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Open Meetings Law: Report and Recommendations

New York State Commission on Government Integrity

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OPEN MEETINGS LAW: REPORT AND RECOMMENDATIONS

STATE OF NEW YORK
New York State COMMISSION ON GOVERNMENT INTEGRITY

DECEMBER 21, 1987

OPEN MEETINGS LAW

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THE OPEN MEETINGS LAW AND
PUBLIC CONFIDENCE IN GOVERNMENT

Democracy demands public participation in public issues. This principle is all the more important at a time when corruption in government has become a major subject of public concern. Back-room decision-making lends itself too readily to self-dealing and disregard of the public's interest. Private discussion and resolution of public issues breeds cynicism; cynicism breeds apathy; both undermine the accountability of elected officials and erode confidence in the integrity of government.

Pursuant to the Commission's charge that it examine "the adequacy of laws, regulations and procedures relating to maintaining ethical practices and standards in government," "make recommendations for action to strengthen and improve" them,¹ and "pursue further the connection between openness in government and integrity in government,"² this Commission has examined the Open Meetings

¹Executive Order No. 88.1, at 1 (April 21, 1987).

²Statement of the Honorable Mario M. Cuomo before the Meeting of the New York State Commission on Government Integrity, at 9. (September 9, 1987).

Law³ throughout the State. We have explored the Open Meetings Law's effectiveness with citizens, political leaders, journalists, and civic groups around the state; we have reviewed press reports and the Annual Reports of the Committee on Open Government; and on November 4 and 5, 1987, we held public hearings on the law in Rochester, New York. Eighteen witnesses testified, both for and against changes in the current law.⁴ This report reflects the Commission's findings and recommendations concerning the important issues which emerged from our review.

The recommendations of the Commission, developed below, are the following:

1. The 1985 amendment to the political caucus exemption of the Open Meetings Law should be repealed with respect to local legislative bodies.
2. Public bodies should be expressly prohibited from holding less-than quorum meetings in order to circumvent the law.

³The Open Meetings Law is codified in N.Y. Pub. Off. Law Sections 100-111 (McKinney 1988). The text of that law is set forth in Appendix A to this report.

⁴A list of these witnesses, as well as a list of the materials submitted to the Commission for inclusion in the record, is attached as Appendix B to this Report. A copy of those materials, and the transcript of the hearings, is on file at the offices of the Commission.

3. Courts should be authorized to impose civil fines upon public officials who knowingly and intentionally violate the Open Meetings Law.
4. Courts should be authorized to void an action of a public body not only if the action is taken in violation of the Open Meetings Law but also if substantial deliberations relating to the action are held in violation of that law.

New York's Open Meetings Law, as first enacted in 1976, was founded upon the premise that openness and integrity are fundamentally linked. The Legislative Declaration accompanying the bill proclaimed:

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 observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonwealth will prosper and enable the governmental process to operate for the benefit of those who created it.⁵

Over the years, however, an amendment to that law, coupled with the lack of effective mechanisms to enforce its provisions, have dimmed that bright promise. Throughout the

⁵N.Y. Pub. Off. Law Section 100 (Legislative Declaration).

state, people are concerned that the public's business is being conducted behind closed doors.

Some have called this debate "merely" a press issue, of little interest to the general public. This Commission has been, however, struck again and again by the public importance of this issue. Citizens have repeatedly stressed to the Commission their concern over the propriety of municipal bodies closing their meetings to the public.⁶ Their concern is also reflected in the fact that during 1987, of over 2,000 telephone inquiries to the Committee on Open Government (the body charged with giving advisory opinions on interpretation of the Open Meetings Law), over 450 came from members of the general public. The balance of the calls were evenly divided between members of the media and public officials seeking clarification of their obligations. The substantial majority of written advisory

⁶During this past summer, the Chairman of the Commission and two staff members traveled throughout New York State, speaking with citizens, representatives of civic groups, and others, to identify the ethical issues of greatest importance to New Yorkers.

opinions the Committee issued during the past year were responses to inquiries from the public.⁷

The Commission is convinced that this issue cannot be dismissed as merely a concern of the press. In this case, the concerns of the press are the concerns of the public. Many citizens must rely upon the press as their eyes and ears at meetings of public bodies. In addition to being the source of information on issues of substance under consideration, the press serves as citizens' watchdog for the integrity of their elected officials. As we have stated in our Preliminary Report on Campaign Financing Reforms,⁸ quoting Justice Brandeis: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."⁹ The conclusion is inescapable that open meetings are crucial to the public's confidence in government.

⁷1987 Report of the New York State Committee on Open Government to the Governor and the Legislature at 32-33.

⁸Preliminary Report on Campaign Financing Reforms issued by the Commission On Government Integrity, December 21, 1987 at 32.

⁹Brandeis, Other People's Money 62 (Nat'l Home Library Foundation ed., 1933)

CURRENT LAW

A. Substantive Provisions

The New York State Open Meetings Law requires that "[e]very meeting of a public body shall be open to the general public."¹⁰ A "meeting" includes the "gathering or meeting of a public body for the purpose of transacting public business, whenever a quorum is present, whether or not a vote of members of the public body is taken."¹¹ Public bodies must hold their meetings upon public notice and must take minutes, which must be available to the public.¹²

Meetings pertaining to certain specifically enumerated subjects, such as collective bargaining negotiations and discussions regarding litigation or certain personnel matters, may be held in executive session, closed

¹⁰N.Y. Pub. Off. Law Section 103(a).

¹¹Orange County Publications v. Council of the City of Newburgh, 60 A.D.2d 409, 419 (2d Dept.), aff'd, 45 N.Y.2d 947 (1978).

