in its rules the question whether committee meetings should be open, the two houses of the Alaska Territorial Legislature operated under very different rules.[25] Thus, in the first legislature of the Territory of Alaska, convened at Juneau in 1913, the Rules of the House permitted "reporters of the press", along with very few others, all official personages,[26] to be on the floor of the House. Journal of the House of Representatives, First Legislative Assembly of the Territory of Alaska, Rule 20, p. 9 (1913). On the other hand, the Alaska Senate Rules allowed floor sessions to be closed on "any business which may, in the opinion of the Senate, require [secrecy]." Journal of the Senate of the Territory of Alaska, Rule 54, p. 285 (1921). This Senate rule survived through territorial days. E.g., Alaska Territorial Legislature, Rules of the Senate and House of Representatives Including Joint Rules of the Senate and House of Representatives, Senate Rule 56 (1951). The House

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[footnote cont'd]

important feature of the former was that they were, in comparison to what went before them, open.

25. Each body had separate rules, although there also existed "Joint Rules of the Senate and House of Representatives," covering limited topics.

26. These were the governor, ex-governor and secretary of the Territory, the Delegate from Alaska, members of the Senate, the federal district judge, and "persons in the exercise of official duty directly connected with the business of the House."

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rules contained no similar authority. Significantly, when the two bodies adopted uniform rules at statehood pursuant to the new state constitution's requirement for uniform legislative rules in article II, section 12, the rules contained no provision similar to former Senate Rule 56. The position of the House, which did not permit closed sessions, apparently won out at the beginnings of statehood.

This situation continued from 1959 to 1973: the rules contained no provision allowing closed sessions. Although historical evidence of what actually occurred in legislative committee rooms is not available, it is reasonable to assume that executive sessions, if they occurred at all, were the exception and not the rule.

In 1973, the uniform rules were amended to provide that "[a]ll meetings of a legislative body [including committees] are open to all legislators, . . . and to the general public except as provided in (b) of this rule." Alaska State Legislature, Uniform Rule 24 (1973). Except for a renumbering which occurred in 1977, Alaska State Legislature, Uniform Rule 22 (1977), that rule has remained unchanged.

It is noteworthy that, at approximately the point when the Uniform Rules of the Legislature were being amended to mandate open proceedings, the legislature also amended AS 44.62.-310, the open meeting law, to extend coverage of the law to the legislature and its committees, 1972 Alaska Sess. Laws ch. 98, § 1, and to include a strong statement of policy regarding the public's right to know of the conduct of government. Id. § 3. That statement provides:

> 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.

(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.

This brief review suggests that, while direct evidence of whether legislative committee meetings in Alaska historically have been open is not available, three important facts are true: (1) the legislature has operated at all times, even pre-statehood, under a presumption of openness;[27] (2) in the first half of this state's existence (1959 - 1973) the legislature operated under rules providing no authority for closed hearings; and (3) in the second half of this state's history (1973 - 1986), the legislature has operated under rules mandating that legislative committee meetings be open (with certain recognized exceptions). Under these circumstances, this court concludes that there is respectable (though not conclusive) historical evidence of "a tradition of accessibility [which] implies the

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27. Even under territorial Senate Rule 54 (later Rule 56), cited above, the session could be closed only upon a determination by the body that secrecy was required.

favorable judgment of experience." Globe Newspaper, 457 U.S. at 605, 73 L. Ed. 2d at 256.

2. Functional Analysis

The second part of the Richmond/Globe analysis, as noted above, is consideration of the effect which a requirement of openness would have on the functioning of government, and specifically in this case, on legislative committees. It appears to this court that the effect would be salutary and that the benefits would be several. Indeed, virtually all of the advantages of openness which courts have found in regard to judicial proceedings, both criminal and civil, are equally applicable to the legislative process. These include the following:

a) The integrity of the fact-finding process is enhanced by open proceedings. As noted in Wigmore on Evidence, public access "plays an important part as a security for testimonial trustworthiness." 6 J. Wigmore, Evidence § 1834, at 435 (J. Chadbourn rev. 1976). The court in Publicker Industries, Inc. v. Cohen, 733 F.2d 1059 (4th Cir. 1984), traced English authorities, including Coke, Hale and Blackstone, who uniformly commented on the beneficial effect of open proceedings on the reliability of testimony adduced from witnesses. Id. at 1068-69.

b) Public respect for the legislative process is increased by open proceedings. As the Alaska Supreme Court noted with regard to the Alaska Open Meetings Act:

> Open decision-making is regarded as an essential aspect of the democratic process. . . . It is believed that public exposure . . . creates greater public acceptance of government action . . . .

Alaska Community Colleges' Federation of Teachers v. University of Alaska, 677 P.2d 886, 891 (Alaska 1984) (hereinafter "ACCFT"). And as Wigmore noted with regard to judicial proceedings, in a passage equally applicable to legislatures: "The educative effect

of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy." 6 J. Wigmore, Evidence § 1834, at 435 (J. Chadbourn rev. 1976). And as the Court found in relation to judicial proceedings in Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508, 78 L. Ed. 2d 629, 637 ("Press-Enterprise I"): "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known." In the same vein, "[o]penness thus enhances . . . the appearance of fairness so essential to public confidence in the system." Id. Conversely, mistrust and suspicion are aroused by closed proceedings. As noted by the federal court in Society of Professional Journalists v. Secretary of Labor, 616 F. Supp. 569 (C.D. Utah 1985), "[s]ecrecy breeds mistrust and abuse." Id. at 576.

c) Open proceedings provide a "therapeutic outlet," cf. Press-Enterprise I, 464 U.S. at 509, 78 L. Ed. 2d at 637, by allowing the public to view the legislative solutions (and the reasons for the solutions chosen) to the problems facing the state. Especially in times of stress (for example, in times of budgetary cutbacks such as the state is presently experiencing), it is incumbent for the people to be afforded the best opportunity to know the magnitude of the problems facing the state and, more importantly for this discussion, the reasons for the choices made by the legislature in solving those problems. The "budget caps" which various legislators affirmed were set in

closed meetings represent extremely important decisions as to which programs will continue and which will not, whose jobs will be saved and whose will not, which communities or communities of interest will be served and which will not. In the best circumstances, those who lose out in this process will be sorely afflicted. But to deny those persons the solace of understanding why the legislature acted as it did (although they may not agree with the reasons) risks doing violence to the compact between the people and their government. As the Court noted in Richmond Newspapers, 448 U.S. at 572, 65 L. Ed. 2d at 986, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."

d) The ability of the public to engage in informed discussion of governmental affairs, to cast an informed ballot, and ultimately to improve our system of self-government are all enhanced by open proceedings. These propositions seem so apparent that extensive citation is probably not necessary. In ACCFT, the Alaska Supreme Court set out several of the advantages of openness in governmental proceedings, which it called "an essential aspect of the democratic process:"

> It is believed that [open decision-making] deters official misconduct, makes government more responsible to its constituency, allows for greater public provision of information to the decision-maker, creates greater public acceptance of government action, and promotes accurate reporting of governmental processes.

677 P.2d at 891 (citations omitted). In the context of access to civil proceedings, the Sixth Circuit has adverted to the "link between access to the courtroom and the popular control necessary in our representative form of government." Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1178 (6th Cir. 1983). In the context of criminal proceedings, the Supreme Court has held

that the "first Amendment embraces a right of access to criminal trials . . . to insure that this constitutionally protected 'discussion of governmental affairs' is an informed one." Globe Newspaper, 457 U.S. at 604-05, 73 L. Ed. 2d at 256. In the context of access to information about judicial misconduct proceedings, the Supreme Court has held that an article concerning a pending judicial review proceeding "clearly served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect." Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 56 L. Ed. 2d 1, 11 (1978). With these decisions in mind, can it be doubted that public access to legislative meetings would even more directly and forcefully serve the goals of ensuring an informed electorate and improving our system of self-government? It is probably sufficient on this point to conclude with a brief reference to the "state policy regarding meetings" (including meetings of all legislative bodies) found in AS 44.62.312. There, state law declares that legislative committees "exist to aid in the conduct of the people's business," that "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," and that "the people's right to remain informed shall be protected so that they may retain control over the instruments they have created." (Emphasis added.)

The question next arises whether the functional values identified in the preceding paragraphs can be protected by open legislative floor sessions. It may be argued that only at such sessions may final and binding action be taken on the budget, and hence that public and press access to such sessions is sufficient. The argument is flawed. Preliminary substantive meetings

such as the types of committee meetings involved in the present case play a critical role in the shaping of the budget. For example, once the budget finally comes to the floor from the free conference committee, the "report [of the free conference committee] is not subject to amendment in either House." Uniform Rule 42(b). If the report is not adopted in each house, the bill can only be referred back to a second free conference committee on the budget. Id. Floor amendments (with their resultant debate) are not allowed under the rules of the legislature.

In Press-Enterprise Co. v. Superior Court, ___ U.S. ___, 54 U.S.L.W. 4869 (June 30, 1986) ("Press-Enterprise II"), the United States Supreme Court was faced with an analogous situation in the area of criminal trials. There, California had closed the preliminary hearing in a mass murder case. The state sought to distinguish the preliminary hearing from the trial (which had to be open under earlier United States Supreme Court decisions) on the ground that the former is not the final action in the case, no conviction can result from it, and the adjudication is before a judicial officer without a jury. The Court answered these arguments in this way:

> But these features, standing alone, do not make public access any less essential to the proper functioning of the proceedings . . . . Because of its extensive scope, the preliminary hearing is often the final and most important step in the criminal proceeding . . . . [T]he preliminary hearing in many cases provides the "sole occasion for public observation of the criminal justice system."

54 U.S.L.W. at 4872 (emphasis added). The Court also noted that a finding of probable cause at the preliminary hearing "leads to a guilty plea in a majority of the cases." Id. The situation in the legislature is virtually identical: Committee actions of the sort involved here are the most important steps of the budget process. In the committee is where the real debate occurs and

the substantive decisions made. And in the case of reports from a free conference committee, floor action is limited to approval or rejection. Thus, access to committee meetings would provide the sole opportunity for public and press observation of the real decisionmaking process.

In recognizing that the public and press have a constitutional right of access to legislative meetings where substantive budget decisions are made, this court is mindful that the right is not absolute. Cf. Press-Enterprise I, 464 U.S. at 510, 78 L. Ed. 2d at 638 ("closure [allowed if it] is essential to serve higher value and is narrowly tailored to serve that interest"); Globe Newspaper, 457 U.S. at 606-07, 73 L. Ed. 2d at 257; Richmond Newspapers, 448 U.S. at 581, 65 L. Ed. 2d at 992 ("[a]bsent an overriding interest articulated in findings," proceeding must be open); Press-Enterprise II, 54 U.S.L.W. at 4873 (closure allowed only if "substantial probability" that fair trial will be prejudiced by publicity and no reasonable alternatives available); Publicker Industries, 733 F.2d at 1070 (closure allowed only if it "serves an important governmental interest and . . . there is no less restrictive way to serve that governmental interest"). However, this court is not called upon to explore the parameters of the right to access,[28] because no party has claimed an exception to the right.

In summary, the history of legislative proceedings in Alaska and a functional analysis of the effect of a requirement of openness on the legislative process (and a review of related

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28. It is worth noting that the Open Meetings Act contains limitations on the right of access which appear generally to have been created with the principles set out above in mind.

federal case law) lead this court to conclude that implied in the guarantee of article I, section 5 of the Alaska Constitution that all citizens may speak, write and publish freely on all subjects is the right of access to governmental proceedings, including legislative committee meetings. This court further concludes that this case therefore involves the type of "exceptional circumstances" referred to in Malone v. Meekins: It is a case "where the rights of persons who are not members of the legislature are involved." 650 P.2d at 359. Thus, as held in Abood v. Gorsuch, 703 P.2d 1158 (Alaska 1985), the nonjusticiability doctrine does not apply to this case because this case "involves [the courts'] constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution, including compliance by the legislature." Id. at 1161. The case is not nonjusticiable, therefore, on the ground that the constitution commits its resolution to the legislature.

B. Lack of Standards for Resolving the Issue

The second element of the test of Baker v. Carr for nonjusticiability is lack of standards for resolving the issue.

There are two potential sources of standards in this case. First, the cases (discussed above) which have established and defined the right of public access to various types of governmental proceedings contain reasonably specific standards which, at least by analogy, suggest appropriate standards for this case. Second, statutes and rules concerning open meetings, while they are not constitutionally based, are another general source of the types of factors which ought to be considered in the establishment of standards.

It is worth noting, in this regard, that the question at issue here -- whether closed legislative committee meetings violate the constitution -- is far simpler in its ultimate

ramifications than the question found to be justiciable in Baker v. Carr -- whether the houses of the Tennessee legislature were constitutionally apportioned.

This case is not nonjusticiable because of a lack of standards.

C. Impossibility of Deciding without an Initial Policy Determination of a Kind Clearly for Nonjudicial Discretion

The third element of the Baker test for nonjusticiability is the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.

There is no initial policy determination here calling for nonjudicial discretion, as the cases above amply illustrate. There is no initial policy decision here required of the legislature.[29] This case is not nonjusticiable for this reason.

D. Impossibility of Court Independently Resolving the Matter without Lack of Respect Due to the Legislature

The fourth element of the Baker test for nonjusticiability is the impossibility of a court independently resolving the matter without showing a lack of respect due to the legislature.

The Alaska Constitution assigns to the courts the responsibility to interpret the constitution and to define the parameters of constitutional rights. The constitution assigns to the legislature, among much else, the authority to develop uniform rules to govern procedures within the legislature.

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29. To the extent that the legislature has made any policy decisions in this area, they appear to be consistent with the court's conclusions: AS 44.62.310 and Uniform Rule 22, which are legislative enactments, strongly support the principle of open legislative meetings.

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Because a court will involve itself in examining matters otherwise committed to the legislature only when such matters involve the constitutional rights of third parties, this court believes that no lack of respect for the legislature is shown by reaching such issues. Thus, a court can review the exceptional case, i.e., where the constitutional rights of third parties are involved, without becoming a "superparlimentarian" and interfering with the routine workings of a coordinate branch of government on a day to day basis.

Judicial resolution of this matter involves no lack of respect due to a co-equal branch of government.

E. Unusual Need for Unquestioning Adherence to Political Decision Already Made

The fifth element of the Baker test for nonjusticiability is the unusual need for unquestioning adherence to a political decision already made.

This factor is not present, for at least two reasons. First, the action by plaintiffs at this point seeks only declaratory relief: there is no specific action of the legislature which is at issue which "ought to be adhered to." Second, on the facts presently before the court, it would be difficult to say that the legislature should be deemed to have made a contrary decision on the substantive question of open meetings. The continued existence of the Open Meetings Act and Uniform Rule 22, along with the affidavits of legislators mentioned above, suggest at the very least a strong division within the legislature on this issue. Certainly, there is no contrary decision that this court should adhere to.

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F. Potentiality of Embarrassment from Multifarious Pronouncements by Various Departments on One Question

The sixth and final element of the Baker test for nonjusticiability is the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

To the extent that there are legislative pronouncements on this subject, they appear to be consonant with what this court has concluded the Alaska Constitution demands. Both a statute (AS 44.62.310-.312) and a uniform rule (Rule 22) require open meetings. Under these circumstances, the potential for a contrary pronouncement seems extremely low. Presumably, too, explication by the courts of the constitutional ramifications of the rights involved would further lessen the chances for a contrary pronouncement by the legislature.

In conclusion, the issue raised by this case is not nonjusticiable. A court may reach the merits of the dispute if it is not precluded by legislative immunity from doing so. Accordingly, the court next examines the arguments of defendants and the intervenor that the defendants enjoy legislative immunity.

II. IMMUNITY: ARE THE DEFENDANTS IMMUNE FROM SUIT UNDER THE ALASKA CONSTITUTION?

Defendants next argue that they enjoy immunity from this action by virtue of article II, section 6 of the Alaska Constitution, and that the case must therefore be dismissed.

Article II, section 6 of the Alaska Constitution provides in relevant part:

> Legislators may not be held to answer before any other tribunal for any statement made in the exercise of their legislative duties while the legislature is in session.

In determining the meaning of this provision, and hence its scope, it is helpful to review its historical basis. It has a general similarity to the "speech or debate" clause of the federal constitution. Kerttula v. Abood, 686 P.2d 1197, 1201 (Alaska 1984). The United States Supreme Court reviewed the history of the speech or debate clause in Kilbourn v. Thompson, 103 U.S. 168, 26 L. Ed. 377 (1881). In that case, Justice Miller traced the history of the struggles between the English monarchy and the parliament:

> The freedom from arrest and the freedom of speech in the two Houses of Parliament were long subjects of contest between the Tudor and Stuart kings and the House of Commons. When, however, the revolution of 1688 expelled the last of the Stuarts and introduced a new dynasty, many of these questions were settled by bill of rights, formally declared by the Parliament and assented to by the Crown. . . . One of these declarations is "that the freedom of speech, and debates, and proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament."

26 L. Ed. at 391. It was noted that Queen Elizabeth and her two successors had denied members of Parliament the privilege of having their debates unquestioned and had punished them for speaking their minds freely, and that the privilege was eventually perceived to be "indispensable." Id. See also Tenney v. Brandhove, 341 U.S. 367, 372-75, 95 L. Ed. 1019, 1025-26 (1951). Thus, the historical purpose of legislative immunity was to protect legislators from arrest or other prosecution for statements made in the legislature. This purpose was noted by the Alaska Supreme Court in Kerttula v. Abood, 686 P.2d 1197, 1202 (Alaska 1984): "The historical policy is that of protecting disfavored legislators from intimidation by a hostile executive."

It is clear that this case does not involve intimidation by a hostile executive of legislators who are disfavored

because of what they have said. The case is not brought by the executive branch. It does not challenge any statements made by legislators. It is not aimed at disfavored legislators.

There is, however, a second and more recently-articulated policy which supports legislative immunity. While prevention of intimidation of legislators by the executive is the "central role" of the clause, United States v. Johnson, 383 U.S. 169, 181, 15 L. Ed. 2d 681 (1966), "[t]hat role is not the sole function of the Clause, however, and English history does not totally define the reach of the Clause." Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502, 44 L. Ed. 2d 334, 336 (1975). The Clause must be interpreted in light of the American experience and in the context of the American constitutional scheme of government. United States v. Brewster, 408 U.S. 501, 508, 33 L. Ed. 2d 507 (1972). Thus, "when it applies, the Clause provides protection against civil as well as criminal actions, and against actions brought by private individuals as well as those initiated by the Executive Branch." Eastland, 421 U.S. at 502-03, 44 L. Ed. 2d at 336 (emphasis added). The basis for this American expansion of the reach of the Clause is the belief that legislators who are acting within the sphere of legitimate legislative activity "should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." Dombrowski v. Eastland, 387 U.S. 82, 85, 18 L. Ed. 2d 577, 580 (1967) (per curiam). Thus, the second policy which supports legislative immunity is "the protection of legislators from the burdens of forced participation in private litigation." Kerttula, 686 P.2d at 1202. The present litigation is private, i.e., brought by private parties. And, if there is no legislative immunity, the named legislative defendants (44 of the 60 members of the legislature) will be

forced to defend. Hence, the court must determine if the present case attacks legislators for statements made "in the exercise of their legislative duties."

As the court noted in Kerttula, the phrase "legislative duties" (and the federal counterpart, "legislative acts") has

> a core meaning which is clear. It necessarily includes activities internal to the legislature such as voting, speaking on the floor of the House or in committee, authoring committee reports, introducing legislation, and questioning witnesses in legislative hearings . . . . However, the extent to which "legislative duties" reach beyond these core activities is not clear, and the answer probably cannot be gained by reference to any single phrase or formula.

Id.

This observation seems particularly apt, as a review of several cases in the United States Supreme Court shows that the Court has wrestled with the proper formulation to define the scope of legislative immunity. While it began with an expansive definition ("things generally done in a session of the House by one of its members in relation to the business before it" Kilbourn v. Thompson, 103 U.S. 168, 204, 26 L. Ed. 377, 392 (1881)), the immunity has not been applied that broadly. Thus, in United States v. Brewster, 408 U.S. 501, 515-16, 33 L. Ed. 2d 507, 519-20 (1972), the Court noted that it had "[n]ever treated the Clause as protecting all conduct relating to the legislative process. In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process - the due functioning of the process." (Emphasis in original.)

In Gravel v. United States, 408 U.S. 606, 625, 33 L. Ed. 2d 602 (1972), the Court provided the following definition:

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is

> construed to reach other matters, they must be an integral part of the deliberative and communicative process by which Members participate in Committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation. . . . [T]he courts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations."

Id. at 625, 33 L. Ed. 2d at 602 (citation omitted).

This standard was repeated and utilized by the Court in Doe v. McMillan, 412 U.S. 306, 314, 36 L. Ed. 2d 912, 922 (1973), and Eastland v. United States Servicemen's Fund, 421 U.S. 491, 44 L. Ed. 2d 324 (1975). Gravel also articulated the standard in a slightly different formulation: If the challenged action is "essential to legislating," it is entitled to protection. 408 U.S. at 621, 33 L. Ed. 2d at 600.

The critical question, then, for resolution of the defendants' claim of immunity, is whether the acts complained of by the plaintiffs were legislative acts. Were they "essential to legislating?" (Gravel) Were they "an integral part of the deliberative and communicative process by which Members participate in committee and House proceedings?" (Gravel, Doe, Eastland) Were they part of the "due functioning of the [legislative] process?" (Brewster)

The gravamen of the plaintiffs' complaint is that the defendants excluded the public and the press (and, occasionally, other legislators)[30] from various legislative committee meetings.

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30. See Complaint for Declaratory and Injunctive Relief, para. 16. Such a claim, if raised properly by a person with standing to raise it -- which this court does not decide here -- would prevail over the immunity defense by virtue of Malone v. Meekins, 650 P.2d 351, 358 and n.14 (Alaska 1982). See also Abood v. Gorsuch, 703 P.2d 1158, 1163-64 and n.6 (Alaska 1985).

The complaint is not a challenge to the holding of legislative committee meetings alone; such a claim would be frivolous. Indeed, the complaint poses no challenge to "any statement made in the exercise of . . . legislative duties." Properly viewed, then, this case is not simply "about meetings" as defendants argue; it concerns the act of closing the door before the meetings begin. Is the exclusion of the public "essential to legislating"? Is secrecy "an integral part of the deliberative and communicative process"? Are closed sessions part of the "due functioning of the legislative process"?

The answer to these questions is no. Defendants have not argued to the contrary. And in light of the overwhelming weight of the policy established by AS 44.62.310 and by Uniform Rule 22,[31] it seems likely that such an argument, if made, would not be persuasive.

As noted by the Court in Gravel, the privilege may be extended to matters beyond pure speech and debate, but "only when necessary to prevent indirect impairment of such deliberations." 408 U.S. at 625, 33 L. Ed. 2d at 602. Conducting committee meetings in secret simply does not seem necessary to prevent impairment of committee deliberations. Certainly there has been no argument, much less any showing, that it is necessary in this case.

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31. It should be clear that this court cites these sources of law only to establish the weight of the policy arguments favoring openness in the legislative process and not to establish the justiciability of the plaintiffs' claims. As noted above in part I of this memorandum of decision, neither the statute nor the legislative rule is sufficient to allow this court to act. Only the constitutional claim justifies judicial action as against a separation of powers defense.

Gravel provides another formulation of the test, which is perhaps the most helpful in assessing this case. Eschewing any "cramped construction" (e.g. "speech or debate" means only statements made on the floor during debate), Gravel noted that

> the Court has sought to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator.

408 U.S. at 618, 33 L. Ed. 2d at 598.[32] Does the present action in any way realistically threaten to control the conduct of any legislator? Again, the answer must be no. There is no suggestion that it does, nor can this court divine how it might. This case simply requires that the conduct -- whatever it might be -- take place where the public can see it.

It may be argued by defendants that the court has drawn the question too narrowly, and that it is analytically incorrect to separate out the act of locking the door of the meeting hall from the act of meeting itself. Since the act of meeting is clearly a part of the legislative process, the argument goes, the court is barred by legislative immunity from hearing the case.

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32. Gravel is cited heavily by the defendants in this case for the proposition that legislative employees and aides are entitled to the same protection as their employers if they are carrying out legislative acts, and it does stand for that proposition. But much more importantly, it stands for the proposition that where illegal or unconstitutional conduct is involved, previous cases

> reflect a decidedly jaundiced view towards extending the Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings.

