

3044.SSA SB 317 (FILE 2) 8672

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

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

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

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

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

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

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

SEK/jb .

Attachment

MEMORANDUM

State of Alaska

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

DATE: January 2, 1981

FILE NO: J-66-445-81

TELEPHONE NO: 465-3666

FROM: WILSON L. CONDON
ATTORNEY GENERAL

SUBJECT: By-laws of Alaska
Energy Center

By:

Rudger W. Pegues
Assistant Attorney General

This responds to your request for advice on this subject.

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

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

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

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

Commissioner W.R. Hudson
January 2, 1981
Page #2

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

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

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

RWP/pjg

cc: Walter Parker
Alaska Energy Center

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K-STATE CAPITOL
BUREAU, ALASKA 99811

465-3665

February 3, 1981

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

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

Dear Mr. Hafling:

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

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

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

February 3, 1981

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

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

Very truly yours,

WILSON L. CONDON
ATTORNEY GENERAL

By: 

Laura L. Davis

Assistant Attorney General

LLD/pjg

cc: PERS Board members

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

MEMORANDUM

State of Alaska

TO: Marie Matsuno, Deputy Commissioner DATE: February 11, 1981
Rural Development Council
Department of Community &
Regional Affairs

FILE NO: J-66-514-81

TELEPHONE NO: 465-3665

FROM: WILSON L. CONDON
ATTORNEY GENERAL

SUBJECT: Rural Development
Council by-laws

By:

Laura  Davis
Assistant Attorney General

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

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

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

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

Marie Matsuno
C&RA--Rural Development Council

February 11, 1981
Page #2

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

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

LLD/pjg

Enc.

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

MEMORANDUM

State of Alaska

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

DATE: May 11, 1981

FILE NO: J-66-655-81

TELEPHONE NO: 465-3600

FROM: WILSON L. CONDON
ATTORNEY GENERAL

SUBJECT: Application of Open
Meetings Law to in-
formal meetings

By:

...Rodger W. Pegues
Assistant Attorney General

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

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

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

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

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

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

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

The statute goes on to say:

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

AS 44.62.310(b) (emphasis added).

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

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

11, 1981
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specific membership and vest it with specific powers and assign it certain functions to be acted upon by a vote of the committee's membership. If that is done, the law applies. But where the committee, task force, or group has no power to act by a vote of its members, has no fixed functions which constitute its business, and has no fixed membership to exercise its power by vote, then the Open Meetings Act, by its own terms, does not apply.

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

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

Some courts have permitted informal, closed meetings of public bodies to be held. See Lessel v. Bd. of Supervisors for the County of Nassau, 394 N.Y.S.2d 762 (1977); Reeves v. Orleans Parish Sch. Bd., 264 So.2d 243 (La. App. 1972), revs'd, 287 So.2d 719 (La. 1973). It appears, however, that there is no basis for this practice under the Alaska Open Meetings Act. It states that "[i]t is the policy of the state that" public bodies conduct "their deliberations . . . openly" and that it is not up to them "to decide what is good for the people to know and what is not good for them to know." AS 44.62.312(a) (2), (4).

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

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

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

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

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

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

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

May 11, 1981

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

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

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

AK Supreme Court

1982

1982 City of Kona v. 672 P2nd 1316

1980 Horowitz v. AK. Bar

quoted Hammond v. Nottot Score Borrowed
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— Uniform Public Meeting
Laws —

→ check Headnote for
Shepard's

LAW LIBRARY has BRIETS

Neal B Phelps - MUNSON

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→ any meeting of pol. org. not encouraged to
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technically legitimate (Sackett's criticism)

MEMORANDUM

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

DATE: August 22, 1979

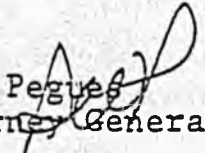
FILE NO: J-66-018-80

TELEPHONE NO:

ATTN: Richard E. Vollertsen

SUBJECT: Secret ballot for
electing the commis-
sion's officers

AVRIM M. GROSS
ATTORNEY GENERAL

By: 
Rodger W. Pegues
Assistant Attorney General

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

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

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

RWP/pjg

Michael F. Porcaro
Executive Director
Alaska Public Broadcasting
Commission


DATE: October 15, 1979

FILE NO: J-66-218-80

TELEPHONE NO: 465-3684

AVRUM M. GROSS
ATTORNEY GENERAL

SUBJECT: Public Meetings by
Conference Call

By: 
G. Thomas Koester
Assistant Attorney General

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

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

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

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

GTK:d1m

MEMORANDUM

Charles H. Meacham, Director
International Fisheries &
External Affairs

DATE: December 4, 1979

FILE NO: J-66-322-80

TELEPHONE NO:

AVRUM M. GROSS
ATTORNEY GENERAL

SUBJECT: Gubernatorial meet-
ings with members of
Board of Fisheries
and others

By:
Rodger W. Pegues
Assistant Attorney General

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

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

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

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

Charles H. Meacham
December 4, 1979
Page #2

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

RWP/pjg

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

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

DATE: February 8, 1979

FILE NO:

TELEPHONE NO:

AVRUM M. GROSS
ATTORNEY GENERAL

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

By: *Joseph K. Donohue*
Joseph K. Donohue
Assistant Attorney General

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

1. Applicability of AS 44.62.330 - .620

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

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

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

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

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

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

JKD:m11

cc: All Board Members

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

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K-STATE CAPITOL
JUNEAU, ALASKA 99811

March 15, 1979

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

Re: Executive Sessions
Our File: J-66-485-79

Dear Senator Stimson:

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

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

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

The following . . . may be discussed in an executive session:

* * * * *

Subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion

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

However, the person being discussed "may request a

Senator Terry Stimson
March 15, 1979
Page #2


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

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

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

Sincerely yours,

AVRUM M. GROSS
ATTORNEY GENERAL

By: 
Rodger W. Pegues
Assistant Attorney General

MEMORANDUM

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

DATE: April 7, 1978

FILE NO:

TELEPHONE NO.

Avrum M. Gross
Attorney General

SUBJECT: Board meetings by phone
Our File J-66-472-78

By:


Ronald W. Lorensen

Assistant Attorney General
Department of Law

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

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

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

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

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

RWL:jf

cc: Frank Flavin
Ombudsman

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH X - STATE CAPITOL
JUNEAU 99811

February 13, 1976

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

Dear Representative Malone:

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

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

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

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

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

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

The Honorable Hugh Malone
Representative

February 13, 1976

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

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

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

At the same time, we note that two Alaskan cases have voided executive action where the executive failed to comply with procedural requirements established to control and regulate the contemplated action. See Alyeska Ski Corporation v. Holdsworth, 546 P.2d 1006 (1967) and State v. Aleut Corp., 541 P.2d 130 (1975).

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

Sincerely,

AVRUM M. GROSS
ATTORNEY GENERAL

By: Richard A. Bradley
Assistant Attorney General

RAB:md

76

April 9, 1976

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

Dear Representative Duncan:

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

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

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

April 9, 1976

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

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

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

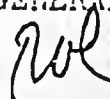
4. Since the Association is not subject to the public meeting law, the determination as to when it may hold executive sessions is presently entirely up to it.

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

Sincerely yours,

AVRUM M. GROSS
ATTORNEY GENERAL

By:



Ronald W. Lorensen
Assistant Attorney General

MEMORANDUM

State of Alaska

Arthur M. Cross
Attorney General

DATE: July 19, 1976

FILE NO:

TELEPHONE NO:

Ronald W. Lorensen
Assistant Attorney General

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

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

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

1. Matters relating to personnel evaluations and performance reports which are contained in a state employee's personnel file.
2. Matters relating to a grievance over personnel action filed by a state employee and which are in the grievance process.
3. Statements by potential prosecution witnesses in criminal matters.