¹²N.Y. Pub. Off. Law Sections 104, 106.

to the public.¹³ But such an executive session may be held only upon the majority vote of the members of the public body, taken in an open meeting pursuant to a motion identifying the general area of the subject to be considered.¹⁴ Minutes must be kept of any action taken by formal vote at an executive session; those minutes must be available to the public.¹⁵

Three types of proceedings are entirely exempt from the requirements of the Open Meetings Law. These include most judicial or quasi-judicial proceedings¹⁶; deliberations of political committees, conferences, and caucuses (the so-called "political caucus exemption"); and proceedings concerning matters made confidential by federal or state law. Since these meetings are exempt, they require

¹³N.Y. Pub. Off. Law Section 105.

¹⁴N.Y. Pub. Off. Law Section 105(1).

¹⁵N.Y. Pub. Off. Law Section 106(2)-(3).

¹⁶Proceedings of the Public Service Commission and zoning boards of appeals, though quasi-judicial, are not exempt from the requirement to hold their meetings in public. N.Y. Pub. Off. Law Section 108.

no notice to the public and no minutes need be made available for public review.¹⁷

The Open Meetings Law was thus intended to reflect a balance between the principle that the public's business must be conducted in a public manner, and the recognition that certain deliberations of governmental bodies must be free from the pressures that accompany publicity. As the discussion which follows shows, weaknesses in the current law upset that balance.

B. Interpretation and Enforcement Provisions

Under the Open Meetings Law, the Committee on Open Government, an administrative agency created under the Freedom of Information Law, may issue advisory opinions interpreting the provisions of the law.¹⁸ Although these advisory opinions are not binding, courts may rely on them for guidance in evaluating whether the law has been violated. During the past year the Committee issued 96

¹⁷See N.Y. Pub. Off. Law Section 108.

¹⁸N.Y. Pub. Off. Law Section 109. See also N.Y. Pub. Off. Law Section 89 (1) (a).

written opinions and answered 2,077 telephone inquiries relating to the law.¹⁹

The Open Meetings Law can be enforced by an Article 78 proceeding or an action for a declaratory judgment. "Any aggrieved person" complaining of a violation of the Open Meeting Law may bring such an action, and in its discretion, upon good cause shown, the court may void the action which it finds was taken in violation of that law.²⁰ The court may also award costs and reasonable attorney's fees to the successful party.²¹ No other remedy for violations of the Open Meetings Law currently exists.

ISSUES RAISED BY THE COMMISSION'S INVESTIGATION

Several substantial issues have emerged from the Commission's investigation of the operation of the Open Meetings Law.

¹⁹1987 Report of the New York State Committee on Open Government to the Governor and the Legislature at 32.

²⁰N.Y. Pub. Off. Law Section 107 (1).

²¹N.Y. Pub. Off. Law Section 107 (2).

First, an amendment to the political caucus exemption enacted in 1985, discussed in detail below, is of vital concern to the public because it can, under present law, be invoked by the majority party in every local legislative body in the state, from the smallest village to the largest city, to allow the public's business to be determined in a private meeting.

Second, enforcement mechanisms in the law are insufficient. Although the Open Meetings Law authorizes the courts to void, in whole or in part, any action taken in violation of the law, it contains no other enforcement mechanism. Furthermore, and directly contrary to the spirit of the law, it provides no remedy at all if an action is taken in public but the deliberations leading to that action are conducted entirely in private.

Finally, the current law contains no remedy for certain conduct intended to circumvent the law's provisions. This issue surfaced whenever repeal of the 1985 amendment to the political caucus exemption was discussed, since some local legislative bodies, before the 1985 amendment, had tried to circumvent a court interpretation of the scope of the exception by holding a series of less-than-quorum

meetings which together served as a single gathering of more than a quorum of the public body.

The Commission's investigations, including the Rochester hearings, have led us to conclude that each of these issues represents a serious deficiency in the current Open Meetings Law and undermines public confidence in government.

A. The Political Caucus Exemption

Of all the open meetings issues, the "political caucus" exemption in Section 108 has been the focus of the most intense debate. Over the years, its scope has been the subject of litigation, an advisory opinion from the Committee on Open Government, an amendment to the statute vastly extending the applicability of the exemption, and, now, calls for repeal or modification of the amendment.

1. History of the Political Caucus Exemption

As enacted in 1976, the Open Meetings Law simply exempted the "deliberations of political committees,

conferences and caucuses."²² The question soon arose whether that exemption permitted members of the same political party to meet in private to discuss public business, even if they constituted a majority of a public body.

a. The Sciolino Decision. In 1980, Anthony Sciolino, the sole Republican member of the Rochester City Council, sought access to certain closed meetings of the Council's Democratic caucus, where the Democratic majority received information relating to city government matters likely to come before the entire Council, and then discussed those matters.²³ Sciolino argued that these meetings of the Democratic majority were meetings of the Council to transact public business, and that neither he nor the public should be excluded. Both the trial and appellate courts agreed. As the Appellate Division stated, the political caucus exemption:

was meant to prevent the statute from extending to the private matters of a political party, as opposed to matters

²²Act of July 20, 1976, ch. 511, 1976 N.Y. Laws 1173, 1175, now codified in N.Y. Pub. Off. Law Section 108(2)(a).

²³See Sciolino v. Ryan, 103 Misc. 2d 1021 (Sup. Ct., Monroe County, 1980), aff'd, 81 A.D.2d at 476-77 (4th Dept. 1981). See also Tr. at 413-14.

which are public business yet discussed by political party members. To allow the majority party members of a public body to exclude minority members, and thereafter conduct public business in closed sessions under the guise of a political caucus, would be violative of the statute.²⁴

To comply with the letter of the court's ruling, the Democratic members of the Council thereafter sometimes split their caucus into two groups, the membership of which would rotate from meeting to meeting, so that no quorum of the entire Council would be present at any one time.²⁵

b. The 1985 Amendment. Some four years after Sciolino, in response to a request from the New York Post, the Committee on Open Government, relying on Sciolino, issued an advisory opinion concluding that caucuses held by a majority of the members of either house of the New York State Legislature for the purpose of conducting public business are subject to the Open Meetings Law.²⁶ Legislative response to that interpretation was swift and

²⁴Sciolino v. Ryan, 81 A.D.2d at 479.