408 U.S. at 620, 33 L. Ed. 2d at 599 (emphasis added).

But courts, especially including the United States Supreme Court, have from the beginning drawn similarly close distinctions to separate out legislative acts (which are immune from judicial scrutiny) from non-legislative acts (which are not).

In Kilbourn v. Thompson, the House had passed a resolution holding Kilbourn in contempt of the House. Thompson, the sergeant-at-arms of the House, had executed the House's warrant, arresting Kilbourn. The Court found that passing a resolution was legislative, and hence protected activity, but the enforcing it was not. Thompson enjoyed no immunity. Nor would any House member who attempted to enforce it. Gravel, 408 U.S. at 621, 33 L. Ed. 2d at 600.[33] In the instant case, holding the meeting is clearly legislative activity, but barring the public from the meeting is not.

In Powell v. McCormack, 395 U.S. 486, 23 L. Ed. 2d 491 (1969), Congressman Adam Clayton Powell was excluded from the United States House of Representatives by a vote of that body. On the grounds of legislative immunity, the Supreme Court affirmed the dismissal of the case against various members of Congress, but it refused to dismiss as against the legislative employees who had to carry out the exclusion order: the doorkeeper who refused him admittance to the floor, the sergeant-at-arms who refused to pay Powell his salary, and the clerk who

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33. Specifically, the Court stated:

> [N]o prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest . . . . Neither they nor their aides should be immune from liability or questioning in such circumstances.

refused to perform clerical duties for him. Upon reaching the merits of the case, the Court granted Powell the principal relief he had requested: a declaratory judgment that his exclusion had been unlawful.[34] It is instructive to consider the extremely fine distinction the Court made in Powell: The legislators' actions in voting to exclude Representative Powell were protected, yet the doorkeeper's actions in closing the door to him were not.[35] In the instant case, there is a substantially greater distinction between the holding of a meeting (protected) and the closing of the door to that meeting (not protected).

In Gravel v. United States, 408 U.S. 606, 33 L. Ed. 2d 583 (1972), the Court was called upon to decide whether an aide to Senator Gravel could be questioned before a grand jury inquiring into possible crimes committed in the publication of government documents popularly referred to as the Pentagon Papers. The Court went to great lengths to draw the distinction between protected legislative activities -- for which immunity protected both legislator and legislative aide -- from non-legislative activities. It held that legislative immunity provided protection for a number of activities, including

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34. Ironically, the Court remanded on the question of back pay, even though the existence of the dispute over back pay allowed the Court to overcome the defendants' mootness defense and (along with the other employee-related issues) allowed the Court to overcome the immunity defense.

35. It must be emphasized that the distinction is not that legislators in doing an act are protected but that their aides in doing the same act are not. Gravel v. United States, 408 U.S. 606, 33 L. Ed. 2d 583 (1972), has made it clear that if a legislator would be protected in doing an act, then the aide would also be protected. The proper distinction is between legislative acts (speech, debate, voting, meeting, etc.) and non-legislative acts (enforcing contempt order, enforcing an arrest warrant, excluding a person from the floor, etc.).

preparation for a legislative subcommittee hearing,[36] but did not extend to arrangements for republication of the documents with a private publisher, nor did it extend to questions tracing the source of the documents (in both cases, as long as no legislative act was implicated).

The point that emerges from these and other cases is that the Court will faithfully guard the immunity of legislators for statements made in the performance of their legislative duties, but that it will go no further. If the challenged action itself is not a legislative act, the protection is unavailable. Because this court has concluded that the acts in question, properly narrowly defined, were not legislative acts, there is no constitutional immunity from this lawsuit which challenges them.[37]

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36. Even here, the Court carved out an exception allowing questions which would be "relevant to investigating possible third-party crime." Gravel, 408 U.S. at 620, 33 L. Ed. 2d at 605.

37. This court therefore does not reach an alternative argument concerning immunity: that even if legislative immunity could be found to apply on these facts, it would be outweighed by the public's constitutional right of access to governmental proceedings. Given the above finding that legislative immunity does not attach here, this court need not attempt that balancing process.

Defendants also argue that the testimonial immunity afforded legislators by the Alaska Supreme Court's decision in Kerttula v. Abood, 686 P.2d 1197 (Alaska 1984), requires dismissal of this case. Even assuming that there are two distinct types of immunity, the argument seems premature. In Kerttula, a non-party legislator (Senator Kerttula) had been subpoenaed for a deposition in the case of Abood v. Gorsuch, 3AN-83-5980 Civ. Senator Kerttula resisted the subpoena. The court was called upon to decide the motion to quash the subpoena. In the present case, resolution of the motions for summary judgment does not require this court to decide whether the testimonial immunity argued for by the defendants would be available or not to any particular legislator. Any motion to quash a subpoena can be decided when it is ripe. And while it is possible to speculate about the various ways in which the [footnote cont'd]

III. 42 U.S.C. § 1983: DO THE DEFENDANTS ENJOY IMMUNITY, ABSOLUTE OR QUALIFIED, FROM AN ACTION BASED ON VIOLATION OF THE PLAINTIFFS' CIVIL RIGHTS?

Defendants argue that legislative immunity shields them absolutely and, if not, that in the alternative they are entitled to a qualified good faith immunity which protects a § 1983 defendant "unless the constitutional right he was alleged to have violated was 'clearly established' at the time of the violation." Davis v. Scherer, 468 U.S. ___, ___, 82 L. Ed. 2d 139, 149 (1984); Harlow v. Fitzgerald, 457 U.S. 800, 818-19, 73 L. Ed. 2d 396, 410-11 (1982); Butz v. Economou, 438 U.S. 478, 498, 57 L. Ed. 2d 895, 911 (1978); State v. Haley, 687 P.2d 305, 317 (Alaska 1984). Plaintiffs contend that these cases are distinguishable because they involved claims for damages, whereas plaintiffs' suit seeks only a declaration of what the law is.[38] Plaintiffs go on, however, to state that the § 1983 cause of action offers no more relief to plaintiffs than a direct cause of action under the Constitution, and that it is therefore "unnecessary to more specifically address the § 1983 issues at this time." (Plaintiffs' Memorandum, pp. 54-55). Under these circumstances, and given that the constitutional right the defendants are alleged to have violated could not be said to have been "clearly established" at the time the defendants acted, the court grants summary judgment in favor of the defendants on those parts of the plaintiffs' claims which rest upon 42 U.S.C. § 1983.

[footnote cont'd]

plaintiffs may attempt to prove their case, it would be speculation only.

38. Absolute judicial immunity as to actions for damages does not extend to declaratory and injunctive relief. Pulliam v. Allen, 466 U.S. 522, 80 L. Ed. 2d 565 (1984); Martinez v. Winner, 771 F.2d 424, 436 (10th Cir. 1985). However, the precise distinction which plaintiffs attempt to make has not been recognized by courts construing 42 U.S.C. § 1983.

CONCLUSION

Because the public and press enjoy an implied right of access to the proceedings of the legislature under the Alaska Constitution, plaintiffs' complaint presents a justiciable issue. Plaintiffs' claims that legislative action violates the Open Meetings Act or the Uniform Rules of the Legislature are, however, not justiciable. Because the actions of defendants which are challenged by the plaintiffs (closing the door to legislative committee meetings) do not implicate "statements made in the exercise of their legislative duties" and are not "legislative duties," legislative immunity is not a bar to this action. Finally, because the plaintiffs cannot show that the constitutional right of the public and press to have access to legislative committee meetings was "clearly established" at the time of the acts complained of, plaintiffs cannot prevail on their claim for relief under the federal statute.

For these reasons, the defendants' motions for summary judgment based on nonjusticiability and legislative immunity are denied, while the defendants' motions for summary judgment on the 42 U.S.C. § 1983 claim are granted. Plaintiffs' cross-motion for summary judgment is therefore granted to the extent noted in the preceding paragraph.

The case should be returned to the trial calendar, and will be at the request of any party.

IT IS SO ORDERED.

DONE at Juneau, Alaska, this 1st day of October, 1986.

Walter L. Carpeneti

Walter L. Carpeneti
Superior Court Judge

090340

10-9-86
Superior

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

LEAGUE OF WOMEN VOTERS OF ALASKA, et al.,

Plaintiffs,

v.

ALBERT P. ADAMS, et al.,

Defendants,

and

STATE OF ALASKA,

Defendant-Intervenor.

FILED IN THE TRIAL COURTS
STATE OF ALASKA, FIRST DISTRICT
AT JUNEAU

OCT - 9 1986

Clerk of Court

By _____ Deputy

No. 1JU-86-986 CIV

PARTIAL FINAL JUDGMENT

The court has reviewed all pleadings and memoranda submitted by the parties, and has heard oral argument on the defendants' motions for summary judgment and plaintiffs' cross-motion for partial summary judgment. It has issued its Memorandum of Decision and Order with respect to those motions. Defendants have moved for partial final judgment under Civil Rule 54(b), and the plaintiffs do not oppose entry of a partial final judgment.[1] The court finds that there is no just reason for delay and expressly directs entry of judgment as follows:

1) Judgment is entered for the plaintiffs and against the defendants on plaintiffs' claim that the public and press have a constitutional right of access to meetings of the members of legislative bodies, (including committees), and including every step of the deliberative and decision-making process when a legislative unit meets to transact public business.

1. Plaintiffs opposed certain language of the form of order proposed by defendants.

040316

2) Judgment is entered for the plaintiffs and against the defendants and defendant-intervenor on defendants' affirmative defense that legislative immunity bars the action;

3) Judgment is entered for the defendants and against the plaintiffs on defendants' affirmative defense that allegations that the legislature has violated the Open Meetings Act and the Uniform Rules of the Legislature are not justiciable;

4) Judgment is entered for the defendants and against the plaintiffs on plaintiffs' claim for relief under 42 U.S.C. § 1983.

IT IS SO ORDERED.

DONE and ENTERED this 9th day of October, 1986.

Walter L. Carpeneti

WALTER L. CARPENETI
Superior Court Judge

CERTIFICATION

The undersigned certifies that on October 9, 1986, copies of this Order were sent to:

D. John McKay, Esq.
Avrum Gross, Esq.
Richard Burnham, Esq.
Jonathan Rubini, Esq.

Secretary to Judge Carpeneti

040317

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

LEAGUE OF WOMEN VOTERS OF ALASKA, et al.,

Plaintiffs,

v.

ALBERT P. ADAMS, et al.,

Defendants,

and

STATE OF ALASKA,

Defendant-Intervenor.

FILED IN THE TRIAL COURTS
STATE OF ALASKA, FIRST DISTRICT
AT JUNEAU

OCT - 9 1986

Clerk of Court

By _____ Deputy

No. 1JU-86-986 CIV

AMENDMENT TO MEMORANDUM OF DECISION AND ORDER, AND FINDINGS AND CONCLUSIONS SUPPORTING ISSUANCE OF PARTIAL FINAL JUDGMENT

At the hearing on defendants' motion for entry of partial final judgment, a question arose as to the scope of the decision announced by this court in the Memorandum of Decision and Order of October 1, 1986. Defendants proposed a form of order which included the following language:

> Judgment is entered . . . that the public and press have a constitutional right of access to all meetings of members of the Alaska legislature at which substantive and binding legislative decisions are made.

Plaintiffs objected to the qualifying language after the word "legislature", arguing that the court's decision went further than meetings at which decisions are made. Defendants, pointing out that the language was drawn from footnote 9 of the Memorandum of Decision and Order, indicated that their intention was merely to set out in judgment form what the court had ruled, and that the language should be altered if the court intended something else.

This issue illustrates clearly why trial courts should be cautious in entering Civil Rule 54(b) partial final judgments. On the one hand, the Memorandum of Decision and Order does contain language at footnote 9 which can be read narrowly, for the reason that a decision on the specific factual case being offered by the plaintiffs (see the affidavits summarized at Memorandum of Decision and Order, pp. 4-6) required no more. On the other hand, if the case is to proceed to appellate review at this point, it hardly serves the interests of the parties or of judicial economy to state the judgment of the trial court in the narrowest terms, if such statement would limit the supreme court in its treatment of the important issues raised by this case.

On the first question, then, whether the case should proceed now to appellate review, this court concurs with the parties that the "general policy against piecemeal appeals" is outweighed in the present case by the "danger of actual hardship caused by delay in entry of final judgment." Johnson v. State, 577 P.2d 706, 710 (Alaska 1978). Most importantly, forcing the defendants to defend at trial would deprive them of immunity before the supreme court could decide the correctness of this court's decision on immunity. Additionally, trial of issues which the defendants claim are nonjusticiable before the supreme court has decided that question may cause hardship. While it is true that a judgment for the defendants on the facts at trial would moot any appeal altogether, it remains that the defendants would have been forced to defend and in that sense their claimed immunity could not be vindicated. On balance, this court concludes that partial final judgment should be entered so that appellate review may be had.

It remains then to decide the form of the partial final judgment: narrower, related closely to the facts alleged

in the affidavits, and only enough to satisfy what was necessary for purposes of deciding the motions for summary judgment, or broader, to facilitate supreme court review of the entire issue of access to legislative meetings? This court concludes that the latter course should be followed, given the fullness of briefing and argument provided by all parties to the court and given the importance to the people and to the legislature of a full resolution of this issue by the supreme court if that is possible.

As to the precise form of the partial final judgment, counsel for the Senate defendants noted during the hearing on entry of partial final judgment that the defendants' proposed judgment drew language at least suggested by Brookwood Area Homeowners Association v. Anchorage, 702 P.2d 1317 (Alaska 1985). This court accepts the suggestions of counsel for the defense (that the proposed partial final judgment be modified to reflect the court's intent and that Brookwood serve as a guide), and amends footnote 9 of the Memorandum of Decision and Order accordingly to read as follows:

> 9. This court would define that term to include not only meetings of the members of legislative bodies, (including committees), at which substantive and binding legislative decisions are made, but also every step of the deliberative and decision-making process when a legislative unit meets to transact public business.

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The court will issue a partial final judgment which reflects this amendment to its Memorandum of Decision and order.

IT IS SO ORDERED.

DONE this 7th day of October, 1986.

Walter L. Carpeneti

WALTER L. CARPENETI
Superior Court Judge

CERTIFICATION

The undersigned certifies that on October 9, 1986, copies of this Order were sent to:

D. John McKay, Esq.
Avrum Gross, Esq.
Richard Burnham, Esq.
Jonathan Rubini, Esq.

Pat Bock

Secretary to Judge Carpeneti

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: CSSJR 1 (Staff)
PUBLISH DATE: 1/9/89

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)

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

STATE OF ALASKA
1990 LEGISLATIVE SESSION

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

FISCAL NOTE

REQUEST:

Revision Date: 12/8/89
Title: Proposing an amendment relating to open meeting
Sponsor: State Affairs Committee
Requestor: State Affairs Committee

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

Components: II - Elections
Primary & General Elections

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	2.2*	-0-	-0-	-0-	-0-	-0-
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	2.2*	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	2.2*	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	2.2*	-0-	-0-	-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 Election Pamphlet, for printing and typesetting, and costs estimated to cover computer programming requirements for vote counting purposes.

Prepared by: Linda Edgeworth
Phone: 465-4611
Division: Division of Elections
Date: 12/8/89

Approved by Commissioner: (Acting)
Date: 12.11.89
Agency: Division of Elections

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. CSSJR 1

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:

Senate State Affairs Committee
January 24, 1989

COMPARISON OF OPEN MEETING LAWS AND PROPOSALS

	Uniform Rule 22	AS 44.62.310	SJR 1	SB 3
Premise	All meetings of a legislative body are open to ...the general public.	Same as Rule 22	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.	Same as SJR 1
Exception	Same as AS 44.62.310	To discuss matters that may (1) adversely impact state finances if immediately known (2) prejudice a person's reputation (3) be required by law to be kept confidential	Same as AS 44.62.310	Same as AS 44.62.310
Penalties	Bill involved is returned to house of origin without further action. (Rule 54)	Actions taken in violation of law are void.	Court may impose civil fine as specified in law; may not invalidate legislation.	Court may impose civil fine (maximum $500); may not invalidate legislation; injunction to stop action may be sought; is violation of ethics code.
Other			Prohibition applies only to quorum of body or committee. Requires vote of public to enact.	Same as SJR 1. Specifies that caucuses may meet in private to consider procedure, strategy, organization.

Senate State Affairs Committee
January 24, 1989

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Penalties	Bill involved is returned to house of origin without further action. (Rule 54)	Actions taken in violation of law are void.	Court may impose civil fine as specified in law; may not invalidate legislation.	Court may impose civil fine (maximum $500); may not invalidate legislation; injunction to stop action may be sought; is violation of ethics code.
Other			Prohibition applies only to quorum of body or committee. Requires vote of public to enact.	Same as SJR 1. Specifies that caucuses may meet in private to consider procedure, strategy, organization.

SJR 1, PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE STATE OF ALASKA RELATING TO OPEN MEETINGS.
(SEE ALSO SB 3)

TO TESTIFY:

SENATOR STURGULEWSKI, BILL SPONSOR (MCKAI)

DICK BRADLEY, LEGAL SERVICES (ON CONSTITUTIONAL AMENDMENT VS. STATUTORY CHANGE)

GENE STORM, OPEN MEETINGS COALITION (TELECONFERENCE FROM ANCHORAGE)

VICKI BOREGO, LEAGUE OF WOMEN VOTERS (MAY OR MAY NOT TESTIFY)

OTHERS (SEE WITNESS LIST)

FYI:

REP. BROWN'S HJR 1 WAS HEARD BY HOUSE STATE AFFAIRS 1/23.
CONCERNS RAISED:

WHAT ABOUT SUBCOMMITTEES? (MCKAI SAYS WAS MUCH DISCUSSION LAST YEAR; SENATE CHOSE TO EXCLUDE. QUORUM OF SUBCOMMITTEE COULD BE AS FEW AS 2 PEOPLE AND IT SEEMED TOO INTRUSIVE TO PROHIBIT 2 PEOPLE FROM DISCUSSING LEGISLATION.)

WHAT CONSTITUTES AN OPEN MEETING? (MCKAI SAYS IF THE CONSTITUTIONAL AMENDMENT PASSES THE OPEN MEETINGS STATUTE SHOULD BE AMENDED TO DEFINE OPEN MEETING IN TERMS OF NOTICE, ACCESSIBLE LOCATION, PUBLIC PRESENCE, ETC. ALSO TO DEFINE EXECUTIVE SESSION, QUORUM, ETC.)

WHO WILL ACTUALLY BRING CHARGES IN CASE OF A VIOLATION? (MCKAI SAYS PRIVATE COUNSEL, AS IN LEAGUE OF WOMEN VOTERS CASE.)

OTHER CONCERNS RAISED IN PAST:

SHOULD THE AMENDMENT BE TO ARTICLE I OF THE CONSTITUTION (RIGHTS) OR ARTICLE II (LEGISLATURE)? (LEGAL SAYS EITHER IS APPROPRIATE; STURGULEWSKI PREFERS IN ARTICLE I.)

NOT SPECIFYING IN THE CONSTITUTION WHEN EXECUTIVE SESSION IS APPROPRIATE LEAVES THE LEGISLATURE DISCRETION TO GRANT THEMSELVES BROAD STATUTORY AUTHORITY TO GO INTO EXECUTIVE SESSION.

ALLOWING THE COURT TO "INTERFERE" WITH THE LEGISLATURE'S OPERATION THROUGH ENFORCEMENT OF OPEN MEETINGS IS "THE CAMEL'S NOSE UNDER THE TENT". (SJR 1 ATTEMPTS TO ADDRESS THIS BY STATING THAT A COURT MAY NOT PRESCRIBE RULES OR

PROCEDURES FOR THE CONDUCT OF LEGISLATIVE BUSINESS BECAUSE OF A VIOLATION -- PAGE 1, LINES 19-20)

ALSO NOTE:

NO MENTION OF CAUCUS. SJR 1 PROHIBITS PRIVATE DISCUSSION OF LEGISLATION (PAGE 1, LINE 17) -- NO PROHIBITION ON DISCUSSION OF ANYTHING ELSE, SO DISCUSSION OF STRATEGY, BLAH BLAH BLAH WOULD BE ALLOWED.

PROHIBITION LANGUAGE IS VERY SPECIFIC. PAGE 1, LINES 17-18 READS "LEGISLATION UNDER THE JURISDICTION OF A COMMITTEE OR BODY". THIS MEANS THAT JUDICIARY COMMITTEE COULD MEET PRIVATELY TO DISCUSS LEGISLATION THAT IS CURRENTLY IN RESOURCES COMMITTEE, ETC.

COURT CANNOT INVALIDATE LEGISLATION BECAUSE OF A VIOLATION (PAGE 1, LINE 20). RATHER, THE MEMBER(S) WHO VIOLATE THE ACT WILL BE CIVILLY FINED (PAGE 1, LINE 21).

A PETITION DRIVE IS UNDERWAY (GENE STORM, WHO INTENDS TO TESTIFY, IS HEADING IT UP). THE PETITION PROPOSAL IS APPARENTLY MORE STRINGENT THAN SJR 1. HOWEVER, IT CALLS FOR AN ADVISORY VOTE, WHICH MEANS THAT IF THE QUESTION GOES ON THE BALLOT AND THE VOTERS APPROVE IT, THE LEGISLATURE WOULD BE ASKED TO DO WHAT WE'RE DOING NOW (I.E. PASS LEGISLATION REGARDING OPEN MEETINGS).

NEXT GENERAL ELECTION IS 1990.

Introduced: 2/3/89
Referred: State Affairs
and Judiciary

6-0605A

IN THE HOUSE BY THE STATE AFFAIRS COMMITTEE

HOUSE BILL NO. 140

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to violations of the open meetings section of the Constitution of the State of Alaska; and amending Alaska Rule of Civil Procedure 82 and Alaska Rule of Appellate Procedure 508; and providing for an effective date.

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

* Section 1. AS 24.40 is amended by adding new sections to read:

ARTICLE 2. LITIGATION INVOLVING THE OPEN MEETINGS REQUIREMENT.

Sec. 24.40.050. DEFENSE ON CHARGES OF VIOLATING THE OPEN MEETING REQUIREMENTS. The Legislative Council shall underwrite the costs and attorney fees reasonably necessary to the defense of a member of the legislature who has been charged with a violation of the open meetings requirements of the Constitution of the State of Alaska.

Sec. 24.40.060. FRIVOLOUS OR MALICIOUS COMPLAINTS. If the court determines that a lawsuit charging a violation of the open meeting requirements of the Constitution of the State of Alaska was brought frivolously or maliciously, the court shall assess as attorney fees and costs the actual expenses of the Legislative Council expended in the defense of the charges and may assess a civil penalty on the plaintiff of not to exceed $1,000.

Sec. 24.40.070. ARBITRATION. If the Legislative Council believes that the amount incurred in a defense under AS 24.40.050 by private counsel for costs and attorney fees was unreasonable or excessive, it shall offer to reimburse the member a portion of the costs

and attorney fees. If the member does not accept the offer of the Legislative Council, the matter shall be resolved by binding arbitration under AS 09.43.010 - 09.43.180. If the member and the Legislative Council do not agree on the selection of an arbitrator, the arbitrator shall be selected under the rules of the American Arbitration Association.

Sec. 24.40.080. LIMITATIONS OF ACTIONS. A person may not bring an action for a violation of the open meeting requirements of the Constitution of the State of Alaska unless the action is commenced within 180 days of the violation.

Sec. 24.40.090. VIOLATION OF OPEN MEETING REQUIREMENTS. An individual member of the legislature determined by the court to have violated a provision of the open meetings requirements of the Constitution of the State of Alaska may be assessed a fine not in excess of $1,000 for each violation.

* Sec. 2. The provisions of sec. 1 of this Act have the effect of changing Alaska Rule of Civil Procedure 82 and Alaska Rule of Appellate Procedure 508 by limiting the courts' discretion in awarding costs and attorney fees.

* Sec. 3. This Act takes effect on the effective date of a constitutional amendment proposed by the Sixteenth Alaska State Legislature relating to open meetings.

Senator Pourchot
January 27, 1989

OPEN MEETINGS
CONSTITUTIONAL PROVISIONS IN OTHER STATES

SOURCE: "Constitutional Provisions Mandating Open Access to State Legislatures", Freedom of Information Center, 11/21/86

The constitutional provisions of other states in respect to open meetings seem to fall into three categories:

1 - Provisions adopted in the 1800's which allow the legislature to close meetings when they determine secrecy is required.
2 - Provisions adopted more recently, which apply only to a body of the legislature, not to legislative committees.
3 - Provisions also adopted more recently which apply to the legislature and its committees.

