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

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

Applicability to the Legislature

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

> This bill makes clear that state law requiring that meetings of public agencies be open to the public applies to the legislature and its subordinate units. The bill also reemphasizes state policy against closed meetings of public bodies.

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

Spontaneaous Meetings

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

Model Laws

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

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

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

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

TABLE 1
OPEN MEETING AND RECORDS STATUTES

STATES	NO EXPLICIT EXEMPTIONS	OPEN COMMITTEE MEETINGS	SPECIFIC CRIMINAL PENALTIES	INCLUDES INFORMAL MEETINGS	OPEN MEETING WITH OR WITHOUT QUORUM	REQUIRED FOR PERSONNEL MATTERS	ATTORNEY GENERAL INTERPRETATION	REVIEWED BY STATE COURT
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	
New Hampshire							x	x
New Jersey								

TABLE 1
OPEN MEETING AND RECORDS STATUTES

STATES	NO EXPLICIT EXEMPTIONS	OPEN COMMITTEE MEETINGS	SPECIFIC CRIMINAL PENALTIES	INCLUDES INFORMAL MEETINGS	OPEN MEETING WITH OR WITHOUT QUORUM	REQUIRED FOR PERSONNEL MATTERS	ATTORNEY GENERAL INTERPRETATION	REVIEWED BY STATE COURT
New Mexico	x		x				x	x
New York				x				
North Carolina				x				
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								x
West Virginia			x				x	x
Wisconsin								x
Wyoming								

a--occurring at this time.

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

Prepared by the House Research Agency, November 1986.

TABLE 2

Summary of Open-Meeting Laws—Part I This Study

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

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

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

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

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

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

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

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

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

GF

Attachments

ATTACHMENT B

Hawaii, Conneticut and Nevada

Open Meetings Law Language

Hawaii REV. STAT. Section 92-1

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

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

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

Nevada REV. STAT. Section 241.015 (i)

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

ATTACHMENT C

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

OPEN MEETINGS ACT

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

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

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

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

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

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

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

05/19[illegible] Various "Open Meeting" Opinions (summarized)

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

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

expenses for meeting improperly held in executive session)

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

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

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

[redacted] Application of Open Meetings Law to informal Meet[redacted] meeting[redacted] as well as formal [redacted] no [redacted] c[redacted])

see geldolf Summary 5/19/83

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

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

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

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

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

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

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

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

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

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

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

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

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

MEMORANDUM State of Alaska

TO: Honorable Bill Ross
Commissioner
Department of Environmental Conservation

DATE: July 24, 1986

FILE NO.: 663-86-0565

THRU:

TELEPHONE NO.: 465-3600

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

FROM: Harold M. Brown
Attorney General

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

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

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

Under the Open Meetings Act, PMAG meetings must be open to the public (AS 44.62.310), and "reasonable public notice" must be given before all meetings (AS 44.62.310(e)). There are a few limited exceptions to the requirement that all meetings be held in public. Those exceptions are: (1) matters the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit; (2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion; and (3) matters which by law, municipal charter, or ordinance are required to be confidential. AS 44.62.312(b) requires that those exceptions be construed narrowly, however. It will be rare that any of the exceptions apply to PMAG meetings.

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

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

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

DKM:md

MEMORANDUM State of Alaska

TO: Honorable Don Collinsworth
Commissioner
Department of Fish and Game

DATE: July 17, 1986

FILE NO.: 663-86-0567

THRU:

TELEPHONE NO.: 465-3600

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

FROM: Harold M. Brown
Attorney General

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

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

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

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

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

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

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

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

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

HMB:LIS:cck

cc: see attached

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

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

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

Liza McCracken
Department of Law Anchorage

MEMORANDUM State of Alaska

TO: Marvin R. Weatherly, Chairman
Alaska Public Utilities Commission

DATE: March 27, 1986

FILE NO: 661-86-0494

TELEPHONE NO: 276-3550

FROM: Harold M. Brown
Attorney General

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

SUBJECT: Adjudicative proceedings of the Alaska Public Utilities Commission

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

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

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

Relevant Authorities

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

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

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

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

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

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

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

Certification and Ratemaking

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

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

What Adjudication Is Not

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

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

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

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

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

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

Formal and Informal Adjudication

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

Conclusion

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

MLF:and

MEMORANDUM State of Alaska

TO: David Rose, Executive Director
Alaska Permanent Fund Corporation

DATE: February 21, 1985

FILE NO: 366-364-85

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: Application of open meetings Act

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

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

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

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

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

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

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

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

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

> -(c) The following excepted subjects may be discussed in an executive session:
>
> (1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit;
>
> (2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;

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

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

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

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

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

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

JBP/pjg

MEMORANDUM State of Alaska

TO: Anselm Staack, Deputy Commissioner
Department of Administration

DATE: January 30, 1985

FILE NO: 366-330-85

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: Evaluation of Anchorage Office Complex proposals

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

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

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

I.

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

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

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

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

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

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

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

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

II.

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

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

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

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

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

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

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

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

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

Application of the Act entails three principal features:

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

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

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

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

One of the stated grounds for adjourning into executive session is to discuss "subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion[.]" AS 44.62.310(c)(2). Committee members may conclude that full discussion of some or all of the architectural models may entail comments which would tend to prejudice the reputation of one or more proponents. However, since the evaluation process is structured to maintain anonymity, the identity of the person or firm impugned would not be known until after the evaluation is complete. In this unique context, we believe the committee may properly vote to adjourn into executive session, even though the person or firm to be discussed would not be accorded an opportunity to elect that the discussion proceed in public.