²⁵Transcript of Hearings held by Commission on Government Integrity, November 4-5, 1987 (hereinafter cited as "Tr.") at 33, 468-69, 485-86, 530, 543-44.

²⁶Committee on Open Government, Advisory Opinion No. OML-AO-1158 (April 11, 1985).

dramatic. Less than six weeks later, the Rules Committees of the Senate and Assembly introduced a bill to overturn the opinion; the bill was passed by both houses a week later; Governor Cuomo signed it within 24 hours.²⁷

That law, commonly referred to as "the 1985 amendment," exempted from the Open Meetings Law all "private meeting[s] of members of the senate and assembly of the state of New York ... who are members or adherents of the same political party...." The exemption applied

without regard to (i) the subject matter under discussion, including discussions of public business, (ii) the majority or minority status of such political committees, conferences and caucuses, or (iii) whether such political committees, conferences and caucuses invite staff or guests to participate in their deliberations....²⁸

The amendment also applied to the legislative body of every county, city, town, and village in the State.

²⁷S-6284, A-7804 was introduced in both houses on May 23, 1985; it was passed by both houses on May 30, 1985, and signed into law on May 31, 1985.

²⁸N.Y. Pub. Off. Law Section 108(2)(b).

c. Post-1985 Experiences. The 1985 amendment had an almost immediate impact upon the access of the public to meetings of local legislative bodies. The majority members of the Rochester City Council, for example, resumed their pre-Sciolino practice of holding closed caucuses.²⁹ Many other bodies, which had previously met in public, began to close their doors. In a January 1986 poll of daily newspapers across the state conducted by the New York Newspaper Publishers Association, twenty of the 44 newspapers responding reported closed-door meetings by public bodies that had been open before May 31, 1985.³⁰

2. Arguments For And Against Change

At our hearings in Rochester, the arguments both for and against the political caucus exemption were addressed. Even one eloquent spokesman for closed caucuses testified that "there should be a presumption for

²⁹The Rochester City Counsel recently resolved that it "will conduct Open Meetings as mandated prior to adoption of the [1985] amendment." Rochester City Council Resolution No. 87-35 (October 13, 1987). See also Tr. at 482-83, 536-37.

³⁰See Responses to NYNSPA Survey "Closed Political Party Caucuses of Local Legislative Bodies" (Jan. 1986), a copy of which is on file with the Commission.

openness."³¹ Elsewhere he wrote, "New York State law creates a presumption that public business be done in public, and this is a good idea. Democracy works best when decision-makers can be held accountable by citizens for their actions."³²

There was, however, recognition that the maxim that public business should be conducted in public cannot be universally applied. The proponents of closed caucuses articulated a number of significant policy reasons for their position. Most witnesses at the Rochester hearing -- both elected officials and representatives of good government groups and the media -- recognized that some measure of deliberative privacy in the legislative process is proper, even at possibly critical points in reaching a decision. The opponents of repeal of the political caucus amendment argue that the voters, in electing legislators to represent them, necessarily allow them latitude of judgment in the performance of their responsibility, and that some discretion to secure information and explore issues with

³¹Tr. at 127.

³²Benjamin, "Confidentiality for Political Caucuses," Empire State Report, at 46 (July 1984).

colleagues in such meetings as they consider most productive is appropriate.

This Commission does not take issue with the general proposition that some degree of deliberative privacy, such as under the circumstances spelled out in other sections of the Open Meetings Law, is appropriate. We conclude, however, that in the context of meetings of a majority of the members of a legislative body, whose decisions can become the decisions of the body as a whole, the public's right to know what is being discussed and decided is more compelling than the lawmaker's interest in deliberating in private.

a. Impact on Deliberations. The primary justification advanced for closed caucuses is that members of public bodies need to discuss in private their views on public issues in order to reach a consensus. As one political scientist and local legislator has written, "a degree of confidentiality is needed to facilitate a free exchange of ideas before a decision is reached."³³

³³Benjamin, "Confidentiality for Political Caucuses," Empire State Report, at 46 (July 1984) (emphasis original).

Similarly, according to the supervisor of one upstate town, "fear of misrepresentation [by the press] tends to stifle free discussion and speculative thought among public officials; so that, the intellectual level of a discussion is lowered and the best synthesis may be lost."³⁴ Some political leaders have also argued that opening caucuses could inhibit a member of a legislative body from asking questions that might give the appearance that the member is uninformed or unintelligent.³⁵

But, in practice, open caucuses do not appear to interfere with the spirited debate of public issues. For example, when asked whether opening caucuses during the period after Sciolino and before the 1985 amendment really made any difference in the way issues were discussed, a representative of the Association of Counties testified before us, "I don't think it had any significant change, to be very honest At the county level ... I really don't think there was a major reaction to it or benefit from it or

³⁴Memorandum by Paul M. Spiegel, Supervisor, Town of Pittsford, dated "about Feb. 1986," on file with the Commission.

³⁵See Tr. at 26-27, 31-32, 269-71, 511-12, 534, 548-50. But see Tr. at 563-64.

adversity from it."³⁶ A representative of the New York Conference of Mayors and Other Municipal Officials similarly stated, "I'm not sure it had an overly dramatic change on the overall process itself."³⁷

In our judgment, the public is entitled to make an informed decision about the quality of its representatives, and cannot do so if the significant deliberations of those representatives are held behind closed doors. In Anthony Sciolino's words, "The public has a right to know who's contributing, who's not; who's being petty, who's being statesmanlike. Unfortunately, when the door is closed nobody knows who is doing the job."³⁸ In fact, discussions of the most difficult and controversial issues are precisely those that legislators might most want to hold in private -- such as the location of low-income housing or a major waterfront development, removal of asbestos from schools, solid waste disposal, or increases in their salaries. These are discussions in which the public has great interest and

³⁶Tr. at 258. See also Tr. at 565-66.