Category 1:

Pennsylvania
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. (Art. II, sec. 13)

Similar language is contained in the state constitutions of Alabama (1901), Arkansas (1879), Colorado, Connecticut (1818), Delaware (1897), Indiana (1851), Iowa (1857), Maryland, Minnesota (1857), Mississippi (1890), Nebraska (1875), New Hampshire (1793), New York (1894), Ohio, Pennsylvania, South Dakota (1889), Tennessee, Vermont (1793), Washington (1889), Wisconsin (1848), and Wyoming (1890).

Category 2:

Florida
Sessions of each house shall be public; except sessions of the senate when considering appointment to or removal from public office may be closed. (Art. III, sec. 4) (1968)

Idaho
The business of each house and of the committee of the whole shall be transacted openly and not in secret session. (Art. III, sec. 12) (1890)

Michigan
The doors of each house shall be open unless the public security requires otherwise. (Art. IV, sec. 20) (1963)

Nevada
The doors of each house shall be kept open during its session, except the senate while sitting in executive session. (Art. IV, sec. 15) (1864)

New Mexico
All sessions of each house shall be public. (Art. IV, sec. 12) (1911)

Texas
The sessions of each House shall be open, except the Senate when in executive session. (Art. II, sec. 22) (1984)

Utah
All sessions of the legislature, except those of the Senate while sitting in executive session, shall be public. (Art. VI, sec. 15)

Category 3

California
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) (1966)

Georgia
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. (Art. III, sec. 4)

Illinois
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. (Art. IV, sec. 5) (1970)

Montana
The sessions of the legislature and of the committee of the whole, all committee meetings, and all hearings shall be open to the public. (Art. V, sec. 10) (1972)

North Dakota
All sessions of the legislative assembly, including the committee of the whole and meetings of legislative committees, shall be open and public. (Art. IV, sec. 14) (1974)

Oregon
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) (1978)

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.

COMPARISON OF KEY PROVISIONS OF VARIOUS OPEN MEETINGS PROPOSALS

	SJR 1 (1989)	CSHJR 1 StAff ('89)	1988 Sen St Aff	'88 House Passed Version	Current Initiative	Oregon Constitution
OFFICIAL MEETINGS	Discussions and debates of each house of the legislature and its committees shall be open to the public	Same as SJR 1	Same as SJR 1	Deliberations of each house of the legislature and its committees shall be open to the public	All collective information gathering, deliberation, and decision making of each house of the legislature and of all subunits of the legislature and each house of the legislature shall be open to the public	Deliberations of each house, of committees of each house or joint committees and of the committee of the whole shall be open
ACCIDENTAL QUORUM	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	Private and formal or informal discussions that lead to promises, agreements, or votes on legislation under its jurisdiction by a quorum of a house of the legislature or a committee are prohibited	Same as SJR 1	Private and subtantive deliberation by a quorum of a legislative body on any subject under its jurisdiction is prohibited	If a matter is appropriate to a particular legislative body, nonpublic consideration of the matter by a quorum of that legislative body is prohibited	
STATED EXCEPTIONS	Executive session	Same as SJR 1 Subcommittee of a committee of the legislature	Same as SJR 1	Executive session Caucuses of the legislature may meet in private to consider matters of procedure, organization, or strategy. The provisions of this section that permit executive sessions and caucuses shall be narrowly construed	Executive session Legislators may meet collectively only to consider matters of procedure, organization, or strategy	
PENALTY	Court may not prescribe rules or procedures for the conduct of legislative business or invalidate legislation	Same as SJR 1	Same as SJR 1	Court may not prescribe rules or procedures for the conduct of legislative business	Action taken in violation of this section may be voided	
	Court may impose a civil fine upon a member of the legislature for a wilful violation	Court may impose a civil fine for a wilful violation and may impose others sanctions authorized by law	Same as SJR 1	Same as CSHJR 1(St Aff)	The legislature shall prescribe additional penalties	

A TEMPORARY LAW OF THE STATE OF ALASKA

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.

STEPHEN McALPINE
LIEUTENANT GOVERNOR

STATE OF ALASKA
P.O. BOX AA
JUNEAU 99811
(907) 465-3520

January 11, 1989

Ms. Cheryl D. Anderson
Suite 797
3605 Arctic Boulevard
Anchorage, AK 99503

Dear Ms. Anderson:

The initiative application relating to the open meeting law has been certified as being in proper form under the provisions of AS 15.45.010 though AS 15.45.060, and Article XI of the Alaska Constitution. This petition will be identified as Initiative #88-OPEN. The official certificate for this application is enclosed.

I am enclosing a copy of the Attorney General's Opinion dated January 4, 1989. Please review the Opinion, giving particular notice to the summary language, and contact my office if you have any comments on the suggested petition summary language. Upon finalization of the impartial summary for this initiative, the Division of Elections will prepare and print numbered petition booklets for circulation.

If this office may be of further assistance, please do not hesitate to contact us.

Warmest regards,

Stephen McAlpine

Stephen McAlpine
Lieutenant Governor

Enclosures

cc: Jeffrey R. Bohman
Carol Murkowski-Sturgulewski
Sandra J. Stout

STATE OF ALASKA

MEMORANDUM

RECEIVED
JAN 4 1989
LIEUTENANT GOVERNOR

State of Alaska
Department of Law

TO: Hon. Stephen McAlpine
Lieutenant Governor
and
Sandra J. Stout, Director
Division of Elections
Office of the Lieutenant Governor

DATE: January 4, 1989

FILE NO.: 663-89-0169

TEL. NO.: 465-3600

SUBJECT: Initiative petition application relating to open meetings (Amended)

FROM: Kathleen Strasbaugh
Assistant Attorney General
Governmental Affairs Section

Note: This memorandum replaces the memorandum dated November 28, 1988 on the above subject. The proposed petition summary has been reworded, and a few sentences added to section III.

I. Introduction

You have asked us to review an application for an initiative petition which would direct you 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."

We previously recommended rejection of an application from the sponsors of this initiative because it was framed as an advisory vote rather than as the enactment of a law. See 1988 Inf. Op. Att'y Gen. (July 15; 663-88-0487) (not yet indexed).

While we have reservations about the wording of both the application for the petition and the proposed bill, and about whether it is appropriate to recommend approval of what could be characterized as an end run around certain constitutional limitations upon the use of the initiative, 1/ we believe you must approve the application under Yute Air Alaska, Inc. v. McAlpine, 698 P.2d 1173 (Alaska 1985) and other Alaska Supreme Court cases holding that the power of the people to propose laws by the initiative is to be liberally construed.

1/ Cf. 1976 Inf. Op. Att'y Gen. (December 23; Pegues); 1979 Inf. Op. Att'y Gen. (February 13; J-66-474-79); 1979 Inf. Op. Att'y Gen. (May 22; J-66-733-79); Starr v. Hagglund, 374 P.2d 316 (Alaska 1962).

II. Applicable Law

An application for an initiative must be in the proper form, as must the attached bill. AS 15.45.030; AS 15.45.040. An initiative must enact a law as required by Article XI, Section 1 of the Alaska Constitution and must be on a subject not prohibited by Article XI, Section 7 of the Alaska Constitution. See Boucher v. Engstrom, 528 P.2d 456, 460-461 (Alaska 1974).

III. Analysis

The application in question is styled as a temporary law of the State of Alaska. It directs the lieutenant governor to place an initiative on the ballot at the next general election. The initiative itself advises the legislature to place a constitutional amendment on the ballot regarding open meetings. Cf. 1985 Inf. Op. Att'y Gen. (August 22; 366-031-86).

The previous opinions of this office cited above have suggested that the voters are not permitted to place an advisory question on the ballot directly because such a ballot question would not enact a law within the meaning of Article XI, Section 1 of the Alaska Constitution. However, direction to a state official to perform an act, in this case the placement of a question on the ballot, does qualify as an enactment. Cf. Yute Air, 698 P.2d at 1182. As the court noted in Yute Air, Article XII, Section 11 of the Alaska constitution, although subject to Article XI, permits the people to exercise the lawmaking powers assigned to the legislature unless clearly inapplicable. Under the Yute Air court's approach, the power to enact a temporary law directing a government official to act is not clearly inapplicable to the initiative process. 2/ Nor is it on a topic forbidden by Article XI, Section 7 of the constitution.

Although the ballot question portion of the bill is somewhat vaguely and rhetorically worded, the bill itself is in the proper form as required by AS 15.45.040. The application documents also appear to meet the requirements of AS 15.45.-030(1)-15.45.030(2). Thus, if your review of the signatures

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2/ While the legislature customarily places measures and constitutional amendments on the ballot by resolution, such resolutions, unlike those held ineffective as laws in State v. A.L.I.V.E. Voluntary, 606 P.2d 769, 773-774 (Alaska 1980), have a clearly binding effect, i.e. they require an action by a government official. Yute Air, 598 P.2d at 1182.

reveals that the requirements of AS 15.45.030(3)-15.45.030(4) have been met, we recommend that the application be approved.

The following petition summary is suggested for your consideration in carrying out the requirements of AS 15.45.090(2):

> "A temporary act requiring the lieutenant governor to place a measure on the ballot advising the legislature whether to amend the state constitution regarding open meetings."
>
> This bill, if passed, would make a temporary law telling the lieutenant governor to place a measure on the ballot at the following general election. That measure would advise the legislature to put a constitutional amendment about open meetings on the ballot. This measure only tells the lieutenant governor to put the advisory question on the ballot at the election after this bill is voted on. It does not make the legislature put a constitutional amendment on the ballot. It does not amend the state constitution.

Please let us know if we may assist you further in this matter.

KS:tg

277-6112

STATE OF ALASKA
LIEUTENANT GOVERNOR
JUNEAU

CERTIFICATE

I, STEPHEN McALPINE, LIEUTENANT GOVERNOR FOR THE STATE OF ALASKA, DO HEREBY CERTIFY THAT the initiative application which proposes an amendment to the Constitution of the State of Alaska relating to open meetings has been reviewed and is in proper form as required under the provisions of Article XI of the Constitution of the State of Alaska and under the provisions of AS 15.45.010 through AS 15.45.070.

I, FURTHER CERTIFY THAT the application contained the signatures and addresses of more than 100 qualified voters.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed hereto the Seal of the State of Alaska, at Juneau the Capital,

This Eleventh day of January,

A.D. 19 89

LIEUTENANT GOVERNOR

CONSTITUTIONAL PROVISIONS MANDATING OPEN ACCESS TO STATE LEGISLATURES--STATE BY STATE
Freedom of Information Center--November 21, 1986

ARKANSAS: Art. V, S. 13. Sessions to 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. (1879)

Legal Periodicals. Watkins, "Open Meetings Under the Arkansas Freedom of Information Act', 38 Ark. Law Review 268 (1984).

CALIFORNIA: Art. IV, S. 14. The doors of each House shall be open, except on such occasions as, in the opinion of the House, may require secrecy. (1849) Amended 1879. Art. IV, S. 13. Open and Secret Sessions. (Volume missing)

S12 rules s16 priv.

COLORADO: Art. V, S. 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. 1980 Replacement Volume. Art V, S. 14. Open Sessions. Open Meetings law not in conflict. Although this section of Art. V, Colorado Constitution, expressly authorizes the general assembly to conduct certain business in secret, both the senate and the house of representatives have determined that the business of legislative caucuses is not such as ought to be kept secret. Therefore, the open meetings law does not conflict with this section of Art. V., Colorado Constitution. Cole v. State, 673 P. 2d 3451 Colo. 1983. Applied in Glennon Heights, Inc., v. Central Bank & Trust, 658 P. 2d. 872 (Colo. 1983). (states that Art V, S 14 is a constitutionally mandated procedure) 878

S15priv. 313 rules

CONNECTICUTT: Art. 3, S. 16. Debates to be public. Sec. 16. The debates of each house shall be public, except on such occasions as in the opinion of the house may require secrecy. Historical note: Identical provisions were contained in the 1818 Constitution in Art. Third S. 11 and in the 1955 Constitution in Art. 3 S. 14.) (1965) See 373A.2d 193 →

313 priv. 39 ruled

DELAWARE: Art. II, S. 11. (1897) Accessibility to each House and Committees of the whole. Section 11. The doors of each House, and of Committees of the Whole, shall be open unless when the business is such as ought to be kept secret.

FLORIDA: Art. 3, S. 4. Quorum and procedure. (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. (1968) →

GEORGIA: (Art.III Sec. IV) Paragraph XI. 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. →

IDAHO: Art. 3 s. 12. Secret sessions prohibited. The business of each house, and of the committee of the whole shall be

Idaho
37 priv.
39 ruled/purs.

transacted openly and not in secret session. (1890)

36(c) ruled
312priv.

ILLINOIS: Art. 4 S. 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 close 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. (1970) under 1870 const. only a majority vote was necy to close mtgs.

Smith-Hurd Illinois Annotated Statutes, 1971, St. Paul: West Publishing, p. 147. 1970. Illinois. Art. 4 S. 5(c). Subsection 5(c) requires that all sessions of the General Assembly and meetings of joint committees and legislative commissions be open to the public. Sessions and committee meetings of a house can be closed to the public only if tow-thirds of the members of that house determine that the public interest requires such secrecy. Two-thirds of each house must make a determination that the public interest requires the closing of meetings of joint committees and legislative commissions. Under the 1870 Constitution, only a majority vote was necessary to close meetings.

Art. 4, S. 7(a). Committees of each house, joint committees of the two houses and legislative commissions shall give reasonable public notice of meetings, including a statement of subjects to be considered. (1970)

"Constitutional Commentary" by Robert A. Helman & Wayne W. Whalen. Smith-Hurd Illinois Annotated Statutes, 1971, p. 152. Subsection 7(a) establishes for the first time a Constitutional requirement that committees of each house, joint committees of the two houses and legislative commissions give reasonable public notice of meetings including a statement of subjects to be considered. The terms "reasonable public notice" and "statement of subjects" are not defined. The Subsection does not state the remedy available to a member or to an injured citizen if such notice is not given. The Legislative Committee Report, which proposed the language adopted by the Convention states: "This requirement hopefully would enhance and encourage public participation in the legislative committee process." Implicit in Subsection 7(a) is the power of each house, or both house jointly, to establish committees and commissions to aid in the conduct of business.

In prior const. 1846 art. 3 S17.

316 ruled
38priv.

INDIANA: Art 4 S. 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. (1851)

311 priv.
,9 ruled

IOWA: (1857) Art. 3 S. 13. Doors of each house. Sec. 13. The doors of each house shall be open, except on such occasions, as, in the opinion of the house, may require secrecy.

Art. 3 S. 9. Authority of the houses. Opinion 8. Open Meetings.

I.C.A. Chapter 28A., Requiring open meetings does not apply to the general assembly or any of its committees because the law by its terrms does not include such and because of the right of each house, under this section, to determine its own rules of proceedings. Op. Atty. Gen. (Cusack), Feb. 6, 1973.

$19 rules $18 priv. MARYLAND: Art. III S. 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. Quoted in Avara v. Baltimore News Am. Div. 292 Md. 543, 440 A.2d 368 (1982).

Ct. did not address question of whether immunity applied or this clause gave unbridled discretion to committee to close doors

MICHIGAN: SEE attached sheet, 3-A.

$10 priv. 37 rules MINNESOTA: Art. 4 S. 14. Open sessions. Sec. 14. Each house shall be open to the public during its sessions except in cases which in its opinion require secrecy. (adopted 1857; amended 1974) →

34 priv. 355 rules MISSISSIPPI: Art. 4 S. 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. (1890) →

$10 rules 3 15 NEBRASKA: Art. III S. 11. Legislative journal; vote viva voce; open doors. 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 anyone 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. (Amended 1934) →

1875

$11 priv. 36 rules NEVADA: Art. IV S 15. Rules Relating to Legislative Procedures. 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, not to any other place than that in which they may be holding their sessions. (1926. Update not available.) (1864)

Pt 2 art. 21 priv. Pt. 2 art 22 rules NEW HAMPSHIRE: Pt. 2 (Art) 8th. (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. (1970 ed., update not available.) → →

$13 immunity 311 rules NEW MEXICO: Art. IV S 12. (Public sessions; journals.) All sessions of each house shall be public. Each house shall keep a journal of its proceedings and the yeas and nays on any questions shall, at the request of one-fifth of the →

immunity of legislators from civil process — 94 ALR 1470

members present, be entered thereon. The original thereof shall be filed with the secretary of state at the close of the session, and shall be printed and published under his authority. (1978) (adopted 1911)

311 priv. ✓ 39 rules

NEW YORK: Art. 3 S. 10. (Journals, etc.; open sessions; adjournments) Each house of the legislature shall keep a journal of its proceedings, and publish the same, except such parts as may require secrecy. The doors of each house shall be kept open, except when the public welfare shall require secrecy. Neither house shall, without the consent of the other, adjourn for more than two days. (1938) (w/ amendments 1969)

derived from Const. 1894 art. 3, 11; Const. 1846 art 3 § 11; Const. 1821, art. 1, § 4 Const 1777 art. 15.

priv. art IV § 15 rules art VI § 12

1889 § 50

NORTH DAKOTA: (1974 - 1984) Art IV S. ~~28~~ 14. All sessions of the legislative assembly, including the committee of the whole and meetings of legislative committees, shall be open ~~to the~~ as public. Note: The section as originally adopted read: "The sessions of each house and of the committee of the whole shall be open unless the business is such as ought to be kept secret." (North Dakota Century Code, Replacement Vol. 13, Indianapolis: Allen Smith, 1981, p. 155.) On p. 156: Law Reviews. Government in the Sunshine: The Status of Open Meetings and Open Records in North Dakota, Daniel S. Guy and Jack McDonald, 53 N.D. Law Rev. 51. (~~Note: no constitutional update available.~~)

✓ OHIO: Art. II S. 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. Research aid O-JUR2: Legislative Section 21.

✓ OREGON: Art. IV S. 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.

(Amendment proposed by S.J.R. No. 36 1973 and adopted by people Nov. 5, 1974. Amendment proposed by H.J.R. No. 29 1977 and adopted by people May 23, 1978.)

315 priv. 311 rules

PENNSYLVANIA: Art. 2 S. 13. 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.

39 rules 311 priv.

SOUTH DAKOTA: Art. III S. 15. (1889) 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. (Historical note. The 1974 amendment proposal (S.L. 1974 Ch. 1 rejected Nov. 5, 1974.) would have transferred the substance of the first clause of this section to new S. 6; would have extended it to joint session, all committee meetings and legislative commission meetings; and would have deleted the secrecy clause. The proposal would also have rewritten the other portions of the article.

Art 4 §16 rules
§11 privilge.

Michigan Compiled Laws Annotated. St. Paul: West, 1985, pp. 525 (Constitution of Michigan, 1963 vol. name).

Art. 4, S. 20. Open Meetings. The doors of each house shall be open unless the public security otherwise requires. prior const. 1835

Convention Comment. This is a revision of Sec. 18, Art. V, of the present (1908) constitution 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.

Art. 4, S. 17. Committees, record of votes, public inspection, notice of hearings. ~~SEc. 17. Each~~ house of the legislature may establish the committees necessary for the efficient conduct of its business and the legislature may create joint committees. On all actions on bills and resolutions in each committee, names and votes of members shall be recorded. Such vote shall be available for public inspection. Notice of all committee hearings and a clear statement of all subjects to be considered at each hearing shall be published in the journal in advance of the hearing.

p. 519. Convention Comment. This is a new section designed to eliminate secrecy in legislative committee meetings. Such committees must keep a recorded roll call vote of all action on bills and resolutions taken in committee and the vote must be available for public inspection.

Notice of all committee hearings and a clear statement of all subjects to be considered at each hearing shall be published in the journal prior to the hearing.

p. 521. (Atty. Gen. Op.) 6. Notice of hearings' requirement of this section that notice of all committee hearings be published in advance in the journal applied to all scheduled public hearings before a legislative committee, not to committee meetings, and , therefore, absence of printed notice in house journal of proposed committee consideration of house bill did not invalidate house action in approving bill. Op. Atty. Gen. 1965, No. 4427, p. 96.

7. Open Meetings. Since a joint legislative committee is "public body" within the meaning of M.C.L.A. S. 15.262, its meetings are subject to the requirements of the Open Meetings Act, M.C.L.A. S. 15.261, et seq. Op. Atty. Gen. 1978, No. 5300. p. 451.

A legislative committee is included within the purview of the Open Meetings Act M.C.L.A. S. 15.261 et seq., and may not engage in the practices of "round-robbing" by which votes on a measure are obtained by a member of the committee going to other members and obtaining their signatures on a tally sheet. Op. Atty. Gen. 1977, No. 5222, p. 216.

get these from Pleades

Immunity from ~~civil~~ pretrial discovery depo. & discovery when senator non-party
Bishop v. Montante, 237 N.W. 2d 465 finding important issue.
(1976)

U. of Mich. Law Library: Study. Report on Legislative Privilege. Michigan Law Revision Commission (1983), 18th Annual Report, p. 14

1976, Ch. 1, rejected Nov. 2, 1976.) (South Dakota Codified Laws, Indianapolis: Allen Smith, 1978, p. 242.) Law Reviews. "Constitutional Limitations on the Enactment of Statutes in South Dakota", 25 S.D. Law Rev. 14 (1980).

TENNESSEE: Art. 2 S. 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.

Law Reviews. "Tennessee Sunshine: The People's Business Goes Public", Richard L. Hollow and Rudolph L. Ennis, 42 Tenn. L. Rev. 52.

Atty. Gen. Op. Election of committee officers, OAG 83-072 (2/23/83).

1876; amended 1984

TEXAS: Art. 3 S. 16. Open sessions. Sec. 16. The sessions of each House shall be open, except the Senate when in Executive session.

earlier Cons. 1845-art 3 S18 1861-art 3 S18 1866-art 3 S17 1869 art 3 S22

(Vernon's Constitution of the State of Texas Annotated, St. Paul: West, 1984, p. 459.) Interpretive Commentary. Originally it was the custom of the British Parliament to hold its sessions behind closed doord, and the seal of secrecy was placed on its deliberations. Such was thought necessary to prevent the King from learning what the members of Parliament were thinking and doing.

S14 priv. Romano case S11 ruled

In America, its has been the belief that known and open responsibility is valuable as a check or an incentive upon the representatives of the people, and that secrecy of legislative proceedings is conducive to intrigue and unconstitutional combinations.

Therefore, to change the principle of parliamentary law calling for closed sessions, the constitutions of most of the states provide for public proceedings except on occasion when, in the judgment of the house concerned, secrecy may be desirable.

The Texas Constitution here follows this trend providing that the legislative sessions shall be open, except the Senate when in executive session.

Executive sessions are those where the Senate considers matters not discreet to reveal to the public. At such times, there is also considered (p. 460) the gubernatorial appointments which must be confirmed or rejected by the senate.

rules S12 priv S8

UTAH: Art. VI S. 15. 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, not to any other place than that in which it may be holding session. (Collateral References. "Committee created by joint or concurrent resolution to function after adjournment of legislature," 28 A.L.R. 1158). (Attempts to amend, 1971

See Tenny v. Brandhove immunity for public good

and 1972, have failed.)

319 rules Ch. 1, § art. 14 priv.

VERMONT: Ch. II ~~§.~~ art 3 8. 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. (1793; amended 1982)

39 rules 316 priv fr. arrest civil process 317 freedom debate

WASHINGTON: Art. 2 S. 11. 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. Neither house shall adjourn for more than three days, nor to any place other than that in which they may be sitting, without the consent of the other. (Adopted 1889)

38 rules 315, 16 priv. immunity

WISCONSIN: Art. 4 S. 10. 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. Neither house shall, without consent of the other, adjourn for more than three days. ("Open Meetings of Government Bodies" see: W.S.A. S.19.81 et seq.) (1848)

312 rules 316 priv.

WYOMING: Art. 3 S. 14. The sessions of each house and of the committee of the whole shall be open unless the business is such as requires secrecy. (1890)

Legis ~~Im~~ Priv. → 41 ALR4th 1116

Wis. immunity – not great for us – do we have – State v. Beno, ~~327~~ 341 NW 2d 668 (1984)

Wash. immunity not criticed – Op. Atty Gen 61-62 No. 134 – not in our law library

Vol 42, 1975

insightfully observed: "An informal conference or caucus of any two or more members [of a public body] permits crystalization of secret decisions to a point just short of ceremonial acceptance."[58] Statutory regulation of informal meetings, however, raises constitutional problems involving the right of free speech. In *Keyishian v. Board of Regents*,[59] the United States Supreme Court stressed the precision which must attend statutory regulation of expression:

> We emphasize once again that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms, . . . [f]or standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." . . . When one must guess what conduct or utterance may lose him his position, one necessarily will "[s]teer far wider of the unlawful zone. . . ."[60]

In regulating attempts to circumvent its requirements, therefore, an open-meeting law must be precise enough so that its members may know the conduct proscribed. But more than mere precision of regulation is required. Regulation of chance meetings must also recognize the substantive right of free speech enjoyed by members of governing bodies. Article I, section 19 of the Tennessee Constitution, after all, secures not only the rights of free press and open government, but also that of free speech.[61] While "the right of free speech is not absolute at all times and under all circumstances,"[62] it too must be protected along with the right of open government.

