

May 23, 1994

Mr. Mike Wetherell
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**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Mr. Wetherell:

By letter dated April 14, 1994, you take exception to a comment this office made to the *Idaho Statesman*. We stated that "serial meetings" held by public officers to form a consensus on a matter pending before a public agency could violate the spirit of the Idaho Open Meeting Law, Idaho Code §§ 67-2340 through 67-2347.¹

You raise three objections to our interpretation of the Open Meeting Law. First, you contend that your actions taken in private to discuss public business are protected by the First Amendment to the United States Constitution. You contend that Idaho's Open Meeting Law would be unconstitutional if it interferes with your "freedom of speech and freedom of communication and association" Second, you contend that even if serial meetings are not protected by the Constitution, it is poor public policy and "contributes to bad, not good government" to read the Open Meeting Law so as to prohibit such meetings. Third, you argue that serial meetings with city council members cannot violate the Open Meeting Law because these meetings are not officially "convened." Finally, you demand that the Attorney General charge you with violations of the Open Meeting Law if it is the opinion of this office that serial meetings do, in fact, violate the law.

I.

PRELIMINARY OBSERVATIONS

At the outset, we decline to address your contention that a ban on serial meetings is poor public policy. If you are convinced that such is the case, your argument should be addressed to the Idaho Legislature, not to this office.

We likewise decline to bring charges against you for any confessed violations of the law. We have not investigated your conduct and do not intend to do so. The 1992 amendment to the Open Meeting Law makes it clear that this office enforces the law against state agencies, not local governmental entities:

The attorney general shall have the duty to enforce this act in relation to public agencies of the state government, and the prosecuting attorneys of the various counties shall have the duty to enforce this act in relation to local public agencies with their respective jurisdictions.

Idaho Code § 67-2347(3).

II.

THE CONCEPT OF SERIAL MEETINGS

In order to respond to your questions, we must first define "serial meetings." The term does not appear in the Idaho Open Meeting Law. We therefore derive our definition of the term from the pattern of conduct presented in your letter. You describe your practice as that of contacting colleagues on the city council "on a one-on-one basis, and indeed even in a serial manner" in an "attempt to build a consensus for a position or a policy" which you "wish to advance or have already advanced." In another paragraph, you describe these serial meetings as part of your "effort to form policy, build consensus, and pass ordinances to govern the City of Boise."

For purposes of this opinion, therefore, we define the term "serial meeting" to mean the contacting of members of a public agency one-on-one or in groups less than a quorum, outside of official public meetings, in a deliberate attempt to build a majority for or against a public policy or proposed ordinance.²

III.

SERIAL MEETINGS MAY VIOLATE THE IDAHO OPEN MEETING LAW EVEN THOUGH THEY ARE NOT FORMALLY CONVENED

The question whether a serial meeting violates the Open Meeting Law boils down to two issues. First, must the meeting be formally "convened"? Second, can a meeting take place without a quorum in attendance at one time? We address each of these two issues in order.

A. The Notion of "Convening"

The fundamental requirement of open meetings is found in Idaho Code § 67-2342(1):

Except as provided below, 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 this act. No

decision at a meeting of a governing body of a public agency shall be made by secret ballot.

The pivotal word is "meeting." The Open Meeting Law is not triggered unless there is first a meeting. The term "meeting," according to the law, means "the convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter." Idaho Code § 67-2341(6). Thus, there are two components of the word "meeting": A procedural element that identifies the group and the context of its gathering ("the convening of a governing body of a public agency") and a substantive element that identifies the purpose of the gathering ("to make a decision or to deliberate toward a decision on any matter").

Turning first to the procedural component, we note that there is no question that the Boise City Council is "the governing body of a public agency." The Open Meeting Law defines "governing body" 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 pertinent part, as "any county, city, school district, special district, or other municipal corporation or political subdivision of the state of Idaho." Idaho Code § 67-2341(4)(c).

The procedural hurdle identified in your letter is the question whether a serial meeting is the "convening" of the governing body of the public agency. You deny that such is the case:

Have we completely forgotten that this is an open "meeting" law and that meeting is specifically defined in the act as the convening of a governing body of a public agency to make a decision or deliberate toward a decision? When I lobby my colleagues (as I point out again I do all the time, and will continue to do unless you or the courts restrain me from this clandestine practice), I do not convene them--I corner them; I call them; I accost them; I probably bore and annoy them, but I most assuredly do not convene them.