³⁷Tr. at 258.

³⁸Rochester Democrat and Chronicle, Sept. 23, 1986, at 1B.

which should clearly be held in public. These are issues which have, on occasion, been discussed behind closed doors. Yet, because the provisions exempting caucuses do not contain any requirements for giving notice or taking minutes, it is difficult if not impossible to know for sure when such caucuses have occurred.

The deliberations of public officials also show why, not merely how, a particular legislator voted on a particular issue. Closed caucuses prevent the public from knowing what considerations led to the decisions of the majority of a legislative body, what alternatives the members of that body examined, and what consequences they weighed.³⁹

b. Effect On The Two-Party System. Secondly, proponents in favor of the political caucus exemption have

³⁹Proponents of closed caucuses respond that a legislator will normally consider it necessary to explain and justify a vote on a crucial issue, typically in open debate at the meeting of the full body or in statements to the media before or after the vote, and that, if legislators do not adequately account for their performance, then their constituents, who have the greatest stake in the matter, can vote them out of office. In the Commission's view, such after-the-fact statements may not reflect the true motives of the legislator as fully as does the actual deliberative discussion.

argued that open caucuses weaken parties and thereby the two-party system.⁴⁰ One commentator has explained that the majority political party in a legislative body "needs a confidential forum in which its members can frankly discuss alternatives and hammer out compromises. Applying the open meeting law to political caucuses inhibits intraparty compromise" on issues and thereby inhibits the ability of the majority to forge a policy position for which the majority, as majority, is responsible.⁴¹

This argument, in our view, does not withstand close scrutiny. First, no one who made this claim could provide the Commission with a concrete example of party structures having suffered these adverse consequences as a result of open caucuses.

Furthermore, any arguably positive effects that closed caucuses might have upon intraparty strength are outweighed by their palpable negative effects upon

⁴⁰ See Tr. at 34-35, 132, 145. See also Tr. at 497-99, 543-44. But see Tr. at 89-90, 105-107, 213-14, 466-67.

⁴¹ Benjamin, "Confidentiality for Political Caucuses," Empire State Report, at 46 (July 1984). But see Tr. at 466-67.

interparty vitality, at least in those numerous localities in New York where the minority party is vastly outnumbered by the majority. In those communities, to the extent that information relevant to the public's business is conveyed in private meetings of the majority, excluded minority members are deprived of information vital to their informed participation in the public debate which is essential to the proper functioning of the two-party system. In these circumstances, closed caucuses may in fact weaken the system.

This handicap is not merely speculative. The sole Republican member of the Rochester City Council vividly described before us the impact of excluding new minority members from majority political caucuses at which public business is discussed. She stated that the Democratic majority in the Rochester City Council regularly obtained "agenda briefings" by staff and others, briefings to which she was not privy. The topics of such closed caucus briefings included an industrial expansion in that same Republican member's district, a review of the proposed line item school budget by the superintendent of schools and school board, and a statement by a utility representative on

that utility's stand on a proposed reassessment program.⁴²
"Now, I consider that [lack of information] a handicap to serving the constituents in [my] district", the minority member testified.⁴³

The handicap is increased when the lawmaker is excluded from meetings at which, for all practical purposes, the issues are decided. The same witness stated, "My exclusion prevents me from representing my constituents adequately because city policy questions are decided at closed meetings outside my presence."⁴⁴ As an example, she discussed how, at the same time that she was meeting with community representatives on the location of a controversial food bank in her own council district, the majority members of the Council met in closed caucus and decided that very question.⁴⁵

The proponents of closed caucuses respond that this handicap might actually increase if the 1985 amendment

⁴²Tr. at 414-17, 428-29.

⁴³Tr. at 415.

⁴⁴Tr. at 414.

⁴⁵Tr. at 418-19.

were repealed. Discussions would lawfully take place in smaller groups, in telephone conversations, and in informal communications among key leaders. To the extent that discussions of public issues were displaced from the caucus to other channels of communication, some legislators would receive less information and would have less opportunity to participate in crucial decisions, and collective party responsibility would be blurred.

We do not agree. In our view, a series of private discussions of even critical issues of substance is qualitatively different than a single gathering of a majority of a public body, where the majority discusses and even decides the public business. The majority can make decisions; smaller groups of lawmakers cannot.

Some witnesses testifying before the Commission also suggested that the pre-1985 Open Meetings Law unfairly discriminated against the majority party, since only the majority was prohibited from discussing public business in closed session. One Rochester City Council member is quoted as having said: "It's like telling the winning team at half

time that it can't go into the locker room to discuss strategy for the second half while the losing team can."⁴⁶

The differing impact open caucus requirements may have on the majority than on the minority party is, in the Commission's view, justifiable. As the Democratic minority leader of the Monroe County Legislature pointed out, the majority party has an obligation different from that of the minority. What the majority decides in caucus is, effectively, the decision of the legislative body itself.⁴⁷ Particularly in politically lopsided bodies, closed caucuses effectively preclude any meaningful debate between opposing parties; the real business may be conducted behind closed doors, and the public meeting may become a pro forma exercise.⁴⁸

c. Impact on Integrity in Government. Some perceive the need for private conferences among lawmakers and elected officials to be so great that secret meetings

⁴⁶Rochester Democrat and Chronicle, Nov. 12, 1986, at 8B.

⁴⁷Tr. at 336-37.