In an effort to recognize the free speech rights of members of governing bodies and at the same time to prevent circumvention of the law, Tennessee's Open-Meeting Act provides:

> Nothing in this section shall be construed as to require a chance

58. City of Miami Beach v. Berns, 245 So. 2d 38, 41 (Fla. 1971).

59. 385 U.S. 589 (1967).

60. *Id.* at 603-04 (citations omitted).

61. The relevant language is: "[E]very citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." TENN. CONST. art. I, § 19.

62. Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942). *See also* Termirello v. City of Chicago, 337 U.S. 1, 6 (1948); Cantwell v. Connecticut, 310 U.S. 296, 310 (1940); Melton v. Young, 328 F. Supp. 88, 91 (E.D. Tenn. 1971), *aff'd*, 465 F.2d 1332 (1972), *cert. denied*, 411 U.S. 951 (1973).

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63. Open-Meeting Act § 2
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> ation of government without permitting public scrutiny and participation is what the law seeks to prohibit.[66]

Moreover, that court's further definition of a secret meeting could just as well be followed to define chance meetings under the Tennessee Act.

> A secret meeting occurs when public officials meet at a time and place to avoid being seen or heard by the public. When at such meetings officials . . . transact or agree to transact public business at a future time in a certain manner they violate the . . . sunshine law, regardless of whether the meeting is formal or informal.[67]

This definition should satisfy the constitutional rule that the proscribed conduct be clearly delineated so that "those who desire to obey the statute will have no difficulty in understanding it."[68]

D. Notice of Meetings

Besides chance or sham public meetings, an open-meeting law can fail to achieve its intended purpose of public scrutiny of the public's business if open meetings are not preceded by adequate public notice. Section 3 of Tennessee's Sunshine Law treats this problem.

The substance of section 3 of the Act is based largely on an amendment.[69] The original House bill provided:

> Any such governmental body which holds a meeting not previously scheduled by statute, ordinance, or resolution, or for which notice is not already provided by law, shall give adequate public notice of such meeting.[70]

The amendment incorporated verbatim this original section as subsection (b) of the current law and added the following subsections:

> (a) Any such governmental body which holds a meeting pre-

66. *Id.* at 41.

67. *Id. See also* Hough v. Stembridge, 278 So. 2d 288 (Fla. 1973); Canney v. Board of Pub. Instruction, 278 So. 2d 260 (Fla. 1973); Board of Pub. Instruction v. Doran, 224 So. 2d 693 (Fla. 1969).

68. Memphis Publishing Co. v. City of Memphis, 513 S.W.2d 511, 513 (Tenn. 1974).

69. This amendment to H.R. 1486, *supra* note 15, was sponsored by Representative Michael Murphey and was adopted by the House on February 11, 1974.

70. *Id.*

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71. Open-Meeting Act §§

72. Reply Brief of Tenn.
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73. 513 S.W.2d 511 (Ten

California Constitution

called Senatorial and Assembly Districts. Each Senatorial district shall choose one Senator and each Assembly district shall choose one member of the Assembly.

Adopted June 3, 1980.

Former Section: Former Art IV § 6, similar in part to present Art IV § 6, was adopted May 7, 1879, amended November 2, 1926, November 3, 1942, and repealed June 3, 1980. The text of former § 6 is set out in 2 *Deering's Constitutional Annotations* at page 68.

Cross References:

Reapportionment of districts: Art XXI § 1.
Compilation by county clerk of reapportionment information: Elec C § 51.
Boundaries of assembly districts: Elec C § 30010.
Boundaries of senatorial districts: Elec C § 30020.
Reapportionment of House of Representatives: 2 USCS § 2a.

If research prior to 1974 is desired, consult the collateral references and casenotes in 2 *Deering's Constitutional Annotations* beginning at page 70.

Collateral References:

42 Cal Jur 3d Legislature §§ 2, 3.
Am Jur 2d Elections §§ 12 et seq.

Law Review Articles:

Legislative apportionment. 1 Hast Const LQ 289.

NOTES OF DECISIONS

Population variations of up to 7.83 per cent, and averaging less than 2 per cent, among Connecticut's state legislative districts under a reapportionment plan are insufficient to prove a prima facie case of invidious discrimination under the equal protection clause. Gaffney v Cummings (1973) 412 US 735, 37 L Ed 2d 298, 93 S Ct 2321; for similar analysis of Texas' plan (involving 9.9% variation between largest and smallest districts), see White v Regester (1973) 412 US 755, 37 L Ed 2d 314, 93 S Ct 2332.

When a federal court imposes a reapportionment plan upon a state, single-member districts are preferable in the absence of unusual circumstances; however, legislative reapportionment is primarily a matter for legislative consideration and determination, and when the state accepts this responsibility, its decisions as to the most effective reconciling of traditional policies should not be restricted beyond the commands of the equal protection clause. Wise v Lipscomb (1977) 434 US 1329, 54 L Ed 2d 41, 98 S Ct 15.

§ 7. Procedure; Journal; Public Sessions; Recesses

(a) Each house shall choose its officers and adopt rules for its proceedings. A majority of the membership constitutes a quorum, but a smaller number may recess from day to day and compel the attendance of absent members.

(b) Each house shall keep and publish a journal of its proceedings. The rollcall vote of the members on a question shall be taken and entered in the journal at the request of 3 members present.

(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

California: Government Code (Executive Agency Sections)

ARTICLE 9

Meetings

[Added by Stats 1967 ch 1656 § 122.]

Cross References:

Cancer Advisory Council exempt from conducting meetings open to public in accordance with this article: H & S C § 1702.

Exclusion of meetings of board of directors of State Compensation Insurance Fund from provisions of this article: Ins C § 11770.5.

Application of provisions of this article to meetings of Colorado River Board of California: Wat C § 12516.

Required certificate, of Colorado River Board of California, that meetings were in accordance with provisions of this article: Wat C § 12519.

Collateral References:

Cal Jur 3d Public Housing § 22, Public Utilities § 23.

Annotations:

Validity, construction, and application of statutes making public proceedings open to the public. 38 ALR3d 1070.

California Constitution

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Former Section: Former Art IV § 6, similar in part to present Art IV § 6, was adopted May 7, 1879, amended November 2, 1926, November 3, 1942, and repealed June 3, 1980. The text of former § 6 is set out in 2 *Deering's Constitutional Annotations* at page 68.

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(b) Each house shall keep and publish a journal of its proceedings. The rollcall vote of the members on a question shall be taken and entered in the journal at the request of 3 members present.

(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.

(d) Neither house without the consent of the other may recess for more than 10 days or to any other place.

Adopted November 8, 1966; Amended November 7, 1972; June 4, 1974; June 8, 1976.

Prior Law: See 2 *Deering's Constitutional Amendments* at page 76.

Amendments:

1972 Amendment: Substituted "10" for "3" in subd (d).

1974 Amendment: Substituted "as provided for statute or by concurrent resolution, which such resolution is adopted by a two-thirds vote of the members of each house, provided, that is there is a conflict between such a statute and concurrent resolution, the last adopted shall prevail" for "on occasions that in the opinion of the house require secrecy" in subd (c).

1976 Amendment: Substituted "when" for "which" before "such resolution" in subd (c).

Former Section: Former Art IV § 7, similar in part to the present section, was adopted May 7, 1879, and repealed November 8, 1966. The text of former § 7 is set out in 2 *Deering's Constitutional Annotations* at page 76.

Cross References:

Senate organization: Gov C § 9022.
Assembly organization: Gov C § 9023.
Choosing legislative officers: Gov C §§ 9170–9172.
Removal of legislative officers: Gov C § 9173.
Custody of journal: Gov C § 12160.
Proceedings of House of Representatives and Senate: USCS Constitution Art I § 5.

If research prior to 1974 is desired, consult the collateral references and casenotes in 2 *Deering's Constitutional Annotations* beginning at page 76.

Collateral References:

Cal Jur 3d Legislature §§ 12, 15, 16, Statutes §§ 40–44.
Am Jur 2d States, Territories and Dependencies §§ 35 et seq.

§ 8. Passage of bills; Effective dates; Urgency statutes

(a) At regular sessions no bill other than the budget bill may be heard or acted on by committee or either house until the 31st day after the bill is introduced unless the house dispenses with this requirement by rollcall vote entered in the journal, three fourths of the membership concurring.

(b) The Legislature may make no law except by statute and may enact no statute except by bill. No bill may be passed unless it is read by title on 3 days in each house except that the house may dispense with this requirement by rollcall vote entered in the journal, two thirds of the membership concurring. No bill may be passed until the bill with amendments has been printed and distributed to the members. No bill may be passed unless, by rollcall vote entered in the journal, a majority of the membership of each house concurs.

California: Government Code (Executive Agency sections)

ARTICLE 9

Meetings

[Added by Stats 1967 ch 1656 § 122.]

Cross References:

Cancer Advisory Council exempt from conducting meetings open to public in accordance with this article: H & S C § 1702.

Exclusion of meetings of board of directors of State Compensation Insurance Fund from provisions of this article: Ins C § 11770.5.

Application of provisions of this article to meetings of Colorado River Board of California: Wat C § 12516.

Required certificate, of Colorado River Board of California, that meetings were in accordance with provisions of this article: Wat C § 12519.

Collateral References:

Cal Jur 3d Public Housing § 22, Public Utilities § 23.

Annotations:

Validity, construction, and application of statutes making public proceedings open to the public. 38 ALR3d 1070.

§ 11120. Legislative finding and declaration; Open proceedings; Citation of article

It is the public policy of this state that public agencies exist to aid in the conduct of the people's business and the proceedings of public agencies be conducted openly so that the public may remain informed.

In enacting this article the Legislature finds and declares that it is the intent of the law that actions of state agencies be taken openly and that their deliberation be conducted openly.

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

This article shall be known and may be cited as the Bagley-Keene Open Meeting Act.

Added Stats 1967 ch 1656 § 122; Amended Stats 1980 ch 1284 § 4; Stats 1981 ch 968 § 4.

Amendments:

1980 Amendment: Added the last paragraph.

1981 Amendment: Added the third paragraph.

Cross References:

Public policy that local agencies' proceedings be conducted openly: § 54950.

Collateral References:

Witkin Procedure 2d p 1400.

Witkin Summary (8th ed) p 3627.

Attorney General's Opinions:

51 Ops Atty Gen 201 (effect of Brown Act on meeting of public body to discuss labor negotiations).

Annotations:

Validity, construction, and application of statutes making public proceedings open to public. 38 ALR3d 1070.

NOTES OF DECISIONS

The Legislature intended that all state and local agencies be included under the provisions of some open meeting act (the Brown Act, Gov. Code, § 54950 et seq.; the State Act, Gov. Code, § 11120 et seq.), unless expressly excluded. Torres v Board of Comrs. (1979) 89 CA3d 545, 152 Cal Rptr 506.

§ 11121. "State body"

As used in this article "state body" means every state board, or commission, or similar multimember body of the state which is required by law to conduct official meetings and every commission created by executive order, but does not include:

(a) State agencies provided for in Article VI of the California Constitution.

(b) Districts or other local agencies whose meetings are required to be open to the public pursuant to the provisions of the Ralph M. Brown Act, Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of this code.

(c) State agencies provided for in Article IV of the California Constitution whose meetings are required to be open to the public pursuant to the Grunsky-Burton Open Meeting Act, Sections 9027 et seq., of this code.

(d) State agencies when they are conducting proceedings pursuant to Section 3596 of this code.

(e) State agencies provided for in Section 1702 of the Health and Safety Code, except as provided in Section 1720 of the Health and Safety Code.

(f) State agencies provided for in Section 11770.5 of the Insurance Code.

Added Stats 1967 ch 1656 § 122; Amended Stats 1980 ch 515 § 1; Stats 1981 ch 968 § 5.

Amendments:

1980 Amendment: Added "and every commission created by executive order" after "official meetings".

1981 Amendment: (1) Substituted "state body" for "state agency"; (2) added ": (a)"; (3) substituted ". (b)" for "nor"; (4) added "the Ralph M. Brown Act," in subd (b); and (5) added subds (c)-(f).

Cross References:

Additional definitions: §§ 11121.2, 11121.7, 11121.8.

Collateral References:

Witkin Summary (8th ed) p 3627.

NOTES OF DECISIONS

A housing authority created pursuant to Health & Saf. Code, § 34200 et seq., is a "local agency" within the meaning of the Brown Act (Gov. Code, § 54950 et seq.; open meetings) and is not a "state agency" within the scope of the State Agency Open Meeting Act (Gov. Code, § 11120 et seq.). Torres v Board of Comrs. (1979) 89 CA3d 545, 152 Cal Rptr 506.

§ 11121.2. Additional definition of "state body"

As used in this article, "state body" also means any board, commission, committee, or similar multimember body which exercises any authority of a state body delegated to it by that state body.

Added Stats 1981 ch 968 § 5.2.

§ 11121.5. Applicability to official student body organizations

Under the provisions of this article, the official student body organiza-

tion at any campus of the California State University and Colleges, or of the California Community Colleges, shall be treated in the same manner as a state body.

Added Stats 1974 ch 1179 § 1, effective September 23, 1974; Amended Stats 1981 ch 968 § 5.3.

Amendments:

1981 Amendment: Substituted "body" for "agency" at the end of the section.

Collateral References:

Cal Jur 3d Universities and Colleges § 108.

§ 11121.7. Additional definition of "state body"

As used in this article, "state body" also means any board, commission, committee, or similar multimember body on which a member of a body which is a state body pursuant to Section 11121, 11121.2, or 11121.5 serves in his or her official capacity as a representative of such state body and which is supported, in whole or in part, by funds provided by the state body, whether such body is organized and operated by the state body or by a private corporation.

Added Stats 1980 ch 1284 § 5; Amended Stats 1981 ch 968 § 6.

Amendments:

1981 Amendment: (1) Deleted "(a)" at the beginning of the section; (2) substituted "body" for "agency" wherever it appears; (3) deleted former subd (b) (see now § 11121.8); (4) deleted former subd (c) (see now § 11125 subd (d); and (5) deleted former subd (d) (see now § 11125 subd (c).

§ 11121.8. Additional definition of "state body"

As used in this article, "state body" also means any advisory board, advisory commission, advisory committee, advisory subcommittee, or similar multimember advisory body of a state body, if created by formal action of the state body or of any member of the state body, and if the advisory body so created consists of three or more persons.

Added Stats 1981 ch 968 § 7.

Prior Law: § 11121.7 subd (b) as added by Stats 1980 ch 1284 § 5.

§ 11121.9. Providing copy of article to members of state bodies

Each state body shall provide a copy of this article to each member of the state body upon his or her appointment to membership or assumption of office.

Added Stats 1980 ch 1284 § 5; Amended Stats 1981 ch 714 § 175, ch 968 § 7.1.

Amendments:

1981 Amendment: Substituted "Each state body shall provide a copy of this article to each member of the state body" for "A copy of this article shall be provided to each member of any state agency".

§ 11122. "Action taken"

As used in this article "action taken" means a collective decision made by the members of a state body, a collective commitment or promise by the members of the state body to make a positive or negative decision or an actual vote by the members of a state body when sitting as a body or entity upon a motion, proposal, resolution, order or similar action.

Added Stats 1967 ch 1656 § 122; Amended Stats 1981 ch 968 § 7.3.

Amendments:

1981 Amendment: Substituted "state body" for "state agency" wherever it appears.

§ 11123. Required open and public meetings

All meetings of a state body shall be open and public and all persons shall be permitted to attend any meeting of a state body except as otherwise provided in this article.

Added Stats 1967 ch 1656 § 122; Amended Stats 1981 ch 968 § 7.5.

Prior Law:

(a) Former § 15486, as added by Stats 1957 ch 2216 § 1.

(b) Former § 15625, as added by Stats 1957 ch 2215 § 1.

Amendments:

1981 Amendment: Substituted "body" for "agency" wherever it appears.

§ 11124. Prohibited conditions to attendance

No person shall be required, as a condition to attendance at a meeting of a state body, to register his or her name, to provide other information, to complete a questionnaire, or otherwise to fulfill any condition precedent to his or her attendance.

If an attendance list, register, questionnaire, or other similar document is posted at or near the entrance to the room where the meeting is to be held, or is circulated to persons present during the meeting, it shall state clearly that the signing, registering, or completion of the document is voluntary, and that all persons may attend the meeting regardless of whether a person signs, registers, or completes the document.

Added Stats 1967 ch 1656 § 122; Amended Stats 1981 ch 968 § 8.

Amendments:

1981 Amendment: (1) Amended the first paragraph by (a) substituting "No person shall be" for "A member of the public shall not be"; (b) substituting "state body" for "state agency"; (c) substituting "or her name, to provide" for "name and"; and (d) adding "or her" before "attendance" at the end; and (2) added the second paragraph.

§ 11124.1. Recording proceedings

Any person attending an open and public meeting of the state body shall have the right to record the proceedings on a tape recorder in the absence of a reasonable finding of the state body that such recording constitutes, or would constitute, a disruption of the proceedings.

Added Stats 1980 ch 1284 § 7; Amended Stats 1981 ch 968 § 9.

Amendments:

1981 Amendment: Substituted "body" for "agency" wherever it appears.

§ 11125. Notice of meeting

(a) The state body shall provide notice of its meeting to any person who requests such notice in writing. Notice shall be given at least 10 days in advance of the meeting, and shall include the name, address, and telephone number of any person who can provide further information prior to the meeting, but need not include a list of witnesses expected to appear at the meeting. The notice requirement shall not preclude the acceptance of testimony at meetings, other than emergency meetings, from members of the public, provided, however, that no action is taken by the state body at the same meeting on matters brought before the body by members of the public.

(b) The notice of a meeting of a body which is a state body as defined in Section 11121, 11121.2, 11121.5, or 11121.7, shall include a specific agenda for the meeting, which shall include the items of business to be transacted or discussed, and no item shall be added to the agenda subsequent to the provision of this notice.

(c) The notice of a meeting of an advisory body, which is a state body as defined in Section 11121.8, shall include a brief, general description of the business to be transacted or discussed, and no item shall be added subsequent to the provision of the notice.

(d) Notice of a meeting of a state body which complies with this section shall also constitute notice of a meeting of an advisory body of that state body, provided that the business to be discussed by the advisory body is covered by the notice of the meeting of the state body, provided that the specific time and place of the advisory body's

meeting is announced during the open and public state body's meeting, and provided that the advisory body's meeting is conducted withina reasonable time of, and nearby, the meeting of the state body.

(e) A person may request, and shall be provided, notice pursuant to subdivision (a) for all meetings of a state body or for a specific meeting or meetings. In addition, at the state body's discretion, a person may request, and may be provided, notice of only those meetings of a state body at which a particular subject or subjects specified in the request will be discussed.

(f) A request for notice of more than one meeting of a state body shall be subject to the provisions of Section 14911.

Added Stats 1967 ch 1656 § 122; Amended Stats 1973 ch 1126 § 1; Stats 1975 ch 708 § 1; Stats 1979 ch 284 § 1, effective July 24, 1979; Stats 1981 ch 968 § 10.

Prior Law: § 11121.7 subds (c) and (d), as added by Stats 1980 ch 1284 § 5.

Amendments:

1973 Amendment: (1) Designated the former section to be subd (a); (2) amended subd (a) by (a) substituting "one week" for "24 hours"; (b) substituting "one week's" for "twenty-four (24) hours"; (c) deleting "such as a natural disaster" after "conditions,"; and (d) substituting "this part" for "Part 1 of Division 3 of Title 2 of this code"; and (3) added subds (b) and (c).

1975 Amendment: (1) Amended subd (a) by adding (a) "prepare an agenda for, and" in the first sentence; (b) "and shall include the agenda for" in the second sentence; and (c) the third sentence.

1979 Amendment: (1) Deleted ", as defined by published rule of the agency adopted pursuant to the provisions of Chapter 4.5 (commencing with Section 11371) of this part" at the end of second sentence of subd (a); (2) added subd (b); and (3) redesignated former subds (b) and (c) to be subds (c) and (d).

1981 Amendment: (1) Substituted subd (a) for former subd (a) which read: "(a) The state agency shall prepare an agenda for, and provide notice of, its meeting to any person who requests such notice in writing. Notice shall be given at least one week in advance of and shall include the agenda for the meeting, provided that emergency meetings may be held with less than one week's notice when such meetings are necessary to discuss unforeseen emergency conditions. The agenda need not include a list of any witnesses expected to appear at the meeting."; (2) substituted subd (b) for former subd (b) which read: "(b) Emergency meetings held for the purpose of adopting emergency regulations pursuant to Section 11421 require no prior notice or agenda, except that the agency shall make a reasonable effort to contact any persons requesting notice pursuant to this section or Section 11423, or both."; (3) substituted subd (c) for former subd (c) which read: "(c) Notice shall include the items of business to be transacted, and no item shall be added to the agenda subsequent to the provisions of such notice, absent unforeseen emergency conditions, as provided in subdivision (a)."; (4) added subd (d); (5) redesignated the first sentence of former subd (d) to be subd (e) and the second sentence to be subd (f); (6) amended subd (e) by substituting (a) "a state body or" for "the agency or only" in the first sentence; (b) "state body's" for "agency's"; and (c) "meetings of a state body" for "agency meetings"; and (6) substituted "a state body" for "an agency" in subd (f).

Cross References:

Rules pertaining to meetings by Franchise Tax Board: 18 Cal Adm Code § 17000.2.

Rules pertaining to notice of meetings of State Energy Resources Conservation & Development Commission: 20 Cal Adm Code § 1103.

Collateral References:
Cal Jur 3d Public Utilities § 23.

§ 11125.1. Agenda and other "writing" as public record; Inspection

(a) Notwithstanding Section 6255 or any other provisions of law, agendas of public meetings and other writings, when distributed to all, or a majority of all, of the members of a state body by a member, officer, employee, or agent of such body for discussion or consideration at a public meeting of such body, are public records under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1) as soon as distributed, and shall be made available pursuant to Sections 6253 and 6256. However, this section shall not include any writing exempt from public disclosure under Section 6253.5, 6254, or 6254.7.

(b) Writings which are public records under subdivision (a) and which are distributed prior to commencement of a public meeting shall be made available for public inspection upon request prior to commencement of such meeting.

(c) Writings which are public records under subdivision (a) and which are distributed during a public meeting and prior to commencement of their discussion at such meeting shall be made available for public inspection prior to commencement of, and during, their discussion at such meeting.

(d) Writings which are public records under subdivision (a) and which are distributed during their discussion at a public meeting shall be made available for public inspection immediately or as soon thereafter as is practicable.

(e) Nothing in this section shall be construed to prevent a state body from charging a fee or deposit for a copy of a public record pursuant to Section 6257. The writings described in subdivisions (b), (c), and (d) are subject to the requirements of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1), and shall not be construed to exempt from public inspection any record required to be disclosed by that act, or to limit the public's right to inspect any record covered by that act. This section shall not be construed to be applicable to any writings solely because they are properly discussed in a closed session of a state body. Nothing in this article shall be construed to require a state body to place any paid advertisement or any other paid notice in any publication.

(f) "Writing" for purposes of this section means "writing" as defined under Section 6252.

Added Stats 1975 ch 959 § 4; Amended Stats 1980 ch 1284 § 8; Stats 1981 ch 968 § 10.1.

Amendments:

1980 Amendment: Substituted the section for the former section which read: "(a) Notwithstanding any other provision of this chapter, agendas of public meetings and copies of public documents, or summaries thereof, which are to be discussed or considered at a public meeting of a state agency shall be made available to the public by the state agency prior to the commencement of such meeting; provided, however, that the state agency may charge a reasonable fee, not to exceed the actual costs of reproduction, for documents furnished pursuant to this subdivision; and further provided that this section shall not include written memoranda prepared for a state agency, or its members, by an attorney holding a fiduciary relationship to such agency.

"(b) Any state agency shall publicly report at a subsequent public meeting any action taken, and any rollcall vote thereon, to appoint, employ, or dismiss a public employee arising out of any executive session of the state agency."