You bolster this argument by pointing to the fact that you personally cannot call into session a formal meeting of the Boise City Council:

Indeed, I have no independent legal power to convene the Boise City Council. I would have to call the other members one at a time to build a consensus to do so other than on a regular meeting night. Let's eliminate this ridiculous (in my opinion) interpretation of the law.

The term "convene" is not defined in the Open Meeting Law. It is reasonable to assume that the legislature meant it to be used in its plain, dictionary meaning. Taken intransitively, the term "convene" follows its own literal derivation, "to meet together;

assemble, esp. for a common purpose." Webster's New World Dictionary, 1988. In the active sense of actively convening, the term's primary meaning is "to cause to assemble, or meet together." *Id.*

In either sense (and the statutory context is not clear), the definition of "convening" seems broad enough to cover formal as well as informal gatherings of the members of the city council. They are "convened" when they meet together or when someone causes them to meet together.

This reading is supported by the fact that the legislature found it necessary to clarify that certain kinds of "informal and impromptu discussions" are exempt from the law; namely, those discussions "of a general nature which do not specifically relate to a matter than pending before the public agency for decision." Idaho Code § 67-2341(2). If the Open Meeting Law applied only to formal meetings, there would have been no need to single out a specific category of informal meetings that is exempt from the law.

Any other reading would eviscerate the law. It makes no sense to say that the Open Meeting Law applies only when the governing body of a public agency has been "convened," *i.e.*, formally called to order by a body's presiding officer. Such a reading would provide a blueprint for circumventing the law: Just don't ever formally convene and you cannot violate the Open Meeting Law.

It is the opinion of this office that the Idaho Legislature could not have intended such a result. The problem sought to be remedied by the Open Meeting Law is the practice of a governing body first convening informally to discuss and decide how public business is to be conducted, and then formally convening to rubber-stamp the secret decisions already reached in private. To repeat, it is the opinion of this office that an Idaho court would find that both formal and informal gatherings are "meetings" and that both must comply with Idaho's Open Meeting Law.

B. The Requirement of a Quorum

As noted earlier, a "meeting" occurs when the governing body of a public agency gathers together "to make a decision or to deliberate toward a decision on any matter." The question with regard to serial meetings is whether the law applies to gatherings of less than a quorum of the governing body of the public agency.

The terms "decision" and "deliberation" are defined in the Open Meeting Law. The term "decision" is defined, in pertinent part, as:

[A]ny 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 term "deliberation" means "the receipt or exchange of information or opinion relating to a decision" Idaho Code § 67-2341(2). As noted above, "deliberation" does not include "informal or impromptu discussions of a general

nature which do not specifically relate to a matter then pending before the public agency for decision." *Id.*³

Thus, the requirement that decisions be made at meetings that are held in public appears to arise in the context of a "meeting at which a quorum is present." The requirement of a quorum would also seem to follow from the commonsense concept of a "meeting" of a "governing body."⁴

As noted above, there is no question that the Open Meeting Law must be complied with whenever a quorum of the members of a governing body meets together to deliberate or decide on matters pending before the public agency--regardless of whether the meeting is formal or informal. The question here is whether the Open Meeting Law requirements must also be complied with when the decision of the majority is reached serially rather than at a single time and place. Idaho law on this question is presently unclear.

For this reason, this office has not previously concluded or given an opinion that serial meetings (person-to-person meetings by a public official to build consensus on public business) violate the Open Meeting Law. As noted in the recent comment to the *Idaho Statesman*, it has been the concern of this office that the practice could be used to evade public deliberation and thereby circumvent the policy and spirit of the law.

This concern over serial meetings is not novel to this office. Several courts have held that a series of meetings of less than a quorum of a public agency can nonetheless result in a violation of an open meeting law.

For instance, in Stockton Newspapers, Inc. v. Members of the Redevelopment Agency of the City of Stockton, 214 Cal. Rptr. 561 (Cal. App. 1985), the transfer of waterfront property by a municipal redevelopment agency to a private party was negotiated by the agency's attorney through a series of one-on-one telephone conversations between the attorney and each member of the agency's board. The plaintiff alleged that this was a common practice by the board and that these serial conversations violated California's Open Meeting Law (the Brown Act). The California Court of Appeals agreed.