3/ AS 44.62.310(c) provides:

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

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

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

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

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

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

JBR/pjg

cc: William King & Associates

MEMORANDUM State of Alaska

TO: James Hagowan
Executive Director
Alaska Real Estate Commission

DATE: October 9, 1984

FILE NO: 166-154-85

TELEPHONE NO: 276-3550

SUBJECT: Confidentiality

FROM: Norman C. Gorsuch
Attorney General

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

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

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

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

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

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

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

> Every public officer having the custody of records not included in the exceptions shall permit the inspections, and give on demand and on payment of the legal fees therefor a certified copy of the writing or record, and the copy shall in all cases be evidence of the original.

AS 09.25.125 provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> In striking a proper balance the custodian of the records in the first instance, and the court in the next, should bear in mind that the legislature has expressed a bias in favor of public disclosure. Doubtful cases should be resolved by permitting public inspection.
>
> . . . .
>
> There is a strong public interest in disclosure of the affairs of government generally . . . . AS 44.62.312(a) powerfully expresses the philosophy underlying this:
>
> > It is the policy of the state that
> >
> > (1) the governmental units mentioned in AS 44.62.310(a) exist to aid the conduct of the people's business;
> >
> > (2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;
> >
> > (3) the people of this state do not yield their sovereignty to the agencies which serve them;
> >
> > (4) the people, in delegating authority, do not give their public servants the right to decide what is good for the

public to know and what is not good for them to know;

(5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created.

In addition, §§ .110 and .120 articulate a broad policy of open records.

642 P.2d 1323-24.

DTL:ihr

Enclosure

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

BILL SHEFFIELD, GOVERNOR

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October 3, 1984

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

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

Dear Mr. Bremson:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Every person has a right to inspect a public writing or record in the state, including public writings and record in recorders' offices except (1) records of vital statistics and adoption proceedings which shall be treated in the manner required by AS 18.50.010 -- 18.50.380; (2) records pertaining to juveniles; (3) medical and related public health records; (4) records required to be kept confidential by a federal law or regulation or by

---

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

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

state law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

until this authority is specifically granted it does not exist.

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

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

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

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

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

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

Id. at 848.

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

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

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

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

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

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

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: Jeffrey W. Bush
Assistant Attorney General

NCG:JWB:cct:

MEMORANDUM State of Alaska

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

DATE: February 9, 1984

FILE NO: 366-417-84

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: November 3, 1983 Board meeting

By: Martha A. Fox
Assistant Attorney General

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

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

FACTS

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

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

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

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

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

DISCUSSION

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

> The meeting must first be convened as public; the question of holding an executive session concerning excepted subjects must be determined by majority vote; only excepted subjects, and only those

mentioned in the motion calling for the executive session, may be considered in the executive session; and no action may be taken at the executive session.

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

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

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

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

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

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

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

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

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

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

MAF/mg

MEMORANDUM State of Alaska

TO: Norman C. Gorsuch
Attorney General

DATE: May 19, 1983

FILE NO: 366-664-83

TELEPHONE NO: 465-3600

FROM: Joe Geldhof
Assistant Attorney General

SUBJECT: Various "open meeting" opinions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JWG:ml

ATTACHMENT F

Open Meetings Laws of Tennessee and Washington

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

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

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

CHAPTER 44

PUBLIC MEETINGS

SECTION.

PART 1—GENERAL PROVISIONS

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

SECTION.

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

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

PART 1—GENERAL PROVISIONS

8-44-101. Policy — Construction.

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

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

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

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

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

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

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

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

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

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

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

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

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

NOTES TO DECISIONS

ANALYSIS

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

1. Constitutionality.

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

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

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— All decisions and determi- ot be reviewable by any court. 2-107; Acts 1984, ch. 972, § 19.]

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

3. Coverage.

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

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

4. Construction with Other Acts.

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

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

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

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

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

5. Jury Trial.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NOTES TO DECISIONS

ANALYSIS

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

1. Constitutionality.

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

2a. Construction with Other Provisions.

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

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

4. Attorney-Client Conferences.

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

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

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

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8-44-103. Notice of public meetings.

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

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

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

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

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

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

8-44-105. Action nullified — Exception.

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

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

8-44-106. Enforcement — Jurisdiction.

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

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

NOTES TO DECISIONS

ANALYSIS

1. Right to sue.
2. Standing.

1. Right to Sue.

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

2. Standing.

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

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

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

PART 2—LABOR NEGOTIATIONS

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

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

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

CHAPTER 46

IMPEACHMENT

PART 1—GENERAL PROVISIONS

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

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

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

8-46-102. Majority of house required.

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

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

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

8-46-105. Jurisdiction of trial.

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

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

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

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

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

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

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

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

Taking acknowledgment, each person over two, two dollars;

Certifying affidavit, with or without stamp, three dollars;

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

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

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

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

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

Repeal

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

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

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

CHAPTER 42.30—OPEN PUBLIC MEETINGS ACT

Sec.

Cross References

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

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

Law Review Commentaries

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

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.30—OPEN PUBLIC MEETINGS ACT

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

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42.30.010. Legislative declaration

Notes of Decisions

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

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

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

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

42.30.020. Definitions

As used in this chapter unless the context indicates otherwise:

(1) "Public agency" means:

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

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

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

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

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

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

(4) "Meeting" means meetings at which action is taken.

Amended by Laws 1982, 1st Ex.Sess., ch. 43, § 10, eff. April 20, 1982; Laws 1983, ch. 155, § 1; Laws 1985, ch. 366, § 1.

Severability—Savings—Laws 1982, 1st Ex.Sess., ch. 43: See Historical Note following § 43.52.374.

Notes of Decisions

The term "pursuant to," as used in statutes, does not require an express authorization of an act or event so long as an enabling provision in a statute

implies that such act or event may come into existence at some time after enactment of the statute. Cathcart v. Andersen (1975) 85 Wash.2d 102, 530 P.2d 313.