I. PERSONNEL MATTERS

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

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

The Personnel Rules provide:

14 07.0 Public Records

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

July 19, 1976

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

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

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

II. GRIEVANCE MATTERS

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

July 19, 1976

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

III. STATEMENTS OF POTENTIAL PROSECUTION WITNESSES

AS 12.45.050 provides:

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

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

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

Lyrum H. Gross
Attorney General

July 19, 1976

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

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

LM:jf

Attachment

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

September 24, 1975

M E M O R A N D U M

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

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

FROM: Avrum M. Gross
Attorney General

BY: Richard L. Peter
Assistant Attorney General

RE: Confidentiality of Proceedings.

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

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

AS 09.25.120 provides in pertinent part:

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

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

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

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

"Reasonable gun control legislation is within the police power of a legislative body to enact; any such restriction imposes a restraint or burden upon the individual, but the interest of the governmental unit is, on balance, manifestly paramount." *Mosher v. City of Dayton*, 48 Ohio St. 2d 243, 247, 350 N.E.2d 540, 543.

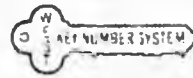
The states have always had great leeway in adopting summary procedures to protect the public health and safety. *Mackey v. Montrym*, supra, 99 S.Ct. 2621. Unlike the situation in *Society for Savings v. Chestnut Estates, Inc.*, supra, here the governmental

or general public interest is one that could be characterized as extraordinary.

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

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

Judgment may enter accordingly.



35 Conn. Sup. 117

Carl GIORDANO et al.

v.

FREEDOM OF INFORMATION
COMMISSION.

No. 2443.

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

Dec. 19, 1979.

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

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

Appeal dismissed.

1. Municipal Corporations ⇐92

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

2. Municipal Corporations ⇐92

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

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

Constance L. Chambers, Meriden, for defendant.

O'SULLIVAN, Judge.

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

The board of aldermen of the city of Milford is a fifteen-member elected legislative body. On April 16, 1978, the board consisted of five Democratic members and

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

conversation and to be heard by Austin if they wished to speak. Giordano asked Austin if \$50,000 would be an acceptable figure as a grant to the borough. Austin indicated he would talk to the burgesses and call back. He did call back and indicated that \$50,000 was acceptable. During the morning of April 17, 1978, Austin called Giordano and advised him that, after reconsideration, the burgesses would not accept the \$50,000 figure. On the evening of April 17, 1978, the board of aldermen, by a nine to six vote (nine Republicans voting in the affirmative and five Democrats and one Republican voting in the negative) appropriated \$40,000 as a grant to the borough.

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

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

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

shall decide the appeal In fact, the defendant commission scheduled the hearing approximately fifty-two days after its receipt of the complaint and issued its decision approximately fifty-five days after the hearing.

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

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

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

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

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

Under these circumstances the gathering was not a caucus, the exemption does not govern the situation and the rules concern-

ing a public meeting do apply. The defendant commission was correct in its finding and in its ruling.

The appeal is dismissed.



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

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

v.

Joan BARR et al., Appellants.

No. 52948.

Supreme Court of Illinois.

Dec. 19, 1980.

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

Affirmed.

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

1. Statutes ⇨195

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

2. Administrative Law and Procedure ⇨124

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

3. Municipal Corporations ⇨92

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

4. Administrative Law and Procedure ⇨124

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

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

5. Constitutional Law ⇨47, 70.3(4, 6)

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

6. Constitutional Law ⇨70.1(12)

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

7. Municipal Corporations ⇨92

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

8. Constitutional Law ⇨238.5

Municipal Corporations ⇨92

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

9. Constitutional Law ⇨213.1(2)

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

10. Constitutional Law ⇨213.1(2)

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

11. Statutes ⇨47

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

12. Constitutional Law ⇨258(2)

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

13. Municipal Corporations ⇨92

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

14. Statutes ⇨76(2)

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

15. Constitutional Law ⇨82(4)

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

16. Constitutional Law ⇨82(4)

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

17. Constitutional Law ⇨90(3)

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

18. Administrative Law and Procedure ⇨7

Constitutional Law ⇨90.1(1), 91

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

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

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

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

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

CLARK, Justice:

Thomas J. Difanis, as State's Attorney of Champaign County, brought a declaratory judgment action against the nine defendants, who are members of the Urbana city council. The plaintiff sought a declaration that the defendants violated the Open Meetings Act (Ill.Rev.Stat.1977, ch. 102, par. 41 et seq.) when, on October 23, 1978, they met and conferred shortly before a special session of the Urbana city council. The circuit court of Champaign County en-

tered judgment in favor of the plaintiff. The appellate court affirmed. (78 Ill. App.3d 842, 34 Ill.Dec. 223, 397 N.E.2d 895.) We allowed the defendants' petition for leave to appeal. 73 Ill.2d R. 315.

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

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

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

Section 2 of the Open Meetings Act provides in part:

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

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

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

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

This clearly enunciated public policy would be poorly served were we to carve out ex-

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

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

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

the term "meeting" includes those sessions or conferences of the board members designed for the discussion of public business. The Elks Club luncheon, attended by the Sacramento County Board of Supervisors, was such a meeting." (*Sacramento Newspaper Guild, Local 92 v. Sacramento County Board of Supervisors* (1968), 263 Cal.App.2d 41, 50-51, 69 Cal.Rptr. 480, 487.) Thus, to allow the nine defendants to circumvent the Act simply because they designate their meeting as an informal gathering or informal caucus would be to thwart the intent of the Act.

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

[5-7] It should be emphasized that it is not the province of this court to pass on the wisdom or desirability of legislation. (*Garcia v. Tully* (1978), 72 Ill.2d 1, 10, 17 Ill.Dec. 820, 377 N.E.2d 10.) As long as the means chosen by the legislature to achieve a desired end are lawful and inoffensive to the State and Federal constitutions, our inquiry may proceed no further. Thus, whether, as the defendants argue, the instant means

nate secrecy in government and permit the free flow of information to the public might restrict the ability of public officials, either as minority blocs or majority groups, to support or oppose legislation, is not within our power to alter. The Act, by its express terms, does sacrifice the ability of public officials to act and deliberate privately to what the General Assembly obviously perceives to be the more important governmental interest of opening the processes of government to public scrutiny. Such a legislative judgment is peculiarly within the domain of the General Assembly. While there appear to be obvious problems of enforcement inherent in the Act, that consideration does not render the Act invalid. Nor may it affect our scrutiny of it. The Act is not intended to prohibit bona fide social gatherings of public officials, or truly political meetings at which party business is discussed. Rather, the Act is designed to prohibit secret deliberative action on business which properly should be discussed in a public forum due to its potential impact on the public. Thus, the items discussed in the meeting in the instant case regarding a new ward map, the appointments of public officers for two separate agencies, and a housing development not only concerned public business but were scheduled to be dealt with that very evening. Moreover, the stipulated facts show that several other items discussed that evening were matters that the city council would need to consider sometime in the future, for example, the burning of leaves within city limits, the treatment of cable television, and the possibility of rescinding an ordinance which required an appointed comptroller. Therefore, it is reasonably clear and definite that the meeting at issue in this case violated the intent and the terms of the Open Meetings Act. The defendants have challenged the Act on its face as violative of equal protection and due process of law. We need not consider these broad-based attacks, however. Instead, we will only decide whether, under the narrow facts presented, the Act violates the constitutional rights of these nine defendants.