⁴⁸See Tr. at 313, 317, 319, 555, 557

will be held no matter what the law provides. In this vein, it has been argued that prohibiting closed caucuses which discuss public business would encourage disrespect for the law,⁴⁹ since the majority party would seek a way to disobey or evade it. A former Rochester City Council member testified, "[A]bolition of closed caucuses is sheer hypocrisy. You'll never abolish them.... [I]f abolished in one form, [they] would only be held in another, even if at midnight in my basement behind the furnace."⁵⁰

Again, the Commission does not agree. Perhaps the most compelling reason for abandoning the political caucus exemption lies precisely in its impact upon the appearance of integrity in government. The public almost invariably perceives closed door meetings of public bodies as evidence that the members of that body have something to hide. That perception alone lends an appearance of impropriety to such a meeting and detracts from public confidence in the integrity of public officials. When such closed door meetings involve a number of lawmakers sufficient to decide

⁴⁹See Governor's Memorandum on approving Act of May 31, 1985, ch. 136, 1985 N.Y. Laws 462, reproduced at 1985 N.Y. Laws 3283 (McKinney's).

⁵⁰Tr. at 530.

a public issue, and take place without notice, minutes, or a clear delineation of the issues considered, that appearance of impropriety is heightened.⁵¹ Until 1985, the circumstances in which closed meetings of legislative bodies could be held were circumscribed by law to reflect fairly narrow areas, with clear procedural safeguards. Since the 1985 amendment, the boundaries are far less clear, and the public's confidence in its lawmakers suffers.

The remedy to the temptation to try to meet behind closed doors to debate and decide public issues, the Commission believes, is a clearer statement in the law that such attempts are prohibited, together with improved enforcement mechanisms. With those changes, the Commission is confident that lawmakers will strive to obey, not flout, the law.

B. Enforcement Issues

Several enforcement-related issues emerged during the course of the Commission's investigation.

⁵¹See generally Tr. at 72, 76-77, 385, 471-72.

A number of witnesses described situations, during the period after Sciolino, but before the 1985 amendment, where the attendees at closed caucus meetings would be systematically rotated so that there would never be a quorum present.⁵² Although such a practice clearly violates the spirit of the Open Meetings Law in effect prior to the 1985 amendment, it appears to have technically complied with the law's provisions. These provisions clearly pose problems for those required to enforce a version of the Open Meetings Law that resembles the law prior to the 1985 amendment.

Second, by providing no remedy for violation of the Open Meetings Law other than by a court proceeding to void the public body's action, the law in its present state allows members of public bodies knowingly to violate its provisions with virtual impunity. Any action voided by a court after litigation can be reinstated by the public body at a later public meeting which may be pro forma;⁵³ the

⁵² See Tr. at 33, 468-69, 485-86, 530, 543-44.

⁵³ See, e.g., Dombroske v. Board of Education, 118 Misc. 2d 800, 804 (Sup. Ct., Onondaga County, 1983). A subcommittee of the Board of Education, consisting of more than the majority of the Board, met many times in secret to discuss an issue, and made a recommendation to the full Board. The Board then met publicly and approved the
(Footnote Continued)

lawmakers themselves suffer no penalty. So basic is this weakness that even one of the strongest advocates of closed caucuses testified in Rochester that, if an open meetings law exists, it should be enforced by individual penalties. That witness supported fines.⁵⁴

Third, the statute does not authorize courts to void an action taken in violation of the Open Meetings Law when the deliberations preceding an action of a public body have been held behind closed doors in violation of the Open Meetings Law but the action was taken at a public meeting which complied with the Law.

The law is clear that deliberations of a public body held behind closed doors, unless they fall within the Law's exceptions or exemptions, violate the Open Meetings

(Footnote Continued)
recommendation. The court declined to void that decision, saying, "a prior violation of the Open Meetings Law does not taint a subsequently held legal meeting at which the questioned action is taken."

⁵⁴Tr. at 52-54. See also Tr. at 349, 446-47. The effectiveness of such fines probably lies less in the threatened monetary loss than in the almost certain embarrassment to a public official resulting from the report of the fine on the front page of the local newspaper. See Tr. at 76, 208-209.

Law.⁵⁵ Nonetheless, private meetings are sometimes held to resolve all differences, with the later public action of the legislative body becoming simply a perfunctory exercise. Under current law, while an "aggrieved person" may litigate to obtain a declaratory judgment that this practice is unlawful, the court in such a case has no power to void the action of the public body.⁵⁶

⁵⁵Orange County Publications v. City of Newburgh, 45 N.Y. 2d 942, 948, aff'g, 60 A.D. 2d 409, 40, N.Y.S. 2d 84 (2d Dept. 1978). (The Open Meetings Law applies to the entire decision-making process, not merely formal acts of voting or formal executions of documents. The Court declared that:

The Open Meetings Law was obviously designed to assure the public's right to be informed. Accordingly, any private or secret meetings or assemblages of the Council of the City of Newburgh, when a quorum of its members is present and when the topics for discussion and eventual decision are such as would otherwise arise at a regular meeting, are a violation of the New York Open Meetings Law.)

⁵⁶See Dombroske v. Board of Education, 118 Misc. 2d 800, 804 (Sup. Ct., Onondaga County, 1983).

THE COMMISSION'S RECOMMENDATIONS

After hearing all the viewpoints so persuasively expressed at its Rochester hearings, and considering the variety of contexts in which these issues are presented, the Commission on Government Integrity makes the following recommendations.

A. The 1985 Amendment to the Political Caucus Exemption Should Be Repealed With Respect to Local Legislative Bodies.

The Commission is convinced that the 1985 amendment to the political caucus exemption should be repealed as it pertains to local legislative bodies.

Some individuals and groups, including the New York Conference of Mayors and Other Municipal Officials, the Association of Counties, and the Association of Towns, have argued against any change in the law that would treat counties, cities, towns, and villages differently from the State Legislature.⁵⁷ The Commission, however, has no authority to investigate the management or affairs of the

⁵⁷Tr. at 227-29, 234, 236, 252-55, 289-90.

State Legislature and therefore makes no recommendation concerning amending the law as to that body.⁵⁸ On the merits, we are convinced that as to the local jurisdictions we are empowered to consider, the amendment should be repealed.

