ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
6354 SENATE JUDICIARY

758

STATE OF ALASKA
1989 LEGISLATIVE SESSION

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

FISCAL NOTE

REQUEST:

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

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

Sponsor: Sturgulewski
Requestor: Sturgulewski

Components: 1 Elections

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

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

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

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

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

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SJR 1

2/13/89

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

Under these circumstances the fiscal note would be:

53.4

Senator Sturgulewski's Office

ALASKA SUNSHINE
SJR 1 Questions and Answers

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

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

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

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

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

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

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

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

at a later date.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator Sturgulewski's Office
February 1, 1989

Amending Alaska's Constitution - Step by Step

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

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

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

3) 1st Vote
If Ballot issue passes -

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

5) 2nd Vote
If advisory vote passes -

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

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

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

9) 3rd Vote
If voters approve -

10)
Alaska Constitution is amended.

A TEMPORARY LAW OF THE STATE OF ALASKA

(6)

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

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

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

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

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

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

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

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

December 18, 1986

MEMORANDUM

TO:

FROM: Ginny Fay
Legislative Analyst

RE: Alaska Open Meetings Law
Research Request 87.049

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

Applicability of the Alaska Open Meetings Law

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

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

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

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

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

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

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

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

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

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

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

Applicability to the Legislature

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

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

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

Spontaneaous Meetings

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

Model Laws

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

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

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

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

TABLE I
OPEN MEETING AND RECORDS STATUTES

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

TABLE 1
OPEN MEETING AND RECORDS STATUTES

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

a--occurring at this time.

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

Prepared by the House Research Agency, November 1986.

TABLE 2

Summary of Open-Meeting Laws—Part I This Study

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

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

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

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

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

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

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

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

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

GF

Attachments

ATTACHMENT A

Alaska Open Meetings Law

Article 5. Judicial Review.

Sec. 44.62.300. Court review.

NOTES TO DECISIONS

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

Article 6. Agency Meetings Public.

Section
310. Agency meetings public
312. State policy regarding meetings

Sec. 44.62.310. Agency meetings public. (a) All meetings of a legislative body, of a board of regents, or of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of its political subdivisions, including but not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations, advisory or otherwise, of the state or local government supported in whole or in part by public money or authorized to spend public money, are open to the public except as otherwise provided by this section. Except for meetings of a house of the legislature, attendance and participation at meetings by members of the public or by members of a body may be by teleconferencing. Agency materials that are to be considered at the meeting shall be made available at teleconference locations. Except when voice votes are authorized, the vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote. The vote at a meeting held by teleconference shall be taken by roll call. This section does not apply to any votes required to be taken to organize a public body described in this subsection.

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

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

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

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

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

(d) This section does not apply to

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

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff; or

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

(e) Reasonable public notice shall be given for all meetings required to be open under this section. The notice must include the date, time, and place of the meeting, and if the meeting is by teleconference the location of any teleconferencing facilities that will be used.

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

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

NOTES TO DECISIONS

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

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

Sec. 44.62.312. State policy regarding meetings. (a) It is the policy of the state that

(1) the governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the people's business;

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

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

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

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

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

(b) AS 44.62.310(c)(1) shall be construed narrowly in order to effectuate the policy stated in (a) of this section and avoid unnecessary executive sessions. (§ 3 ch 98 SLA 1972; am § 4 ch 54 SLA 1985)

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

NOTES TO DECISIONS

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

Article 7. Legislative Review of Rules.

Sec. 44.62.320. Legislative annulment of regulations and review.

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

Article 8. Administrative Adjudication.