The court of appeals focused upon collective activity by a majority of a governing body, whether or not in the presence of one another. This focus was dictated by the fact that the California Legislature had amended the Brown Act in 1961 "to make clear that legislative action within the act was not necessarily limited to action taken at a formal meeting." 214 Cal. Rptr. at 564. The 1961 amendment defined "action taken" as:

- (1) A collective decision made by a majority of the members of a legislative body, (2) a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision,

or (3) an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance.

1961 Cal. Stat. 1671. Based upon this definition and prior case law, the court of appeals held that the California Open Meeting Law would be too easily evaded if violations could occur only when a quorum was present at a common site:

The foregoing authorities make clear that the concept of "meeting" under the Brown Act comprehends informal sessions at which a legislative body commits itself collectively to a particular future decision concerning the public business. Considering the ease by which personal contact is established by use of the telephone and the common resort to that form of communication in the conduct of public business, no reason appears why the contemporaneous physical presence at a common site of the members of a legislative body is a requisite of such an informal meeting. Indeed if face-to-face contact of the members of a legislative body were necessary for a "meeting," the objective of the open meeting requirement of the Brown Act could all too easily be evaded.

214 Cal. Rptr. at 565 (emphasis added). The court then concluded:

Thus a series of nonpublic contacts at which a quorum of a legislative body is lacking at any given time is proscribed by the Brown Act if the contacts are "planned by or held with the collective concurrence of a quorum of the body to privately discuss the public's business" either directly or indirectly through the agency of a nonmember. (65 Ops. Cal. Atty. Gen., supra, at p. 66.)

. . . If a quorum of the members of the legislative body so intended to unite in an agreement to agree, a violation of the Brown Act would be established.

Id.

The California Supreme Court adopted the reasoning of this decision in Roberts v. City of Palmdale, 20 Cal. Rptr. 2d 330, 337 (Cal. 1993), stating:

Of course the intent of the Brown Act cannot be avoided by subterfuge; a concerted plan to engage in collective deliberation on public business through a series of letters or telephone calls passing from one member of the governing body to the next would violate the open meeting requirement.

The Idaho statutes are not as broad as California's because they do not include collective commitment or promise by a majority to take action, so the California courts are deciding cases under a more proscriptive statutory scheme.

The Tennessee Court of Appeals reached a similar conclusion in an unreported opinion, State ex rel. Mathews v. Shelby County Board of Commissioners, 1990 WL 29276, 18 Media L. Rep. 1440 (Tenn. App. 1990). The case concerned the filling of a vacant position on an 11-member county commission. The facts were similar to those envisioned in your letter:

[V]arious Commissioners either met together or talked among themselves outside the chambers of the Commission, without public notice, and discussed personally and by telephone the pros and cons, merits and demerits of announced candidates for the position.

1990 WL 29276, at *3. The commissioners concluded that none of the announced candidates enjoyed majority support and a new effort would be made to find a "consensus" candidate. A single commissioner took upon himself the responsibility of locating a candidate and lined up the support of two other commissioners. Those three commissioners then garnered the support of three others until the required six-member majority was in place.

The Tennessee Court of Appeals held that the above facts stated a cause of action in alleging a violation of that state's Open Meetings Law even though no public "meeting" had ever been held: "[T]he Act must apply when public officials meet in secret to deliberate and make decisions affecting the public's business with the intent to hold an open meeting to announce their decision at a later time" 1990 WL 29276, at *5 (quoting the unreported case of Williamson County Broadcasting Co. v. Williamson County Board of Education, (Tenn. App. M.S., Sept. 3, 1976)). Any other outcome, the court concluded, would frustrate the most fundamental purposes of the act: "One of the purposes of the Open Meetings Law is to prevent, at a non-public meeting, the crystallization of secret decisions to a point just short of ceremonial acceptance." *Id.* (quoting the unreported case of Selfe v. Bellah, (Tenn. App. E.S., March 11, 1981)). In reaching this conclusion, the Tennessee court relied upon a specific provision of the Tennessee Open Meetings Law which stated that "[n]o such chance meetings, informal assemblages, or electronic communication shall be used to decide or deliberate public business in circumvention of the spirit or requirements of this [act]." Tenn. Code Ann. § 8-44-102(d). The Idaho law has no parallel language.