Opponents of repeal of the 1985 amendment have voiced the view that any decision whether to invoke the broad political caucus exemption expressed in current law should be left to the local legislative bodies themselves.⁵⁹ They argue that the local legislators who have been elected by the people of the community to represent them should be allowed to exercise their discretion in this regard; if the representatives abuse their privilege of deliberative privacy and refuse to open their deliberations to reasonable public scrutiny, the remedy should lie with the local

⁵⁸The provision of the Appropriations Bill which allocated funds to this Commission expressly stated:

no funds pursuant to the appropriation may be used to fund the work of any commission which has one of its purposes the investigation of the management or affairs of the Legislature....

1987 New York State Appropriations Bill, at 497.

⁵⁹See Tr. at 53-54, 191. But see Tr. at 99, 222, 444-45, 463, 571-73.

voters, who have the most direct interest and the greatest ability to evaluate the performance of their legislative representatives. They also observe that repeal as to local governments would be especially offensive to home rule principles if the State legislature were to maintain the exemption for itself.

Witnesses favoring repeal of the amendment responded to that argument by emphasizing the paramount importance of openness in the legislative process to both the appearance and the reality of integrity of elected officials.⁶⁰ For all the reasons discussed above, this Commission agrees, and is not persuaded that to leave the question to local option would be effective. The efforts of the New York State League of Women Voters demonstrate the difficulties inherent in trying to lobby for city-by-city changes in the law.⁶¹ Moreover, even those public bodies

⁶⁰The analogy has been drawn to the Freedom of Information Law, which applies to every municipality of the State. The Freedom of Information Law is codified at N.Y. Pub. Off. Law Sections 84-90 (McKinney 1988).

⁶¹Soon after the passage of the 1985 amendment, local Leagues of Women Voters throughout New York State began seeking to persuade counties, cities, town, and villages (which number some 1616 jurisdictions) to renounce the new law. Only about 60 local municipalities (less than half
(Footnote Continued)

that today pass an open meetings resolution may tomorrow rescind it, particularly should the open meetings become a political liability.

The Commission also carefully considered whether some different formulation of the political caucus exemption might more effectively balance the competing interests at stake. Its investigation revealed widespread acceptance of the notion that some number of the members of the same political party should be allowed to meet and discuss public issues in private. Many witnesses before us agreed that two members of the same party should be permitted to discuss public business in private. The heart of the debate, however, lies in where, past that number, the line is to be drawn between legitimately private discussions and meetings which should be open to the public. The pre-1985 law used

(Footnote Continued)

those contacted by the local Leagues) adopted resolutions either requiring the governing bodies to meet in public or committing the municipality to abide by the pre-1985 law. The League, observing that its efforts on the local level were having a minimal impact statewide, shifted its open meeting efforts to the State Legislature. Tr. at 209-10, 219-21. See also Tr. at 294-95, 582-83.

the majority of the relevant body as the trigger point; Governor Cuomo has proposed two-thirds.⁶²

The Commission has considered each of these alternatives, as well as the suggestion of linking the maximum permissible size of a closed caucus to the size of the affirmative vote required to pass the matter under discussion. On balance, the Commission favors simply a

⁶²The Governor's most recent proposal would require that political caucuses discussing public business be open to the public when two-thirds or more of the total membership of the legislative body is present. A. 7460, introduced by Committee on Rules at request of Assemblyman Zimmer on May 4, 1987. See also S. 4870, introduced by Senator Donovan on April 13, 1987. Thus, for example, "if the makeup of a legislature was split 60-40 between the two parties, the caucuses of both parties could be closed." Memorandum accompanying Governor's Program Bill No. 69, at 2-3 (1987). That two-thirds rule is justified on "the basis of a strong two-party system[, which] should act to ensure that public business is not conducted behind closed doors." Id., at 3.

That conclusion, however, may not be correct. The fact that the majority party constitutes less than two-thirds of the members of the legislative body does not necessarily signify a strong two-party system. The remaining members may be split among two or more parties, may be politically weak, or may in fact be aligned with the majority. Particularly in smaller municipalities it is not unusual for a registered Democrat or Republican to run for election as an independent or even on the opposing party's slate. Even the presence of a strong two-party system hardly guarantees open caucuses, especially in those municipalities with a tradition of closed caucuses or where the holding of closed caucuses benefits both parties.

return to the formulation which was in effect after Sciolino and prior to the 1985 amendment.⁶³

B. Intentional Circumvention of the Law Should Be Expressly Prohibited in the Statute

Wherever the line is drawn requiring the doors to meetings to be opened, it is evident that the problem of deliberately structuring meetings to comply with the letter but not the spirit of the law must be addressed.

To discourage a recurrence of the kind of subterfuge that took place before the 1985 amendment, the Commission recommends that public bodies be prohibited from holding less-than-quorum meetings in order to circumvent the law.⁶⁴ This prohibition should be explicitly stated in the

⁶³For the reasons discussed herein Commissioner James L. Magavern does not concur in the Commission's recommendation to repeal the 1985 amendment to the political caucus exemption as it pertains to local legislative bodies.

⁶⁴See N.J. Rev. Stat. Section 10:4-11 ("No person or public body shall fail to invite a portion of its members to a meeting for the purpose of circumventing the provisions of this act"). The same purpose could possibly be accomplished in New York by adding the following sentence subdivision one of to Section 102 of the Open Meetings Law:

The convening, whether officially or unofficially, of less than a quorum, shall be

(Footnote Continued)

law to avoid ambiguity and to put public officials on notice. While we recognize that there may be some situations where the difference between a permissible private conference and an intentional effort to evade the law is not crystal clear, in most cases the issue will be relatively clear. In our judgment, such distinctions are best left to the courts or the Committee on Open Government to judge in the context of particular circumstances.