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

ATTACHMENT B

Hawaii, Conneticut and Nevada

Open Meetings Law Language

Hawaii REV. STAT. Section 92-1

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

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

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

Nevada REV. STAT. Section 241.015 (i)

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

ATTACHMENT C

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

OPEN MEETINGS ACT

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

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

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

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

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

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

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

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

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

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

expenses for meeting improperly held in executive session)

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

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

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

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

see geldoff Summary 5/19/83

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

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

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

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

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

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

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

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

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

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

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

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

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

MEMORANDUM State of Alaska

TO: Honorable Bill Ross
Commissioner
Department of Environmental Conservation

THRU:

DATE: July 24, 1986

FILE NO.: 663-86-0565

TELEPHONE NO.: 465-3600

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

FROM: Harold M. Brown
Attorney General

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

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

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

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

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

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

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

DKM:md

MEMORANDUM State of Alaska

TO: Honorable Don Collinsworth
Commissioner
Department of Fish and Game

DATE: July 17, 1986

FILE NO.: 663-86-0567

THRU:

TELEPHONE NO.: 465-3600

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

FROM: Harold M. Brown
Attorney General

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

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

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

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

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

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

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

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

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

HMB:LIS:cck

cc: see attached

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

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

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

Liza McCracken
Department of Law Anchorage

MEMORANDUM State of Alaska

TO Marvin R. Weatherly, Chairman
Alaska Public Utilities Commission

DATE March 27, 1986

FILE NO 661-86-0494

TELEPHONE NO 276-3550

FROM Harold M. Brown
Attorney General

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

SUBJECT Adjudicative proceedings of the Alaska Public Utilities Commission

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

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

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

Relevant Authorities

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

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

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

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

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

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

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

Certification and Ratemaking

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

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

What Adjudication Is Not

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

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

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

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

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

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

Formal and Informal Adjudication

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

Conclusion

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

MLF:and

MEMORANDUM State of Alaska

TO: David Rose, Executive Director
Alaska Permanent Fund Corporation

DATE: February 21, 1985

FILE NO: 366-364-85

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: Application of open meetings Act

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JBR/pjg

MEMORANDUM State of Alaska

TO: Anselm Staack, Deputy Commissioner
Department of Administration

DATE: January 30, 1985

FILE NO: 366-330-85

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General

SUBJECT: Evaluation of Anchorage Office Complex proposals

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

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

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

I.

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

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

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

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

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

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

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

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

II.

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

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

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

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

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

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

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

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

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

Application of the Act entails three principal features:

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

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

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

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

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

3/ AS 44.62.310(c) provides:

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

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

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

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

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

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

JBR/pjg

cc: William King & Associates

MEMORANDUM State of Alaska

TO:
James Hagowan
Executive Director
Alaska Real Estate Commission

DATE
October 9, 1984

FILE NO
166-154-85

TELEPHONE NO
276-3550

FROM:
Norman C. Gorsuch
Attorney General

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

SUBJECT
Confidentiality

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

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

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

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

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

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

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

AS 09.25.125 provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

642 P.2d 1323-24.

DTL:ihr

Enclosure

BILL SHEFFIELD, GOVERNOR

REPLY TO:

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STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

October 3, 1984

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

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

Dear Mr. Bremson:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

state law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

until this authority is specifically granted it does not exist.

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

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

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

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

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

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

Id. at 848.

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

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

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

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

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

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

Sincerely,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: Jeffrey W. Bush
Assistant Attorney General

NCG:JWB:cct:

MEMORANDUM State of Alaska

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

DATE: February 9, 1984

FILE NO: 366-417-84

TELEPHONE NO: 465-3600

FROM: Norman C. Gorsuch
Attorney General

By: Martha A. Fox
Assistant Attorney General

SUBJECT: November 3, 1983
Board meeting

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

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

FACTS

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

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

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

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

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

DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

MAF/mg

MEMORANDUM State of Alaska

TO Norman C. Gorsuch
Attorney General

DATE May 19, 1983

FILE NO 366-664-83

TELEPHONE NO 465-3600

FROM Joe Geldhof
Assistant Attorney General

SUBJECT Various "open meeting" opinions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JWG:ml

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

The judgment below is AFFIRMED.

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

v.

MUNICIPALITY OF ANCHORAGE, Appellee,

and

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

Nos. S–573, S–629.

Supreme Court of Alaska.

July 19, 1985.

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

Reversed and remanded.