The Budget!

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

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

IV, section 5(c), of the 1970 Constitution which provides:

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

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

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

Illinois
caucus
exempted

The next constitutional contention raised by the defendants is that the Open Meetings Act, as applied to these defendants, is a denial of due process of law under the fourteenth amendment to the United States Constitution and article I, section 2, of the Illinois Constitution of 1970. Those constitutional provisions read in pertinent part: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . " (U.S. Const., amend. XIV, sec. 1.)

"Section 2. Due Process and Equal Protection

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

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

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

[13] We think that the Open Meetings Act, as applied to these defendants, is not impermissibly vague for two reasons. First, after the 1967 amendments deleted the word "official" where it had appeared before the word "meetings," no guessing was required to prohibit all meetings of members of legislative bodies, where deliberations were conducted or actions taken on

public business. Secondly, the clear import of section 2 of the Act is that any subdivision of a legislative body, "including but not limited to committees and subcommittees" supported by tax revenues, is subject to the Act. Ill. Rev. Stat. 1977, ch. 102, par. 42.

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

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

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

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

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

Thus, the exemption of the General Assembly from coverage under the Act is not akin to an attempt to enact reforms "one step at a time" (*Grace v. Howlett* (1972), 51 Ill.2d 478, 487, 283 N.E.2d 474, quoting Wil-

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

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

[15, 16] A governmental purpose to control or prevent activities constitutionally subject to State regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. (*Zwickler v. Koota* (1967), 389 U.S. 241, 250, 19 L.Ed.2d 444, 451, 88 S.Ct. 391, 396; *NAACP v. Alabama ex rel. Flowers* (1964), 377 U.S. 288, 307, 12 L.Ed.2d 325, 328, 84 S.Ct. 1302, 1314; *Peo-*

deliberated or acted upon in an open forum. In short, the Act requires that public business must be conducted publicly. We perceive this limitation to be reasonable when viewed in relation to a public official's obligation to carry out the public trust honorably and in good faith. Moreover, we think the Act clearly does not prohibit consultation between an official and his staff so that the official may offer views for discussion and debate in a private setting. (See *People ex rel. Cooper v. Carlson* (1975), 28 Ill.App.3d 569, 328 N.E.2d 675 (staff members not subject to Act).) Thus the Open Meetings Act is a reasonable attempt to balance the right of the press and the people to view the deliberative and decision-making processes of government first-hand with the right of public officials to speak their minds freely and associate with whomever they choose. The Act places a limited and reasonable regulation upon officials by requiring them to speak of public business with their fellow officials only when they are in a public forum, and sufficient notice under the Act has been given. (Ill. Rev.Stat.1977, ch. 102, par. 4202.) We agree with the appellate court that public officials' desire to consult privately must give way to the open conduct of the public's business "or else the people risk having their business done in secret, with the possibility that private deals will supplant the public interest." (78 Ill.App.3d 842, 845, 34 Ill.Dec. 223, 397 N.E.2d 895.) We are unable to say therefore that the balance struck by the General Assembly is unreasonable.

[17, 18] It is a well recognized constitutional principle that the government may adopt reasonable time, place and manner regulations which do not discriminate among speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication. (*Buckley v. Valeo* (1976), 424 U.S. 1, 18, 46 L.Ed.2d 659, 687, 96 S.Ct. 612, 634, and cases cited therein.) We conclude that the General Assembly has adopted reasonable regulations with regard to public officials' rights of speech and assembly when those rights are balanced against the extremely important governmental interest of the public's right of access to public information. The Open Meetings Act does not prohibit political discussions between or among members of public bodies; thus there is no chilling effect upon political discussion. Moreover, we agree with the Attorney General's opinion that "whether a gathering falls within the definition of meeting as used in the Act, would depend upon the peculiar facts in each situation. It is unlikely that the casual non-prearranged conversation among less than, or even all, of the members of a particular body in a coffee shop, during which the business of the body was discussed, would constitute a meeting within the terms of the Act. I assume such a gathering is primarily a social gathering and business is discussed only incidentally between certain individuals and not among the group as a whole. Of course, if any decisions or agreements to make decisions are made, such a gathering would be a meeting within the terms of the Act." (1974 Atty Gen. Op. 123, 126.) The Act is only addressed to meetings designed to discuss or reach an accord with regard to

caucus decision
to vote for X budget.

In short, the Act requires that public business must be conducted publicly. We perceive this limitation to be reasonable when viewed in relation to a public official's obligation to carry out the public trust honorably and in good faith. Moreover, we think the Act clearly does not prohibit consultation between an official and his staff so that the official may offer views for discussion and debate in a private setting. (See *People ex rel. Cooper v. Carlson* (1975), 28 Ill.App.3d 569, 328 N.E.2d 675 (staff members not subject to Act).) Thus the Open Meetings Act is a reasonable attempt to balance the right of the press and the people to view the deliberative and decision-making processes of government first-hand with the right of public officials to speak their minds freely and associate with whomever they choose. The Act places a limited and reasonable regulation upon officials by requiring them to speak of public business with their fellow officials only when they are in a public forum, and sufficient notice under the Act has been given. (Ill. Rev.Stat.1977, ch. 102, par. 4202.) We agree with the appellate court that public officials' desire to consult privately must give way to the open conduct of the public's business "or else the people risk having their business done in secret, with the possibility that private deals will supplant the public interest." (78 Ill.App.3d 842, 845, 34 Ill.Dec. 223, 397 N.E.2d 895.) We are unable to say therefore that the balance struck by the General Assembly is unreasonable.

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

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

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

Judgment affirmed.

WARD, Justice, dissenting:

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

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

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

The Act fairly bristles with questions regarding the separation of powers and other constitutional areas. The opinion of the majority implicitly acknowledges constitutional problems, stating that the decision

here is only "under the narrow facts presented" (83 Ill.2d at 202, 46 Ill.Dec. at 682, 414 N.E.2d at 735 and that "[w]hether the Act applies to other meetings and whether it is constitutional in other settings or as applied to other public officials must await further determination" (83 Ill.2d at 211, 46 Ill.Dec. at 686, 414 N.E.2d at 739). But the deep and troubling problems will not go away. I believe it is a disservice not to address the problems and permit the legislature, if the Act is in fact determined to be unconstitutional, to take fresh legislative action.

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

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

UNDERWOOD, J., joins in this dissent.



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

CATERPILLAR TRACTOR
CO., Appellee,

v.

The INDUSTRIAL COMMISSION et al.

Appeal of Clara D. JOHNSON.

No. 53061.

Supreme Court of Illinois.

Dec. 19, 1980

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

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

[5] Finally, the claim that the due process rights of petitioners were violated because a reapportionment plan was developed without full public participation is without merit. The Municipal Home Rule Law (§ 10, subd. 1, par. a, subpar. [13]) authorizes a county to reapportion its legislative body through adoption of a local law enacting such a reapportionment plan following a public hearing. Petitioners, citizens and taxpayers, do not claim that the reapportionment plan violates substantive due process (see *McGill v. Board of Supervisors of Niagara County*, 28 A.D.2d 637, 280 N.Y.S.2d 448, app. dsmd. 19 N.Y.2d 860). Indeed, no such plan had been enacted when this lawsuit was commenced. Nor do

any respondents claim that the legislative action which they seek to annul is the resolution calling for a public hearing. A challenge to a reapportionment plan, when and if enacted, on due process grounds would, of course, be proper (see *Franklin v. Krause*, 32 N.Y.2d 234, 344 N.Y.S.2d 885, 298 N.E.2d 68, app. dsmd. 415 U.S. 904, 94 S.Ct. 1397, 39 L.Ed.2d 461; *Iannucci v. Board of Supervisors of County of Washington*, 20 N.Y.2d 214, 282 N.Y.S.2d 502, 229 N.E.2d 195).

