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ATTORNEY GENERAL OPINION NO. 85-9

TO: Mr. A. I. Murphy  
Director  
Idaho State Board of Corrections

STATEHOUSE MAIL

Per Request for Attorney General Opinion

QUESTIONS PRESENTED

1. Are the meetings of the Commission of Pardons and Parole subject to the Open Meeting Law, Idaho Code § 67-2341, et seq. ?
2. What records are exempt by law from public inspection and may be considered in executive session pursuant to Idaho Code § 67-2345(d)?
3. May a vote of the Commission of Pardons and Parole be taken in private?

CONCLUSION:

1. As a statutory entity with authority to make decisions concerning paroles, pardons and commutations, the Commission of Pardons and Parole is subject to the Open Meeting Law and is required to open all meetings to the public except those conducted in executive session.

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2. Only documents which are excluded from public inspection by statute are to be considered in executive session. Idaho Code §§ 67-2342(1) and 67-2345(3).

3. The Commission of Pardons and Parole may not vote in private.

#### ANALYSIS

##### Question No. 1

The Idaho Commission of Pardons and Parole is appointed by the Board of Corrections under authority of Idaho Code § 20-210. The Commission has the power to establish rules, regulations, policies and procedures under which parole may be granted. Idaho Code § 20-233. A quorum of three commissioners holds regular parole hearings. Idaho Code § 20-210.

The Commission also has the authority to grant commutations and pardons. Idaho Code § 20-210, Idaho Const., art. 4, § 7. The Commission meets at least four times a year to consider applications for pardon and commutation of sentence. Idaho Code § 20-213.

Under the Idaho Open Meeting Law, governing bodies of public agencies created by statute, as well as those created by the Idaho Constitution, are required to open their meetings to the public. Idaho Code § 67-2341(3)(a); Idaho Att'y Gen. Op. No. 77-30 (1977). "Governing body" is defined as "the members of any public agency which consists of two or more members with the authority to make decisions for or recommendations to a public agency regarding any matter." Idaho Code § 67-2341(4). "Public agency" includes any state board or commission. Idaho Code § 67-2341(3)(a). Thus, the Commission of Pardons and Parole, a statutorily created public agency, having both statutory and constitutional powers to make decisions concerning paroles, pardons and commutations, is subject to the provisions of the Open Meeting Law. All of the Commission's meetings, except those conducted in an executive session, must be open to the public. Similar conclusions have been reached in other states. See, Missouri Att'y Gen. Op. No. 32-83 (1983) (Board of Pardons and Parole subject to Missouri's Open Meeting Law); and Sanders v. Benton, 579 P.2d 815 (Okla. 1978) (Board of

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Corrections, by reason of its statutory origin, comes within the purview of the Oklahoma Open Meeting Law).

Furthermore, "meeting" is defined in Idaho Code § 67-2341(5) as "the convening of a governing body of a public agency to make a decision or to deliberate towards a decision on any matter" (emphasis added). Therefore, deliberations by the Commission must be conducted publicly. See, Idaho Att'y Gen. Op. No. 77-13 (1977).

It could be argued that as to the deliberative processes by which the Commission arrives at its decisions, its function is judicial or quasi-judicial, and as to that phase of its activities, the Open Meeting Law should not apply under Idaho Code § 67-2341(1)(a) which excludes "court and their agencies and divisions, and the judicial council, and the district magistrates commission." Such an argument fails, for the reasons that follow.

In Idaho, quasi-judicial functions have been defined as those acts which entail the application of "general rules or policies to specific individuals, interests, or situations," Cooper v. Board of County Commissioners of Ada Co., 101 Idaho 407, 410, 614 P.2d 947, 950 (1980), and those acts involving "investigation, judgment and discretion," Raaf v. State Board of Medical Examiners, 11 Idaho 707, 717 (1906), (quoting, People v. Dental Examiners, 110 Ill. 180). When these definitions are applied to the Commission of Pardons and Parole, many of the Commission's functions are quasi-judicial: The Commission conducts hearings, considers evidence, makes a determination affecting only a specific individual, and comes to a decision in much the same manner as a court of law. (See, Missouri Att'y Gen. Op. No. 32-83 (1983), which states that the Missouri Board of Probation and Parole has rulemaking and quasi-judicial powers.)