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

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

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

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

3. **Zoning and Planning ⇐194**

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

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

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

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

5. Zoning and Planning ⇐194

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

6. Municipal Corporations ⇐92

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

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

7. Zoning and Planning ⇐194

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

8. Zoning and Planning ⇐194

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

9. Administrative Law and Procedure ⇐124

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

10. Administrative Law and Procedure ⇐124

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

11. Administrative Law and Procedure ⇐124

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

12. Administrative Law and Procedure ⇐124

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

13. Administrative Law and Procedure ⇐124

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

14. Zoning and Planning ⇐194

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

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

15. Zoning and Planning ⇐191

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

16. Zoning and Planning ⇐194

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

17. Zoning and Planning ⇐729

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

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

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

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

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

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

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

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

OPINION

MOORE, Justice.

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

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

ATTACHMENT D

Alaska Uniform Rules - Rule 22 and 23

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

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

OPEN AND EXECUTIVE SESSIONS

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

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

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

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

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

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

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

COMMITTEE MEETINGS

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

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

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

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

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

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

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

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

(f) Each standing, special, and joint committee

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

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

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

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

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

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

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

standing, special, or chief clerk or secre- in the time, place or the next daily legis- edule change shall be ecretary and published house.

a standing, special, led at any time. If ion shall be given in otice of change in (b)

d (b) of this rule do , or joint committee conference committee dments to or differ- general appropriation a standing, special, ritten notice of the a meeting at least 24

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name and affiliation fore the committee;

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formally considered f the member moving action taken on the nays if a committee all vote on adoption

hronological file of made available upon

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

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

COMMITTEE REFERRAL AND ACTION

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

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

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

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

COMMITTEE OF THE WHOLE

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

ATTACHMENT E

Alaska Open Meetings Law Legislative History

LAWS OF ALASKA

1972

Source

SB 253

Chapter No.

28

AN ACT

Relating to public agency meetings.

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

* Section 1. AS 44.62.310(a) is amended to read:

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

* Sec. 2. AS 44.62.310(c)(1) is amended to read:

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

* Sec. 3. AS 44.62 is amended by adding a new section in Article 6 to read:

Sec. 44.62.312. STATE POLICY REGARDING MEETINGS. (a) It is the policy of the state that

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

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

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

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

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

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

Approved by governor: June 2, 1972
Actual effective date: August 31, 1972

MESSAGES FROM THE SENATE

SB 206 am H — A message from the Senate dated February 1, 1972 was read, stating the Senate has concurred in the House amendment to SENATE BILL 206 and the enrolled copy of SENATE BILL 206 amended by the House (relating to fees for duplicate sport fishing and hunting licenses; and providing for an effective date) is transmitted herewith for the signatures of the Speaker and Chief Clerk. It was signed by the Speaker and the Chief Clerk and returned to the Senate.

REPORTS OF STANDING COMMITTEES

HB 555 — The Labor and Management Committee has had HOUSE BILL NO. 555 (establishing the official state plumbing code) under consideration and a majority of the Committee members recommends it do pass with the following amendment:

amendment No. 1 by the Labor and Management Committee:

Page 1, line 14: Delete "15" and insert "13"

The report was signed by Mr. Orbeck, Chairman, and concurred in by Orbeck, McOill, Banfield and Ferguson.

HOUSE BILL NO. 555 was referred to the Finance Committee.

SB 253 — The Judiciary Committee has had SENATE BILL NO. 253 (relating to public agency meeting) under consideration and a majority of the Committee members recommends it do pass. The report was signed by Mr. Moran, Chairman, and concurred in by Moran, Hillstrand, Randolph, Flynn, Rose, Barber and Banfield.

SENATE BILL NO. 253 was referred to the Rules Committee for placement on the calendar.