1981 Amendent: (1) Amended subd (a) by (a) substituting "body" for "agency" wherever it appears; and (b) adding "California"; and (2) amended subd (c) by substituting (a) "body" for "agency" wherever it appears; and (b) "be construed to be applicable to any writings solely because they are properly discussed in a closed session of a" for "apply to any writings properly discussed in a closed session of the" in the third sentence.

§ 11125.2. Public report of action taken regarding public employee

Any state body shall report publicly at a subsequent public meeting any action taken, and any rollcall vote thereon, to appoint, employ, or dismiss a public employee arising out of any closed session of the state body.

Added Stats 1980 ch 1284 § 9; Amended Stats 1981 ch 968 § 10.3.

Amendments:

1981 Amendment: Substituted (1) "body" for "agency" wherever it appears; and (2) "report publicly" for "publicly report".

§ 11125.5. Emergency meetings; Notification of media

In the case of an emergency situation involving matters upon which prompt action is necessary due to the disruption or threatened disruption of public facilities, a state body may hold an emergency meeting without complying with the 10-day notice requirement of Section 11125.

For purposes of this section, "emergency situation" means any of the following, as determined by a majority of the members of the state body during a meeting prior to the emergency meeting, or at the beginning of the emergency meeting:

(a) Work stoppage or other activity which severely impairs public health, safety, or both.

(b) Crippling disaster which severely impairs public health, safety, or both.

(c) Difficulties with examinations for licensure which require immediate attention.

(d) Administrative disciplinary matters, including, but not limited to,

consideration of proposed decisions and stipulations, and pending litigation, which require immediate attention.

(e) Consideration of applications for licensure where a decision must be made in less than 10 days.

(f) Consideration by a licensing agency of proposed legislation which requires immediate attention due to legislative action which may be taken prior to the next regularly scheduled meeting of the agency, or due to time limitations imposed by law.

However, newspapers of general circulation and radio or television stations which have requested notice of meetings pursuant to Section 11125 shall be notified by the presiding officer of the state body, or a designee thereof, one hour prior to the emergency meeting by telephone. In the event that telephone services are not functioning the notice requirements of this section shall be deemed waived, and the presiding officer of the state body, or a designee thereof, shall notify such newspapers, radio stations, or television stations of the fact of the holding of the emergency meeting, the purpose of the meeting, and any action taken at the meeting as soon after the meeting as possible.

The minutes of a meeting called pursuant to this section, a list of persons who the presiding officer of the state body, or a designee thereof, notified or attempted to notify, a copy of the rollcall vote, and any actions taken at such meeting shall be posted for a minimum of 10 days in a public place as soon after the meeting as possible.

Added Stats 1981 ch 968 § 11.

§ 11126. Permitted closed sessions

(a) Nothing contained in this article shall be construed to prevent a state body from holding closed sessions during a regular or special meeting to consider the appointment, employment or dismissal of a public employee or to hear complaints or charges brought against such employee by another person or employee unless such employee requests a public hearing. As a condition to holding a closed session on the complaints or charges to consider disciplinary action or to consider dismissal such employee shall be given written notice of his or her right to have a public hearing rather than a closed session, which notice shall be delivered to the employee personally or by mail at least 24 hours before the time for holding a regular or special meeting. If notice is not given, any disciplinary or other action taken against any employee at such closed session shall be null and void. The state body also may exclude from any such public or closed session, during the examination of a witness, any or all other witnesses in the matter being investigated by the state body. Following

the public hearing or closed session the body may deliberate on the decision to be reached in a closed session.

For the purposes of this section, the term "employee" shall not include any person who is elected to, or appointed to a public office by, any state body; provided, however, that officers of the California State University and Colleges who receive compensation for their services other than per diem and ordinary and necessary expenses shall, when engaged in such capacity, be considered employees.

(b) Nothing in this article shall be construed to prevent state bodies which administer the licensing of persons engaging in businesses or professions from holding closed sessions to prepare, approve, grade or administer examinations.

(c) Nothing in this article shall be construed to prevent an advisory body of a state body which administers the licensing of persons engaged in businesses or professions from conducting a closed session to discuss matters which the advisory body has found would constitute an unwarranted invasion of the privacy of an individual licensee or applicant if discussed in an open meeting, provided that the advisory body does not include a quorum of the members of the state body itadvises. Such matters may include review of an applicant's qualifications for licensure and an inquiry specifically related to the state body's enforcement program concerning an individual licensee or applicant where the inquiry occurs prior to the filing of a civil, criminal, or administrative disciplinary action against the licensee or applicant by the state body.

(d) Nothing in this article shall be construed to prohibit a state body from holding a closed session to deliberate on a decision to be reached based upon evidence introduced in a proceeding required to be conducted pursuant to Chapter 5 (commencing with Section 11500) of Part 1, Division 3, Title 2 of the Government Code or similar provision of law.

(e) Nothing in this article shall be construed to prevent any state body from holding a closed session to consider matters affecting the national security.

(f) Nothing in this article shall be construed to grant a right to enter any correctional institution or the grounds of a correctional institution where that right is not otherwise granted by law, nor shall anything in this article be construed to prevent a state body from holding a closed session when considering and acting upon the determination of a term, parole, or release of any individual or other disposition of an individual case, or if public disclosure of the subjects under discussion or consideration is expressly prohibited by statute.

(g) Nothing in this article shall be construed to prevent any closed session to consider the conferring of honorary degrees, or gifts,

donations and bequests which the donor or proposed donor has requested in writing to be kept confidential.

(h) Nothing in this article shall be construed to prevent the Alcoholic Beverage Control Appeals Board from holding a closed session for the purpose of holding a deliberative conference as provided in Section 11125 of the Government Code.

(i) Nothing in this article shall be construed to prevent the Trustees of the California State University and Colleges from holding closed sessions dealing with site selection for such state university and colleges.

(j) Nothing in this article shall be construed to prevent the California Postsecondary Education Commission from holding closed sessions to consider matters pertaining to the appointment or termination of the Director of the California Postsecondary Education Commission.

(k) Nothing in this article shall be construed to prevent the Franchise Tax Board from holding closed sessions for the purpose of discussion of confidential tax returns or data the public disclosure of which is prohibited by law, or from considering matters pertaining to the appointment or removal of the executive officer of the Franchise Tax Board.

(l) Nothing in this article shall be construed to prevent the Board of Corrections from holding closed sessions when considering reports of crime conditions under the provisions of Section 6027 of the Penal Code.

(m) Nothing in this article shall be construed to prevent the State Air Resources Board from holding closed sessions when considering the proprietary specifications and performance data of manufacturers.

(n) Nothing in this article shall be construed to prevent a state body which invests retirement, pension, or endowment funds from holding closed sessions when considering investment decisions. For purposes of consideration of shareholder voting on corporate stocks held by the state body, closed sessions for the purposes of voting may be held only with respect to election of corporate directors, election of independent auditors, and other financial issues which could have a material effect on the net income of the corporation

(o) Nothing in this article shall be construed to prevent a state body, or such boards, commissions, administrative officers, or other representatives as may properly be designated by law or by such state body, from holding closed sessions with its representatives in discharging its responsibilities under Chapter 10 (commencing with Section 3500) of Division 4 of Title 1 of this code as such sessions relate to salaries, salary schedules, or compensation paid in the form of fringe benefits. For the purposes enumerated in the preceding

sentence, a state body may also meet with a state conciliator who has intervened in the proceedings.

(p) Notwithstanding any other provision of law, any meeting of the Public Utilities Commission at which the rates of entities under the commission's jurisdiction are changed shall be open and public.

Nothing in this article shall be construed to prevent the Public Utilities Commission from holding closed sessions to deliberate on the institution of proceedings, or disciplinary actions against regulated utilities.

(q) Nothing in this article shall be construed to prevent a state body from holding a closed session to confer with legal counsel regarding pending litigation when discussion in open session concerning those matters would adversely affect or be detrimental to the public interest.

(r) Nothing in this article shall be construed to prevent a state body which invests in retirement, pension, or endowment funds from holding closed sessions to confer with legal counsel regarding pending litigation, when discussion in open session concerning these matters would adversely affect, or be detrimental to, those funds. For purposes of subdivision (q) and this subdivision, litigation shall be considered pending when a complaint, claim or petition for writ of mandate has been filed, or the threat of litigation is imminent in the sound opinion of the state body.

(s) Nothing in this article shall be construed to prevent the examining committee established by the Board of Forestry pursuant to Section 763 of the Public Resources Code from conducting a closed session to consider disciplinary action against an individual professional forester prior to the filing of an accusation against the forester pursuant to Section 11503.

(t) Nothing in this article shall be construed to prevent an administrative committee established by the Board of Accountancy pursuant to Section 5020 of the Business and Professions Code from conducting a closed session to consider disciplinary action against an individual accountant prior to the filing of an accusation against the accountant pursuant to Section 11503. Nothing in this article shall be construed to prevent an examining committee established by the Board of Accountancy pursuant to Section 5023 of the Business and Professions Code from conducting a closed hearing to interview an individual applicant or accountant regarding the applicant's qualifications.

(u) Nothing in this article shall be construed to prevent a state body, as defined in Section 11121.2, from conducting a closed session to consider any matter which properly could be considered in closed session by the state body whose authority it exercises.

(v) Nothing in this article shall be construed to prevent a state body,

as defined in Section 11121.7, from conducting a closed session to consider any matter which properly could be considered in a closed session by the body defined as a state body pursuant to Section 11121, 11121.2, or 11121.5.

(w) Nothing in this article shall be construed to prevent a state body, as defined in Section 11121.8, from conducting a closed session to consider any matter which properly could be considered in a closed session by the state body it advises.

(x) Nothing in this article shall be construed to prevent the State Board of Equalization from holding closed sessions when considering matters pertaining to the appointment or removal of the executive secretary of the State Board of Equalization.

Added Stats 1967 ch 1656 § 122; Amended Stats 1968 ch 1272 § 1; Stats 1970 ch 346 § 5; Stats 1972 ch 431 § 43, ch 1010 § 63, effective August 17, 1972, operative July 1, 1972; Stats 1974 ch 1254 § 1, ch 1539 § 1; Stats 1975 ch 197 § 1, ch 959 § 5; Stats 1977 ch 730 § 5, effective September 12, 1977; Stats 1980 ch 1197 § 1, ch 1284 § 11; Stats 1981 ch 180 § 1, ch 968 § 12.

Amendments:

1968 Amendment: Added the last paragraph.

1970 Amendment: Substituted "State Air Resources" for "Motor Vehicle Pollution Control" in the eleventh paragraph.

1972 Amendment: Added the thirteenth paragraph.

1974 Amendment: Added the last paragraph.

1975 Amendment: (1) Amended the first paragraph by deleting (a) "officer or" after "a public", "against such", and "unless such"; and (b) "public officer" after "by another" in the first sentence; and (c) "officer or" after "dismissal such" and "against any" in the second and third sentence; (2) added the second paragraph; (3) substituted "Employees'" for "Employees" in the thirteenth paragraph; (4) added the sixteenth paragraph; (5) amended the seventeenth paragraph by deleting (a) "(1)" after "deliberate on"; (b) "enforcement" after "institution of"; and (c) "or litigation or (2) decisions to be reached in matters for which public hearings have been held pursuant to the applicable provisions of the Public Utilities Code" at the end of the paragraph.

1977 Amendment: Added the tenth paragraph.

1980 Amendment: (1) Substituted "a closed" for "an executive" and "closed" for "executive" wherever it appears; (2) amended the second sentence of the first paragraph by (a) adding "or her" after "notice of his"; and (b) substituting "the employee" for "him" after "delivered to"; (3) added the fourth paragraph; (4) added ", or from considering matters pertaining to the appointment or removal of the executive officers of the Franchise Tax Board" at the end of the eleventh paragraph; (5) amended the sixteenth paragraph by (a) substituting "state" for "public" after "body of a" near the beginning of the paragraph; and (b) adding the second and third sentences; and (6) added the last two paragraphs. (As amended by Stats 1980, ch 1284, compared to the section as it read prior to 1980. This section was also amended by an earlier chapter, ch 1197. See Gov C § 9605.)

1981 Amendment: In addition to adding subdivision designations, (1) substituted "body" for "agency" wherever it appears in subd (a); (2) substituted "closed session" for "private meeting" in the fourth sentence of subd (a); (3) substituted "bodies" for "agencies" in subd (b); (4) substituted "state body" for "state agency" wherever it appears in subds (c)–(m); (5) added "University and" and "university and" in subd (i); (6) deleted the former fourteenth paragraph which read: "Nothing in this article shall be construed to prevent the Board of Administration of the Public Employees' Retirement System from holding closed sessions when considering investment decisions."; (7) deleted the former fifteenth

paragraph which read: "Nothing in this article shall be construed to prevent the Teachers' Retirement Board of the State Teachers' Retirement System from holding closed sessions when considering investment decisions."; (8) added subd (n); (9) amended the first sentence of subd (o) by (a) substituting "a state body" for "the governing body of a state agency" after "prevent"; (b) substituting "state body" for "governing body" before ", from holding"; and (c) deleting "at any time" after "representatives"; (10) amended the second sentence of subd (o) by (a) substituting "body" for "agency"; and (b) deleting ", providing a quorum of the state agency is present" at the end; (11) deleted the former last sentence of subd (o) which read: "For purposes of this paragraph, a state agency may not otherwise meet without using a designated representative, but it may appoint from its membership a member or members to act as its designated representative, with whom it may meet in closed session."; (12) amended the second paragraph of subd (p) by (a) adding "or" before "disciplinary"; and (b) deleting ", or litigation" at the end; (13) added subds (q) and (r); and (14) added subds (u)–(x). (As amended by Stats 1981, ch 968, compared to the section as it read prior to 1981. This section was also amended by an earlier chapter, ch 180. See Gov C § 9605.)

Cross References:

Meetings of representatives of public agency and employee organization: § 3505.

Franchise Tax Board: §§ 15700 et seq.

State Personnel Board, holding executive sessions as provided by this section: § 18653.

Hearings of Board of Administration of Public Employees' Retirement System: § 20133.

Executive sessions of State Board of Accountancy: B & P C § 5017.

Alcoholic Beverage Control Appeals Board: B & P C §§ 23075–23077.

Hearings of Teachers' Retirement Board: Ed C § 22217.

Powers, duties, and functions of Trustees of California State University and Colleges: Ed C § 66606.

Hearings of State Air Resources Board: H & S C § 41502.

Granting of paroles by Board of Prison Terms: Pen C §§ 3040 et seq.

Collateral References:

Witkin Summary (8th ed) pp 3628, 3821.

Cal Jur 3d Administrative Law § 204.

NOTES OF DECISIONS

Under Gov. Code, § 18653, providing for meetings of the State Personnel Board, the Board is required to hold public hearings, but when the hearing has reached the decisional stage, it may hold an executive session for the sole purpose of deliberating on the decision to be reached, and at the conclusion of the executive session, the Board must reconvene the public hearing and make public announcement of its decision. The provision in Gov. Code, § 18653, authorizing the Board to hold executive sessions "as provided in" Gov. Code, § 11126, containing exceptions to the declared policy of public hearings, was intended to identify the exceptions in Gov. Code, § 18653, with those in Gov. Code, § 11126, and as so construed, the words "as provided in" are synonymous with "in accordance with" rather than being interpreted as "only as provided in." California State Employees' Asso. v State Personnel Board (1973) 31 CA3d 1009, 108 Cal Rptr 57.

In a disciplinary hearing before the Psychology Examining Committee on allegations that a licensed psychologist had illegally prescribed and furnished dangerous drugs and engaged in sexual and other physical intimacies with three female patients, committee members and the hearing office did not violate the requirements of Gov. Code, §§ 11120–11131, of open and public action and deliberation by state agencies, by convening in executive sessions on six occasions during the hearing, where it appeared that the objective in conducting each of the sessions was to reach "a decision . . . based upon evidence introduced" at the hearing, as permitted by Gov. Code, § 11126. Moreover, the subject matter of each session and the decision discussed at it were fully placed on the record before each session, or afterward, or on both occasions in some instances, and the accused had the opportunity to examine and challenge each of the decisions made in executive session and in fact did so. Cooper v State Board of Medical Examiners (1975) 49 CA3d 931, 123 Cal Rptr 563.

§ 11126.1. Minute book of closed session

The state body shall designate a clerk or other officer or employee of the state body, who shall then attend each closed session of the state body and keep and enter in a minute book a record of topics discussed and decisions made at the meeting. The minute book made pursuant to this section is not a public record subject to inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1), and shall be kept confidential. The minute book shall be available to members of the state body or, if a violation of this chapter is alleged to have occurred at a closed session, to a court of general jurisdiction. Such minute book may, but need not, consist of a recording of the closed session.

Added Stats 1980 ch 1284 § 12; Amended Stats 1981 ch 968 § 13.

Amendments:

1981 Amendment: (1) Substituted "body" for "agency" wherever it occurs; and (2) deleted "wherein the state agency lies" at the end of the third sentence.

§ 11126.3. Statement of reasons and authority for closed session

Prior to holding any closed session, the state body shall state the general reason or reasons for the closed session, and cite the specific statutory authority, including the particular section and subdivision, or other legal authority under which the session is being held. In the closed session, the state body may consider only those matters covered in its statement. The statement shall be made as part of the notice provided for the meeting and of any order or notice required by Section 11129. Nothing in this section shall require or authorize the giving of names or other information which would constitute an invasion of privacy or otherwise unnecessarily divulge the particular facts concerning the closed session.

Added Stats 1980 ch 1284 § 13; Amended stats 1981 ch 968 § 14.

Amendments:

1981 Amendment: (1) Amended the first sentence by substituting (a) "body" for "agency"; and (b) "specific statutory authority, including the particular section and subdivision," for "statutory"; and (2) added "and of any order or notice required by Section 11129" at the end of the third sentence.

§ 11126.5. Clearing room where meeting wilfully interrupted

In the event that any meeting is willfully interrupted by a group or

groups of persons so as to render the orderly conduct of such meeting unfeasible and order cannot be restored by the removal of individuals who are willfully interrupting the meeting the state body conducting the meeting may order the meeting room cleared and continue in session. Nothing in this section shall prohibit the state body from establishing a procedure for readmitting an individual or individuals not responsible for willfully disturbing the orderly conduct of the meeting. Notwithstanding any other provision of law, only matters appearing on the agenda may be considered in such a session. Representatives of the press or other news media, except those participating in the disturbance, shall be allowed to attend any session held pursuant to this section.

Added Stats 1970 ch 1598 § 1; Amended Stats 1981 ch 968 § 15.

Amendments:

1981 Amendment: (1) Substituted "the state body" for ", the members of the state agency" in the first sentence; (2) substituted "body" for "agency" in the second sentence; (3) added "Notwithstanding any other provision of law," at the beginning of the third sentence; and (4) deleted "Duly accredited" at the beginning of the last sentence.

Note—Stats 1970 ch 1598 also provides: § 3. The Legislature finds that it is in the public interest to allow duly accredited representatives of the press or other news media to attend sessions from which members of the general public have been excluded by reason of a willful disturbance.

§ 11126.7. Fees

No fees may be charged by a state body for providing a notice required by Section 11125 or for carrying out any provision of this article, except as specifically authorized pursuant to this article.

Added Stats 1980 ch 1284 § 14; Amended Stats 1981 ch 968 § 16.

Amendments:

1981 Amendment: Substituted "body for providing a notice required by Section 11125 or" for "agency".

§ 11127. State bodies subject to article

Each provision of this article shall apply to every state body unless the body is specifically excepted from that provision by law or is covered by any other conflicting provision of law.

Added Stats 1967 ch 1656 § 122; Amended Stats 1981 ch 968 § 17.

Amendments:

1981 Amendment: Substituted (1) "Each provision" for "The provisions"; (2) "body" for "agency" wherever it appears; and (3) "from that provision by law or is covered by any other conflicting provision of law" for "by law".

§ 11128. When closed sessions held

Each closed session of a state body shall be held only during a regular or special meeting of the body.

Added Stats 1967 ch 1656 § 122; Amended Stats 1980 ch 1284 § 15; Stats 1981 ch 968 § 18.

Amendments:

1980 Amendment: Substituted "closed" for "executive".

1981 Amendment: Substituted (1) "Each closed session of a state body" for "All closed sessions of a state agency"; and (2) "body" for "agency" at the end of the section.

Collateral References:

Witkin Summary (8th ed) p 3628.

§ 11129. Continuance or recontinuance of hearing

Any hearing being held, or noticed or ordered to be held by a state body at any meeting may by order or notice of continuance be continued or recontinued to any subsequent meeting of the state body which is noticed pursuant to Section 11125. A copy of the order or notice of continuance shall be conspicuously posted on or near the door of the place where the hearing was held within 24 hours after the time of the continuance; provided, that if the hearing is continued to a time less than 24 hours after the time specified in the order or notice of hearing, a copy of the order or notice of continuance of hearing shall be posted immediately following the meeting at which the order or declaration of continuance was adopted or made.

Added Stats 1967 ch 1656 § 122; Amended Stats 1981 ch 968 § 19.

Amendments:

1981 Amendment: (1) Substituted "body" for "agency" wherever it appears; and (2) added "which is noticed pursuant to section 11125" at the end of the first sentence.

§ 11130. Commencement of action

Any interested person may commence an action by mandamus, injunction, or declaratory relief for the purpose of stopping or preventing violations or threatened violations of this article or to determine the applicability of this article to actions or threatened future action by members of the state body.

Added Stats 1967 ch 1656 § 122; Amended Stats 1969 ch 494 § 1; Stats 1981 ch 968 § 20.

Amendments:

1969 Amendment: (1) Deleted "either" after "an action"; (2) deleted "or" before "injunction,"; (3) added "or declaratory relief" after "injunction," and (4) added "or to determine the applicability of this article to actions or threatened future action".

1981 Amendment: Substituted "body" for "agency" at the end of the section.

Cross References:

Injunction: CCP §§ 525 et seq.

Declaratory relief: CCP §§ 1060 et seq.

Writ of mandate: CCP §§ 1084 et seq.

NOTES OF DECISIONS

The legislative immunity from service of civil process conferred on legislators by Cal Const, art IV, § 14, applicable to the legislator-members of the State Advisory Commission on Indian Affairs, did not expose private citizens to abuse of governmental power untrammeled by judicial restraint, and did not deny due process to plaintiffs seeking in a superior court to enforce a right conferred by state law to demand open meetings of state boards, where the commission itself was the only indispensable party, the individual members were proper but not necessary parties, and plaintiffs' inability to serve effective process on the legislator-members did not bar them from relief, and where the commission was advisory only, did not govern in the sense that it executed and administered the laws, had no power to impinge on the lives, liberty or property of private citizens, and its powers involved merely the interchange of information, the assembling of data, and the formulation of proposals to be placed before the Legislature. Harmer v Superior Court (1969) 275 CA2d 345, 79 Cal Rptr 855.

§ 11130.5. Costs and attorney fees

A court may award court costs and reasonable attorney's fees to the plaintiff in an action brought pursuant to Section 11130 where it is found that a state body has violated the provisions of this article. Such costs and fees shall be paid by the state body and shall not become a personal liability of any public officer or employee thereof.

A court may award court costs and reasonable attorney's fees to a defendant in any action brought pursuant to Section 11130 where the defendant has prevailed in a final determination of such action and the court finds that the action was clearly frivolous and totally lacking in merit.

Added Stats 1975 ch 959 § 6; Amended Stats 1981 ch 968 § 21.

Amendments:

1981 Amendment: Substituted (1) "body" for "agency" wherever it appears; and (2) "attorney's" for "attorney" wherever it appears.

§ 11130.7. Offenses

Each member of a state body who attends a meeting of such body in violation of any provision of this article, with knowledge of the fact that the meeting is in violation thereof, is guilty of a misdemeanor.

Added Stats 1980 ch 1284 § 16; Amended Stats 1981 ch 968 § 22.

Amendments:

1981 Amendment: Substituted "body" for "agency" wherever it appears.

§ 11131. Prohibition against use of certain facilities

No state agency shall conduct any meeting, conference, or other function in any facility that prohibits the admittance of any person, or persons, on the basis of race, religious creed, color, national origin, ancestry, or sex. As used in this section, "state agency" means and

includes every state body, office, officer, department, division, bureau, board, council, commission, or other state agency.

Added Stats 1970 ch 383 § 1; Amended Stats 1981 ch 968 § 23.

