

July 6, 1993

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**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Private Industry Councils and the Idaho Open Meeting Law

Dear Ms. Gleason:

You have asked whether private industry councils are subject to the provisions of the Idaho Open Meeting Law, Idaho Code §§ 67-2340 through 67-2347 (1989 and 1992 Supp.). Additional questions are whether private industry councils, if subject to the provisions of the law, may legally hold meetings by means of telephone conference calls, and whether they may reach final decisions by means of ballots distributed to council members in the mail.

CONCLUSION

Private industry councils are subject to the Idaho Open Meeting Law, and therefore must, with only limited exceptions, conduct their business at meetings open to the public. As entities subject to the law, these councils must also comply with requirements such as notice to the public of meetings and agendas.

Private industry councils may conduct their meetings by telephone conference calls. Such a procedure complies with the Open Meeting Law, provided that the public is notified of and given full access to the meeting.

The Idaho Open Meeting Law prohibits a governing body of a public agency from voting by "secret ballot," *see* Idaho Code § 67-2342(1), and the Attorney General has interpreted this provision to require that votes of governing bodies of public agencies must be "conducted in public." *See* Idaho Atty. Gen. Op. 85-9 (1985). Thus, private industry councils may not take votes by mailed-in ballots and should only take votes at meetings open to the public.

ANALYSIS

A. Background on Private Industry Councils

Private industry councils are local/regional governmental entities that have a unique identity. They are created and authorized under the provisions of the federal Job Training Partnership Act; however, they are operated and their members are appointed by state and local governments. Job Training Partnership Act of 1982, Pub. L. No. 97-300, §103(a), 96 Stat. 1322 (1982), codified as amended at 29 U.S.C. § 1513(a). Each private industry council is responsible "to provide policy guidance for, and exercise oversight with respect to, activities under the job training plan for its service delivery area in partnership with the unit or units of general local government within its service delivery area." *Id.* In accordance with an agreement with a service delivery area's chief local elected officials (such as county commissioners and city council members), a private industry council develops the area's biannual job training plan, selects a grant recipient and administrative entity to administer the job training plan, and procures job training services from service providers in the area to carry out the plan. *See* JTPA §§ 103 and 104.

A private industry council is composed of representatives of private sector businesses, organized labor, community-based organizations, and governmental agencies that are located in each JTPA service delivery area. JTPA § 102(a). The chief elected officials of the units of general local government, by agreement, appoint the members of a private industry council. JTPA § 102(d). In the absence of such an agreement, the governor of the state has authority to appoint the members of the area's private industry council. *Id.* The governor must also certify that the composition and appointments of a private industry council are consistent with the JTPA before it is allowed to function. JTPA § 102(g).

The JTPA allows private industry councils to be incorporated. JTPA § 103(e). In Idaho, all private industry councils have incorporated as nonprofit corporations.

B. Applicability of the Idaho Open Meeting Law to Private Industry Councils

1. Preemption Doctrine Analysis

Before the substantive provisions of the Idaho Open Meeting Law are analyzed for their applicability to private industry councils, a threshold issue must be addressed. As the preceding section has shown, private industry councils are the creation of federal, not state, law. Although local county and city elected officials, and in some cases the state's governor, appoint private industry council members, the councils themselves are created and governed by the provisions of the JTPA.

The question of whether the Idaho Open Meeting Law applies to a governmental entity that is created pursuant to a federal statute is one of first impression. No reported court case has addressed the issue before.¹ Given the lack of specific guidance from case law on open meeting law provisions, this issue requires a general interpretation of the Supremacy Clause of the United States Constitution. That provision states that the "Constitution and the Laws of the United States shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

In interpreting the Supremacy Clause, the federal courts apply the "preemption doctrine" which requires that whenever Congress has exercised its authority to regulate in an area, concurrent conflicting state legislation may be challenged as having been superseded or overruled by the federal legislation. See J.E. Nowak, R.D. Rotunda & J. N. Young, Handbook on Constitutional Law, 267 (1978). The courts usually invoke the preemption doctrine only in cases "where there is an actual conflict between the two sets of legislation such that both cannot stand, for example, if federal law forbids an act which state legislation requires." *Id.*

The traditional test for determining whether state legislation is preempted under the Supremacy Clause is whether the "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52 (1941). In Hines, the United States Supreme Court held that Congress had, with the passage of the Alien Registration Act of 1939, preempted Pennsylvania from enacting its own alien registration statute that conflicted with the federal law. 312 U.S. at 67.