The School of Law of the University of Washington is a public agency established pursuant to statutory authority. Cathcart v. Andersen (1975) 85 Wash.2d 102, 530 P.2d 313.

Meetings of the faculty of the School of Law of the University of Washington are meetings of the governing body of a public agency and are subject to the provisions of the open public meetings act (this chapter). Cathcart v. Andersen (1975) 85 Wash.2d 102, 530 P.2d 313.

A public agency's governing body, for purposes of the open public meetings act (this chapter), is that body which actually makes the policy and rules of the agency notwithstanding an abstract, rarely exercised, capability of a higher agency to overrule such decisions. Cathcart v. Andersen (1975) 85 Wash.2d 102, 530 P.2d 313.

Any independent examination by state transportation commission of domestic shipbuilder's plans and specifications constituted neither "action" nor "meeting" under Open Public Meetings Act, and thus commission, which took its "action" in awarding ferry construction contract to domestic rather than foreign shipbuilder in open public meeting following presentation by both firms, experts and the public, did not violate the act. Equitable Shipyards, Inc. v. State By and Through Dept. of Transp. (1980) 93 Wash.2d 465, 611 P.2d 396.

"Action" invoking requirements of Open Public Meetings Act of 1971 means transaction of official business of public agency by governing body, and does not automatically occur when majority of members of governing body gather together. Matter of Recall of Estey (1985) 104 Wash.2d 597, 707 P.2d 1338.

42.30.030. Meetings declared open and public

Attorney General's Opinions

The Washington Open Public Meetings Act (this chapter) is applicable to meetings of services and activities fees committees at state institutions of higher education. Op.Atty.Gen.1983, No. 1.

It is not clearly a violation of the Open Public Meeting Act for the board of regents of a state university to consider, and by duly adopted motion, fix the salary of its president in an executive session. Op.Atty.Gen. 1985, No. 4.

Notes of Decisions

Meetings of the faculty of the School of Law of the University of Washington are meetings of the governing body of a public agency and are subject to the provisions of the open public meetings act (this chapter). Cathcart v. Andersen (1975) 85 Wash.2d 102, 530 P.2d 313.

Any independent examination by state transportation commission of domestic shipbuilder's plans and specifications constituted neither "action" nor "meeting" under Open Public Meetings Act, and thus commission, which took its "action" in awarding ferry construction contract to domestic rather than foreign shipbuilder in open public meeting following presentation by both firms, experts and the public, did not violate the act. Equitable Shipyards, Inc. v. State By and Through Dept. of Transp. (1980) 93 Wash.2d 465, 611 P.2d 396.

A "meeting" occurs only when "action" takes place, and does not automatically occur when majority of members of governing body gathered together, for purposes of Open Public Meetings Act of 1971. Matter of Recall of Estey (1985) 104 Wash.2d 597, 707 P.2d 1338.

The Open Public Meetings Act of 1971 is declared to be remedial legislation whose provisions are to be liberally construed (§ 42.30.910) and, accordingly, any exceptions to the act must be narrowly confined. Port Townsend Publishing Co. v. Brown (1977) 18 Wash.App. 80, 567 P.2d 664.

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"Action" invoking requirements of Open Public Meetings Act of 1971 means transaction of official business of public agency by governing body, and does not automatically occur when majority of members of governing body gather together. Matter of Recall of Estey (1985) 104 Wash.2d 597, 707 P.2d 1338.

ing" under Open Public Meetings Act, and thus commission, which took its "action" in awarding ferry construction contract to domestic rather than foreign shipbuilder in open public meeting following presentation by both firms, experts and the public, did not violate the act. Equitable Shipyards, Inc. v. State By and Through Dept. of Transp. (1980) 93 Wash.2d 465, 611 P.2d 396.

A "meeting" occurs only when "action" takes place, and does not automatically occur when majority of members of governing body gathered together, for purposes of Open Public Meetings Act of 1971. Matter of Recall of Estey (1985) 104 Wash.2d 597, 707 P.2d 1338.

The Open Public Meetings Act of 1971 is declared to be remedial legislation whose provisions are to be liberally construed (§ 42.30.910) and, accordingly, any exceptions to the act must be narrowly confined. Port Townsend Publishing Co. v. Brown (1977) 18 Wash.App. 80, 567 P.2d 664.

42.30.060. Ordinances, rules, resolutions, regulations, etc., to be adopted at public meetings—Notice

Cross References

Notice of intent to adopt rules under Administrative Procedure Act, see § 34.04.025.

Attorney General's Opinions

It is not clearly a violation of the Open Public Meeting Act for the board of regents of a state university to consider, and by duly adopted motion, fix the salary of its president in an executive session. Op.Atty.Gen. 1985, No. 4.

Notes of Decisions

Municipal defendants did not violate this section in connection with the termination of the plaintiff's temporary employment as a police officer. Jordan v. City of Oakville (1986) 106 Wash.2d 122, 720 P.2d 824.

A municipal corporation has no duty to give advance notice to persons who may be affected by the enactment of a proposed ordinance except as such a duty is imposed by an overriding provision of its charter, state statute or the constitution. A charter provision requiring "due notice" does not, by itself, require notice in the procedural due process sense. King County v. Olson (1972) 7 Wash.App. 614, 501 P.2d 188.

Where a governing body takes an otherwise proper action later invalidated for procedural reasons only, that body may retrace its steps and remedy the defense by reenactment with the proper formalities. Henry v. Town of Oakville (1981) 30 Wash.App. 240, 633 P.2d 892.

Although bondholder, the farmers home administration of the United States department of agriculture, had to be joined as a party defendant in declaratory judgment action challenging the validity of ordinances authorizing the issuance of municipal bonds and providing for their payment, such action was clearly not a contract action against the federal government, as to which state jurisdiction would be barred under federal statute, 28 U.S.C.A. § 1491, giving the United States court of claims jurisdiction to hear contract actions against the United States. Henry v. Town of Oakville (1981) 30 Wash.App. 240, 633 P.2d 892.