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

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

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

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

HANCOCK, J., concurs in the following opinion.

HANCOCK, Justice (concurring):

I concur. I would, however, hold that the party caucuses of the Democratic members of the legislature on March 7, March 21 and April 20, 1981 were outside the purview of the Open Meetings Law not because there were no quorums of the legislature present at those meetings but because as partisan political caucuses there were exempt (Public Officers Law, § 97, subds. 1 & 2; Public Officers Law, § 103, subd. 2). A meeting of the legislators of one political party to discuss legislation is not a "meeting", i. e., "the official convening of a public body for the purpose of conducting public business." (Public Officers Law, § 97, subd. 1). Nor is a partisan caucus of legislators a "public body", i. e., "an entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or

subd. 2). A party caucus is not a committee or subcommittee or other similar body of the legislature—the official public body. It is an unofficial meeting of legislators who belong to the same party. No quorum is required and no official business may be conducted.

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



81 A.D.2d 475

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

v.

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

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

v.

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

Supreme Court, Appellate Division, Fourth Department.

June 29, 1981.

Article 78 proceeding was brought to determine whether closed session meetings

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

Affirmed.

1. Administrative Law and Procedure
⇨ 124

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

2. Municipal Corporations ⇨ 92

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

3. Municipal Corporations ⇨ 92

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

4. Municipal Corporations ⇌ 92

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

5. Administrative Law and Procedure ⇌ 124

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

6. Municipal Corporations ⇌ 92

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

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

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

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

MOULE, Justice.

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

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

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

On May 8, 1980 petitioner in the first proceeding, Anthony J. Sciolino, the Republican member of the Council, attempted to attend one of these closed sessions but was denied admission. On May 22, 1980 and

petitioner in the second proceeding, Gannett Co., Inc., also requested admission to these sessions but were denied. On these three occasions, petitioners observed at least six members of the Council's Democratic majority.

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

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

Respondents' first contention on appeal is that the political majority of a legislative body is not a quorum or a public body

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

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

[1-3] By enactment of the Open Meetings Law, the Legislature intended to affect the entire decision-making process, not just the formal act of voting or the formal execution of an official document (*Matter of Orange County Pubs., Div. of Ottaway Newspapers v. Council of City of Newburgh*, 60 A.D.2d 499, 401 N.Y.S.2d 84, aff'd. 45 N.Y.2d 947, 411 N.Y.S.2d 564, 383 N.E.2d 1157). The statute encompasses private meetings, attended by only a quorum of the members of a public entity, at which the matters for discussion and eventual decision are such as would otherwise arise at a public meeting (*Matter of Britt v. County of Niagara*, 82 A.D.2d 65, 440 N.Y.S.2d 790 [1981]; *Matter of Oneonta Star Div. of Ottaway Newspapers v. Board of Trustees of Oneonta School Dist.*, 66 A.D.2d 51, 412 N.Y.S.2d 927). It is not necessary that an entity have binding authority for it to be considered a public body; it is within the meaning of the Open Meetings Law if its determinations affect the public and eventually obtain substance in official form (*Matter of Syracuse United Neighbors v.*

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

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

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

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

Accordingly, the judgments appealed from should be affirmed.

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

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

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

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

Thus, the Statute basically provides that on April 1 and October 1 of each year, "all" employees (with specified exceptions), regardless of length of service and regardless of whether or not employed during the calculation period, shall be paid a salary supplement equal to the change in the Consumer Price Index for the Philadelphia region measured during the period from January 1 to June 30, or July 1 to December 31. The key dates under the plan are April 1 and October 1, the effective dates of the increase, for on those dates the right to the supplement vests in each State employee compensated at that time with a "regular state pay check." Compare *Kingston v. McLaughlin*, D.C.Mass., 359 F.Supp. 25 (1972), aff'd 411 U.S. 923, 92 S.Ct. 1900, 36 L.Ed.2d 388 (1973); *Bennett ex rel. Arizona State Pers. Comm'n v. Beard*, 27 Ariz.App. 534, 556 P.2d 1137 (1976); *Butterworth v. Boyd*, 12 Cal.2d 140, 82 P.2d 434 (1938); *Austin v. Benefield*, 149 Ga.App. 96, 230 S.E.2d 16 (1976); *Committee of Int. & Res. v. City of New York*, 87 Misc.2d 504, 386 N.Y.S.2d 177 (1976); *Personnel Division of Executive Dep't v. St. Clair*, 10 Or.App. 106, 498 P.2d 809 (1972); and *Yelle v. Kramer*, 83 Wash.2d 464, 520 P.2d 927 (1974).

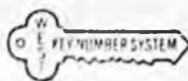
In this context, then, the salary supplement falls within the category of future benefits which may be lawfully adjusted or eliminated by the State prior to the vesting date. See 63 *Am.Jur.2d*, Public Officers and Employees § 368 (1972); 81 *C.J.S.* States § 92(2) (1953), 67 *C.J.S.* Officers § 94 (1950);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

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

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

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

Both certified questions are answered in the negative.



The NEWS-JOURNAL COMPANY and
Wendy Fox, Plaintiffs,

v.

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

Court of Chancery of Delaware,
New Castle.

Submitted June 27, 1977.

Decided July 7, 1977.

Publisher of daily and Sunday newspapers having statewide circulation, together

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

Ordered accordingly.

1. Municipal Corporations ⇌92

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

2. Municipal Corporations ⇌92

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

3. Municipal Corporations ⇌92

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

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

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

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

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

BROWN, Vice Chancellor.

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

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

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

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

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

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

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

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

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

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

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

No notice of this 6:30 p. m. meeting was given. Prior to its occurrence, however, the plaintiff Fox received word from an unidentified caller that there would be an unannounced special meeting of City Council at approximately 6:30 p. m. She immediately called the defendant City Clerk who confirmed that "they were getting together" to talk about the possible repeal of the wage tax. She asked if she could attend

upon arrival. Upon arrival, however, she was denied admission to the gathering and was told to wait in the office of the City Clerk. Various reasons were offered in support of her exclusion, including the representation that it was an emergency meeting,¹ that it was not a public meeting but rather one being held to discuss party strategy, and that she could not attend because the group could not afford to allow members of the General Assembly to learn in advance of what they might propose to do. Ms. Fox returned to her office, but thereafter attended the regularly scheduled meeting of City Council at 8:00 p. m.

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

Defendants point out that "public business" is defined as any matter over which the public body has (1) supervision, (2) control, (3) jurisdiction or (4) advisory power. They say that the matter on which the councilmen were to be briefed was the likelihood that the General Assembly would repeal the statutes which empowered the City to levy and collect its wage tax. They say that City Council has absolutely no su-

sembly or the existing statutes then under consideration by it. Likewise, the possible repeal of a State statute is something which does not fall within the jurisdiction of municipal government. Finally, while defendants concede that perhaps everyone has a right to offer advice and opinion to members of a legislative body, they point out that there is no statute or constitutional provision which would give the City Council "advisory power" as to actions taken by the General Assembly. Thus, their argument concludes, the subject matter which brought them together and on which information was provided was not one over which City Council had any supervision, control, jurisdiction or advisory power and, as a consequence, their meeting was not for the purpose of discussing or taking action on public business.