A comparison of the JTPA and the Idaho Open Meeting Law demonstrates no actual conflict between the express provisions of the two pieces of legislation. The JTPA does not explicitly forbid states from enacting open meeting laws that are applicable to private industry councils authorized under the Act. On the contrary, Congress provided a "savings clause" in the JTPA that allows state legislatures to adopt legislation "providing for the implementation . . . of the programs assisted" under the Act. JTPA § 126. See also S. Rep. No. 97-469, 97th Cong., 2nd Sess. (1982), reprinted in 1982 U.S.C.A.N. 2636, 2638 (legislative history of the Job Training Partnership Act) (concept of "federalism" as allowing for mutual roles of federal, state and local governments under the JTPA). The existence of such a "savings clause" in federal legislation is often

¹A review of the reported appellate cases construing the Idaho Open Meeting Law indicates that none have involved the issue of the applicability of the law to a governmental entity that is authorized by a federal statute. Additionally, we have not found any cases in which other states' open meeting laws have been interpreted to apply to a public agency created by a federal statute, or in which other states' private industry councils have been the subject of open meeting law litigation.

interpreted to preclude a preemption problem under the Supremacy Clause. *See Handbook on Constitutional Law* at 267.

An analysis of the respective purposes of the JTPA and the Idaho Open Meeting Law is helpful in revealing any conflicts between the two pieces of legislation that might indicate a preemption problem. The JTPA provides that private industry councils shall make decisions regarding the selection of service providers and the procurement of job training services within their respective service delivery areas. JTPA § 103(a). Additionally, the JTPA requires state and local governments to ensure that "procurements shall be conducted in a manner providing full and open competition" and that the state's procurement standards will "ensure fiscal accountability and prevent fraud and abuse." JTPA § 164(a)(3).

The purpose of the Idaho Open Meeting Law is to ensure that the "formulation of public policy" is "public business" and "shall not be conducted in secret." Idaho Code § 67-2340. Given the JTPA goals of ensuring "open" procurement processes and preventing "fraud and abuse," the applicability of the state's open meeting law to a private industry council would appear not only compatible with, but an enhancement to, the JTPA.

Thus, based upon the above analysis, federal preemption is not a barrier to the applicability of the Idaho Open Meeting Law to private industry councils.

2. Coverage Provisions of the Idaho Open Meeting Law

The Idaho Open Meeting Law requires that "all 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 the law. Idaho Code § 67-2343(1). The operative terms in this provision are "governing body" and "public agency." A "governing body" is defined as "the members of any public agency which consists of two (2) or more members, with the authority to make decisions for or recommendations to a public agency regarding any matter." Idaho Code § 67-2341(5). A "public agency" is defined in the following categories:

(a) any state board, commission, department, authority, educational institution or other state agency which is created by or pursuant to statute, other than courts and their agencies and divisions, and the judicial council, and the district magistrates commission;

(b) any regional board, commission, department or authority created by or pursuant to statute;

(c) any county, city, school district, special district, or other municipal corporation or political subdivision of the state of Idaho;

(d) any subagency of a public agency which is created by or pursuant to statute, ordinance, or other legislative act.

Idaho Code § 67-2341(4).

An entity must meet the statutory definitions of both a "governing body" and a "public agency" to be covered by the requirements of the Idaho Open Meeting Law. As the policy-making entity composed of more than one person, a private industry council has authority under the JTPA to both make "decisions" and "recommendations" regarding the delivery of job training services in its service delivery area. JTPA §§ 103 and 104. Based upon the provisions of the JTPA, a private industry council meets the definition of a "governing body" contained in Idaho Code § 67-2341(5).

To determine whether private industry councils fit the definition of a "public agency" contained in Idaho Code § 67-2341(4), it must first be determined whether they are actually public rather than private in nature. The word "private" in the phrase "private industry council" raises a concern that such councils may not be public agencies but rather private entities that merely receive government funding under the JTPA program. Furthermore, Idaho's private industry councils are incorporated as nonprofit corporations, and corporations are ordinarily not considered to be public agencies.

The fact that private industry councils are incorporated, however, is not a barrier to considering them "public" in nature if they meet the test for a public corporation. The test for a public corporation is whether the government has the sole right to regulate, control and direct the corporation. *See Idaho Atty. Gen. Op. 89-7 at 8 (1989), citing Trustees of Columbia Academy v. Board of Trustees, 262 S. Ct. 117, 202 S.E.2d 860, 864 (1974).*

Private industry councils are subject to extensive and complete governmental control and, therefore, meet the test of a public corporation. Not only are the members of the councils appointed by either the local elected officials of their service delivery area or the governor, but the job training plan they are required by the JTPA to develop every two years must be submitted to and approved by the local elected officials and the governor. JTPA §§ 103 and 104. The governor has the authority to "certify" private industry councils and may withhold certification if the appointments to the council made by local elected officials do not conform to the requirements of the JTPA. JTPA § 102(g). All responsibilities of private industry councils are subject to the oversight and review of the state job training council appointed by the governor and its staff/administrative entity (in Idaho, the Department of Employment). JTPA § 122.

Ultimately, private industry councils, like all other JTPA grantees, are accountable to the U.S. Department of Labor which, as the federal grantor agency for the JTPA program, has oversight and monitoring authority for all JTPA programs. JTPA §§ 163, 164 and 165.