The type of activity set forth in Stockton, Roberts and Mathews pushes the limit of acceptable conduct under Idaho law and circumvents the policy stated at Idaho Code § 67-2340; namely, the legislature finds and declares that it is the policy of this state that the formulation of public policy is public business and shall not be conducted in secret.

Whether the Idaho Supreme Court would apply the Idaho Open Meeting Law as the California and Tennessee courts have done remains to be seen.

At least one Idaho district court has so concluded. On April 28, 1994, Judge Gary Haman, ruling from the bench, ruled that the City of Sandpoint's annexation of 17,000 acres had been made in violation of the Open Meeting Law. According to a report in the *Spokesman-Review* of April 29, 1994, the mayor of Sandpoint admitted to meeting individually, one-on-one, with city council members to garner their support for the annexation before going public with the proposal. The mayor defended his action by saying that the individual council members had not indicated how they would vote. On the contrary, three council members said they were asked how they would vote, and one member said the annexation was a "done deal" after the mayor's secret meetings. During the public meeting on the annexation, no residents spoke in favor of it and more than 20 opposed it. Then, without any discussion by the city council, members unanimously approved the plan. On these facts, Judge Haman invoked the penalty provisions of the Open Meeting Law and struck down the annexation plan as null and void. Idaho Code § 67-2347. Thus, the decisions of other state courts interpreting their statutes and the only announced decision to date in Idaho conclude that serial meetings violate the Open Meeting Law--at least in fact patterns where decisions are nailed down prior to presentation of the matter in a public meeting.

Unfortunately, Judge Haman's need to intervene quickly prevented him from issuing a written decision. Thus, we do not know his precise approach to the questions addressed in this opinion. We continue to adhere to our prior statements that the sort of "clandestine practice" described in your letter, if intended to forge a majority decision outside of the public forum, violates at least the spirit of Idaho's Open Meeting Law. In light of Judge Haman's decision, it is clear that public officials who operate in this manner do so at their own jeopardy.

IV.

OPEN MEETING LAW RESTRICTIONS DO NOT VIOLATE THE FIRST AMENDMENT RIGHTS OF PUBLIC OFFICIALS

Reliance upon the First Amendment's protection of speech to justify noncompliance with a state's open meeting law has not been successful in any court that has addressed the issue. Simply stated, conduct that violates a state's open meeting law is not protected by the First Amendment, and a public officer has no protected right to conduct public business in private. Several state appellate courts have so held.

In People ex rel. Difanis v. Barr, 397 N.E.2d 895 (Ill. App. 1979), for example, the practice of city councilmembers meeting in political caucuses was challenged as violating Illinois' Open Meetings Act. Among other defenses, the defendant public officers

asserted that their practice was protected by the First Amendment. The court disagreed, stating:

The Open Meetings Act neither prohibits the expression of any idea, nor makes assembly illegal; the Act requires merely that public bodies meet and deliberate public business openly rather than behind closed doors. The defendants' free speech argument is misplaced. The first amendment to the United States Constitution and article I, section 4, of the Illinois Constitution guarantee the right to express ideas publicly, and the Open Meetings Act does not restrict that right in any way. The defendants in effect argue that the freedom of speech gives them the right to confer privately rather than publicly about public business--business about which they have power to act. Freedom of speech protects the expression of ideas, not the right to conduct public business in closed meetings. The same reasoning applies to the defendants' argument that the Act infringes on their right of free assembly.

397 N.E.2d at 899 (emphasis added; citations omitted). The Illinois Supreme Court affirmed that decision. 414 N.E.2d 731 (1980).

The Colorado Supreme Court has addressed the practice of caucusing by political officials behind closed doors. Cole v. State, 673 P.2d 345 (Colo. 1983). The court first noted the important policy reasons behind the public's right to open discussion and debate:

The First Amendment plays an important role in affording the public access to discussion, debate, and the dissemination of information and ideas. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978). A free self-governing people needs full information concerning the activities of its government not only to shape its views of policy and to vote intelligently in elections, but also to compel the state, the agent of the people, to act responsibly and account for its actions.