Under the Open Public Meetings Act, the primary requirement for regularly scheduled meetings is that they be open to the public; notice of the agenda is required only for special meetings. Dorsten v. Port of Skagit County (1982) 32 Wash.App. 785, 650 P.2d 220.

Where resolution increasing moorage rates was passed at regularly scheduled meeting of port district, port was not required to provide notice of the agenda of that meeting, and enactment of the resolution increasing rates did not violate the Open Public Meetings Act (§ 42.30.010 et seq.). Dorsten v. Port of Skagit County (1982) 32 Wash.App. 785, 650 P.2d 220.

The appearance of fairness doctrine did not apply to port's decision to raise the moorage charges at its marina, since port's decision was legislative rather than judicial and a public hearing was not required. Dorsten v. Port of Skagit County (1982) 32 Wash.App. 785, 650 P.2d 220.

Under the Open Public Meetings Act, the primary requirement for regularly scheduled meetings is that they be open to the public; notice of the agenda is required only for special meetings. Dorsten v. Port of Skagit County (1982) 32 Wash.App. 785, 650 P.2d 220.

42.30.070. Times and places for meetings—Emergencies—Exception

The governing body of a public agency shall provide the time for holding regular meetings by ordinance, resolution, bylaws, or by whatever other rule is required for the conduct of business by that body. Unless otherwise provided for in the act under which the public agency was formed, meetings of the governing body need not be held within the boundaries of the territory over which the public agency exercises jurisdiction. If at any time any regular meeting falls on a holiday, such regular meeting shall be held on the next business day. If, by reason of fire, flood, earthquake, or other emergency, there is a need for expedited action by a governing body to meet the emergency, the presiding officer of the governing body may

provide for a meeting site other than the regular meeting site and the notice requirements of this chapter shall be suspended during such emergency. It shall not be a violation of the requirements of this chapter for a majority of the members of a governing body to travel together or gather for purposes other than a regular meeting or a special meeting as these terms are used in this chapter: *Provided*, That they take no action as defined in this chapter.

Amended by Laws 1973, ch. 66, § 1; Laws 1983, ch. 155, § 2.

42.30.075. Schedule of regular meetings—Publication in state register—Notice of change—"Regular" meetings defined

State agencies which hold regular meetings shall file with the code reviser a schedule of the time and place of such meetings on or before January of each year for publication in the Washington state register. Notice of any change from such meeting schedule shall be published in the state register for distribution at least twenty days prior to the rescheduled meeting date.

For the purposes of this section "regular" meetings shall mean recurring meetings held in accordance with a periodic schedule declared by statute or rule.

Added by Laws 1977, Ex.Sess., ch. 240, § 12, eff. Jan. 1, 1978.

Effective date—Laws 1977, 1st Ex. Sess., ch. 240: See Historical Note following § 34.08.010.

Severability—Laws 1977, 1st Ex. Sess., ch. 240: See § 34.08.910.

Cross References

Public meeting notices in state register, see § 34.08.020.

Library References

Administrative Law and Procedure ⇔353, 395, 453.

C.J.S. Public Administrative Bodies and Procedure §§ 84, 97, 130.

42.30.080. Special meetings

Attorney General's Opinions

Section 52.12.090, rather than this section, governs the calling of a special meeting of a board of fire protection district commissioners; accordingly, such a meeting may be called "by a majority of the commissioners or by the secretary and chairman of the board". Op.Atty.Gen.1979, L.O. No. 16.

In view of the specific legislative directive in § 42.30.140, it is this section and not § 52.12.090 which governs the calling of a special meeting of the board of fire protection district commissioners; accordingly, such a meeting may be called by the presiding officer of the board or by a majority of the members of the board without any necessity for concurrence by the secretary to the board. Op.Atty.Gen.1979, L.O. No. 18.

Notes of Decisions

An unscheduled meeting of a school board for purposes of acting on a resolution is a special meeting within the Open Public Meetings Act of 1971 (ch. 42.30). Mead School Dist. v. Mead Education Asso. (1975) 85 Wash.2d 140, 530 P.2d 302.

The "emergency" contemplated by this section, which permits convening a special meeting without required notices being given to deal with an emergency situation, must be one involving or threatening sudden, unexpected, and severe physical damage and requiring immediate action. Mead School Dist. v. Mead Education Asso. (1975) 85 Wash.2d 140, 530 P.2d 302.

Section 34.04.025, which contains detailed notice requirements regarding meetings to adopt administrative rules, is not rendered inapplicable by this section, which is a part of the Open Public Meetings Act of 1971 providing notice requirements for special meetings. Hartman v. State Game Com. (1975) 85 Wash.2d 176, 532 P.2d 614.

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Section 34.04.025, which contains detailed notice requirements regarding meetings to adopt administrative rules, is not rendered inapplicable by this section, which is a part of the Open Public Meetings Act of 1971 providing notice requirements for special meetings. Hartman v. State Game Com. (1975) 85 Wash.2d 176, 532 P.2d 614.

Fire chief did not have standing to raise issue whether fire protection district violated Open Public Meetings Act of 1971, § 42.30.010 et seq., by filing to give one of the district commissioners notice of the special meeting at which the fire chief was dismissed; only the aggrieved commissioner could raise such issue. Kirk v. Pierce County Fire Protection Dist. No. 21 (1981) 95 Wash.2d 769, 630 P.2d 930.

Fire protection district did not violate Open Public Meetings Act of 1971, § 42.30.010 et seq., by not giving notice to the print and broadcast media of the special meeting at which fire chief was dismissed, where none of the media had filed the request required under this section for such notice. Kirk v. Pierce County Fire Protection Dist. No. 21 (1981) 95 Wash.2d 769, 630 P.2d 930.