Having determined that private industry councils are public rather than private in nature, we turn to the definition of a "public agency" in Idaho Code § 67-2341(4). Private industry councils fit into at least two of the four categories of public agencies defined in that section. First, as the governing body of its service delivery area, a private industry council is a "regional board, commission, department or authority created by or pursuant to statute," Idaho Code § 67-2341(4)(b), because a statute (the JTPA) has created it to be the authority in a specific region (the service delivery area). JTPA §§ 103 and 104. Second, because the members of a private industry council are appointed by the local elected officials (including city councils and county commissions) in their service delivery area, the members are, in a sense, a subagency of those public agencies which are themselves subject to the provisions of the Idaho Open Meeting Law. Thus, one could view a private industry council as a "subagency" of a public agency, and conclude that it meets the definition of a public agency contained in Idaho Code § 67-2341(d).

In conclusion, private industry councils meet the definitions of both a "governing body" and a "public agency" contained in the Idaho Open Meeting Law. *See* Idaho Code § 67-2341. Therefore, they must comply with the procedural requirements of the law contained in Idaho Code §§ 67-2342 through 67-2345. The specific procedural requirements of the law are discussed below.

C. Procedural Requirements of the Idaho Open Meeting Law

1.) Meetings

The most important procedural requirement of the Idaho Open Meeting Law is that all meetings of a governing body of a public agency must be open to the public, *see* Idaho Code § 67-2342(1), unless there is a specific reason allowed by the law for holding an executive session. *See* Idaho Code §67-2345.² Governing bodies of public agencies

² Public agencies may hold "executive sessions" as follows:

(a) To consider hiring a public officer, employee, staff member or individual agent. This paragraph does not apply to filling a vacancy in an elective office;

(b) To consider the evaluation, dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent, or public school student;

(c) To conduct deliberations concerning labor negotiations or to acquire an interest in real property which is not owned by a public agency;

(d) To consider records that are exempt from disclosure as provided in chapter 3, title 9, Idaho Code;

subject to the law must make final decisions at meetings open to the public, and cannot make decisions by "secret ballot" or in executive sessions. Idaho Code §§ 67-2341(1) and 67-2345(3). Furthermore, a public agency subject to the law must comply with specific notice requirements concerning when and where its meetings will be held, and the notice must contain the agenda items "known at the time" the notice is given "to be probable items of discussion" at the meeting. Idaho Code § 67-2343. Finally, the law requires that minutes must be recorded for all meetings. Idaho Code § 67-2344.

2.) Teleconference Meetings

Nothing in the Idaho Open Meeting Law specifically prohibits meetings held by telephone conference call. Thus, this kind of procedure is permissible. *See* Office of the Idaho Attorney General, Idaho Open Meeting Law Handbook, 15-16 (4th ed. 1992). Nevertheless, a public agency that holds meetings by telephone cannot dispense with the mandatory procedural requirements of the law concerning openness to the public, notice, executive sessions, etc. *Id.* When a private industry council holds meetings by telephone conference, therefore, the public must be allowed to participate and have full access. *Id.*

3.) Mail-In Ballots

If a private industry council makes final decisions by means of ballots mailed in by its members rather than at meetings open to the public, however, such a procedure would be a violation of the "secret ballot" prohibition contained in Idaho Code § 67-2342(1). In interpreting this provision in an opinion issued in 1985, the Attorney General concluded that it means that "all voting on a public agency's decisions must be done in public." *See* Idaho Atty. Gen. Op. 85-9 (1985) at 55. Even if the decision that is the subject of a mailed-in balloting is discussed at an open meeting prior to the balloting, it is difficult to reconcile such a practice with the requirement that the final vote must be held in public. A vote taken by ballots through the mail cannot be viewed in any manner as "public." Thus, private industry councils should refrain from making final decisions by ballots mailed in by their members, and should only hold votes at meetings that are open to the public.

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- (e) To consider preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations;
 - (f) To consider and advise its legal representatives in pending litigation or where there is a general public awareness of probable litigation;
 - (g) By the Commission of Pardons and Parole, as provided by law.

Idaho Code § 67-2345(1). "Labor negotiations" may also be conducted in executive session if either side requests a closed meeting. I.C. § 67-2345(2).

SUMMARY

Private industry councils, which are created and authorized under the provisions of the federal Job Training Partnership Act but appointed and controlled by local elected officials and the governor, are covered by the requirements of the Idaho Open Meeting Law. Idaho Code § 67-2340 *et seq.* These agencies must comply with all procedural requirements of the law, including holding meetings in public, giving notice, making final decisions at public meetings, etc. The meetings of private industry councils may be held by telephone conference call provided that the public is notified and given full access. Because the law's prohibition on "secret ballots" requires public agencies to make final decisions at meetings open to the public, private industry councils should not make final decisions by means of ballots mailed in by council members.

If additional clarification is required, please do not hesitate to contact me.

Sincerely,

JOHN C. HUMMEL
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