Amendments:

1981 Amendment: Added "body," in the second sentence.

ARTICLE 9.5

Discrimination

[Added by Stats 1977 ch 972 § 1.]

§ 11135. Prohibited discrimination

No person in the State of California shall, on the basis of ethnic group identification, religion, age, sex, color, or physical or mental disability, be unlawfully denied the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is funded directly by the state or receives any financial assistance from the state.

Added Stats 1977 ch 972 § 1.

Collateral References:

Cal Jur 3d Civil Rights § 2.

Law Review Articles:

Review of Selected 1977 California Legislation. 9 Pacific LJ 650.
Mandatory retirement: Past, present and future of an anachronism. (1977) 5 West St U LR 1.

Annotations:

Application of state law to sex discrimination in employment. 87 ALR3d 93.
Construction and effect of state legislation forbidding job discrimination on account of physical handicap. 90 ALR3d 393.
Application of state law to age discrimination in employment. 96 ALR3d 195.

§ 11136. Hearing to determine violation

Whenever a state agency that administers a program or activity that is funded directly by the state or receives any financial assistance from the state, has reasonable cause to believe that a contractor, grantee, or local agency has violated the provisions of Section 11135, or any regulation adopted to implement such section, the head of the state

California : Government Code (Legislative Sections)

§ 9026. Standing committees; Appointment

All standing committees of either the Senate or Assembly shall be appointed by the presiding officer of their respective house if the house by resolution or its rules does not direct otherwise.

Enacted 1943.

Prior Law: Former Pol C § 248, as added by Stats 1899 ch 129 § 1 p 165.

Cross References:

Joint Rules Committee: § 9107.
Engrossing and enrolling committee: § 9501.
Appointment of committees: Const Art IV § 11.

Collateral References:

42 Cal Jur 3d Legislature § 17.
72 Am Jur 2d States, Territories, and Dependencies §§ 44, 50.

Legislative Counsel's Opinions:

Powers of Speaker of Assembly. 1961 AJ 2255.

§ 9027. Open and public proceedings

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.

Added Stats 1973 ch 1148 § 1; Amended Stats 1974 ch 1280 § 1; Stats 1975 ch 959 § 2.

Amendments:

1974 Amendment: Added the second paragraph.

1975 Amendment: Deleted (1) "on the budget" after "committee" in the first paragraph; and (2) "other than that on the budget" after "committee" in the second paragraph.

Former Section: Former § 9027, similar to present § 9126, was added by Stats 1949 ch 567 § 1 and repealed by Stats 1949 ch 1238 § 4.

Note—Stats 1973 ch 1148 also provides: § 7. This act shall be known and may be cited as the "Grunsky-Burton Open Meeting Act."

Collateral References:

42 Cal Jur 3d Legislature § 15.
Cal Digest of Official Reports 3d Series, Legislature § 7.

§ 9028. Public notice of meetings

Any such meetings at which the discussion or adoption of any proposed resolution, rule, regulation, or formal action occurs, or at which a majority or quorum of the body is in attendance, shall be held only after full and timely notice to the public as provided by the Joint Rules of the Senate and Assembly.

Added Stats 1973 ch 1148 § 2.

Former Section: Former § 9028, similar to present § 9126, was added by Stats 1949 ch 567 § 2 and repealed by Stats 1949 ch 1238 § 4.

Collateral References:
Cal Jur 3d Legislature § 15.
Cal Digest of Official Reports 3d Series, Legislature § 7.

§ 9029. Permitted executive sessions

Nothing contained in this article shall be construed to prevent: the Assembly or the Senate or a committee or subcommittee thereof from holding executive sessions to consider the appointment of members to committees or to the chairmanship or vice chairmanship thereof, or to consider the appointment, employment or dismissal of a public officer or employee or to hear complaints or charges brought against such officer or employee, or an elected public official, or to consider matters relating to internal house management, or to consider assignment of bills to committee, or affecting the safety and security of the State Capitol or Members of the Legislature, its staff and employees, or the Members of the Assembly or the Senate from meeting privately in caucus with members of their own political party.

Added Stats 1973 ch 1148 § 3; Amended Stats 1974 ch 1280 § 2; Stats 1975 ch 959 § 3.

Amendments:
1974 Amendment: Added ", except as provided in Section 9027,"; (2) deleted a comma after "legislative conference committee"; and (3) added "a conference committee" before "on the budget,".
1975 Amendment: Deleted ", or, except as provided in section 9027, a legislative conference committee other than a conference committee on the budget, consisting of members of both houses duly appointed and meeting to consider legislation when the first house refused to concur in amendments of the second house" at the end of the section.

Former Section: Former § 9029, similar to present § 9127, was added by Stats 1949 ch 567 § 3 and repealed by Stats 1949 ch 1238 § 4.

Collateral References:
Cal Jur 3d Legislature § 15.
Cal Digest of Official Reports 3d Series, Legislature § 7.

§ 9030. Violation of section as misdemeanor

Each Member of the Legislature who attends a meeting of the Assembly, the Senate, or any committee or subcommittee thereof, where action is taken in violation of Section 9027, with knowledge of the fact that the meeting is in violation thereof, is guilty of a misdemeanor.

Added Stats 1973 ch 1148 § 4.

Former Section: Former § 9030, similar to present § 9130, was added by Stats 1949 ch 567 § 4 and repealed by Stats 1949 ch 1238 § 4.

Collateral References:
Cal Jur 3d Legislature § 15.
Cal Digest of Official Reports 3d Series, Legislature § 7, Public Officers and Employees § 16.

§ 9031. Remedies against violations

Any interested person may commence an action by mandamus, injunction or declaratory relief for the purpose of stopping or preventing violations or threatened violations of Section 9027 by Members of the Legislature or to determine the applicability of this chapter to actions or threatened future action of the Legislature.

Added Stats 1973 ch 1148 § 5.

Collateral References:
Cal Jur 3d Legislature § 15.
Cal Digest of Official Reports 3d Series, Legislature § 7.

§ 9032. Severability and partial validity

If any provision of this article, or the application thereof, to any person or circumstance is held invalid, the validity of the remainder of such article and the application of such provision to other persons and circumstances shall not be affected thereby.

Added Stats 1973 ch 1148 § 6.

Collateral References:
Cal Jur 3d Legislature § 15.

ARTICLE 2.5

Legislative Session After War or Enemy-Caused Disaster

[Added by Stats 1st Ex Sess 1958 ch 75 § 1, operative November 4, 1958.]

Cross References:
Filling vacancies caused by war: § 9004.

Collateral References:
Cal Jur 3d Legislature § 13, Military and Civil Defense § 54.
Cal Digest of Official Reports 3d Series, § 7.
Am Jur 2d States, Territories, and Dependencies § 59.

§ 9035. "Disaster"

As used in this article, "disaster" means a war or enemy-caused calamity within this State, such as an attack by nuclear weapons.

senatorial district, when more than one county shall constitute the same, shall be composed of contiguous counties, and no county shall be divided in creating such senatorial districts. Senatorial or representative districts comprising not more than one county may be divided into subdistricts from time to time by law. Subdistricts shall be composed of contiguous territory within the district; and the ratios to population of senators or representatives, as the case may be, elected from the subdistricts, shall be substantially equal within the district. [Constitution of 1859; Amendment proposed by H.J.R. No. 20, 1953, and adopted by people Nov. 2, 1954]

Section 8. Qualification of Senators and Representatives. No person shall be a Senator or Representative who at the time of election is not a citizen of the United States; nor anyone who has not been for one year next preceding the election an inhabitant of the district from which the Senator or Representative may be chosen. However, for purposes of the general election next following the operative date of an apportionment under section 6 of this Article, the person must have been an inhabitant of the district from January 1 of the year following the reapportionment to the date of the election. Senators and Representatives shall be at least twenty one years of age. [Amendment proposed by H.J.R. 6, 1985, and adopted by people Nov. 4, 1986]

Section 9. Legislators free from arrest and not subject to civil process in certain cases; words uttered in debate. Senators and Representatives in all cases, except for treason, felony, or breaches of the peace, shall be privileged from arrest during the session of the Legislative Assembly, and in going to and returning from the same; and shall not be subject to any civil process during the session of the Legislative Assembly, nor during the fifteen days next before the commencement thereof: Nor shall a member for words uttered in debate in either house, be questioned in any other place.—

Section 10. Regular sessions of the Legislative Assembly. The sessions of the Legislative Assembly shall be held biennially at the Capitol of the State commencing on the second Monday of September, in the year eighteen hundred and fifty eight, and on the same day of every second year thereafter, unless a different day shall have been appointed by law.—

Section 10a. Emergency sessions of the Legislative Assembly. In the event of an emergency the Legislative Assembly shall be convened by the presiding officers of both Houses at the Capitol of the State at times other than required by section 10 of this Article upon the written request of the majority of the members of each House to commence within five days after receipt of the minimum requisite number of requests. [Created through H.J.R. No. 28, 1975, and adopted by the people Nov. 2, 1976]

Section 11. Legislative officers; rules of proceedings; adjournments. Each house when assembled, shall choose its own officers, judge of the election, qualifications, and returns of its own members; determine its own rules of proceeding, and sit upon its own adjournments; but neither house shall without the concurrence of the other, adjourn for more than three days, nor to any other place than that in which it may be sitting.—

Section 12. Quorum; failure to effect organization. Two thirds of each house shall constitute a quorum to do business, but a smaller number may meet; adjourn from day to day, and compel the attendance of absent members. A quorum being in attendance, if either house fail to effect an organization within the first five days thereafter, the members of the house so failing shall be entitled to no compensation from the end of the said five days until an organization shall have been effected.—

Section 13. Journal; when yeas and nays to be entered. Each house shall keep a journal of its proceedings.—The yeas and nays on any question, shall at the request of any two members, be entered, together with the names of the members demanding the same, on the journal; provided that on a motion to adjourn it shall require one tenth of the members present to order the yeas, and nays.

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. [Amendment proposed by S.J.R. No. 36, 1973, and adopted by people Nov. 5, 1974; Amendment proposed by H. J. R. No. 29, 1977, and adopted by people May 23, 1978]

Section 15. Punishment and expulsion of members. Either house may punish its members for disorderly behavior, and may with the concurrence of two thirds, expel a member; but not a second time for the same cause.—

Section 16. Punishment of nonmembers. Either house, during its session, may punish by imprisonment, any person, not a mem-

items dishonored or which created overdrafts, dollar volume of dishonored items and items which when paid created overdrafts, a statement explaining any credit arrangement between the financial institution and the customer to pay overdrafts, dates and amounts of deposits and debits to a customer's account, the account balance on such dates, a copy of the customer's signature card and the dates the account opened or closed. [1977 c.517 §8 (2), (3)]

192.590 Civil liability for violation of ORS 192.550 to 192.595; status of evidence obtained in violation. (1) Any customer who suffers any ascertainable loss as a result of a wilful violation of ORS 192.550 to 192.595 by any person, may bring an individual action in an appropriate court to recover actual damages or $1,000, whichever is greater.

(2) Any customer who suffers any ascertainable loss as a result of a negligent violation of ORS 192.550 to 192.595 by any person, may bring an individual action in an appropriate court to recover actual damages.

(3) In any successful action to enforce civil liability for violation of the provisions of ORS 192.550 to 192.595, the customer may recover the cost of the action, together with reasonable attorney fees at trial and on appeal as determined by the court.

(4) An action to enforce any provision of ORS 192.550 to 192.595 must be commenced within two years after the date on which the violation occurred.

(5) Evidence obtained in violation of ORS 192.550 to 192.595 is inadmissible in any proceeding. [1977 c.517 §9; 1981 c.897 §41]

192.595 Severability. If any provision of ORS 192.550 to 192.595 or the application thereof to any person or circumstance is held invalid for any reason, such invalidity shall not affect any other provision or application of ORS 192.550 to 192.595 which can remain in effect without the invalid provision or application, and to this end the provisions of ORS 192.550 to 192.595 are severable. [1977 c.517 §10]

PUBLIC MEETINGS

192.610 Definitions for ORS 192.610 to 192.690. As used in ORS 192.610 to 192.690:

(1) "Decision" means any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting at which a quorum is present.

(2) "Executive session" means any meeting or part of a meeting of a governing body which is closed to certain persons for deliberation on certain matters.

(3) "Governing body" means the members of any public body which consists of two or more members, with the authority to make decisions for or recommendations to a public body on policy or administration.

(4) "Public body" means the state, any regional council, county, city or district, or any municipal or public corporation, or any board, department, commission, council, bureau, committee or subcommittee or advisory group or any other agency thereof.

(5) "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 onsite inspection of any project or program. "Meeting" also does not include the attendance of members of a governing body at any national, regional or state association to which the public body or the members belong. [1973 c.172 §2; 1979 c.644 §1]

192.620 Policy. The Oregon form of government requires an informed public aware of the deliberations and decisions of governing bodies and the information upon which such decisions were made. It is the intent of ORS 192.610 to 192.690 that decisions of governing bodies be arrived at openly. [1973 c.172 §1]

192.630 Meetings of governing body to be open to public; location of meetings. (1) All meetings of the governing body of a public body shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by ORS 192.610 to 192.690.

(2) No quorum of a governing body shall meet in private for the purpose of deciding on or deliberating toward a decision on any matter except as otherwise provided by ORS 192.610 to 192.690.

(3) A governing body shall not hold a meeting at any place where discrimination on the basis of race, creed, color, sex, age or national origin is practiced. However, the fact that organizations with restricted membership hold meetings at the place shall not restrict its use by a public body if use of the place by a restricted membership organization is not the primary purpose of the place or its predominate use.

(4) Meetings of the governing body of a public body shall be held within the geographic boundaries over which the public body has juris-

diction, or at the administrative headquarters of the public body or at the other nearest practical location. Training sessions may be held outside the jurisdiction so long as no deliberations toward a decision are involved. A joint meeting of two or more governing bodies shall be held within the geographic boundaries over which one of the participating public bodies has jurisdiction or at the nearest practical location. Meetings may be held in locations other than those described in this subsection in the event of an actual emergency necessitating immediate action. This subsection does not apply to the Oregon State Bar until December 31, 1980. [1973 c.172 §3; 1979 c.644 §2]

192.640 Public notice required; special notice for executive sessions, special or emergency meetings. (1) The governing body of a public body shall provide for and give public notice, reasonably calculated to give actual notice to interested persons including news media which have requested notice, of the time and place for holding regular meetings. The notice shall also include a list of the principal subjects anticipated to be considered at the meeting, but this requirement shall not limit the ability of a governing body to consider additional subjects.

(2) If an executive session only will be held, the notice shall be given to the members of the governing body, to the general public and to news media which have requested notice, stating the specific provision of law authorizing the executive session.

(3) No special meeting shall be held without at least 24 hours' notice to the members of the governing body, the news media which have requested notice and the general public. In case of an actual emergency, a meeting may be held upon such notice as is appropriate to the circumstances, but the minutes for such a meeting shall describe the emergency justifying less than 24 hours' notice. [1973 c.172 §4; 1979 c.644 §3; 1981 c.182 §1]

192.650 Written minutes required; content; content of minutes for executive sessions. (1) The governing body of a public body shall provide for the taking of written minutes of all its meetings. Neither a full transcript nor a recording of the meeting is required, except as otherwise provided by law, but the written minutes must give a true reflection of the matters discussed at the meeting and the views of the participants. All minutes shall be available to the public within a reasonable time after the meeting, and shall include at least the following information:

(a) All members of the governing body present;

(b) All motions, proposals, resolutions, orders, ordinances and measures proposed and their disposition;

(c) The results of all votes and, except for public bodies consisting of more than 25 members unless requested by a member of that body, the vote of each member by name;

(d) The substance of any discussion on any matter; and

(e) Subject to ORS 192.410 to 192.505 relating to public records, a reference to any document discussed at the meeting but such reference shall not affect the status of the document under ORS 192.410 to 192.505.

(2) Minutes of executive sessions shall be kept in accordance with subsection (1) of this section. However, the minutes of a hearing held under ORS 332.061 shall contain only the material not excluded under ORS 332.061 (2). Instead of written minutes, a record of any executive session may be kept in the form of a sound tape recording which need not be transcribed unless otherwise provided by law. Material the disclosure of which is inconsistent with the purpose for which a meeting under ORS 192.660 is authorized to be held may be excluded from disclosure. However, excluded materials are authorized to be examined privately by a court in any legal action and the court shall determine their admissibility. [1973 c.172 §5; 1975 c.664 §1; 1979 c.644 §4]

192.660 Executive sessions permitted on certain matters; procedures; news media representatives' attendance; limits. (1) Nothing contained in ORS 192.610 to 192.690 shall be construed to prevent the governing body of a public body from holding executive session during a regular, special or emergency meeting after the presiding officer has identified the authorization under ORS 192.610 to 192.690 for the holding of such executive session. Executive session may be held:

(a) To consider the employment of a public officer, employe, staff member or individual agent. The exception contained in this paragraph does not apply to:

(A) The filling of a vacancy in an elected office.

(B) The filling of a vacancy on any public committee, commission or other advisory group.

(C) The consideration of general employment policies.

(D) The employment of the chief executive officer, other public officers, employes and staff

members of any public body unless the vacancy in that office has been advertised, regularized procedures for hiring have been adopted by the public body and there has been opportunity for public input into the employment of such an officer. However, the standards, criteria and policy directives to be used in hiring chief executive officers shall be adopted by the governing body in meetings open to the public in which there has been opportunity for public comment.

(b) To consider the dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employe, staff member or individual agent, unless such public officer, employe, staff member or individual agent requests an open hearing.

(c) To consider matters pertaining to the function of the medical staff of a public hospital licensed pursuant to ORS 441.015 to 441.063, 441.085, 441.087, 441.990 (3), 442.320 and 442.340 including, but not limited to, all clinical committees, executive, credentials, utilization review, peer review committees and all other matters relating to medical competency in the hospital.

(d) To conduct deliberations with persons designated by the governing body to carry on labor negotiations.

(e) To conduct deliberations with persons designated by the governing body to negotiate real property transactions.

(f) To consider records that are exempt by law from public inspection.

(g) To consider preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations.

(h) To consult with counsel concerning the legal rights and duties of a public body with regard to current litigation or litigation likely to be filed.

(i) To review and evaluate, pursuant to standards, criteria and policy directives adopted by the governing body, the employment-related performance of the chief executive officer of any public body, a public officer, employe or staff member unless the person whose performance is being reviewed and evaluated requests an open hearing. The standards, criteria and policy directives to be used in evaluating chief executive officers shall be adopted by the governing body in meetings open to the public in which t .e has been opportunity for public comment. execu- tive session for purposes of evaluati chief executive officer or other officer, employe or staff member shall not include a general evaluation of an agency goal, objective or operation or any directive to personnel concerning agency goals, objectives, operations or programs.

(j) To carry on negotiations under ORS chapter 293 with private persons or businesses regarding proposed acquisition, exchange or liquidation of public investments.

(2) Labor negotiations may be conducted in executive session if either side of the negotiators requests closed meetings. Notwithstanding ORS 192.640, subsequent sessions of the negotiations may continue without further public notice.

(3) Representatives of the news media shall be allowed to attend executive sessions other than those held under paragraph (d) of subsection (1) of this section relating to labor negotiations or executive session held pursuant to ORS 332.061 (2) but the governing body may require that specified information subject of the executive session be undisclosed.

(4) No executive session may be held for the purpose of taking any final action or making any final decision. [1973 c.172 §6; 1975 c.664 §2; 1979 c.644 §5; 1981 c.302 §1; 1983 c.453 §1; 1985 c.657 §2]

192.670 Meetings by means of telephonic or electronic communication. (1) Any meeting, including an executive session, of a governing body of a public body which is held through the use of telephone or other electronic communication shall be conducted in accordance with ORS 192.610 to 192.690.

(2) When telephone or other electronic means of communication is used and the meeting is not an executive session, the governing body of the public body shall make available to the public at least o place where the public can listen to the communication at the time it occurs by means of speakers or other devices. The place provided may be a place where no member of the governing body of the public body is present. [1973 c.172 §7; 1979 c.361 §1]

192.680 Enforcement of ORS 192.610 to 192.690; effect of violation on validity of decision of governing body; liability of members. (1) Any person affected by a decision of a governing body of a public body may commence a suit in the circuit court for the county in which the governing body ordinarily meets, for the purpose of requiring compliance with, or the prevention of violations of ORS 192.610 to 192.690, by members of the governing body, or to determine the applicability of ORS 192.610 to 192.690 to matters or decisions of the governing body. The court may order such equitable relief as

it deems appropriate in the circumstances. 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.

(2) If the court makes a finding that a violation of ORS 192.610 to 192.690 has occurred under subsection (1) of this section and that the violation is the 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 or the public body of which it is a part for the amount paid by the body under subsection (1) of this section.

(3) The provisions of this section shall be the exclusive remedy for an alleged violation of ORS 192.610 to 192.690. [1973 c.172 §8; 1975 c.664 §3; 1979 c. 644 §6; 1981 c.897 §42; 1983 c.453 §2]

192.690 Exceptions to ORS 192.610 to 192.690. (1) ORS 192.610 to 192.690 shall not apply to the deliberations of the State Board of Parole, the State Banking Board, the Psychiatric Security Review Board, of state agencies conducting hearings on contested cases in accordance with the provisions of ORS 183.310 to 183.550, the review by the Workers' Compensation Board of similar hearings on contested cases, meetings of the state lawyers assistance committees, the local lawyers assistance committees in accordance with the provisions of ORS 9.545 and the peer review committees in accordance with the provisions of ORS 441.055 or to any judicial proceeding.

(2) Because of the grave risk to public health and safety that would be posed by misappropriation or misapplication of information considered during such review and approval, ORS 192.610 to 192.690 shall not apply to review and approval of security programs by the Energy Facility Siting Council pursuant to ORS 469.530 (3). [1973 c.172 §9; 1975 c.606 §41b; 1977 c.380 §19; 1981 c.354 §3; 1983 c.617 §4; 1987 c.850 §3]

192.695 Prima facie evidence of violation required of plaintiff. In any suit commenced under ORS 192.680 (1), the plaintiff shall be required to present prima facie evidence of a violation of ORS 192.610 to 192.690 before the governing body shall be required to prove that its acts in deliberating toward a decision complied with the law. When a plaintiff presents prima facie evidence of a violation of the open meetings law, the burden to prove that the provisions of ORS 192.610 to 192.690 were complied with shall be on the governing body. [1981 c.892 §97d]

Note: 192.695 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS 192.610 to 192.990 by legislative action. See Preface to Oregon Revised Statutes for further explanation.

192.710 Smoking in public meetings prohibited. (1) No person shall smoke or carry any lighted smoking instrument in a room where a public meeting is being held or is to continue after a recess. For purposes of this subsection, a public meeting is being held from the time the agenda or meeting notice indicates the meeting is to commence regardless of the time it actually commences.

(2) As used in this section:

(a) "Public meeting" means any regular or special public meeting or hearing of a public body to exercise or advise in the exercise of any power of government in buildings or rooms rented, leased or owned by the State of Oregon or by any county, city or other political subdivision in the state regardless of whether a quorum is present or is required.

(b) "Public body" means the state or any department, agency, board or commission of the state or any county, city or other political subdivision in the state.

(c) "Smoking instrument" means any cigar, cigarette, pipe or other smoking equipment. [1973 c.168 §1; 1979 c.262 §1]

FINANCIAL INSTITUTION RECORD DISCLOSURES

192.800 Definitions. (1) "Customer" means any person who or which is transacting or has transacted business with a financial institution, or who or which is using or has used the services of such an institution, or for whom or which a financial institution has acted or is acting as a fiduciary.

(2) "Financial institution" means any state or national bank, state or federal savings and loan association, federal savings bank, state or federal credit union, trust company or mutual savings bank.

(3) "Financial records" means any original written document, any copy thereof, or any information contained therein, held by or in the custody of a financial institution, when the document, copy or information is identifiable as pertaining to one or more customers of the financial institution.

(4) "Subpena" means a judicial subpena or subpena duces tecum. [1985 c.797 §1]

192.805 Reimbursement required prior to disclosure; charges. Before producing

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.

TO: Pat FROM: Sandra

RE: Interplay of Open Meetings (SJR 1) and Ethics Meetings

Per Dick Bradley, 2-2-89

SJR 1 allows executive session. Although Ethics Law references "confidential meetings", he feels this is only a semantics problem, and that Ethics Committee meetings would in fact be covered under the executive session provision.

He is addressing this as part of his memo/opinion to you on the Adams situation.

S.

Daily News - 1/26/89

file SJR 1

In public or private?

