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The Honorable Marti Calabretta  
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THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Political Caucuses in the State Legislature

Dear Senator Calabretta:

For ease of analysis, your questions have been restructured to address two major issues:

1. Does the Idaho Open Meeting Law apply to the state legislature, legislative committees, and legislative caucuses, and if so, what are its requirements?

2. Does the Idaho Constitution's prohibition against secret sessions of the legislature apply to legislative caucuses?

CONCLUSIONS:

1. The Open Meeting Law does not require legislative sessions or political caucuses to be open to the public. However, the Open Meeting Law does require open meetings of all standing, select or special committees of the legislature.

2. The Idaho Supreme Court is not likely to extend the Idaho Constitution's requirement that the "business" of each house be conducted openly to include meetings of political caucuses. Courts from other states have generally held that secret caucuses must be limited to the discussion of the private matters of the political party. However, the Idaho Supreme Court's traditional deference to the legislature in the running of its internal affairs, the court's narrow interpretation of Idaho's open meeting statutes, and the difficulty of enforcing any prohibition on discussion of public business in closed caucus, lead us to conclude that the Idaho Supreme Court is unlikely to prohibit closed caucuses or to prescribe what may be

discussed in caucus. Any such limitations should be implemented by the legislators themselves.

#### ANALYSIS

##### Question 1:

The Idaho Open Meeting Law is codified in Idaho Code §§ 67-2340 through 67-2347. As originally enacted in 1974, § 67-2346 read:

The provisions of this act shall apply to each house of the legislature of the state of Idaho. All meetings of any standing, special or select committee of either house of the legislature shall be open to the public at all times, and any person may attend any meeting of a standing, special, or select committee, but may participate in the committee only with the approval of the committee itself.

1974 Idaho Sess. Laws, ch. 187, § 7.

In 1977, the legislature amended Idaho Code § 67-2346 to delete the sentence reading: "The provisions of this act shall apply to each house of the legislature of the state of Idaho." 1977 Sess. Laws, ch. 173, § 4. The statutory heading of that amendment stated that the legislative purpose was "TO DELETE APPLICATION OF THE [Open Meeting] ACT TO THE STATE LEGISLATURE." 1977 Idaho Sess. Laws, ch. 173. Thus, it is clear that the Open Meeting Law no longer applies to the legislature as a whole. Because the Open Meeting Law does not apply to the legislature as a whole, it also does not apply when the legislature arguably meets in a de facto manner, such as when a quorum of its members attend a political caucus.

In sum, the Open Meeting Law would apply to all standing, special and select committees of the legislature, but not political caucuses or the legislature as a whole. See Idaho Code § 67-2346 which requires such committee meetings to be "open to the public at all times." (Emphasis added.) One caveat should be noted, however. Certain committees enjoy a limited statutory exemption from the Open Meeting Law. See Idaho Code § 67-455 (Special Committee on Personnel Matters) and Idaho Code § 67-438 (JFAC).

Question 2:

Background

As stated above, the Open Meeting Law does not apply to the legislature as a whole or to political caucuses. However, the Idaho Constitution itself contains an open meeting requirement:

The business of each house, and of the committee of the whole shall be transacted openly and not in secret session.

Idaho Const. art. 3, § 12. The section requires all legislative sessions to be open to the public. By extension, a political caucus could arguably violate this section if it was de facto transacting the "business" of either house. Thus, we must initially define the word "business." Idaho Const. art. 3, § 10, provides a starting point:

A majority of each house shall constitute a quorum to do business . . . .

Idaho Code § 67-2340, the preamble to the Open Meeting Law, sheds further light on the meaning of the word "business":

[T]he legislature finds and declares that it is the policy of this state that the formation of public policy is public business and shall not be conducted in secret. (Emphasis added.)

As a preliminary rule, therefore, we can say that when a majority of either house meets and formulates public policy, it is conducting the "business" of the legislature. However, it is necessary to further define exactly what is meant by "public business," and to decide whether the legislature only conducts public business when it meets formally, or whether an informal meeting such as a political caucus can also conduct public business.

Before coming to our conclusion, it is useful to compare the Idaho Constitution's "open sessions" requirement to those in other state constitutions. Fourteen state constitutions contain no provision at all regarding open sessions. Most state constitutions require open sessions, but make exceptions for executive sessions, for closed sessions when "secrecy" so requires, or when provided for by statute, resolution or rule. Only four states besides Idaho have a constitutional provision requiring all legislative sessions to be held openly, with no exceptions. Of these four states, our informal survey discloses that three (Montana, Oregon, and New Mexico) have long-standing traditions allowing closed legislative caucuses. In North

Dakota, the legislature's political caucuses are open to the public.