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

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

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

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

[2] Defendants also rely on the recent Pennsylvania decision of *Judge v. Pocius*, 28 Pa.Cmwlth. 139, 967 A.2d 788 (1977) which held that a meeting at which a superintendent of schools gave information to school board members was only a "work session" and not a meeting required to be open to the public under the Pennsylvania sunshine law. From the decision, however, it appears that the Pennsylvania law only applied to meetings where "formal action" was taken. Our law is not so limited. Rather it applies to meetings called to discuss public business as well as to meetings called to take action on public business. Thus the case is readily distinguishable.

[3,4] Defendants further argue, with unassailable accuracy, that the present record is devoid of any indication that the defendant councilmen either discussed anything themselves or decided upon any course of action at the 6:30 meeting. Of course, they are the only ones who would know since all other uninvited persons were

excluded. If the Delaware statute is to be liberally construed in favor of the citizens of the State as its policy declaration at 29 *Del.C.* § 10001 intends it to be, then the burden should not be cast upon one asserting a violation of it to establish what the public body actually did and said at a meeting from which he was excluded in order to obtain relief. The statutory definition of a "meeting" found at § 10002(e) seems satisfied when a quorum of a public body gathers "for the purpose" of discussing or taking action on public business regardless of what they might choose to do once convened. Proof of purpose seems sufficient to establish a violation of the statute; proof of that which took place would perhaps have a bearing on the extent of any relief to be granted. In the present case the purpose of the 6:30 meeting is factually conceded and, in my opinion, it dealt with public business within the meaning of the statute.

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

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

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

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

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

We answer the last portion of defendant's contention by quoting the words of *People v. Elliott*, 54 Cal.2d 498, 505, 6 Cal.Rptr. 753, 758, 354 P.2d 215, 230. "Obviously, if actual prejudice must be shown, the guarantee would become meaningless. (*People v. Byrnes*, 84 Cal.App.2d 72, 79, 190 P.2d 290.)"⁶

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

the defendant as it is for the citizenry generally.

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

The judgment is reversed.

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



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

v.

The SACRAMENTO COUNTY BOARD OF
SUPERVISORS, Eugene T. Gualeo, James
Phelan, Leslie E. Wood, Henry Klass, and
Frank O'Brien, Individually and as Mem-
bers of the Sacramento County Board of
Supervisors, Defendants and Appellants.

Civ. 11685.

Court of Appeal, Third District.

June 12, 1968.

As Modified June 20, 1968.

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

6. We recognize that the cases of *People v. Shroyer*, 203 Cal.App.2d 478, 483, 21 Cal.Rptr. 460; *People v. Marcus*, 153 Cal.App.2d 579, 583, 284 P.2d 848; and *People v. Mayfield*, 85 Cal.App. 77, 79, 259 P. 75 have been cited as authority for the contrary conclusion. All of these cases were decided before *Gideon v. Wainwright*, supra, (1963) 372 U.S. 335, 342, 83 S.Ct. 792 and *Miranda v. State of Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 604.

7. See 2 Atlay, *Victorian Chancellors* 400 (1908).

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

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

† Assigned by Chairman of Judicial Council.

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

Affirmed as modified

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

1. Counties ⇨52

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

2. Citizens ⇨10.1

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

3. Injunction ⇨114(2)

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

4. Counties ⇨47

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

5. Counties ⇨52

Municipal Corporations ⇨86

It is intent of public meeting law that deliberation as well as action of legislative

body of local agency occur openly and publicly. West's Ann.Gov.Code, §§ 54950-54960.

6. Counties ⇨52

Municipal Corporations ⇨86

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

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

7. Officers ⇨121

Not every violation of open meeting law is a violation of misdemeanor section of law. West's Ann.Gov.Code, §§ 54950-54960, § 4959.

8. Counties ⇨52

Municipal Corporations ⇨86

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

9. Counties ⇨52

Municipal Corporations ⇨91

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

10. Constitutional Law ⇨81

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

11. Counties ⇨52

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

12. Counties ⇨52

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

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

13. Witnesses ⇨205

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

14. Witnesses ⇨222

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

15. Counties ⇨52

Witnesses ⇨205

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

16. Witnesses ⇨217

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

17. Witnesses ⇨217

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

18. Counties ⇨63

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

19. Witnesses ⇨198(1)

Objective of lawyer-client privilege is to enhance value which society places upon

legal representation by assuring client full disclosure to attorney unfettered by fear that others will be informed. West's Ann.Evid.Code, §§ 917, 952.

20. Statutes ⇨161(1)

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

21. Statutes ⇨212.1

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

22. Statutes ⇨158

There is presumption against repeals of statutes by implication.

23. Statutes ⇨159

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

24. Statutes ⇨161(1)

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

25. Statutes ⇨223.2(1)

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

26. Witnesses ⇨185

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

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Cite as 69 Cal.Rptr. 480

27. Statutes ⇨217.4

Unadopted legislative proposals have little value in establishing legislative intent.

28. Statutes ⇨223.2(1)

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

29. Witnesses ⇨198(1)

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

30. Witnesses ⇨198(1)

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

31. Witnesses ⇨205

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

32. Witnesses ⇨205

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

33. Injunction ⇨157

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

William P. Smith, Jr., and Richard A. Case, Sacramento, for plaintiffs-respondents.

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

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

Harold W. Kennedy and John D. Maharg, Los Angeles County Counsel, Los Angeles, amicus curiae.

FRIEDMAN, Associate Justice.

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

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

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

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

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

[1] The Brown Act opens with section 54950, which states the law's intent that the "actions [of local legislative bodies] be taken openly and that their deliberations be conducted openly."² At its core is section 54953, which declares: "All meetings of the legislative body of a local agency shall be open and public * * *." Both these declarations were in the original version of the Brown Act adopted in 1953. As the legislative body of a local agency, a county board of supervisors is subject to the act. (Secs. 54951, 54952.) One feature of the act is section 54957, which permits executive sessions to consider (a) matters affecting the national security and (b) employment and dismissal of personnel. The 1961 legislature made several additions to the Brown Act (Stats.1961, ch. 1671), among them a definition of the phrase "action taken" in section 54952.6 and a new misdemeanor penalty provision in section 54959.³

[2.3] A provision of the Brown Act, section 54960, authorizes any "interested person" to seek legal restraint against violations or threatened violations. Defendants do not question the Newspaper Guild's

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

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

2. The full text of section 54950 declares:

"In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

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

3. Section 54952.6 states: "As used in this chapter, 'action taken' means a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance."

Section 54959 provides: "Each member of a legislative body who attends a meeting of such legislative body where action is taken in violation of any provision of this chapter, with knowledge of the fact that the meeting is in violation thereof, is guilty of a misdemeanor."