Unlike Idaho, the statutes of several states address the issue of whether their Open Meeting Laws apply to quasi-judicial functions, and/or boards of pardons and paroles. Such statutes may be grouped into the following three categories:

(1) By specifically excluding quasi-judicial bodies from the scope of the Open Meeting Law. (See, Ky.Rev.Stat.Ann. §§ 61.805(2) (Supp. 1984); Wash.Rev.C.Ann. § 42.30.140(2) (Supp.

1986); N.Y.Pub.Off.L. § 108 (Supp. 1985), or by permitting such bodies to deliberate in private, (See, Alaska St. § 44.62.310(d)(1) (Supp. 1984); Wis.Stat. Ann. § 19.85(1)(a) (Supp. 1985); Kans.Stat. Ann. § 75-4318(a) (1985);

(2) By specifically including quasi-judicial bodies within the scope of the Open Meeting Law, (See, Tex.Rev.Civ.Stat. Ann., art. 6252-17(c) (Supp. 1985); Ariz.Rev.Stat. Ann. § 38-431(6) (1985); Mo. Ann. Sta. § 610.010(2) (Supp. 1984); or

(3) By specifically excluding parole and/or pardon boards from the scope of the Open Meeting Law, (See, N.J.Stat. Ann. § 10:4-8(a) (Supp. 1985); Ohio Rev.C. Ann. § 121.22(D) (1984); Alaska Stat. § 44.62.310(d)(3) (Supp. 1984).

However, Idaho's Open Meeting Law, like the open meeting laws of many other states, does not specifically address quasi-judicial functions or quasi-judicial bodies. In a few of these states like Idaho, courts have been asked to determine whether quasi-judicial functions come within the Open Meeting Law.

The leading case on this issue is Canney v. Board of Public Instruction of Alachua Co., 278 So.2d 260 (Fla. 1973). In Canney, the Florida Supreme Court held that the quasi-judicial proceedings of a school board were not excluded from Florida's open meeting law:

Once the legislature transforms a portion of a board's responsibilities and duties into that of a judicial character so that the board may exercise quasi-judicial functions, the prerogatives of the legislature in the matter do not cease. ... If the legislature may delegate these quasi-judicial powers to the School Board and regulate the procedure to be followed in hearings before the board, it follows as a matter of common logic that the legislature may further require all meetings of the board at which official acts are to be taken to be public meetings open to the public. Id. at 263.

The reasoning of Canney v. Board of Public Instruction has been followed in court opinions from other states (See, City of

Harrisburg v. Pickles, 492 A.2d 90, 96 (Pa. 1985); Citizen Action Coalition of Indiana, Inc., v. Public Service Commission of Indiana, 425 N.E.2d 178 (Ind. 1981); Ill.Att'y Gen.Op. 83-004 (1983), and is harmonious with the statutory and constitutional provisions of Idaho. Of special significance is Idaho's constitutional provision that, "the legislature shall by law prescribe the sessions of said board [i. e., Board of Pardons] and the manner in which application shall be made, and regulate proceedings thereon." Article 4, § 7, Idaho Constitution. Until the Idaho legislature provides to the contrary, this public agency is bound by the Open Meeting Law like all other public agencies. To hold otherwise would be to ignore the express words of the statute, "[a]ll meetings of a governing body of a public agency shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act." Idaho Code § 67-2342(1). Where a statute is neither ambiguous nor uncertain, the clearly expressed intent of the legislature must be given effect and there is no occasion for interpretive construction. Swensen v. Buildings, Inc., 93 Idaho 466, 468, 463 P.2d 932, 934 (1970).

Furthermore, failure to conduct its business pursuant to the Open Meeting Law may be a source of great and untoward mischief: "Any action taken at any meeting which fails to comply with the provisions of [this law] shall be null and void." Idaho Code § 67-2347.

Therefore, it is our opinion that, except for those meetings properly conducted in executive session, Idaho's statutes require that the Commission of Pardons and Parole deliberate in public.