C. Civil Penalties Should Be Imposed On
Individuals Who Intentionally Violate The Law

Many witnesses testified that the penalties for violation of the Open Meetings Laws which consist solely of possible court orders voiding actions taken in violation of the Law's provisions, were insufficient. This Commission agrees. Accordingly, the Commission recommends that courts be authorized to impose civil fines upon public officials

(Footnote Continued)

a meeting for purposes of this article if the number of members present is limited to less than a quorum in order to circumvent the requirements of this article and public business is discussed.

who knowingly and intentionally violate the Open Meetings Law.⁶⁵

Fines against individual public officials have precedent in New York law, in comparable circumstances.⁶⁶ Other states have established fines for violations of their open meetings laws - for example, up to \$500 in New Jersey for repeat offenders and up to \$1,000 in Connecticut.⁶⁷

⁶⁵This recommendation could possibly be implemented by adding a new sentence to the first paragraph of subdivision one of Section 107 of the Open Meetings Law, to read as follows:

In such action or proceeding, the court shall also have the power to impose a fine upon any member of the public body who has knowingly and intentionally violated any provision of this article. Such fine shall not exceed \$100 for the first violation and \$200 for each succeeding violation committed within a period of eighteen months. Notwithstanding any provision of law to the contrary, no government entity shall indemnify any such member for payment of any such fine.

⁶⁶See, e.g., Pub. Off. Law Section 79 (failure to perform a public duty enjoined by special provision of law). See also Ethics in Government Act, ch. 813, 1987 N.Y. Laws 1404, 1407-1408, 1411, 1420-21, 1424-25, 1430-31, 1447, 1450-51.

⁶⁷N.J. Rev. Stat. Section 10:4-17; Conn. Gen. Stat. Section 1-21i(b)

Violation of the Nevada open meetings law is a misdemeanor.⁶⁸

Governor Cuomo has proposed a fine of up to \$100 where a court hearing an open meetings law case finds that the public body or any of its members engaged in a pattern of violations or a flagrant disregard of the Open Meetings Law. In such a case, the fine would be payable by each member who knowingly or intentionally engages in the violation.⁶⁹ The Commission believes that this standard of proof is unnecessarily strict, and that a fine should be imposed simply for any knowing and intentional violation of the Open Meetings Law.

Such a rule would adequately protect individuals against uncertainties in the law and against difficulties that volunteer, part-time officials may have judging its application to particular facts. Under this provision, legislators who in good faith but mistakenly believe that the business discussed at a closed meeting is "political"

⁶⁸ Nev. Rev. Stat. Section 241.040.

⁶⁹ A. 7460, introduced by Committee on Rules at request of Assemblyman Zimmer on May 4, 1987.

rather than "public" would suffer no fine; but, for example, legislators who insist on keeping the meeting closed after learning that the Committee on Open Government had rendered an opinion that the business is in fact "public" would act at their peril.

D. Courts Should Have Power to Void An
Action After Substantial Deliberations
Held in Violation of the Open Meetings Law

The Commission perceives no justification for omitting a remedy for cases where public bodies hold private meetings in which the true issues are debated and resolved, and then appear in a perfunctory open meeting to take the action previously decided. The Commission therefore recommends that courts be authorized to void an action of a public body not only if the action is taken in violation of the Open Meetings Law but also if substantial deliberations relating to the action are held in violation of that law.⁷⁰

⁷⁰This change could possibly be implemented by changing the second sentence of subdivision one of Section 107 to read

the court shall have the power, in its discretion, upon good cause shown, to declare any action void, in whole or in part, when that action, or substantial deliberations relating thereto, was

(Footnote Continued)

In a case where a court has voided such an action, the public body would not be precluded from arriving at the same result after it had gone through the full deliberative and voting process in compliance with the Open Meetings Law.

E. Consideration Should Be Given to
Expanded Public Hearings

The recommendations which we have made to amend the Open Meetings Law may not be enough. Serious consideration should be given to requiring public hearings at the county, city, town, and village levels where items of significant import are discussed. Despite strengthening the Open Meetings Law, there may still be too much private discussion of significant public issues, even without circumvention of the amended provisions. There is little logic in requiring a public hearing (where the public can ask questions and demand answers) when a local law is being passed which may be of minor significance, but requiring only an open meeting where decisions are being made which may be of maximum significance. For example, we question why a public hearing must precede passage of a local law

(Footnote Continued)

taken or held in violation of this article.

requiring a minor increase in fees or fines, while a municipality can commit to spend millions of dollars on a new project without public participation.

We do not suggest that such hearings be held in place of open caucuses of the majority of the legislative body, for although public hearings permit the public to speak, they do not require the members of the public body to reveal the basis of their votes.

We recommend consideration of requiring public hearings at the local level whenever public benefits or expenditures of a significant magnitude are being considered. While the threshold size of the benefit or expenditure may vary depending upon the level of government, such an amendment would serve to strengthen our recommended amendments of the Open Meetings Law and diminish the likelihood of efforts to circumvent the strengthened provisions.

CONCLUSION

Open meetings, like democracy itself, are not always pleasant or convenient. Yet they are no less valuable for that fact. As one witness testified, "[Y]es, it is uncomfortable to vote yourself a pay raise in public. Yes, it is uncomfortable to talk about a school with asbestos in it in front of anxious parents. Yes, it is uncomfortable to talk about where to locate low income housing when you have people in the audience who might live next to the site, but, whoever said democracy had to be easy or comfortable?"⁷¹

The current open meetings law falls far short of the ideal, at least as portrayed in one University study.⁷² More significant than any rank on a university survey, however, is the corrosive effect of the present inadequacies of the Open Meetings Law upon the public's perception of the integrity of their local governments. Every time a citizen

⁷¹Tr. at 370.

⁷²Braman, Sunshine Laws From the 50 States: A Spectrum, Hubert H. Humphrey Institute of Public Affairs (July 1984).

sees a closed meeting as a cloak for misconduct, democracy suffers. That perception alone, we believe, would justify the proposed changes to the Open Meetings Law. Buttressed by all the other reasons set forth above, the argument for those changes becomes irrefutable.