This survey of other states is inconclusive and cuts both ways. On the one hand, Idaho is among the small group of states whose constitutional requirement of open sessions is the strongest in the land. On the other hand, most states having this requirement have not historically interpreted it to require open sessions when political caucuses discuss public business.

A look at early Idaho history also yields ambiguous results. Newspaper articles from the 1890's reveal that the early legislatures, some of whose members helped frame the Idaho Constitution, did meet in secret caucus. While it is hard to ascertain what was discussed at such caucuses, they appear to have been limited to party organization and nomination of legislative officers. In 1895, for example, Republicans met in closed caucus to nominate a candidate for U. S. Senator. As Republicans were the majority party, their candidate was sure to win confirmation. This action was highly controversial. Many people, both inside and outside the legislature, thought it improper to decide the senatorial race in secret caucus. In a letter printed in the January 10, 1895, issue of The Statesman, Representative Gamble stated:

I did not wish to be entangled in anything that might be regarded as of a doubtful character, and that said caucus was not only opposed to my conscientious views, but was not embraced in the instructions given me by the convention which nominated me for representative of Latah County.

Mr. Gamble would have preferred the senatorial race to be decided in open legislative session, and many of his fellow legislators felt the same; 18 of the 37 Republicans in the legislature refused to participate in the caucus. (It should be noted that many of those who refused to attend the caucus obviously had political reasons for so doing.)

The above history is equivocal at best. A survey of early history does not compel the conclusion that political caucuses in Idaho are forbidden to deal with public business. It does reveal, however, that shortly after statehood, serious questions were raised about the practice of having caucuses meet in secret even for the purpose of conducting party business.

The Argument for Extending the Open Session Requirement to Political Caucuses.

Our research discloses no cases interpreting constitutional provisions similar to Idaho's; however, several states have

applied their open meeting statutes to political caucuses.

The only case we have been able to find dealing with meetings of a legislative caucus comes from Colorado. In that case the Colorado Supreme Court held that political caucuses of the Colorado State Legislature violated the Colorado Open Meetings Law. The Colorado Open Meetings Law states:

It is declared to be the policy of this state that the formation of public policy is public business and may not be conducted in secret.

Colo. Rev. Stat. § 26-6-401. In interpreting this language, the Colorado court held that "while a political caucus is not an official policy-making body of the General Assembly, it is, nonetheless, a de facto policy-making body which formulates legislative policy that is of governing importance to the citizens of this state." Cole v. State, 673 P.2d 345, 348-49 (Colo. 1983). In support of its decision, the court quoted testimony from Colorado State Senator Regis Groff:

Caucus positions are taken in the party caucus meetings. Caucuses . . . take binding positions . . . which means that when the caucus is over and the action is taken on the floor, the vote is predetermined . . . so in effect, in that particular case, what appears on the Senate floor is simply acting out the procedure, when, in fact, the issue has been settled in caucus.

Id. at 348. The court found that while positions taken at a political caucus are not binding, legislators are unlikely to change their votes on the floor because to do so would "adversely affect the legislator's relationship with other members of the caucus . . . in effect, the floor vote on a measure when a caucus position has been taken . . . is little more than a formality." Id. at 349.

It should be noted that the Colorado court did not expressly hold that a quorum was necessary for a caucus to violate the Open Meetings Law. Nevertheless, the caucus in Cole did involve a majority of the state senate, so that locking in votes at the caucus predetermined the vote on the senate floor.

The New York Supreme Court, Appellate Division, has reached a similar conclusion in the context of a political caucus at the city council level. The New York Public Meetings Law provides:

It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this

state be fully aware of and able to . . . attend and listen to the deliberations and decisions that go into the making of public policy. (Emphasis added.)

N.Y. Pub. Off. Law § 100.

Thus, the New York law takes "public business" to include the deliberations and decisions that go into the making of public policy. The New York law applies to "public bodies," and defines "public body" as "any entity, for which a quorum is required in order to conduct public business." N.Y. Pub. Off. Law § 97(2). In Sciolino v. Ryan, 440 N.Y.S.2d 795 (App. Div. 1981), the court held that a city council political caucus that discussed public business would violate the Public Meetings Law if a quorum attended the caucus. The court recognized that decisions made at caucuses are not binding on the entire public body, but stated that:

The decisions of these sessions . . . although not binding, affect the public and directly relate to the possibility of a . . . matter becoming an official enactment.