The Speaker stated that without objection, the reading of the Judiciary Committee Chairman's report on SB 253 would be waived and it would be printed in the journal. There being no objection, the report appears as follows:

"Judiciary Committee Report

on

SENATE BILL NO. 253

This bill makes clear that state law requiring that meetings of public agencies be open to the public applies to the legislature and its subordinate units. The bill also reemphasizes state policy against closed meetings of public bodies. In sec. 3, AS 44.62.312(a) is based on California Government Code Annotated, sec. 54950.

William J. Moran, Chairman"

LAWS OF ALASKA

1972

Source

CSHB 605 am

Chapter No.

100

AN ACT

Relating to the meetings of the Board of Regents of the University of Alaska; and providing for an effective date.

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

* Section 1. AS 14.40.160 is repealed and re-enacted to read:

Sec. 14.40.160. BOARD MEETINGS PUBLIC, MEETING NOTICE, PUBLIC FACILITIES. (a) The provisions of AS 44.62.310 apply to meetings of the Board of Regents. All meetings of the board, its committees or subcommittees, are open to the public and press except as otherwise provided in AS 44.62.310(c). The findings of an executive session shall be made a part of the record of the proceedings of the Board of Regents. All records of the meetings and proceedings shall be open to inspection by the public and the press at reasonable times.

(b) The board may determine the time and place of its meetings. However, 30 days notice is required for all regular meetings and 10 days notice is required for special meetings of the board, its committees or subcommittees called under the bylaws or rules of procedure of the board. Emergency meetings may be called without notice.

(c) The Board of Regents shall provide adequate facilities for members of the public to attend the meetings of the board, its committees or subcommittees.

* Sec. 2. AS 44.62.310(a) is amended to read:

(a) All meetings of a board of regents or of an administrative body, board, commission, committee, subcommittee, authority, council, agency, or other organization, including subordinate units of the above groups, of the state or any of its political subdivisions, including but

not limited to municipalities, boroughs, school boards, and all other boards, agencies, assemblies, councils, departments, divisions, bureaus, commissions or organizations, advisory or otherwise, of the state or local government supported in whole or in part by public money or authorized to spend public money, are open to the public except as otherwise provided by this section.

* Sec. 3. This Act takes effect on the day after its passage and approval or on the day it becomes law without approval.

Approved by governor: June 2, 1972
Actual effective date: June 3, 1972

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

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

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

COMMUNICATIONS

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

REPORTS OF STANDING COMMITTEES

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

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

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

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

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

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

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

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

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

Genie Chance
Genie Chance, Chairman"

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

amendment No. 1 by the Local Government Committee:

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

LAWS OF ALASKA

1976

Source: HB 831 am S

Chapter No.: 189

AN ACT

Relating to public meetings.

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

* Section 1. AS 44.62.310(a) is amended to read:

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

Approved by governor: June 18, 1976
Actual effective date: September 16, 1976

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

AMENDED TITLE: CS *

PRIME SPONSORS: PARKER

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

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

[redacted] AN ACT RELATING TO PUBLIC MEETINGS

AMENDED TITLE: * AM S

PRIME SPONSORS: PARKER

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

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

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

PRIME SPONSORS: PARKER

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

DATE	SEQ. NO.	JOURNAL PAGE	SENATE ACTION

ATTACHMENT F

Open Meetings Laws of Tennessee and Washington

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

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

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

CHAPTER 44

PUBLIC MEETINGS

SECTION.

PART 1—GENERAL PROVISIONS

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

SECTION.

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

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

PART 1—GENERAL PROVISIONS

8-44-101. Policy — Construction.

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

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

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

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

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

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

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

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

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

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

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

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

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

NOTES TO DECISIONS

ANALYSIS

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

1. Constitutionality.

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

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

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

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

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

)VISIONS

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cability to utility district commission gs, OAG 85-161 (5/16/85).
l: Board of Educ. v. Memphis Publish- , 585 S.W.2d 629 (Tenn. Ct. App. 1979); ad v. Community Action Services of County, Inc., 494 F. Supp. 699 (E.D. 1980).

ONS

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

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

3. Coverage.

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

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

4. Construction with Other Acts.

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

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

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

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

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

5. Jury Trial.

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

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

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

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