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

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

[4,5] There is nothing in the Brown Act to demarcate a narrower application than the range of governmental functions performed by the agency. Although the Brown Act artificially classifies it as a legislative body, a board of supervisors actually performs legislative, executive and even quasi-judicial functions. (*Chinn v. Superior Court* (1909) 156 Cal. 478, 481, 105 P. 580; *Fraser v. Alexander* (1888) 75 Cal. 147, 152, 16 P. 757.) Section 54950 is a deliberate and palpable expression of

the act's intended impact. It declares the law's intent that deliberation as well as action occur openly and publicly. Recognition of deliberation and action as dual components of the collective decision-making process brings awareness that the meeting concept cannot be split off and confined to one component only, but rather comprehends both and either. To "deliberate" is to examine, weigh and reflect upon the reasons for or against the choice. (See Webster's New International Dictionary, 3d ed.) Public choices are shaped by reasons of fact, reasons of policy or both. Any of the agency's functions may include or depend upon the ascertainment of facts. (*Walker v. County of Los Angeles* (1961) 55 Cal.2d 626, 635, 12 Cal.Rptr. 671, 361 P.2d 247.) Deliberation thus connotes not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision.

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

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

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

its general application to collective investigatory and consideration activity stopping short of official action.⁵

Extrinsic as well as intrinsic evidence of legislative intent impels rejection of a narrow interpretation. Tendencies toward secrecy in public affairs have been the subject of extensive criticism and comment. Such governmental phenomena as "managed" news, secret meetings and closed records are disparaged as inimical to the goals and needs of a self-governing nation.⁶ The suppression of public information at the local government level in California was the subject of investigation by an Assembly Interim Committee on Judiciary, which submitted its report at the 1953 legislative session. (Progress Report to the Legislature, Assembly Interim Comm. on Judiciary (1953 Reg.Sess.) pp. 13-62.) The committee's recommendations included the proposed measure which later became the Brown Act. The report noted widespread evasion of existing open meeting statutes⁷

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

5. In section 54955 the Brown Act provides for notice of adjourned or continued meetings. Section 54955.1, added in 1965, provides for the continuation of "hearings" in the same manner as continuation of "meetings." This segmented terminology supplies a foothold for the argu-

ment that a hearing is not a meeting, thus is unaffected by the public meeting demand of section 54953. Instead of signifying exclusion, section 54955.1 points to the inclusion of meetings and hearings within a single concept, since it assures public notice and awareness of both.

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

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

Sources

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

[10-12] In this area of regulation, as well as others, a statute may push beyond debatable limits in order to block evasive techniques. An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial

general law cities, and Education Code section 956, relating to school boards, all having statutory predecessors which antedated the Brown Act and all requiring meetings to be public.

8. Members of public boards bring to bear upon their ultimate decisions a range of impressions, experiences and beliefs, some gained individually, others collectively. The writer of the comment in 54 California Law Review 1650, 1651, observes: "There is a spectrum of gatherings of agency members that can be called a meeting, ranging from formal convocations to transact business to chance encounters where business is discussed. However, neither of these two extremes is an acceptable definition of the statutory word 'meeting.' Requiring all dis-

acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices.⁸ As operative criteria, formality and informality are alien to the law's design, exposing it to the very evasions it was designed to prevent. Construed in the light of the Brown Act's objectives, the term "meeting" extends to informal sessions or conferences of the board members designed for the discussion of public business. The Elks Club luncheon, attended by the Sacramento County board of supervisors, was such a meeting.

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

cussion between members to be open and public would preclude normal living and working by officials. On other hand, permitting secrecy unless there is formal convocation of a body invites evasion." Although one might hypothesize quasi-social occasions whose characterization as a meeting would be debatable, the difference between a social occasion and one arranged for pursuit of the public's business will usually be quite apparent.

9. The injunction suit is described in some detail in *In re Berry* (1968) 68 A.C. 135, 65 Cal.Rptr. 273, 430 P.2d 273.

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

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

[14,15] Where the privilege against disclosure is claimed, its opponent has the burden of proving nonconfidentiality. (Evid.Code, § 917.) Here, although a courtroom occasion occurred, the privilege against testifying was not claimed.¹¹ The assertion appears belatedly, in the form of

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

argument urging a legal characterization. There is no evidentiary basis at all for the characterization. The luncheon meeting of February 8, 1967, finds no shelter under the lawyer-client privilege. The trial court correctly concluded that it violated section 54953.

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

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

cludes advice given by the lawyer in the course of that relationship."

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

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

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

[19] Plaintiffs do not dispute the availability of the lawyer-client privilege to public officials and their attorneys. They view it as a barrier to testimonial compulsion, not a procedural rule for the conduct of public affairs. The view is too narrow. The privilege against disclosure is essentially a means for achieving a policy objective

of the law. The objective is to enhance the value which society places upon legal representation by assuring the client full disclosure to the attorney unfettered by fear that others will be informed. (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 396, 15 Cal.Rptr. 90, 364 P.2d 206; *Holm v. Superior Court*, supra, 42 Cal.2d at pp. 506-507, 267 P.2d 1025, 268 P.2d 722; 8 *Wigmore on Evidence* (McNaughton rev. 1961) § 2251; Comment, Attorney-Client Privilege in California, 10 *Stan.L.Rev.* 297-300 (1958); *Louisell, Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 *Tulane L.Rev.* 101 (1956).) The privilege serves a policy assuring private consultation. If client and counsel must confer in public view and hearing, both privilege and policy are stripped of value. Considered in isolation from the Brown Act, this assurance is available to governmental as well as private clients and their attorneys.

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

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

12. Evidence Code section 951: "As used in this article, 'client' means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent."

Evidence Code section 175: "'Person' includes a natural person, firm, associa-

tion, organization, partnership, business trust, corporation, or public entity."

Evidence Code section 200: "'Public entity' includes a nation, state, county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation, whether foreign or domestic."

See Law Revision Commission Comment following Evidence Code section 951; also, 6 *Calif.Law Rev.Comm., Reports, Recommendations and Studies*, p. 221.

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

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

The question, then, is whether the public meeting requirement of section 54953 abrogates by implication the statutory penalty assuring opportunity for private legal consultation by public agency clients; or, in equivalent terms, whether the Brown Act supplies unmistakable evidence of a legislative intent to abolish that statutory policy. That policy is just as meaningful, as financially important, to public as to private clients. Public agencies are constantly embroiled in contract and eminent domain litigation and, with the expansion of public tort liability, in personal injury and property damage suits. Large-scale public services and projects expose public entities to potential tort liabilities dwarfing those of most private clients. Money actions by and against the public are as contentious as those involving private litigants. The most casual and naive observer can sense the financial stakes wrapped up in the conventionalities of a condemnation trial. Government should have no advantage in legal strife; neither should it be a second-class citizen. We reiterate what we stated in the superseded aspect of this suit, *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, supra, 255 A.C.A. at page 74, 62 Cal.Rptr. at page 821: "Public agencies face the same hard realities as other civil litigants. An attorney who cannot confer with his client outside his opponent's presence may be under insurmountable handicaps. A panoply of constitutional, statutory, administrative and fiscal arrangements covering state and local government expresses a policy that litigating public agencies strive with their legal adversaries on fairly even terms. We need not parse for citations to demonstrate the obvious. There is a public entitlement to the effective aid of legal counsel in civil litigation. Effective aid is impossible if opportunity for confidential legal advice is banned."

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

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

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

competing public interests; that it adopted the Brown Act with unmistakable intent to abolish the values inherent in the lawyer-client privilege of local boards of government.

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

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

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

14. 8 Wigmore, op. cit., § 2291, p. 554; see *Jencks v. United States* (1950) 353 U.S. 657, 670-672, 77 S.Ct. 1007, 1 L.Ed.

2d 1103; Currow, Governmental Non-disclosure in Judicial Proceedings, 107 U. Pa.L.Rev. 100 (1958); Timbers and Cohen, Demands of Litigants for Government Information, 18 U.Pittsburgh L. Rev. 687 (1957).