Recall charge that school meeting not regularly scheduled violated Open Public Meetings Act of 1971 was legally insufficient, and therefore, could not constitute grounds for recall, since written notice for special meetings need be given only to each board member and to local media with request on file, where petition characterized meeting as "special meeting" and there was no allegation that its local media had requested notification of special meetings. Matter of Recall of Estey (1985) 104 Wash.2d 597, 707 P.2d 1338.

42.30.110. Executive sessions

(1) Nothing contained in this chapter may be construed to prevent a governing body from holding an executive session during a regular or special meeting:

(a) To consider matters affecting national security;

(b) To consider the selection of a site or the acquisition of real estate by lease or purchase when public knowledge regarding such consideration would cause a likelihood of increased price;

(c) To consider the minimum price at which real estate will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price. However, final action selling or leasing public property shall be taken in a meeting open to the public;

(d) To review negotiations on the performance of publicly bid contracts when public knowledge regarding such consideration would cause a likelihood of increased costs;

(e) To consider, in the case of an export trading company, financial and commercial information supplied by private persons to the export trading company;

(f) To receive and evaluate complaints or charges brought against a public officer or employee. However, upon the request of such officer or employee, a public hearing or a meeting open to the public shall be conducted upon such complaint or charge;

(g) To evaluate the qualifications of an applicant for public employment or to review the performance of a public employee. However, subject to RCW 42.30.140(4), discussion by a governing body of salaries, wages, and other conditions of employment to be generally applied within the agency shall occur in a meeting open to the public, and when a governing body elects to take final action hiring, setting the salary of an individual employee or class of employees, or discharging or disciplining an employee, that action shall be taken in a meeting open to the public;

(h) To evaluate the qualifications of a candidate for appointment to elective office. However, any interview of such candidate and final action appointing a candidate to elective office shall be in a meeting open to the public;

(i) To discuss with legal counsel representing the agency matters relating to agency enforcement actions, or to discuss with legal counsel repre-

senting the agency litigation or potential litigation to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party, when public knowledge regarding the discussion is likely to result in an adverse legal or financial consequence to the agency.

(2) Before convening in executive session, the presiding officer of a governing body shall publicly announce the purpose for excluding the public from the meeting place, and the time when the executive session will be concluded. The executive session may be extended to a stated later time by announcement of the presiding officer.

Amended by Laws 1973, ch. 66, § 2; Laws 1979, ch. 42, § 1, eff. June 7, 1979; Laws 1983, ch. 155, § 3; Laws 1985, ch. 366, § 2; Laws 1986, ch. 276, § 8.

Severability—Laws 1986, ch. 276: See § 53.31.901.

Cross References

Open Public Meetings Act, see ch. 42.30.

Law Review Commentaries

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

Attorney General's Opinions

It is not clearly a violation of the Open Public Meetings Act for the board of regents of a state university to consider, and by duly adopted motion, fix the salary of its president in an executive session. Op.Atty.Gen. 1985, No. 4.

Notes of Decisions

A public agency's meeting to consider the amount of compensation to be offered for condemned property falls within the provision of this section which permits certain deliberations relating to acquisition of property to be held in executive session. Such exception to the requirement of a public meeting is grounded upon the attorney-client relationship which may exist between a public agency and its lawyers whenever the ordinary elements of an attorney-client relationship are present. Port of Seattle v. Rio (1977) 16 Wash.App. 718, 559 P.2d 18.

A public body's discussion regarding the availability of funds and the advisability of retaining or hiring specific employees, without mentioning them by name, is a matter "affecting" the appointment or employment of a public employee within the meaning of this section, which excepts such discussions from the requirement of an open public meeting. Port Townsend Publishing Co. v. Brown (1977) 18 Wash.App. 80, 567 P.2d 664.

Court of appeals would not consider city's argument that nondisclosure of police officers' statements detailing complaints about police chief was consistent with Open Public Meetings Act (§ 42.30.010 et seq.) which permits public body to go into closed, executive session to consider personal matters and complaints about public officer or employee, where argument was not presented to trial court. Columbian Pub. Co. v. City of Vancouver (1983) 36 Wash.App. 25, 671 P.2d 280.

42.30.120. Violations—Personal liability—Penalty—Attorney fees and costs

(1) Each member of the governing body who attends a meeting of such governing body where action is taken in violation of any provision of this chapter applicable to him, with knowledge of the fact that the meeting is in violation thereof, shall be subject to personal liability in the form of a civil penalty in the amount of one hundred dollars. The civil penalty shall be assessed by a judge of the superior court and an action to enforce this penalty may be brought by any person. A violation of this chapter does not constitute a crime and assessment of the civil penalty by a judge shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.

(2) Any person who prevails against a public agency in any action in the courts for a violation of this chapter shall be awarded all costs, including

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A public body's discussion regarding the availability of funds and the advisability of retaining or hiring specific employees, without mentioning them by name, is a matter "affecting" the appointment or employment of a public employee within the meaning of this section, which excepts such discussions from the requirement of an open public meeting. Port Townsend Publishing Co. v. Brown (1977) 18 Wash.App. 80, 567 P.2d 664.

Court of appeals would not consider city's argument that nondisclosure of police officers' statements detailing complaints about police chief was consistent with Open Public Meetings Act (§ 42.30.010 et seq.) which permits public body to go into closed, executive session to consider personal matters and complaints about public officer or employee, where argument was not presented to trial court. Columbian Pub. Co. v. City of Vancouver (1983) 36 Wash.App. 25, 671 P.2d 280.

reasonable attorney fees, incurred in connection with such legal action. Pursuant to RCW 4.84.185, any public agency who prevails in any action in the courts for a violation of this chapter may be awarded reasonable expenses and attorney fees upon final judgment and written findings by the trial judge that the action was frivolous and advanced without reasonable cause.