Lawmakers again debate open meetings legislation

By BRIAN S. AKRE
The Associated Press

JUNEAU — Chances have improved this year for passage of legislation aimed at requiring lawmakers to comply with Alaska's open meetings statute, Sen. Arliss Sturgulewski said Wednesday.

"I can't say if it has enough votes on the floor, but it's got a lot more support than last year," Sturgulewski told the Senate State Affairs Committee.

Sen. Sturgulewski

Sturgulewski, R-Anchorage, is the primary sponsor of a proposed constitutional amendment to place the legislature and its committees under the same open-meeting requirements demanded of city councils, school boards and state commissions — that most of their business be conducted in public. The amendment would have to be approved by voters.

"We, in a sense, are above the law in this issue," Sturgulewski said.

The committee held its first hearing on the amendment Wednesday, but took no action. Committee members agreed to hold a work session to determine how specific the amendment should be.

The effort to pass a constitutional amendment began after the Alaska Supreme Court in 1987 ruled the courts could not force the legislature to obey the law.

The amendment would permit the courts to fine a legislator who intentionally violates the law.

Last year the House passed a similar amendment, but the measure died in the Senate Rules Committee.

Senate President Tim Kelly, R-Anchorage, said Wednesday that while he supports such legislation, he was concerned that Sturgulewski's proposal does not specify an exception for caucuses in which procedures, organization or political strategy are discussed.

Kelly said that if the amendment is not more specific, it could lead to a barrage of lawsuits which would be costly for the legislature to defend.

"There's a lot of attorneys out there looking for work," Kelly said.

Committee members agreed a companion bill to amend the open meetings law may have to be passed to provide the legislature with specific rules not in the more generally worded constitutional amendment.

Sen. Pat Rodey, D-Anchorage, has introduced such a bill. But committee Chairman Pat Pourchot, D-Anchorage, said Rodey had asked the committee to delay considering it until after the constitutional amendment is considered.

Dick Bradley, an attorney with the legislative counsel's office, said the committee should avoid making the constitutional amendment too specific, and should leave the details for an amendment to the law.

Continued from Page B-1

OPEN MEETINGS: Lawmakers again discuss amendment

Meanwhile, the Committee for an Open Legislature plans to begin circulating petitions aimed at forcing a public vote on the open meetings issue. The committee was formed by members of the League of Women Voters, the Alaska Press Club and the Alaska Public Interest Research Group.

Their proposal is broader than the one before the legislature. It would bring the legislature, its committees and all other "subunits" — including subcommittees and caucuses — under the law. It still would allow closed meetings for discussions of strategy, procedure and organization.

Jeff Bohman, executive director of the Alaska Public Interest Research Group in Anchorage, testified that his group would like to ensure the law applies to "undesignated but influential groups of legislators" who meet in private to make decisions affecting the public.

As an example, he cited frequent closed-door meetings of legislative leaders to discuss budgetary issues.

Please see Page B-3, OPEN

Legislative Immunity / Legislature's Rulemaking Authority / State Constitution

Imprisonment for Debt

SECTION 17. There shall be no imprisonment for debt. This section does not prohibit civil arrest of absconding debtors.

Eminent Domain

SECTION 18. Private property shall not be taken or damaged for public use without just compensation.

Right to Bear Arms

SECTION 19. A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

Quartering Soldiers

SECTION 20. No member of the armed forces shall in time of peace be quartered in any house without the consent of the owner or occupant, or in time of war except as prescribed by law. The military shall be in strict subordination to the civil power.

Construction

SECTION 21. The enumeration of rights in this constitution shall not impair or deny others retained by the people.

Right of Privacy

SECTION 22. The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

(The addition of this section, as an amendment to Article I, was approved by the voters of the state August 22, 1972 and became effective October 14, 1972.)

ARTICLE II

THE LEGISLATURE

Legislative Power; Membership

SECTION 1. The legislative power of the State is vested in a legislature consisting of a senate with a membership of twenty and a house of representatives with a membership of forty.

Members; Qualifications

SECTION 2. A member of the legislature shall be a qualified voter who has been a resident of Alaska for at least three years and of the district from which elected for at least one year, immediately preceding his filing for office. A senator shall be at least twenty-five years of age and a representative at least twenty-one years of age.

Election and Terms

SECTION 3. Legislators shall be elected at general elections. Their terms begin on the fourth Monday of the January following election unless otherwise provided by law. The term of representatives shall be two years, and the term of senators, four years. One-half of the senators shall be elected every two years.

(Exercising its authority under this section, the legislature has provided that terms begin on the second Monday in January, except in years immediately following a gubernatorial election when they begin on the third Monday in January; see AS 24.05.080.)

Vacancies

SECTION 4. A vacancy in the legislature shall be filled for the unexpired term as provided by law. If no provision is made, the governor shall fill the vacancy by appointment.

Disqualifications

SECTION 5. No legislator may hold any other office or position of profit under the United States or the State. During the term for which elected and for one year thereafter, no legislator may be nominated, elected, or appointed to any other office or position of profit which has been created, or the salary or emoluments of which have been increased, while he was a member. This section shall not prevent any person from seeking or holding the office of governor, secretary of state, or member of Congress. This section shall not apply to employment by or election to a constitutional convention.

(The Sixth Legislature's Senate Joint Resolution No. 2 "changing the name of the secretary of state to lieutenant governor" in sixteen sections of the Alaska Constitution, approved by the voters August 25, 1970, inadvertently omitted express amendment of this section.)

Immunities

SECTION 6. Legislators may not be held to answer before any other tribunal for any statement made in the exercise of their legislative duties while the legislature is in session. Members attending, go-

SJR 1: Judicial enforcement of open meetings allowed, notwithstanding Art. II, Sec 6 & 12.

ing to, or returning from legislative sessions are not subject to civil process and are privileged from arrest except for felony or breach of the peace.

Salary and Expenses

SECTION 7. Legislators shall receive annual salaries. They may receive a per diem allowance for expenses while in session and are entitled to travel expenses going to and from sessions. Presiding officers may receive additional compensation.

Regular Sessions

SECTION 8. The legislature shall convene each year on the fourth Monday in January, but the month and day may be changed by law.

(Exercising its authority under this section, the legislature has provided that it shall convene on the second Monday in January, except in years immediately following a gubernatorial election when it shall convene on the third Monday in January; see AS 24.05.090.)

Special Sessions

SECTION 9. Special sessions may be called by the governor or by vote of two-thirds of the legislators. The vote may be conducted by the legislative council or as prescribed by law. At special sessions called by the governor, legislation shall be limited to subjects designated in his proclamation calling the session, to subjects presented by him, and the reconsideration of bills vetoed by him after adjournment of the last regular session. Special sessions are limited to thirty days.

(The amendment of this section was approved by the voters of the state November 2, 1976 and became effective December 23, 1976. This amendment deleted "or" preceding "to subjects" in the third sentence and added "and the reconsideration of bills vetoed by him after adjournment of the last regular session.")

Adjournment

SECTION 10. Neither house may adjourn or recess for longer than three days unless the other concurs. If the two houses cannot agree on the time of adjournment and either house certifies the disagreement to the governor, he may adjourn the legislature.

Interim Committees

SECTION 11. There shall be a legislative council, and the legislature may establish other interim committees. The council and other interim committees may meet between legislative sessions.

They may perform duties and employ personnel as provided by the legislature. Their members may receive an allowance for expenses while performing their duties.

Rules

SECTION 12. The houses of each legislature shall adopt uniform rules of procedure. Each house may choose its officers and employees. Each is the judge of the election and qualifications of its members and may expel a member with the concurrence of two-thirds of its members. Each shall keep a journal of its proceedings. A majority of the membership of each house constitutes a quorum to do business, but a smaller number may adjourn from day to day and may compel attendance of absent members. The legislature shall regulate lobbying.

Form of Bills

SECTION 13. Every bill shall be confined to one subject unless it is an appropriation bill or one codifying, revising, or rearranging existing laws. Bills for appropriations shall be confined to appropriations. The subject of each bill shall be expressed in the title. The enacting clause shall be: "Be it enacted by the Legislature of the State of Alaska."

Passage of Bills

SECTION 14. The legislature shall establish the procedure for enactment of bills into law. No bill may become law unless it has passed three readings in each house on three separate days, except that any bill may be advanced from second to third reading on the same day by concurrence of three-fourths of the house considering it. No bill may become law without an affirmative vote of a majority of the membership of each house. The yeas and nays on final passage shall be entered in the journal.

Veto

SECTION 15. The governor may veto bills passed by the legislature. He may, by veto, strike or reduce items in appropriation bills. He shall return

Daily News

Winner, 1976 Pulitzer Prize Gold Medal for Public Service

Gerald E. Grilly
Publisher

Howard Weaver
Managing Editor

Michael Carey
Editorial Page Editor

Katherine Fanning, Editor and Publisher 1971 to 1983
Lawrence Fanning, Editor and Publisher 1967 to 1971

Founded in 1946 by Norman C. Brown

Daily News 2/9/89

Open meetings, frivolous suits

One again the legislature is taking a look at an open meetings amendment to the Constitution. But this time, lawmakers also are discussing legislation that addresses penalties for violators as well as punishment for citizens who file malicious or frivolous open meetings suits.

HB 140, offered by three Anchorage representatives, would set a maximum $1,000 fine for legislators found guilty of violating the amendment. The measure also permits judges to fine suit-happy meddlers $1,000 and attorney fees.

If lawmakers want protection from harassment, they should have it. Fine, make someone like Tom Staudenmaier pay court costs for wasting the legislature's time.

But why are the lawmakers so concerned about frivolous suits? The facts suggest frivolous open meeting suits aren't the problem. To our knowledge, none have ever been filed.

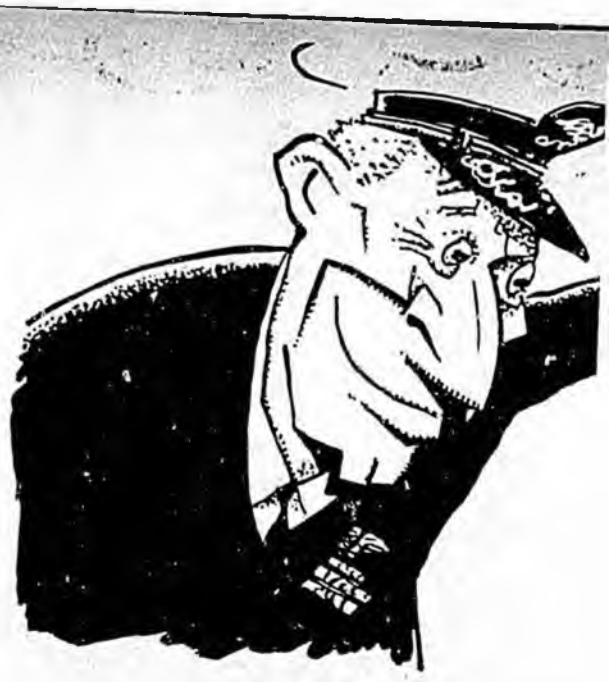
The real danger is lawmakers' obsessive longing for secrecy. There have been hundreds of secret meetings over the years. In 1986, legislators were writing the budget itself behind closed doors. It took a lawsuit to stop them.

Alaskans aren't menaced by frivolous open meetings suits; secrecy is the perennial danger. Worrying about frivolous suits completely misfocuses lawmakers' attention. It magnifies minutia and distorts the debate.

Alaskans needs a constitutional guarantee that their government will be open. There is nothing frivolous about the dangers of secrecy.

The people speak

Congress won't get a pay raise for a while. The American people have told lawmakers — loudly, overwhelmingly — to live on $89,000 a year or go



THE NAVY RUNS A DEPTH (

It's time to elimi

James

WASHINGTON — Every four years, it is suggested in this corner that the new administration could double the efficiency of its public relations operations by cutting the federal PR budget in half.

The best estimate available is that these official information offices — or beautification parlors — now cost the government more than $2 billion a year, but this doesn't take into account all the other hidden persuaders who masquerade as assistants to the assistants, social secretaries, pollsters, researchers and various other types of advisers and make-up artists.

You can go through the big, new budget book with a magnifying glass and still not find a reliable account of the cost of all this "flackery."

We know from the Pentagon's ads during the football games that the Marines are "looking for a few good men," and that the Army is a "good place to start," but we don't know the cost of these items, and the Office of Manageme itself tells u duce a total.

What we d one non-matl of this expa ment publicit skepticism, cyni:ism, a bo of official ir also know th to stop this flation is ol start of a n tion, when "experts" a offer their r

Part of t course, is has grown war. There porters acc Congression

Nation's youn

current statute

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-

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.

9-29-87
Supreme

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE SUPREME COURT OF THE STATE OF ALASKA

MITCHELL E. ABOOD, JR., DON BENNETT, JOHN B. COGHILL, EDNA DeVRIES, RICHARD I. ELIASON, BETTYE FARRENKAMP, JAN FAIKS, FRANK R. FERGUSON, PAUL FISCHER, RICK HALFORD, TIM KELLY, JALMAR M. KERTTULA, PATRICK RODEY, JOHN C. SACKETT, ARLISS STURGULEWSKI, FRED F. ZHAROFF, JACK GIBBONS, PEGGY MULLIGAN, ALBERT P. ADAMS, JOHNE BINKLEY, H.A. BOUCHER, BETTE M. CATO, JIM DUNCAN, STEVEN FRANK, JOHN G. FULLER, PETER GOLL, MAX F. GRUENBERG, JR., BEN F. GRUSSENDORF, ADELHEID HERRMAN, NIILO E. KOPONEN, RONALD L. LARSON, M. MIKE MILLER, MIKE W. MILLER, MIKE NAVARRE, JOHN RINGSTAD, RICHARD SHULTZ, JOHN SUND, ROBIN L. TAYLOR, DAVID W. THOMPSON, and KAY WILLIS,	File No. S-1831 File No. S-1841 File No. S-1957
Appellants and Cross-Appellees,	
v.	O P I N I O N
LEAGUE OF WOMEN VOTERS OF ALASKA, and ANCHORAGE DAILY NEWS,	
Appellees and Cross-Appellants.	[No. 3230 - September 29, 1987]

Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau, Walter L. Carpeneti, Judge.

Appearances: Avrum M. Gross and Susan A. Burke, Gross & Burke, Juneau, for Senate Appellants/Cross-Appellees, Mitchell E. Abood, Jr., Don Bennett, John B. Coghill, Edna DeVries, Richard I. Eliason, Bettye Farhenkamp, Jan Faiks, Frank R. Ferguson, Paul Fischer, Richard Halford, Tim Kelly, Jalmar M. Kerttula, Patrick Rodey, John C. Sackett, Arliss Sturgulewski, Fred F. Zharoff, Jack Gibbons, and Peggy Mulligan. Richard M. Burnham, Findley & Burnham, Juneau, for House of Representatives Appellants/Cross-Appellees, Albert P. Adams, Johne Binkley, H.A. Boucher, Bette M. Cato, Jim Duncan, Steve Frank, John G. Fuller, Peter Goll, Max F. Gruenberg, Jr., Ben F. Grussendorf, Adelheid Herrman, Niilo E. Koponen, Ronald L. Larson, M. Mike Miller, Mike W. Miller, Mike Navarre, John Ringstad, Richard Shultz, John Sund, Robin L. Taylor, David W. Thompson, and Kay Willis. D. John McKay and Laura N. Cromwell, Middleton, Timme & McKay, Anchorage, for Appellees/Cross-Appellants League of Women Voters of Alaska and Anchorage Daily News.

Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton, and Moore, Justices.

MATTHEWS, Justice.
COMPTON, Justice, dissenting.

These appeals arise from the superior court's decision that a claim that certain groups of state legislators held closed committee meetings and caucuses in violation of the Open Meetings Act was not justiciable, but that a claim that the closed meetings violated an implied constitutional right of public access to meetings of legislative units was both justiciable and correct. We agree that the claim of violation of the Open Meetings Act by state legislators is nonjusticiable, but contrary to the superior court's decision, we hold that there is no

implied right of public access to legislative committee or caucus meetings under the Alaska Constitution. We therefore reverse.

I. FACTS AND PROCEEDINGS

In April 1986, the League of Women Voters of Alaska, the Anchorage Daily News, and the Fairbanks Daily News Miner (collectively referred to hereafter as the League) filed an action seeking a declaratory judgment and injunctive relief against certain members of the Alaska Legislature (the Legislators) and four legislative employees. The League alleged that members of the Senate and House Finance Committees had held meetings "closed to the press and members of the public," and during those meetings had "engaged in collective fact-finding, deliberation, debate and decision-making with respect to the budget for FY 1987." The complaint further alleged that members of the House Finance Committee and the Senate Finance Committee had met jointly in meetings closed to the press and public "to discuss and attempt to obtain agreement upon the amount of funds available for the FY 1987 budget." The complaint also alleged that members of the House Finance Committee and the Senate Finance Committee had met from time to time in "closed caucus meetings" with other members of the ruling majority, and during these meetings had engaged in "substantial collective discussion, deliberation, and decision-making" concerning the FY 1987 budget.

The League attached affidavits from several senators and representatives which described these meetings in some detail.

The League charged that these meetings violated the Open Meetings Act (AS 44.62.310), the Uniform Rules of the Legislature (Rule 22), various federal and state constitutional provisions, and common law rights of access to government. The superior court was asked to declare that the closed meetings violated state and federal law, and that any appropriation bill adopted as a result of such meetings would be void unless each house of the legislature conducted "substantial, de novo, independent and public reconsideration of those substantive matters previously discussed in private." The injunctive relief sought by the League was aimed at preventing the legislature from continuing to engage in the type of meetings complained of, and from enacting the state budget for FY 1987 unless and until certain remedial action was taken.

On April 30, the superior court held a hearing on an application by the League for a temporary restraining order, and on May 1 the court issued its first decision in this case. The court concluded that litigation premised upon the alleged closed meetings held in violation of the Open Meetings Act presented a justiciable controversy. The court refused to issue the requested TRO, however, because it found that it could not fashion an order that would effectively control these legislative activities. The court then decided that it was empowered to

issue a final declaratory judgment solely on the basis of the League's complaint and affidavits filed in support of the motion for the TRO. The court found that a pattern of conduct which was violative of the Open Meetings Act had been established, that action taken contrary to the Act was void, and therefore that any budget decision which was reached at a closed meeting was void.

The Legislators immediately appealed from the superior court's decision and requested emergency relief, claiming that due process had been denied to them because the decision had been rendered before the Legislators had been afforded a fair opportunity to respond on the merits. After an expedited argument, we reversed the judgment issued by the superior court and remanded the case for the purpose of conducting a full hearing on the merits.

Shortly thereafter, the Legislators filed their answers to the complaint, and moved to dismiss the case or alternatively for summary judgment, arguing that the issues in the case were nonjusticiable and that the claims against the Legislators were barred by legislative immunity. The League filed a cross-motion for summary judgment on the justiciability issue.

In October 1986, the superior court entered its second decision in this case, the partial final judgment which is the subject of this appeal. The court reversed its earlier ruling and concluded that the League's claim that the closed meetings violated the Open Meetings Act was not justiciable. The League

appeals from this ruling. The court proceeded to hold, however, that the public and press enjoy an implied right of access to the proceedings of the legislature under article I, section 5 of the Alaska Constitution, which guarantees freedom of speech and of the press. The court further held that a claim that the Legislators violated this constitutional right was justiciable. The court finally held that legislative immunity was not a bar to the suit. The Legislators appeal from these rulings. The State of Alaska, intervenor on behalf of the Legislators below, and the Fairbanks Daily News Miner, are not participants in this appeal.

II. STANDARD OF REVIEW

All of the issues in this appeal raise questions of Alaska constitutional and statutory law, subject to de novo review. The facts of this case are not in dispute; the only facts in the record are the seven affidavits submitted by the League which attest to a pattern of meetings by legislative committee and caucus majority members which were closed to the public, the press, and sometimes minority members of the legislature. The Legislators do not deny that these meetings occurred, or that they conducted the business and made the decisions that the League alleges.

III. VIOLATIONS OF THE OPEN MEETINGS ACT ARE NOT JUSTICIABLE

The League argues that the Legislators violated Alaska's Open Meetings Act[1] and the legislature's Uniform Rule

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1. The Alaska Open Meetings Act provides:

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

(Footnote Continued)

(Footnote Continued)

action may be taken at the executive session.

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

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

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

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

(d) This section does not apply to

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

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff; or

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

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

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

AS 44.62.310.

22[2] through the closed meetings attested to in the League's affidavits. The superior court held that these claims were

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2. Uniform Rule of the Legislature 22 provides:

> 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 by (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.

nonjusticiable because "[j]usticiability in this case depends on a determination that there is a constitutional right alleged to have been infringed." (Emphasis by the court.) As a general proposition, we agree.

> In Malone v. Meekins, we recognized that
>
> > the established principle that courts should not attempt to adjudicate "political questions" . . . stems primarily from the separation of powers doctrine. . . . "[I]t is the relationship between the judiciary and the coordinate branches of the . . . Government . . . which gives rise to the 'political question.'"

650 P.2d 351, 356 (Alaska 1982) (quoting Baker v. Carr, 369 U.S. 186, 210, 7 L. Ed. 2d 663, 682 (1962)). See also Abood v. Gorsuch, 703 P.2d 1158, 1160 (Alaska 1985) ("There are certain questions involving coordinate branches of the government, sometimes unhelpfully called political questions, that the judiciary will decline to adjudicate.").

Our statement in Abood suggests the difficulty inherent in precisely defining the contours of the doctrine of justiciability. It is not possible to draw the exact boundary separating justiciable and nonjusticiable questions.

> Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issues for decision . . . and the actual hardship to the litigants of denying them the relief sought.

Poe v. Ullman, 367 U.S. 497, 508-09, 6 L. Ed. 2d 989, 999 (1961) (Frankfurter, J., plurality opinion). Nor will merely characterizing a case as nonjusticiable or political in nature render it immune from judicial scrutiny. Malone, 650 P.2d at 356. Rather, to identify those political questions which will be held to be nonjusticiable, we have utilized the approach adopted by the United States Supreme Court in Baker v. Carr. Id. at 357; see also Abood, 703 P.2d at 1160. In Malone, we explained that the Supreme Court of the United States had identified "various elements, one or more of which is '[p]rominent on the surface of any case held to involve a political question. . . .' These elements included (1) a textually demonstrable commitment of the issue to a coordinate political department . . . ." 650 P.2d at 357 (citing Baker v. Carr, 369 U.S. at 217, 7 L. Ed. 2d at 686).

The Legislators argue that article II, section 12 of the Alaska Constitution contains an express textual commitment of authority, which specifically and exclusively authorizes the legislature to adopt its own rules of procedure. Article II, section 12 provides in part: "Rules. The houses of each legislature shall adopt uniform rules of procedure." Pursuant to this authority, the legislature has adopted Uniform Rule 22, in language substantially identical to the Open Meetings Act, providing that all meetings of a legislative body are open to the general public. Compare notes 1 and 2, supra. The Legislators argue that since the constitution commits to the legislature the

authority to set its own procedures, only the legislature may determine whether the Open Meetings Act should apply to the legislature, and how it should apply consistent with Uniform Rule 22. The Legislators rely on this court's decisions in Malone and Abood, and on the Florida Supreme Court's opinion in Moffitt v. Willis, 459 So.2d 1018 (Fla. 1984).

In Malone, we declined to address the question of whether the legislature had violated AS 24.10.020, which prohibited a person other than the Speaker of the House from convening a session of the House. We held that the matter of the election or removal of the Speaker was committed by the constitution to the House, and the judicial branch owed respect to that body. We explained that

> [s]uch a declaration would, in our view, be an unwarranted intrusion into the business of the House. To be sure, the judicial branch of government has the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution, including the compliance by the legislature. But a statute such as AS 24.10.020 relates solely to the internal organization of the legislature, a subject which has been committed by our constitution [Article II, section 12] to each house.

650 P.2d at 356 (footnote omitted). We also considered the question whether the "reasonable public notice" requirement of the Open Meetings Act, AS 44.62.310(e), was violated by the legislature and said, "we regard this question as it

relates to the internal organization of one of the Houses of the legislature to be nonjusticiable." Id. at 359.

In Abood, we held nonjusticiable the question of whether a joint session of the legislature could legally be presided over by the President of the Senate in the absence of the Speaker of the House. At issue was the interpretation of the legislature's Uniform Rule 51 which required the presence of both officers. We agreed with the trial court that the issue arose out of "the rulemaking powers of the legislature." 703 P.2d at 1164. We also agreed that "out of respect owed to a coordinate branch of state government, [we must] defer[] to the wisdom of the legislature concerning violations of legislative rules which govern the internal workings of the legislature." Id.