#### Question No. 2

Idaho Code § 67-2345(1)(d) of the Open Meeting Act states that executive sessions may be held for the purpose of considering records that are exempt by law from public inspection. This section must be read in conjunction with Idaho Code § 9-301, which states that "[e]very citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statutes." The wording of these two statutory provisions clearly indicates that only certain documents which have been excluded from public inspection by clear statutory provision may be considered in

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executive session. Furthermore, the Idaho Supreme Court has stated that it would not create an exception to the rule of disclosure where exception has not been explicitly provided by statute: "[s]uch language clearly evidences an intent by the legislature to create a very broad scope of government records and information accessible to the public." Dalton v. Idaho Dairy Products Commission, 107 Idaho 6, 11, 684 P.2d 983 (1984).

Records that are exempt by law from public inspection and would, therefore, be appropriately considered in executive session include: Criminal preliminary hearing transcripts, Idaho Code § 19-813; records of grand jury proceedings, Idaho Code § 19-1112; special inquiry judge proceedings, Idaho Code § 19-1123; and presentence investigations, Idaho Code § 19-2515(d), Idaho Criminal Rules 32(g).

#### Question No. 3

The Open Meeting Law requires that all voting on a public agency's decisions must be conducted in public. "No decision at a meeting of a governing body of a public agency shall be made by secret ballot." Idaho Code § 67-2342(1). "Decision" is defined as "any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting at which a quorum is present." Idaho Code § 67-2341(1).

The requirement that voting must be conducted in public cannot be circumvented by retiring into executive sessions. "[N]o executive session may be held for the purpose of taking any final action or making any final decision." Idaho Code § 67-2345(3). See, Atty.Gen.Op. 77-13. Thus, matters discussed in executive session must still be voted upon in public.

#### AUTHORITIES CONSIDERED:

Idaho Constitution art. 4, § 7

Idaho Code § 9-301

Idaho Code § 19-813

Idaho Code § 20-210

Idaho Code § 20-213

Idaho Code § 20-233

Idaho Code § 67-2341(1), (1)(a), (3)(a), (4), (5)

Idaho Code § 67-2342(1)

Idaho Code § 67-2345(3)(d)

Idaho Criminal Rules 6(c)

Idaho Criminal Rules 32(g)(h)

Canney v. Board of Public Instruction of Alachua County,  
278 So.2d 260 (Fla. 1973)

Citizen Action Coalition of Indiana, Inc. v. Public Service  
Commission of Indiana, 425 N.W.2d 178 (Ind. 1981)

City of Harrisburg v. Pickles, 492 A.2d 90 (Pa. 1985)

Common Cause v. Utah Public Service Commission, 598 P.2d  
1312 (Utah 1979)

Cocper v. Board of County Commissioners of Ada County, 101  
Idaho 407, 614 P.2d 947

Dalton v. Idaho Dairy Products Commission, 107 Idaho 6, 684  
P.2d 983 (1984)

Della Serra v. Borough of Mountainside, 481 A.2d 547 (N.J.  
1984)

Jordan v. District of Columbia, 362 A.2d 114 (D.C. 1976)

Orr v. State Board of Equalization, 3 Idaho 190, 28 P. 416  
(1891)

Raaf v. State Board of Medical Examiners, 11 Idaho 707, 717  
(1906)

Swensen v. Buildings, Inc., 93 Idaho 466, 463 P.2d 932  
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Sanders v. Benton, 579 P.2d 815 (Okla. 1978)

Washington Water Power Co. v. Kootenai Environmental Alliance, 99 Idaho 875, 591 P.2d 122 (1979)

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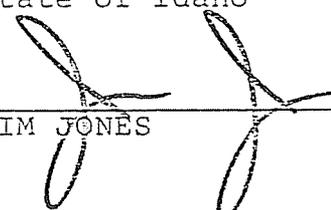
Idaho Att'y Gen.Op. 77-30 (1977)

Ill. Att'y Gen.Op. 83-004 (1983)

Mo. Att'y Gen.Op. 32-83 (1983)

DATED this 31<sup>st</sup> day of December, 1985.

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ANALYSIS BY:

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