Id., 440 N.Y.S.2d at 798. The court noted that the New York Public Meetings Law contained an express exemption for "political caucuses," but held that such exemption must be narrowly applied to "the private matters of a political party, as opposed to matters which are public business yet discussed by political party members." Id. at 798.<sup>1</sup>

In another case, the New York court refused to find a violation of the Public Meetings Law where a political caucus consisting of less than a quorum met to discuss public business. The presence of a quorum was critical because:

[T]he existence of a quorum at an informal conference . . . permits the crystallization of secret decisions to a point just short of ceremonial acceptance.

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<sup>1</sup>It should be noted that in response to the Sciolino decision, the New York State Legislature amended the Public Meetings Law to specifically allow political caucuses to meet "without regard to . . . the subject matter under discussion, including discussions of public business." New York Pub. Off. Law, § 108 (Supp. 1987).

Britt v. County of Niagara, 440 N.Y.S.2d 790, 793 (App. Div. 1981), quoting from Adkins, Government in the Sunshine, 22 Federal Bar News 317 (1975).

The Illinois Supreme Court has also held that a closed party caucus called to discuss matters on a city council's formal agenda violated the Illinois Open Meetings Act. The court held that the Act would not prohibit "the bona fide social gatherings of public officials, or truly political meetings at which party business is discussed"; nonetheless, the Act prohibited "informal political caucuses where, as here, public business was deliberated and it appears that a consensus on at least one issue was reached outside of public view." People ex rel. Difanis v. Barr, 414 N.E.2d 731, 734-35 (Ill. 1980).

The court in Difanis rejected the defendants' argument that their pre-council meeting was only "a political caucus" and not "a formal meeting" of the city council:

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

Id. at 734, quoting approvingly from Sacramento Newspaper Guild Local 92 v. Sacramento County Board of Supervisors, 263 Cal.App.2d 41, 50-51, 69 Cal.Rptr. 480, 487 (1968). The court did not decide whether a quorum was necessary for a caucus to violate the Act. Id. at 735. However, the Illinois Open Meetings Act normally applies even when fewer than a quorum are present. People ex rel. Hopf v. Barger, 332 N.E.2d 649 (1975).

The Delaware Court of Chancery has similarly held that a closed, informal party caucus which constituted a quorum of a city council and discussed "public business," violated Delaware's Sunshine Law. News-Journal Co. v. McLaughlin, 377 A.2d 358 (Del. 1977). The Delaware Sunshine Act defines "public business" as any matter over which the public body has (1) supervision, (2) control, (3) jurisdiction, or (4) advisory power. 29 Del.C. § 1002(b). Defendants in that case, the 11 Democrats on a 13-member city council, argued that applying the Delaware Sunshine Law to their political caucus would be "an unfair limitation on their ability as majority political party to function as a unified group." Id. at 362. The court replied: "As a practical matter, it obviously does." Id. But the court found that the burden of holding open meetings was "outweighed by the benefit that will flow to the citizenry by

requiring those in control of public business to exercise it in an open manner." Id.

Applying the reasoning of the above decisions to the Idaho Constitution's open sessions requirement yields the conclusion that "public business" consists of the deliberations and decisions that go into public policy (Sciolino); decisions that affect the public and directly relate to the possibility of a matter becoming an official enactment (Sciolino); deliberations where a consensus on an issue is reached (Difanis); any matter over which the public body has supervision, control, jurisdiction, or advisory power (McLaughlin). Using these definitions of "public business," it can be argued that political caucuses, if comprised of a majority of either house, are capable of conducting public business and thus of violating the Idaho Constitution if conducted in secret.

The Argument Against Extending the Open Session Requirement to Political Caucuses

Despite this string of court decisions applying open meetings laws to political caucuses, there remain several powerful counter-arguments for not including caucuses in the constitutional prohibition against conducting legislative "business" in secret. In People ex rel. Difanis v. Barr, 397 N.E.2d 895 (Ill. App. 1979), the dissent argued strongly that closed caucuses should not be prohibited by the Illinois Open Meetings Act because the Act only applied to public bodies:

The emphasis by the legislature upon the functioning of the public body as organized for the conduct of business is apparent, i.e., its act as organized by law. By its terms, the statute makes no reference to, and imposes no limitation upon members who are acting as individuals outside the structure of the "body."

Id. at 901. The dissent went on to argue that a political caucus has none of the characteristics of a legislative body:

In this case, the voluntary group meeting in what is termed a "caucus" has no attributes of public authority or structure. It appears that participation is voluntary, has no organizational structure, takes no action, and makes no decisions concerning the public matters.

Id. Under this line of reasoning, closed legislative caucuses would not violate the Idaho Constitution because they simply are not meetings of a "house" or of "the committee of the whole." Instead, the "open sessions" provision would apply only to formalized legislative sessions, as organized for the conduct of

business by law: i.e., the introduction, debate, and passing of bills.