673 P.2d at 350. The court then held that the requirements of the Colorado Open Meetings Law did not infringe on the legislators' First Amendment rights:

The Open Meetings Law does not forbid political discussion among legislators, and does not regulate the content of their discussions. The Colorado Open Meetings Law merely requires that business meetings of policy-making bodies of the General Assembly be open to the public. The Open Meetings Law, as we view it, is a reasonable legislative enactment which seeks to balance the public's right of access to public information

with the right of legislators to speak candidly and to associate with whomever they choose.

Id.

The Kansas Supreme Court, in State ex rel. Murray v. Palmgren, 646 P.2d 1091 (Kan. 1982), stressed the unique status of a person elected to public office when it rejected a First Amendment challenge to open meeting requirements:

The First Amendment does indeed protect private discussions of governmental affairs among citizens. Everything changes, however, when a person is elected to public office. Elected officials are supposed to represent their constituents. In order for those constituents to determine whether this is in fact the case they need to know how their representative has acted on matters of public concern. Democracy is threatened when public decisions are made in private. Elected officials have no constitutional right to conduct governmental affairs behind closed doors. Their duty is to inform the electorate, not hide from it.

646 P.2d at 1099 (emphasis added). *See also* C.R. Dorrier v. Dark, 537 S.W.2d 888 (Tenn. 1976).

The foregoing cases are consistent with the Idaho Legislature's statement of policy when enacting Idaho's Open Meeting Law in 1974:

The people of the state of Idaho in creating the instruments of government that serve them, do not yield their sovereignty to the agencies so created. Therefore, the 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.

Idaho Code § 67-2340. To the extent that the conduct described in your letter comes within the scope of Idaho's Open Meeting Law, it must be conducted in conformity with the procedures set forth in the law. Conduct or speech regarding public business is not protected by the First Amendment to the United States Constitution if it otherwise contravenes the state's Open Meeting Law.

V.

CONCLUSION

To summarize, our conclusion is that the Open Meeting Law must be complied with whenever a quorum of the governing body of any public agency assembles together and discusses any issue on which a vote will be required. It does not matter that the

meeting is not formally scheduled or called to order. It does not matter that the members of the governing body are not all together in one place. So long as a quorum is present and the members are talking business, the Open Meeting Law is violated if the meeting is not preceded by a notice and agenda, if the gathering is not actually open to the public, and if all votes are not taken publicly and recorded in the minutes.

The question with regard to "serial meetings" is whether the Open Meeting Law is violated when a quorum of the governing body never actually assembles but a member contacts other members--either directly or through an agent--in a deliberate attempt to build a majority for or against a public policy or proposed ordinance. It is our opinion that such a practice is designed to circumvent the Open Meeting Law and clearly violates the spirit of that law. One Idaho district court has held that it violates the letter of the law as well.

Factors that appear likely to trigger court scrutiny, in other states as well as in Idaho, are: whether the members of the governing body deliberately set out to reach a final decision apart from the public eye; whether their meetings are, in fact, conducted in secret; whether the matter in question is specific, controversial and highly visible; whether the secret decision flaunts the will of the public; and whether the final decision is a "done deal," with no serious discussion or deliberation and with votes already clearly locked in. It is our opinion that an Idaho court will likely find a violation when these factors are present.

Finally, conduct by a public official that violates Idaho's Open Meeting Law is not protected by the First Amendment's rights of free speech or assembly.

Yours very truly,

JOHN J. MCMAHON
Chief Deputy Attorney General

¹ In a second letter of the same date, you ask this office to address the question how Idaho's Open Meeting Law may apply to the use of E-mail by public agencies. We will address that question separately at a later date.

² This definition focuses on the process of "decision making" rather than that of "deliberating." The latter term raises issues that go beyond the scope of your opinion request and we do not address them here.

³ For the same reasons enunciated in our discussion of the word "convene," we do not believe an Idaho court would give a cramped reading to the concept of a "**matter then pending before the public agency** for decision." A matter need not be on the table in the form of a motion in order to be "pending." Again, any such reading would provide a blueprint for evading the law. The Open Meeting Law, in our opinion, applies to any matter that the city council is required to decide in the normal annual cycle of its business, or that is of significant public interest at the time in question.

⁴ The term "deliberation" is less clear. The notion of a quorum is not expressly contained in the definition of that term, although it may be

incorporated by implication since every deliberation concerns matters "relating to a decision." We do not address this complication in this opinion since the pattern of conduct identified in your letter clearly goes beyond deliberation and involves building a majority consensus for the ultimate decision itself.