Amended by Laws 1973, ch. 66, § 3; Laws 1985, ch. 69, § 1.

Notes of Decisions

Fire chief did not have standing to raise issue whether fire protection district violated Open Public Meetings Act of 1971, § 42.30.010 et seq., by failing to give one of the district commissioners notice of the special meeting at which the fire chief was dismissed; only the aggrieved commissioner could raise such issue. Kirk v. Pierce County Fire Protection Dist. No. 21 (1981) 95 Wash.2d 769, 630 P.2d 930.

42.30.130. Violations—Mandamus or injunction

Notes of Decisions

Whether laches will apply to bar an action for mandamus depends upon the particular facts of each case including any justification for delay and the effect of the remedy requested. The fact that the suit is brought in the public interest is just one of the factors to be balanced against the potential harm caused by delay in bringing the suit (overruling State ex rel. Mason v. Board of County Comm'rs, 146 Wash. 449, insofar as it is inconsistent). Lopp v. Peninsula School Dist. (1978) 90 Wash.2d 754, 585 P.2d 801.

The remedies of injunction and mandamus, which are authorized by this section to prevent violations of the open public meetings act, are both subject to the doctrine of laches. Lopp v. Peninsula School Dist.(1978) 90 Wash.2d 754, 585 P.2d 801.

Fire chief did not have standing to raise issue whether fire protection district violated Open Public Meetings Act of 1971, § 42.30.010 et seq., by failing to give one of the district commissioners notice of the special meeting at which the fire chief was dismissed; only the aggrieved commissioner could raise such issue. Kirk v. Pierce County Fire Protection Dist. No. 21 (1981) 95 Wash.2d 769, 630 P.2d 930.

42.30.140. Chapter controlling—Application

If any provision of this chapter conflicts with the provisions of any other statute, the provisions of this chapter shall control: *Provided*, That this chapter shall not apply to:

(1) The proceedings concerned with the formal issuance of an order granting, suspending, revoking, or denying any license, permit, or certificate to engage in any business, occupation or profession or to any disciplinary proceedings involving a member of such business, occupation or profession, or to receive a license for a sports activity or to operate any mechanical device or motor vehicle where a license or registration is necessary; or

(2) That portion of a meeting of a quasi-judicial body which relates to a quasi-judicial matter between named parties as distinguished from a matter having general effect on the public or on a class or group; or

(3) Matters governed by Title 34 RCW, the administrative procedure act, except as expressly provided in RCW 34.04.025; or

(4) That portion of a meeting during which the governing body is planning or adopting the strategy or position to be taken by such governing body during the course of any collective bargaining, professional negotiations, grievance or mediation proceedings, or reviewing the proposals made in such negotiations or proceedings while in progress.

Amended by Laws 1973, ch. 66, § 4.

Attorney General's Opinions

In view of the specific legislative directive in this section, it is § 42.30.080 and not § 52.12.090 which governs the calling of a special meeting of the board of fire protection district commissioners; accordingly, such a meeting may be called by the presiding officer of the board or by a majority of the members of the board without any necessity for concurrence by the secretary to the board. Op.Atty.Gen.1979, L.O. No. 18.

Notes of Decisions

School directors determining whether to renew a teacher's contract are performing a quasi-judicial function and therefore are exempt from the requirements of public access of ch. 42.30, the open public meetings statute. Pierce v. Lake Stevens School Dist. (1974) 84 Wash.2d 772, 529 P.2d 810.

42.30.200. Governing body of recognized student association at college or university—Chapter applicability to

The multimember student board which is the governing body of the recognized student association at a given campus of a public institution of higher education is hereby declared to be subject to the provisions of the open public meetings act as contained in this chapter, as now or hereafter amended. For the purposes of this section, "recognized student association" shall mean any body at any of the state's colleges and universities which selects officers through a process approved by the student body and which represents the interests of students. Any such body so selected shall be recognized by and registered with the respective boards of trustees and regents of the state's colleges and universities: *Provided*, That there be no more than one such association representing undergraduate students, no more than one such association representing graduate students, and no more than one such association representing each group of professional students so recognized and registered at any of the state's colleges or universities.

Added by Laws 1980, ch. 49, § 1.

42.30.920. Severability—1971 1st ex.s. c 250

Notes of Decisions

The Open Public Meetings Act of 1971 is remedial legislation; its provisions are to be liberally construed, and its exceptions are to be strictly construed. Mead School Dist. v. Mead Education Asso. (1975) 85 Wash.2d 140, 530 P.2d 302.

CHAPTER 42.32—MEETINGS

Cross References

Open Public Meetings Act, see ch. 42.30.

State residential schools, per capita cost of care to be adopted as a rule in accordance with this chapter, see § 72.33.660.

CHAPTER 42.36—APPEARANCE OF FAIRNESS DOCTRINE—LIMITATIONS

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ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

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

March 23, 1987

MEMORANDUM

TO: Representative Fran Ulmer

FROM: Ginny Fay
Legislative Analyst

RE: **Alaska State Open Meetings Act**
Research Request 87.162

You requested information regarding enforcement and penalty provisions of state open meeting laws and public meeting notification requirements. You had a number of specific questions on open meeting laws. This memorandum lists each question with the pertinent information immediately following.

1. Do some states penalize violators in addition to voiding the action taken? Which states have penalties and are penalties mandatory or discretionary? Who has standing to enforce the law? What are the legal mechanisms for enforcement of these laws? Are court costs and attorney fees available to the prevailing party?