A similar argument was made by the concurring justice in Britt v. Niagara:

A meeting of the legislators of one political party to discuss legislation is not a "meeting", . . . Nor is a partisan caucus of legislators a "public body", . . . A party caucus is not a committee or subcommittee or other similar body of the legislature--the official public body. It is an unofficial meeting of legislators who belong to the same party. No quorum is required and no official business may be conducted.

440 N.Y.S.2d at 794-95 (emphasis added). Applying the logic of the concurring justice in Britt to the Idaho constitutional provision, it can be argued that Idaho Const. art. 3, § 11, expressly applies only to each "house" of the legislature and to "the committee of the whole," not to other subdivisions of the legislature, and certainly not to political caucuses of individual parties within the legislature.

One further consideration would militate strongly against any suit requesting the Idaho Supreme Court to dictate to the legislature what it can discuss and not discuss during closed caucuses. The Idaho Constitution prohibits one department of government from exercising any power properly belonging to another department. Idaho Const. art. 2, § 1. Accordingly, the court has been reluctant to interfere with the legislature's exercise of powers expressly delegated to it by the constitution. Diefendorf v. Galler, 51 Idaho 619, 10 P.2d 307 (1932). However, when the legislature's actions have violated the state or federal constitutions, the court has taken action. See Cohn v. Kinsley, 5 Idaho 416, 49 P. 985 (1897) (legislature must abide by constitutional provision requiring bills to be read on "3 several days"); Hellar v. Cenarrusa, 106 Idaho 586, 682 P.2d 539 (1984) (even though court recognized apportionment as a matter of legislative discretion and judgment, the court had power to declare legislature's reapportionment plan unconstitutional). Because the prohibition against secret legislative sessions is contained in the state constitution, it must be assumed that the court would enforce it. It is only "in the absence of constitutional offense" that the court is bound to respect the legislature's exercise of its powers. Diefendorf v. Galler, 51 Idaho at 635, 10 P.2d at 313.

It should be noted, moreover, that because of the court's traditional reluctance to interfere in the legislature's internal affairs, it would construe the constitutional provision as favorably as possible toward the legislature. Such a

construction may well lead the court to decide that political caucuses do not transact legislative "business," no matter what is discussed at the meeting.

This outcome is especially likely given the Idaho court's reluctance to strictly enforce the Idaho Open Meeting Law. In State v. City of Hailey, 102 Idaho 511, 633 P.2d 576 (1981), the court held that actions taken at meetings violative of the Open Meeting Law would not "taint final actions subsequently taken upon questions conscientiously considered at subsequent meetings which do comply with the provisions of the [Open Meeting Law]." Id. 102 Idaho at 514, 633 P.2d at 579. If the court were to apply similar reasoning to the "open sessions" provision of the Idaho Constitution, it might well decide that political caucuses that discuss public business are permissible because the business is subsequently discussed and voted upon in open legislative session.

It must also be noted that the approach of the Idaho court on open meeting issues contrasts with that of state courts which apply their open meeting laws as "liberally" and "broadly" as possible. See Holden v. Board of Trustees of Cornell University, 440 N.Y.S.2d 58 (1981); Cole v. State, 673 P.2d 345 (Colo. 1983); News-Journal Co. v. McLaughlin, 377 A.2d 358 (Del. 1977). This liberal construction was certainly a factor in the cases discussed above holding that caucuses violated open meeting laws. Because the Idaho Supreme Court has not employed a liberal construction in favor of open meetings, it is less likely to hold that closed political caucuses violate the Idaho Constitution.

A final factor that would weigh against the court requiring open political caucuses is that such meetings routinely do discuss private party business. A court could not prohibit closed caucuses to discuss purely political business, especially in light of party members' first amendment freedom of association rights. A court could order such closed caucuses not to conduct "public business," but such an order would be practically impossible to implement, since the caucuses themselves would determine what was public business and what was party political business.

#### CONCLUSION

It is a very close question as to whether the open sessions requirement of the Idaho Constitution would apply to meetings of party political caucuses. No case has been found precisely on point, though most state courts are eloquent in upholding the principle that public business should not be conducted behind closed doors.

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It is not likely that the Idaho Supreme Court would require party political caucuses to submit to the open session requirement imposed by the Constitution on the legislature itself and the houses thereof. Four of the five states with strong open session requirements maintain a long history of closed political caucuses. We doubt that the Idaho Supreme Court -- with its traditional deference to internal legislative affairs and its narrow interpretation of statutory open meeting requirements -- would attempt to ban closed political caucuses or to prescribe the agenda of such caucuses.

Very truly yours,



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