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

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

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

[28-32] The two enactments are capable of concurrent operation if the lawyer-client privilege is not overblown beyond its true dimensions. As a barrier to testimonial disclosure, the privilege tends to suppress relevant facts, hence is strictly con-

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

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

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

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

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

NOTE REGARDING THE FOLLOWING FRAME(S) ON MICROFILM:
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OPINIONS IN THIS ISSUE

To Be Cited 9 Med.L.Rptr.

MONEY—GRAND JURY

Under the First Amendment nor the shield law protects a *Washington* reporter from testifying before a grand jury concerning her series of articles which depicted sexual assaults in a county jail which she identified the names of her sources. In *Washington v. Glendon*, the Maryland Court of Appeals rules, noting that the grand jury has not been shown to have acted in bad faith outside the legitimate scope of its authority. (*Tofani v. Maryland*, 9/16/83).

SCHOOL—MEETINGS

An arranged telephone conference call between members of a school board is not a "meeting" to which the Virginia Freedom of Information Act applies, according to the Supreme Court (*Roanoke School Board v. Times-World*, 9/9/83); a federal court in Rhode Island rules that the Open Meetings Law gives the press the right to tape record a school

committee's nonexecutive meetings (*Belcher v. Mansi*, 6/30/83).

ALSO IN THIS ISSUE—

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

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BOOK CONTRACT—PROMOTION

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

FCC—FAIRNESS DOCTRINE

The Federal Communications Commission did not err by denying the Democratic National Committee's Fairness Doctrine complaint alleging that NBC and CBS failed to afford a reasonable opportunity for the presentation of contrasting points of view regarding the Reagan Administra-

tion's economic policies, the U.S. Court of Appeals for the District of Columbia Circuit rules, although it emphasizes the "continuing vitality" of the Fairness Doctrine (*Democratic National Committee v. FCC*, 9/27/83).

ALSO IN THIS ISSUE—

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

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

v.

The ALASKA BAR ASSOCIATION,
Appellee/Cross-Appellant.

Nos. 4310, 4311.

Supreme Court of Alaska.

April 4, 1980.

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

Affirmed.

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

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

1. Statutes ⇨ 188

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

2. Attorney and Client ⇨ 31

Provision of open meeting statute that bylaws and regulations adopted by board or members of Alaska Bar are not subject to Administrative Procedure Act exempts

board bylaws and regulations themselves and not merely their method of adoption; hence, violation of open meeting requirements in connection with meeting of Board of Governors of Alaska Bar Association in connection with business meeting did not render the meeting void, as meeting was otherwise convened in accordance with ABA bylaws, AS 08.08.080(a)(3, 6), (b)(2), 08.08.100, 44.62.310.

3. Attorney and Client ⇨ 31

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

4. Constitutional Law ⇨ 255(1), 278(1)

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

5. Costs ⇨ 172

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

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

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

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

OPINION

CONNOR, Justice.

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

This is an appeal from an order of the Superior Court, Third Judicial District, Anchorage, Mark C. Rowland, J., granting the Alaska Bar Association's (hereinafter ABA) motion for judgment on the pleadings pursuant to Alaska Rule of Civil Procedure 12(c) but denying ABA's motion for attorney's fees. The suit was brought against the ABA by ten members and two non-members seeking a declaration that a business meeting of the ABA Board of Governors held in Kauai, Hawaii in February, 1978,¹ was void because it violated their

federal and state due process rights and Alaska's open meeting statute. Appellants challenge the Superior Court's rejection of their due process claims and the finding that the open meeting statute, as part of the Administrative Procedure Act, is not applicable to the ABA. The ABA has cross-appealed from the superior court's denial of its motion for an attorney's fee award. The superior court denied that award on the ground that the suit constituted public interest litigation.

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

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

2. AS 44.62.310 provides in full.

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

(b) If excepted subjects are to be discussed at a meeting, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss matters that come within the exceptions contained in (c) of this section shall be deter-

mined by a majority vote of the body. No subjects may be considered at the executive session except those mentioned in the motion calling for the executive session unless auxiliary to the main question. No action may be taken at the executive session.

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

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

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

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

(d) This section does not apply to

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

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff; or

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

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

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

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

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

Appellants assert that this language meant only to exempt the ABA from the procedures prescribed by the Administrative Procedure Act for the adoption of bylaws and regulations. If the meaning of a statute is plain it should be enforced as it reads without judicial modification or construction. *Poulin v. Zartman*, 542 P.2d 251, 270 (Alaska 1975), *reh.*, 548 P.2d 1299 (Alaska 1975); *Application of Babcock*, 387 P.2d 694, 696 n. 6 (Alaska 1963); *Sutherland, Statutes and Statutory Construction*, § 45-02 at 4-5 (4th ed. 1973).

AS 44.62.312 states:

State policy regarding meetings. (a) It is the policy of the state that

(1) the governmental units mentioned in § 310(a) of this chapter exist to aid in the conduct of the people's business;

(2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;

(3) the people of this state do not yield their sovereignty to the agencies which serve them;

(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

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

(b) Section 310(c)(1) of this chapter shall be construed narrowly in order to effectuate the policy stated in (a) of this section and avoid unnecessary executive sessions.

3. In answer to an interrogatory the ABA admitted that public notice was not given, although notice was given in the Alaska Bar

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

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

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

Brief and was sent to the officers of the ABA, the members of the Board of Governors, and to the presidents of local bar associations, as required by the ABA's bylaws. During the Hawaii meeting the Board of Governors held a number of executive sessions without following AS 44.62.310(b), and subjects were discussed which do not fall within AS 44.62.310(c) and (d).

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

"Section 8. MEETINGS.

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

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

Moreover, the interpretation contended for by appellants would mean that the legislature's action in 1966 amounted to an implied repeal of AS 08.08.100, a result which we should be reluctant to reach in the absence of an irreconcilable conflict between the two statutes. *Peters v. State*, 581 P.2d 1263, 1268 (Alaska 1975). Cutting against this argument is the legislature's action in 1976, ten years after the re-enactment of the open meeting statute, broadening the exemption of AS 08.08.100 from merely "rules" to "by-laws and regulations." Ch. 181, § 8, SLA 1976.⁷

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

[4] Appellants also claim that by reason of the meeting being held in Hawaii, they were denied due process of law. We will take cognizance of a due process claim only where there is an alleged deprivation of a sufficient liberty or property interest to

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

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

7. It is noteworthy that in 1978 the legislature in exempting the Alaska Housing Finance Corporation from the Administrative Procedure Act, expressly did not exempt it from the open meeting statute. AS 18.56.088, Ch. 167, § 5,

warrant constitutional protection. *Herscher v. State Dept. of Commerce*, 568 P.2d 996, 1002 (Alaska 1977); *Nichols v. Eckert*, 504 P.2d 1359, 1362 (Alaska 1963). On the record we do not think that a cognizable deprivation of property or liberty has been made out. We find no merit in this contention.

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

AFFIRMED.

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

AS 08.08.100 provides:

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

The effect of the majority opinion is to hold that this statute plainly¹ exempts from the Administrative Procedure Act not only the Alaska Bar Association's method of adopting bylaws and regulations, but also any act of the Alaska Bar which happens to be authorized by bylaw or regulation, including violation of the open meeting act, AS 44.62.310. With this, I disagree.

SLA 1978. Therefore, it is reasonable to conclude that when the legislature acted concerning the ABA in 1976, it consciously granted the ABA a broad exemption from AS 44.62.