Tables 1 and 2 provide information regarding action voidableness, penalties for violations, citizen standing, and attorney fees. Action taken in illegal meetings are voided or considered invalid or not binding in 43 (86 percent) states and the District of Columbia. Also, in 43 states and the District of Columbia, citizens have standing to sue and enforce the law (Table 1). The states of Iowa, Kansas, Missouri and Oregon explicitly place the burden of proof on the alleged violators; Maryland explicitly places the burden on the plaintiff. In 37 states, legal recourse to halt secrecy is available through injunctions or writs of mandamus (Table 2).

TABLE 2

Summary of Open-Meeting Laws--Part I This Study

State	Includes statement of public policy	Provides for open legislature	Provides for open legislative committees	Opens state agencies	Opens county local agencies	Opens county board	Opens city councils	Forbids closed executive sessions	Exceptions[a] and/or reasons for executive session	Legal recourse to halt secrecy	Actions in meetings in violation void	Provides penalties for violation	Score
	1	2	3	4	5	6	7	8		9	10	11	
Alabama				y	y	y	y		+[e]			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		+[e]	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	9
North Dakota		y	y	y	y	y	y	†	+[a]		y	y	7
Ohio				y	y	y	y		-	y	y	y	7
Oklahoma	y			y	y	y	y		+		y	y	7
Oregon	y	y	y	y	y	y	y		-	y	y	y[c]	10
Pennsylvania		y	y	y	y	y	y		+	y	y	y	9
Rhode Island	y		y	y	y	y	y		x	y	y		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."

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

[e]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.

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.

4. Do municipal code of ethics address open meeting laws and if so how these codes and open meeting acts interrelate?

The book Codes of Professional Responsibility (edited by Rena A. Gorlin, Washington: BNA, 1986) contains codes of ethics for federal officials, including members of Congress. There is no mention of open meetings. Conversations with the Freedom of Information Center and other information agencies indicate that open meeting laws are not covered in codes of ethics because these laws are more of a legal than ethical consideration.

You also asked generally about open meeting case law. Attached (Attachment D) is the most recent compilation and discussion of open meeting case law.[6]

In regard to public meeting notice requirements, Attachment E is a memorandum done by this agency in November 1986 on this topic.

I hope this information is useful; please do not hesitate to contact this agency if you have additional questions.

Attachments

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[6]If you would like more recent or additional case law, Legal Services can compile this information using the West Law computer which costs $100 per hour of computer time.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

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November 19, 1987

MEMORANDUM

TO: Representative Kay Brown

FROM: Karla Hart KH
Legislative Analyst

RE: **Other States' Constitutional Provisions for Open Meetings**
Research Request 88.061

You requested this agency to gather language from other state constitutions which provides for open meetings. You expressed a particular interest in provisions for the closure of certain types of meetings, while providing that, in general, meetings are to be open.

Following is a list of the open meeting provisions in the constitutions of 37 states; I was unable to locate provisions in those of the remaining 13 states.[1] I have copied the statutory language verbatim, emphasizing in bold the provisions for closed meetings. Of the 37 states, only six do not make any such provisions for closed meetings under certain circumstances.

ALABAMA. Article 4, Section 57.

> The doors of each house shall be opened **except on such occasions as, in the opinion of the house, may require secrecy,** but no person shall be admitted to the floor of either house while the same is in session, except members of the legislature, the officers and employes of the two houses, the governor and his secretary, representatives of the press, and other persons to whom either house, by unanimous vote, may extend the privileges of its floor.

ARKANSAS. Article 5, Section 13.

> **Sessions to be open.--The sessions of each house and of committees of the whole shall be open, unless when the business is such as ought to be kept secret.**

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[1]The states without constitutional provisions for open meetings are: Alaska, Arizona, Kansas, Kentucky, Louisiana, Maine, Massachusetts, New Jersey, North Carolina, Oklahoma, Rhode Island, Virginia and West Virginia.

CALIFORNIA. Article 4, Section 7(c).
The proceedings of each house and the committees thereof shall be public except as provided by statute or by concurrent resolution, when such resolution is adopted by a two-thirds vote of the members of each house, provided, that if there is a conflict between such a statute and concurrent resolution, the last adopted shall prevail.

COLORADO. Article 5, Section 14.
Open Sessions. The sessions of each house, and of the committees of the whole, shall be open, unless when the business is such as ought to be kept secret.

CONNECTICUT. Article 3, Section 16.
Debates to be public. The debates of each house shall be public, except on such occasions as in the opinion of the house may require secrecy.

DELAWARE. Article 2, Section 11.
Accessibility to each House and Committees of the Whole. The doors of each House, and Committees of the Whole, shall be open unless when the business is such as ought to be kept secret.

FLORIDA. Article 3, Section 4(b).
Sessions of each house shall be public; except sessions of the senate when considering appointment to or removal from public office may be closed.

GEORGIA. Article 3, Section 4, Paragraph 11.
Open Meetings. The sessions of the General Assembly and all standing committee meetings thereof shall be open to the public. Either house may by rule provide for exceptions to this requirement.

HAWAII. Article 3, Section 12, Paragraph 4.
Every meeting of a committee in either house or of a committee comprised of a member or members from both houses held for the purpose of making decision on matters referred to the committee shall be open to the public.

IDAHO. Article 3, Section 12.
Secret sessions prohibited.--The business of each house, and of the committee of the whole shall be transacted openly and not in secret session.

ILLINOIS. Article 4, Section 5(c).

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

INDIANA. Article 4, Section 13.

Doors to be open.--The doors of each House, and of Committees of the Whole, shall be kept open, except in such cases, as, in the opinion of either House, may require secrecy.

IOWA. Article 3, Section 13.

Doors open. The doors of each house shall be open, except on such occasions, as, in the opinion of the house, may require secrecy.

MARYLAND. Article 3, Section 21.