Dated: New York, New York
December 21, 1987

STATE OF NEW YORK
COMMISSION ON GOVERNMENT INTEGRITY

John D. Feerick
Chairman

Richard D. Emery
Patricia M. Hynes
James L. Magavern
Bernard S. Meyer
Bishop Emerson J. Moore
Cyrus R. Vance

APPENDIX A
PUBLIC OFFICERS LAW, ARTICLE 7
OPEN MEETINGS LAW

Section 100. Legislative declaration.	106. Minutes.
101. Short title.	107. Enforcement.
102. Definitions.	108. Exemptions.
103. Open meetings and executive sessions.	109. Committee on open government.
104. Public notice.	110. Construction with other laws.
105. Conduct of executive sessions.	111. Severability.

§100. Legislative declaration. 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 observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it.

§101. Short Title. This article shall be known and may be cited as "Open Meetings Law".

§102. Definitions. As used in this article. 1. "Meeting" means the official convening of a public body for the purpose of conducting public business.

2. "Public body" means any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body.

3. "Executive session" means that portion of a meeting not open to the general public.

§103. Open meetings and executive sessions.

(a) Every meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with section one hundred of this article.

(b) Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty of the public buildings law.

§104. Public notice. 1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.

2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

3. The public notice provided for by this section shall not be construed to require publication as a legal notice.

§105. Conduct of executive sessions. 1. Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys:

a. matters which will imperil the public safety if disclosed;

b. any matter which may disclose the identity of a law enforcement agent or informer;

c. information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;

d. discussions regarding proposed, pending or current litigation;

e. collective negotiations pursuant to article fourteen of the civil service law;

f. the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;

g. the preparation, grading or administration of examinations; and

h. the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.

2. Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body.

§106. Minutes. 1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session.

§107. Enforcement. 1. Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part.

An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body. The provisions of this article shall not affect the validity of the authorization, acquisition, execution or disposition of a bond issue or notes.

2. In any proceeding brought pursuant to this section, costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party.

3. The statute of limitations in an article seventy-eight proceeding with respect to an action taken at executive session shall commence to run from the date the minutes of such executive session have been made available to the public.

§108. Exemptions. Nothing contained in this article shall be construed as extending the provisions hereof to:

1. judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning boards of appeals;

2. a. deliberations of political committees, conferences and caucuses.

b. for purposes of this section, the deliberations of political committees, conferences and caucuses means a private meeting of members of the senate or assembly of the state of New York, or the legislative body of a county, city, town or village, who are members or adherents of the same political party, without regard to (i) the subject matter under discussion, including discussions of public business, (ii) the majority or minority status of such political committees, conferences and caucuses or (iii) whether such political committees, conferences and caucuses invite staff or guests to participate in their deliberations; and

3. any matter made confidential by federal or state law.

§109. Committee on open government. The committee on open government, created by paragraph (a) of subdivision one of section eighty-nine of this chapter, shall issue advisory opinions from time to time as, in its discretion, may be required to inform public bodies and persons of the interpretations of the provisions of the open meetings law.

§110. Construction with other laws. 1. Any provision of a charter, administrative code, local law, ordinance, or

rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article.

2. Any provision of general, special or local law or charter, administrative code, ordinance, or rule or regulation less restrictive with respect to public access than this article shall not be deemed superseded hereby.

3. Notwithstanding any provision of this article to the contrary, a public body may adopt provisions less restrictive with respect to public access than this article.

§111. Severability. If any provision of this article or the application thereof to any person or circumstances is adjudged invalid by a court of competent jurisdiction such judgment shall not affect or impair the validity of the other provisions of the article or the application thereof to other persons and circumstances.

1985 Amendment

For further information, contact:

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NEW YORK STATE
Mario M. Cuomo
Governor

DEPARTMENT OF STATE
Gail S. Shafer
Secretary of State

APPENDIX B

Witnesses Testifying, and Documents Submitted,
at the Public Hearings of the
New York State Commission on Government Integrity
in Rochester, New York
November 4 and 5, 1987

WITNESSES

- Thomas P. Ryan, Jr., Mayor, City of Rochester (Transcript pages 14-55).
- Robert J. Freeman, Executive Director, New York State Committee on Open Government (pages 55-124).
- Gerald Benjamin, Professor of Political Science, State College at New Paltz, and Majority Leader, Ulster County Legislature (pages 124-169).
- John D. Kutzer, Executive Director, New York Newspaper Publishers Association (pages 172-203).
- Susan Schwardt, Vice President, New York State League of Women Voters (pages 203-224).
- Edward C. Farrell, Executive Director, New York Conference of Mayors and Other Municipal Officials (pages 224-293).
- G. Jeffrey Haber, Executive Secretary, Association of Towns of New York State (pages 224-293).
- Edwin L. Crawford, Executive Director, New York State Association of Counties (pages 224-293).
- Dorothy Mauser, Co-coordinator, Cong. Dist. 29, Common Cause (pages 293-307).
- Kevin B. Murray, Minority Leader, Monroe County Legislature (pages 307-352).
- Jerry Brickler, Councilmember, Town of Chili (pages 352-358).
- Barbara A. Henry, Editor, Rochester Democrat and Times-Union (pages 362-412).

Jean M. Carrozzi, Member, Rochester City Council (pages 412-459).

John Erb, Member, Rochester City Council (pages 459-474).

Ruth H. Scott, President, Rochester City Council (pages 474-522).

Paul E. Haney, former Member, Rochester City Council (pages 522-552).

Warren Doremus, Director of Community Affairs, WHEC-TV (pages 552-581).

John D. Lynn, Common Cause (pages 581-586).

DOCUMENTS SUBMITTED

Statements by the Witnesses.

Statement from the New York State Society of Newspaper Editors.

Monroe County Legislature Resolution No. 279 of 1986 (August 5, 1986), Urging the Governor and the Legislature of the State of New York to Abolish the May 1985 Amendment to the Open Meetings Law, submitted by Joanne D. Van Zandt, President, Monroe County Legislature.