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

The main impact² of the Act on state agency regulations is to provide a detailed and comprehensive procedure for their adoption, promulgation, amendment and repeal,³ and for judicial⁴ and legislative⁵ review. If the bylaws⁶ and regulations of the Alaska Bar were subject to the Act, they would be subject to the procedural requirements of the Act with respect to their adoption and other handling, because that is the principal relevance of the Act to such bylaws and regulations. The effect of AS 08.08.100 making these bylaws and regulations "not subject to the Administrative Procedure Act (AS 44.62)" (emphasis added), is that they are not subject to the procedural aspects of the Act, *i. e.*, their method of adoption is not governed by the Administrative Procedure Act, but rather by action of the Alaska Bar Association or its Board of Governors under the Alaska Integrated Bar Act.⁷

The majority errs, I believe, in concluding from the fact the Alaska Bar's bylaws and regulations are exempt from the Administrative Procedure Act that the Alaska Bar, as an agency, is exempt from the Administrative Procedure Act, including its open meeting requirements. AS 44.62.310--312, the open meeting statute, is a portion of the Administrative Procedure Act. It does not deal at all with the procedural aspects of the adoption of regulations, and purports by

its terms to encompass the activities of legislative-created agencies such as the Alaska Bar Association and its Board of Governors. It follows that the Association and Board are subject to the Administrative Procedure Act to this extent. Article 6 of Title 44, chapter 62 (AS 44.62.310--312), requires meetings of a broad range of governmental agencies of the state and its political subdivisions to be open to the public. AS 44.62.310 provides in part:

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

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

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

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

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

3. AS 44.62.040--290.

4. AS 44.62.300.

5. AS 44.62.320.

6. I would hold that "bylaws" fall generally in the category of regulations, since they are "[r]egulations . . . [or] rules . . .

adopted by an association . . . for its government." Black's Law Dictionary at 182 (5th ed. 1979).

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

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

8. AS 44.62.310(c) provides:

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

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

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

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

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

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

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

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

AS 44.62.310(d) provides:

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

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

RABINOWITZ, Chief Justice, dissenting in part.

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

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

This section does not apply to

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

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff; or

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

Cite as: Alaska, 609 P.2d 39

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

This same principle is subsumed within the broader constitutional guarantee of substantive due process of which appellants argue they have been deprived. Substantive due process is denied when the actions of a public agency are arbitrary and bear no reasonable relationship to a legitimate governmental purpose. *Concerned Citizens of Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447, 452 (Alaska 1974). While one challenging government action bears a heavy burden of proof under this

standard, I am persuaded it has been met here. The ABA has not offered any legitimate reasons for holding the meeting in Hawaii.

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



TOWN OF PALM BEACH v. GRADISON

Fla. 473

Cite as Fla., 200 So.2d 473

TOWN OF PALM BEACH et al.,
Petitioners,

v.

Jules T. GRADISON, Respondent.

TOWN OF PALM BEACH et al.,
Petitioners,

v.

Fred GLADSTONE, Respondent.

TOWN OF PALM BEACH et al.,
Petitioners,

v.

FAIRMONT CONVERTING CO., INC.,
Respondent.

TOWN OF PALM BEACH et al.,
Petitioners,

v.

Morris LANSBURGH, Respondent.

TOWN OF PALM BEACH et al.,
Petitioners,

v.

Perry KAYE, Respondent.

TOWN OF PALM BEACH et al.,
Petitioners,

v.

Ralph H. SHERE et al., Respondents.

TOWN OF PALM BEACH et al.,
Petitioners,

v.

Walter PORANSKI et ux., Respondents.

TOWN OF PALM BEACH et al.,
Petitioners,

v.

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

Nos. 44099 to 44106.

Supreme Court of Florida.

May 1, 1974.

Rehearing Denied July 10, 1974.

Action challenging town zoning ordinance. The Circuit Court, Palm Beach County, James C. Downey, J., upheld the

296 So.2d—3042

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

Certified question answered, and cause remanded.

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

1. Municipal Corporations ⇨92

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

2. Municipal Corporations ⇨92

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

3. Municipal Corporations ⇨92

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

4. Municipal Corporations ⇨92

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

5. Municipal Corporations ⇨92

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

6. Municipal Corporations \S 286.011(1)

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

7. Municipal Corporations \S 286.012

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

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

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

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

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

ADKINS, Chief Justice.

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

"Whether a zoning ordinance adopted by zoning authorities and the Town Council after public hearings is rendered invalid under the \S 286.011, F.S.1971, [F.S.A.], Government in the Sunshine

Law, because of the nonpublic activities of a citizen's planning committee which committee was established by the town council and acting on behalf of the council in an advisory capacity participated in the formulation of the zoning plan."

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

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

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

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

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

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

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

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

The government in the sunshine law contains the following:

"(1) All meetings of any board or commission of any state agency or au-

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

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

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

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

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

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

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

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

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

Cases from other jurisdictions dealing with the scope of similar statutes compel

the conclusion that bodies such as the Palm Beach Planning Committee selected by the Town Council are governed by Fla.Stat. § 286.011, F.S.A.

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

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

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

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

In *Beacon Journal Publishing Co. v. City of Akron*, 3 Ohio St.2d 191, 206 N.E. 399, 404 (1965), it was held that a city planning commission created by the city charter with "such other powers and duties as the council may confer upon the planning commission," was subject to the open meeting provision of the Akron City Code which applied to "any board or commission . . . created by the charter or by action of council."

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

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

"An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices. As operative criteria, formality and informality are alien to the law's design, exposing it to the very evasions it

was designed to prevent. Construed in the light of the Brown Act's objectives, the term 'meeting' extends to informal sessions or conferences of the board members designed for the discussion of public business." (p. 487)

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

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

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

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

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

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

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

ficiently impelling counter-interest may be argued to bespeak sustaining the action impugned. *It suffices here to say that mere absence of bad faith or other impropriety on the part of the public body should not ordinarily move the court to stay its hand in voiding official action taken contrary to the statute upon proper application therefor.*" (Emphasis supplied.) (pp. 308-309)

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

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

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

It is so ordered.

ERVIN, BOYD and McCAIN, JJ., concur.

DEKLE, J., dissents with opinion.

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

DEKLE, Justice (dissenting):

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"In construing or interpreting the words of a statute it should be born in mind that the courts have no function of legislation, and seek only to ascertain the will of the Legislature. The courts may not imagine an intent and bend the letter of

the act to that intent, much less, says the Maryland court, 'can we indulge in the license of striking out and inserting and remodeling with the view of making the letter express an intent which the statute in its native form does not evidence.'" *Fine v. Moran*, 74 Fla. 417, 77 So. 533, 536 (1917).

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

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

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

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

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

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

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

In my view, the language of the statute mandates that the fact that a purely advisory group of private citizens did not hold public meetings, is not a violation of Fla. Stat. § 286.011, F.S.A., such as to void official action later taken in the "Sunshine" by the Zoning Commission over a period

of five days of public hearings and debate and thereafter, by the City Council, after six days of public hearings at which the only decisions were made. The fact that a private advisory group provided a part of the input which resulted in the plan presented to the official bodies for consideration is at best a preliminary planning aid which is entirely subject to the will ("decisions") of the Commission and the Council (official body). It only provided a starting point from which the Commission could start to work and into which the public could inject its contentions and plans to be incorporated or substituted as the public body should decide. The "marketplace of ideas" occurs at that point and total input from the public is therefore not denied.

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

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