Doors to be kept open. The doors of each House, and of the Committee of the Whole, shall be open, except when the business is such as ought to be kept secret.

MICHIGAN. Article 4, Section 20.

Open meetings. The doors of each house shall be open unless the public security otherwise requires.

Convention Comment: This is a revision...declaring that meetings of the legislature shall be open unless public "security" otherwise requires. The new word replaces "welfare" and is more descriptive of a situation which might require secrecy.

MINNESOTA. Article 4, Section 14.

Open sessions. Each house shall be open to the public during its sessions except in cases which in its opinion require secrecy.

MISSISSIPPI. Article 4, Section 58.

The doors of each house, when in session, or in committee of the whole, shall be kept open, except in cases which may require secrecy; and each house may punish, by fine and imprisonment, any person not a member who shall be guilty of disrespect to the house by any disorderly or contemptuous behavior in its presence, or who shall in any way disturb its deliberations during the session; but such imprisonment shall not extend beyond the final adjournment of that session.

MISSOURI. Article 3, Section 20.

Regular sessions of assembly--quorum--compulsary attendance--public sessions--limitation on power to adjourn. ...The sessions of each house shall be held with open doors, except in cases which may require secrecy but not including the final vote on bills, resolutions and confirmations...

MONTANA. Article 5, Section 11, Paragraph 3.
The sessions of the legislature and of the committee of the whole, all committee meetings, and all hearings shall be open to the public.

NEBRASKA. Article 3, Section 11.
The Legislature shall keep a journal of its proceedings and publish them (except such parts as may require secrecy) and the yeas and nays of the members on any question, shall at the desire of any one of them be entered on the journal. All votes shall be viva voce. The doors of the Legislature and of the Committees of the Whole, shall be open, unless when the business shall be such as ought to be kept secret.

NEVADA. Article 4, Section 15.
Open sessions: adjournment for more than 3 days. The doors of each House shall be kept open during its session, except the Senate while sitting in executive session, and neither shall, without the consent of the other, adjourn for more than three days nor to any other place than that in which they may be holding their sessions.

NEW HAMPSHIRE. Part 2, Article 8.
Open Sessions of Legislature. The doors of the galleries, of each house of the legislature, shall be kept open to all persons who behave decently, except when the welfare of the state, in the opinion of either branch, shall require secrecy.

NEW MEXICO. 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.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

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November 26, 1986

MEMORANDUM

TO: Representative John Sund

ATTN: John Hartle

FROM: Ginny Fay
Legislative Analyst

RE: Provisions of State Open Meeting Laws
Research Request 87-045

You requested that we identify states with open meeting laws and discuss the provisions of these laws. All states have open meeting or "sunshine" laws, however, the provisions vary considerably among states. A 1984 study of state sunshine laws identified 23 separate provisions that can be contained in these laws and found that states varied considerably in their definition of sunshine (as measured by the combinations of these provisions).[1] Tennessee and Florida led the states; their laws contain 21 and 20 of these provisions, respectively. In contrast, laws in Pennsylvania, Wisconsin and Wyoming contained only eight provisions each. Table 1 (attached) presents the 11 most common provisions of state open meeting laws and indicates the number of states' laws that contain these provisions.

Table 2 (attached) provides the citation of the open meeting and freedom of information laws in each state; Table 3 specifically identifies and contrasts eight major provisions of open meeting laws. The majority of states have had their open meeting law interpreted by the state's attorney general. Somewhat fewer than half of the states have had their laws reviewed by the courts; have laws that do not exempt informal meetings; and/or have laws which include specific criminal penalties for violations. Approximately one-third of the states' laws do not explicitly exempt any government bodies and/or require that personnel matters be discussed in open meetings. Relatively few state laws require open committee meetings or that meetings be open even if there is no quorum.

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[1] Council of State Governments, The Book of the States, 1984-1985. (Lexington, Kentucky), 1984, p. 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 F. 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 the conduct of public business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly."

[4]National Association of Attorney Generals, Open Meetings: Exceptions to State Laws (Raleigh, N.C.:NAAG), March 1979, p.14.

General Assembly meetings other than those of the standing commitees are closed. Legislative subcommittee and conference meetings are closed in Mississippi. Meetings of the Wisconsin legislature may be closed when the state's sunshine law conflicts with legislative rules. In Alaska, organizational meetings of the legislature are closed. A committee meeting in the New Hampshire legislature may be closed by a vote of three-fifths of the members. The North Carolina open meetings law does not apply to the Advisory Budget Commission of the Legislative Services Commission. The Georgia and Oklahoma sunshine laws do not apply to the legislature.[5]

Many states allow caucus meetings in the legislature to be closed. Those states are: Alaska, California, Delaware, Hawaii, Idaho, Illinois, Indiana, Kentucky, Montana, Nevada, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Utah, Virginia, Washington, West Virginia, and Wyoming.

Nearly all states' open meeting laws provide for remedial action if the law is violated. In 36 states, actions are voided if the open meetings law is not followed (see Table 3). Georgia legislation (1982) made it a misdemeanor for officials to willfully obstruct release of public records or information and required 24-hour notice of any public hearing. The laws in 21 states include specific criminal penalties for the violation of open meeting laws (see Table 2).

Complications with the enforcement of open meeting statutes have led several states to form independent commissions to review complaints. In New York, the Committee on Open Government was established to handle citizen appeals on denial of open meeting and information requests. The New York committee is composed of seven members, three from government and four from the public. At least two of the public members are news media representatives. The committee has the authority to provide written and oral advice and mediate controversies. Between 1974 and 1979, the committee issued 1,500 written advisory opinions.[6]

I hope this information is of use to you. If you have any questions, or would like additional information, please call.

GF

Attachments

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[5]Freedom of Information Center, "Executive Session: 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.