Our holdings in Malone and Abood are controlling in this case. The Alaska Constitution expressly commits to the legislature authority to adopt its own rules of procedure. The question whether legislative business should be conducted in open or closed sessions is a procedural question which has traditionally been the subject of legislative rules. See Society of Professional Journalists v. Secretary of Labor, 616 F. Supp. 569, 577 (D. Utah 1985) (a right of access to administrative hearings is more a procedural right than a substantive right); see also P. Mason, Manual of Legislative Procedure sec. 630 (1979) (committee meetings open to public except when considering specified restricted subjects). Pursuant to this constitutional

grant of authority, the legislature has enacted Uniform Rule 22 and the Open Meetings Act in substantially identical language.

The League asserts that the Legislators have violated both the Uniform Rule and the Open Meetings Act. If they have, to hold that these claims are justiciable places the judiciary in direct conflict with the legislature's constitutionally authorized rulemaking prerogative. We agree with the Florida Supreme Court that it is the legislature's prerogative to make, interpret and enforce its own procedural rules and the judiciary cannot compel the legislature to exercise a purely legislative prerogative. Moffitt v. Willis, 459 So.2d 1018, 1021 (Fla. 1984).[3] As we stated in Malone, "except in extraordinary

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3. The facts in Moffitt are virtually identical to the facts in this case. Newspaper publishing companies brought a declaratory judgment action against the state house speaker and senate president alleging that secret meetings of the legislature violated the legislature's rule requiring open meetings, a statute requiring the legislature to follow its own rules, and various state and federal constitutional provisions. The Florida Supreme Court held that the courts lacked jurisdiction to hear the case, explaining:

> In our view, a judicial determination of this matter hinges on the meaning of legislative committee meetings and what activity constitutes such a meeting. At this point, the judiciary comes into head-to-head conflict with the legislative rulemaking prerogative.
>
> Article III, section 4(a) of the Florida Constitution gives each house the power to determine its own rules of procedure. . . .

(Footnote Continued)

circumstances, as where the rights of persons who are not members of the legislature are involved, it is not the function of the judiciary to require that the legislature follow its own rules." 650 P.2d at 359. In support of this proposition, we cited United States v. Smith, 286 U.S. 6, 33, 76 L. Ed. 954, 958-59 (1932), where the Court discussed the rule that the only justiciable limitations on a legislative body's power to adopt rules of its proceedings are that the body

> may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rules and the result which is sought .

(Footnote Continued)

> [T]his provision gives each house the power and prerogative not only to adopt, but also to interpret, enforce, waive or suspend whatever procedures it deems necessary or desirable so long as constitutional requirements for the enacting of laws are not violated. . . . It is the final product of the legislature that is subject to review by the courts, not the internal procedures.
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> . . . .
>
> Just as the legislature may not invade our province of procedural rulemaking for the court system, we may not invade the legislature's province of internal rulemaking. . . . A member of the legislature can raise a point of order regarding a violation of any of the rules of the house or senate. That is the proper forum for determining the propriety of the activities complained of in the suit below.

Id. at 1021-22 (emphasis by the court, citations omitted).

> to be obtained. But within these limitations all matters of method are open to the determination of the house. . . .

Id. at 33, 76 L. Ed. at 959, quoting United States v. Ballin, 144 U.S. 1, 5, 36 L. Ed. 321, 324 (1891). See also Exxon Corp. v. F.T.C., 589 F.2d 582, 590 (D.C. Cir. 1978) ("Although the courts will intervene to protect constitutional rights from infringement by Congress, . . . where constitutional rights are not violated, there is no warrant for the judiciary to interfere with the internal procedures of Congress . . ."), cert. denied, 441 U.S. 943, 60 L. Ed. 2d 1044 (1979); Consumers Union of United States v. Periodical Correspondents' Ass'n, 365 F. Supp. 18, 24 (D.D.C. 1973) ("A congressional rule which infringes upon the constitutional rights of persons other than Congressmen presents a proper question for the judiciary"), rev'd on other grounds, 515 F.2d 1341 (D.C. Cir. 1975), cert. denied, 423 U.S. 1051, 46 L. Ed. 2d 640 (1976); State ex rel. City Loan & Sav. Co. v. Moore, 177 N.E. 910 (Ohio 1931) (the legislature's disregard of its own rules as to its lawmaking procedures is not subject to judicial inquiry, where the rule is not embraced in the constitution); Schweitzer v. Territory, 47 Pac. 1094 (Okla. 1897) (since the court cannot declare an act of the legislature void on account of noncompliance with rules of procedure made by itself to govern its deliberation, the failure of the legislature to observe a statute enacted by itself, and concerning the legislature's procedure for lawmaking, was no ground for refusing

to enforce a statute passed in noncompliance with the rule, where there was no constitutional provision mandating a particular procedure); State v. Cumberland Club, 188 S.W. 583, 585 (Tenn. 1916) (where a state legislature has the right under its constitution to make its own rules of procedure, it must be the judge of those rules, and all the court can do is to ascertain whether the constitution has been complied with). Likewise, in Abood, we noted that the "nonjusticiability [of rules violations] doctrine would not apply to cases involving our constitutionally mandated duty to insure compliance with the provisions of the Alaska Constitution, including compliance by the legislature." 703 P.2d at 1161.[4]

We observe that in Smith, the Court held that where the "construction to be given to the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one." 286 U.S. at 33, 76 L. Ed. at 959. In this case, the construction of the Open Meetings Act and Uniform Rule 22 does not affect persons other than members of the legislature in the same sense as was the case in Smith. There, the controversy was between the United States Senate and an appointee of the

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4. We adjudicated the question presented as to the quorum needed for acts of the legislature in joint session because it "is a question of Alaska constitutional law. . . . to which the nonjusticiability doctrine does not apply." Id. at 1161.

President, the resolution of which depended upon the right of the Senate to reconsider, under its rules, its prior confirmation of the President's nominee after the President had appointed the nominee pursuant to the earlier confirmation. Here, there is no specific individual with any particular right at stake in the controversy. Rather, the right granted under the Open Meetings Act as it applies to the legislature, and under Uniform Rule 22, is a right of the public generally to observe the legislature's proceedings.

It is true that the legislature has identified in the Open Meetings Act the public's interest in open meetings, AS 44.62.312(a), and we have recognized that the Act exists primarily to advance the people's interest, and that it is applicable to the legislature.[5] Alaska Community Colleges' Federation of Teachers v. University of Alaska, 677 P.2d 886, 891 (Alaska 1984). We do not retreat from these principles. The question before us, however, is not whether the Open Meetings Act applies to the legislature, but rather whether the legislature's alleged violation of the Act or Uniform Rule is justiciable.[6] As

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5. Even so, it is beyond doubt that the legislature has the power to exempt itself at any time from the coverage of the Open Meetings Act.

6. Compare Cole v. State, 673 P.2d 345, 349 (Colo. 1983) (held: requirement of open meetings law that legislative caucus meetings be open to public does not conflict with state

(Footnote Continued)

we have concluded, 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. Of course, having made the rule, it should be followed, but a failure to follow it is not the subject matter of judicial inquiry. See State ex rel. City Loan & Sav. Co. v. Moore, 177 N.E. 910, 911 (Ohio 1931).

If there were allegations that the legislature, acting pursuant to or in violation of one of its rules of procedure, had infringed on the rights of a third person not a member of the legislature as in Smith, or had ignored constitutional restraints or violated fundamental rights, then the "exceptional circumstances" exception to the rule of nonjusticiability would come into play. None of these factors are involved in this case, however, and there is no basis for employing the "exceptional circumstances" exception.

Thus, because the constitution commits to the legislature the authority to provide for its own rules of procedure, and because the question of whether a legislative committee meeting or caucus meeting shall be open or closed falls within this grant of authority, we regard the question whether the Legislators have violated the Open Meetings Act or Uniform

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(Footnote Continued)

constitutional provision authorizing legislature to establish its own rules, however, court did not discuss justiciability).

Rule 22 to be nonjusticiable. As we have recognized, the legislature's violation of its rules of procedure may be justiciable in "exceptional circumstances" of constitutional dimension. If the League's claim is to survive this justiciability challenge, it must involve a right protected by either the Alaska Constitution or the United States Constitution.

IV. NO IMPLIED CONSTITUTIONAL RIGHT OF ACCESS TO LEGISLATIVE MEETINGS

The United States Constitution does not expressly require the Congress to hold any of its meetings in public. There is also no common law right to attend meetings of government bodies. Society of Professional Journalists, 616 F. Supp. at 572; see Watkins, Open Meetings under the Arkansas Freedom of Information Act, 38 Ark. L. Rev. 268 (1984) (Watkins); Note, Open Meeting Statutes: The Press Fights for the "Right to Know", 75 Harv. L. Rev. 1199, 1203 (1962) (Note). Indeed, the tradition of the English Parliament, which was subsequently carried on in the legislative bodies of Colonial America, was to hold legislative debate in secret and to prohibit publication of legislative proceedings. Society of Professional Journalists, 616 F. Supp. at 572 (observing that both the Continental Congress and the Constitutional Convention conducted their proceedings in secret, and thus "[i]t is not surprising . . . that the Framers of the Constitution did not include an express provision in the

Constitution that required Congress to deliberate in public"); Watkins, supra at 271.

On the other hand, at least thirty-five states have constitutional requirements that their legislatures meet in public.[7] See Note, supra at 1203. All fifty states, the District of Columbia, and the federal government have some form of an open meetings act. Watkins, supra at 268, 272. These acts have never been held to be constitutionally required, however. Society of Professional Journalists, 616 F. Supp. at 572; see Watkins, supra at 272.

There is one area where a constitutional right of access clearly does exist, namely, in judicial proceedings. The United States Supreme Court has found under the first amendment that the public and press have a right of access to criminal

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7. The State of Oregon amended its constitution in 1974 and 1978 to require that its legislature conduct its deliberations in public. This amendment is found in that part of the Oregon Constitution dealing with the legislative branch, and provides:

> 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.

Or. Const. article IV, § 14.

trials even where the defendant expressly waives his or her right to a public trial and desires the proceedings to be cl[illegible]d. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 65 L. Ed. 2d 973 (1980) (plurality decision adopted as a majority decision in Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 73 L. Ed. 2d 248 (1982)). The Supreme Court's rationale for finding this unenumerated right of access is significant. First, criminal trials have historically been open to the press and public. Globe Newspaper, 457 U.S. at 605, 73 L. Ed. 2d at 256. Second, the right of access to criminal trials plays a significant role in the proper functioning of the judicial process. Id. at 606, 73 L. Ed. 2d at 256.

In this case the superior court utilized the analysis applied by Richmond Newspapers/Globe Newspaper to find that the public and the press have an implied right under the Alaska Constitution, article I, section 5, to attend certain meetings of legislative units. The court's analysis is in two parts: an historical review, looking to the practice in effect at the time of the adoption of the Alaska Constitution to determine what the framers intended, and a functional evaluation seeking to determine the effect that a requirement of public access to legislative meetings would have.

We disagree with this analysis because the history of the Alaska Constitutional Convention indicates that the framers of our constitution did not intend to confer a right of public

access to meetings of legislative committees or legislative caucuses.[8]

The constitution expressly provides that it is the legislature's province to establish its own rules of procedure. Alaska Const. article II, section 12. We have held in part III of this opinion that this provision includes the authority to make rules concerning whether legislative bodies shall conduct their business in open or closed meetings. Of course, if the constitution contained an express or implied guarantee of public access to legislative meetings, the legislature could not, pursuant to article II, section 12, adopt a rule or enact a law to the contrary.

At the outset, we are confronted with the rule that the intent underlying constitutional language should first be gathered from the language itself. Baker v. City of Fairbanks, 471 P.2d 386, 397 (Alaska 1970). Although we would naturally expect a provision requiring legislative bodies to conduct their meetings in public to be found in article II, which pertains to the legislature, it is clear that the constitution contains no express provision there, or in the declaration of rights in

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8. We are not presented with the issue whether there may be an implied constitutional right of the public and the press to attend floor sessions of the two houses of the legislature, or to attend sessions of the legislature meeting as a whole. Our opinion is limited to meetings of legislative committees and so-called caucuses.

article I, or anywhere else. Thus, we must determine if such a right may be implied.

We begin by seeking to determine the intent of the framers. We find evidence of such intent in the debate at the Constitutional Convention over the question of the public's access to the Convention's own committee meetings. That debate shows clearly that the delegates were aware of the issue and of the necessity for dealing with it directly.

One of the first orders of business for the Constitutional Convention was to adopt procedural rules to govern its own activities in drafting the constitution. Rule 19 concerned public access to the deliberations of the Standing Committees of the Convention. As originally proposed, Rule 19 provided:

> The deliberations of the Standing Committees shall not be open to the public except upon invitation of the Committee. Each Standing Committee shall notify the Secretary of the time and place of meetings, and the Secretary shall make such notice public.

1 Proceedings of the Alaska Constitutional Convention 75 (November 9, 1955) (hereafter "Convention Proceedings"). Delegate Rivers spoke first in support of the Rule.

> The committees have a lot of work to do and need freedom to express themselves to arrive at a consensus of their thinking and, accordingly, the committees in all fairness, could hear anyone who requested to be heard, and that is the reason for saying that the time of these committee meetings shall be posted or publicized by the Secretary. Everyone is supposed to know when we are

> meeting so that anyone can request to be heard, but we don't want to have them open to the public while we try to develop a consensus of our thinking during all of our exploratory work. We think the committees can do better work if the public is there on invitation or if particular persons who want to be heard, do so upon request, and that is the reason for the rule.

Id. Delegate Hellenthal spoke in opposition to the Rule, stating:

> This is an unusual rule. I doubt if any other body such as this has such a rule. I know the Congress of the United States does not have such a rule, and I think that we would put ourselves open to the well-deserved criticism that we are meeting in secret session, which has an ugly connotation, but which criticism will be levelled at the group unless we adopt a more normal method. I would suggest the method of executive session, that by majority of two-thirds vote of the members of the committee, that the public be excluded to consider stated objects . . . . That is the rule of the United States Congress. I think this rule will involve us in great difficulties, and I see absolutely no need for it. Now if the occasion develops that crackpots or someone (I don't think there are many crackpots in Alaska) start plaguing us, then we can take a prophylactic rule such as the one recommended here, but in the absence of that demonstration I think that this rule has no place before our body.

Id. at 76.

Delegate Sundborg took issue with Delegate Hellenthal's statement.

> Many another deliberative body and I think practically every deliberative body has a rule such as this. Committee meetings of the United States Congress are not open to the public except upon invitation of the committees. Hearings are but committee

> meetings, I've been excluded from them many times, in Congress. I might say that our legislative committee meetings are not open to the public except upon invitation.

Id.[9] After noting the secret nature of both committee meetings and plenary sessions of the Federal Constitutional Convention, Delegate Sundborg commented:

> I feel we do have to have the freedom which we would have in committee only if we can speak without having a lot of people sitting around breathing down our necks. If a matter comes before a committee which would require the presence of the public, or where the presence of the public would help the committee reach a solution, I am sure any committee would be glad to invite the public in, . . . but I just don't think that business can be conducted efficiently if the public is walking in and out wandering around through these committee rooms all the time we are trying to do serious business.

Id. at 76-77.

Delegate Vic Fischer moved that the first sentence of Rule 19 as proposed be amended to read:

> The deliberations of the Standing Committees shall be open to the public, unless the Committee by two-thirds vote of all the members to which it is entitled votes to hold an executive session.

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9. Although not required by the United States Constitution, the United States Senate has met in public on a regular basis since 1794, and the House since the War of 1812. Committee sessions, where the bulk of the Congress' work is done, were not routinely open to the public until the mid-1970's. Watkins, supra at 271-72.

Id. at 77. This proposal met with heated disagreement from Delegates Hermann, Taylor, and Barr. See id. at 77-79. Delegate Hermann stated:

> I think that . . . the Convention should remember that no business conducted in the committee itself is even final. What we shall be doing in these committees is threshing out minor details, maybe some major ones too, but the point of the matter is that we have no power to translate that into action until it is brought before the Convention as a whole. If the public meetings are open to the Convention, which they certainly will be at all times, any discussion on any matter pertinent to the Constitution will be open to the public.

Id. at 77-78.

At this point the Convention recessed for lunch. Over the lunch recess a compromise was reached. Id. at 80-81. The compromise proposal, adopted by unanimous consent, provided:

> The deliberations of the Standing Committees shall be open to the public at such times as may be designated by the respective committees. If a committee finds it to be in the public interest, upon application any citizen may attend committee sessions. . . .

Id. at 81. It is clear that although Rule 19 was crafted in terms of open meetings, in fact the rule establishes a normal procedure of closed meetings unless a committee acted to open a meeting to the public.

In light of the delegates' debate concerning the merits of adopting a procedural rule governing the public's right of access to the Convention's committee meetings, and of their unanimous decision to establish a norm of closed meetings, we do

not believe that they intended that the constitution would direct that committee meetings of the future state's legislature should be open to public access. Rather, it is our view that the Constitutional Convention left this topic to the legislature by providing in article II, section 12 that the legislature was authorized to adopt its own rules of procedure.

Our conclusion is supported by the constitutional framers' understanding that territorial legislative committee meetings were usually closed to the public. The practice of closed territorial legislative committee meetings was noted in the delegates' debate on whether the Convention's Standing Committee meetings should be closed to the public. Convention Proceedings at 76 (comment of Delegate Sundborg). Given this practice, it seems highly improbable that the delegates, if they intended a contrary rule, would be content to leave it for discovery by implication. Rather, since historically the rule was one of closed meetings, it is most reasonable to conclude that the delegates thought they were not changing traditional practices. See Baker v. City of Fairbanks, 471 P.2d 400-401.

We conclude that the framers of the Alaska Constitution did not intend that the constitution require that committee and caucus meetings of legislative bodies be conducted in public. Therefore, we hold that there is no implied right of access to such meetings under the Alaska Constitution.

V.

That part of the superior court's decision which held as nonjusticiable allegations that the Legislators violated the Open Meetings Act or legislative rules is affirmed. That part of the court's decision which held that the public and press have an implied constitutional right of access to meetings of committees of the legislature and caucuses of legislators is reversed.[10] The case is remanded with instructions to dismiss the League's action.

AFFIRMED in part, REVERSED and REMANDED in part.

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10. Our resolution of the justiciability and implied constitutional right of access issues makes it unnecessary to address the parties' contentions as to legislative immunity (Alaska Const. Article II, section 6).

COMPTON, Justice, dissenting.

In 1972 the Alaska Legislature amended the Open Meetings Act to express that

> [i]t 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;
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> (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.

AS 44.62.312(a) (emphasis added). It is clear that the Open Meetings Act provides for and protects a public right. The Act creates an obligation on the part of all state governmental bodies to open their meetings to public scrutiny. This court has held that the Act by its own language "plainly includes the state legislature." Malone v. Meekins, 650 P.2d 351, 358 (Alaska 1982). Therefore, the legislature cannot now unilaterally and without public debate abrogate that right.

As the court recognizes, the contours of the doctrine of justiciability are not easily defined. To guide our

deliberations, we have in the past looked to the criteria enunciated by the Supreme Court in Baker v. Carr, 369 U.S. 186, 7 L. Ed. 2d 663 (1962). See Malone v. Meekins, 650 P.2d at 356-57. The relevant Baker criterium discussed by the court today is "a textually demonstrable constitutional commitment of the issue to a coordinate political department . . . ." 396 U.S. at 217, 7 L. Ed. 2d at 686. This court recognizes, and I do not contest, that the Alaska Constitution contains an express textual commitment authorizing the legislature to adopt its own rules of procedure.[1] Yet the issue before the court is the public's statutory right to be informed. Our past cases have not held that resolution of this issue lies outside the province of the judiciary, contrary to the opinion of this court today.

In Malone, this court addressed the justiciability of legislative rules regarding who may call the legislature to order. This court refused to act as a "sort of super parliamentarian." 650 P.2d at 359. We also declined to determine what public notice is "reasonable" under the Open Meetings Act. AS 44.62.310(e). I do not seek to overrule that precedent. If courts were to act as "super parliamentarians,"

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1. Alaska Const. art. II, § 12. The fact that the legislature has adopted a rule which mirrors the statute should not confuse the issue before the court. Adoption of a rule similar to a statute cannot erode the force of the statute as law. If the legislature wishes to exempt itself from the requirements of the statute it can do so in the act itself.

thereby denying the legislature reasonable interpretations of its internal rules, the legislature would be hobbled to the point of inactivity. However, the legislature's disregard of a right granted by the Open Meetings Act does not deserve the same deference as its interpretation of a phrase contained in that Act. This is more than a matter of degree. It is a matter of the complete denial of the public's express right to witness important legislative debate. Thus Malone does not control in the current case.

In Abood v. Gorsuch, 703 P.2d 1158 (Alaska 1985) we held non-justiciable the question of whether the President of the Senate could legally preside over a joint session of the legislature in the absence of the Speaker of the House. We agreed with the trial court to defer "to the wisdom of the legislature concerning violations of legislative rules which govern the internal workings of the legislature." 703 P.2d at 1164 (emphasis added). We did, however, under the guise of constitutional interpretation, see fit to decide whether a quorum was present. At issue was whether the quorum must be composed of a majority of each house respectively or, alternatively, whether it need only be a simple majority of the total number of legislators. We held the latter, clearly deciding a procedural issue. Id. at 1162. Our definition of what constituted a "quorum," a parliamentary matter seemingly committed to the rule making authority of the legislature, is distinct from "insur[ing] compliance with the

provisions of the Alaska Constitution." Thus, Abood is inapposite to the current case because it dealt with a dispute solely between members of the legislature over their own rules. What precedential value the case does possess shows that this court will decide certain procedural issues for the legislature and that this court has not been completely deferential in the past.

The court also relies on Moffitt v. Willis, 459 So. 2d 1018 (Fla. 1984). The court argues that "[t]he facts in Moffitt are virtually identical to the facts in this case." This simply is not so. The Moffitt court was faced with interpretation of a broad constitutional free speech clause and specific legislative rules. The court deferred to the legislature's rule making power only after limiting the case by observing:

> We are not confronted with whether a statute applies, rather we are asked to allow the courts to determine when and how legislative rules apply to members of the legislature.

Moffitt, 459 So. 2d at 1022. Thus the Moffitt court expressly excluded from its holding the specific issue raised in the case at bar.

Moreover, we have recognized the public nature of the Open Meetings Act. In Alaska Community Colleges' Federation of Teachers v. University of Alaska, 677 P.2d 886, 891 (Alaska 1984) we stated that

> [s]ection 312 makes clear that the [Open Meetings Act] exists primarily to advance the interests of "the people of this state." When the sunshine act is breached it is "the

people's right to remain informed" which sustains injury.

The Supreme Court in United States v. Smith, 286 U.S. 6, 33, 76 L. Ed. 954, 959 (1932) held that where the "construction to be given to the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one." Smith, then, is more analogous to the current issue than the other cases cited by this court.[2] Whereas in Malone and Abood the controversy was between members of the legislature, who were parties to the rule making and enforcement proceedings, in Smith the affected person was other than a member of the [United States] senate and unable to personally participate in rectifying the wrong done him. So it is in the current case. The affected persons are not members of the legislature and in fact their interests are at odds with the legislature. Their only recourse is to the courts which, as Smith suggests, should not decline to decide these disputes.

Finally, it is observed that the doctrine of non-justiciability of issues concerning legislative action "is primarily a function of the separation of powers." Baker v. Carr, 369 U.S. at 210, 7 L. Ed. 2d at 682. But, while the

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2. The court distinguishes Smith on the ground that in Smith a specific individual was affected whereas in the case at bar it is the right of the public that is affected. The court does not explain the signficance of this distinction.

separation of powers theory requires some deference by the judiciary to a coequal branch of government, the theory originated

as a system of checks and balances on the power of each branch. The line between when this court should act with deference and when it should check the power of the legislature is not easily drawn. However, "where the rights of persons who are not members of the legislature are involved . . .," Malone, 650 P.2d at 359, this court should be more willing to defend those rights than it shows itself to be today.[3]

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3. I do not believe that the constitutional issue addressed in Part IV of the court's opinion need be decided. The clear policy mandate of the statute should be dispositive of the issues presented in this case. This approach adheres "to the doctrine of abstaining from answering constitutional questions when other dispositive grounds exist." Deubelbeiss v. C.F.E.C., 689 P.2d 487, 491 (Alaska 1984) (Compton, J., concurring).