A Public Hearing in the Matter of Open Meetings Law

New York State Commission on Government Integrity

Follow this and additional works at: http://ir.lawnet.fordham.edu/feerick_integrity_commission_hearings

Part of the Law Commons

Recommended Citation
http://ir.lawnet.fordham.edu/feerick_integrity_commission_hearings/1
A PUBLIC HEARING IN THE MATTER OF
THE OPEN MEETINGS LAW
[NOVEMBER 4, 5, 1987]

OCLC:
24476800

Note: OCLC record indicates hearing dates November 4, 7, 1987, the hearing dates attached are
November 4, and 5, 1988. Further, physical description indicates 2 volumes. The hearing
transcript dated November 4, 1987 is in two parts and that of the November 5, 1987 one part.
STATE OF NEW YORK

COMMISSION ON GOVERNMENT INTEGRITY

A PUBLIC HEARING

IN THE MATTER

of

THE OPEN MEETINGS LAW

A Public Hearing held in the above matter at the Rochester Riverside Convention Center, Room 102-C, Rochester, New York, on Wednesday, November 4, 1987, commencing at approximately 9:30 A.M., before JOHN D. FEERICK, Commission Chairman, and JAMES L. MAGAVERN, Commissioner.

OTHER PANEL MEMBERS: NICOLE A. GORDON
KEVIN J. O'BRIEN
MARK L. DAVIES
WILLIAM J. SMALL
IN RE: OPEN MEETINGS LAW

CHAIRMAN FEERICK: Good morning. My name is John Feerick, Chairman of the New York State Commission on Government Integrity. Welcome to this public hearing of our commission.

Our subject today is the New York State Open Meetings Law. In 1976, the New York State legislature passed an Open Meetings Law, the purpose of which was to ensure that "public business be performed in an open and public manner." The Open Meetings Law provides that meetings of public bodies must be open to the public.

These hearings will help our Commission to determine, among other things, whether that laudable purpose is now being served or whether a 1985 amendment to this law has created a loophole so substantial that much government business which ought to be conducted in public is now withheld from public scrutiny.

Rochester has played an interesting role in the brief history of the Open Meetings legislation. After the
IN RE: OPEN MEETINGS LAW

original law took effect ten years ago, a lawsuit was brought by Anthony Sciolino, a Rochester City Council member, challenging the closed caucuses of Democrats on the council. A New York State appellate court ruled in that case, Sciolino versus Ryan, that whenever a majority of the members of the Rochester City Council meet to discuss public business, they must do so in public, even if all the city council members present at the meeting belong to the same political party. After that ruling, Rochester's Democratic majority in the city council held open meetings.

In 1985, the New York Post obtained an opinion from the New York Committee on Open Government, citing the Sciolino decision to the effect that even state legislative caucuses may only discuss political, not public business in private. An amendment of the Open Meetings Law was then passed, excepting party caucuses of the state legislature from the Open Meetings Law. The amended law also extended that
IN RE: OPEN MEETINGS LAW

exemption to any legislative body in the state, down to the village level.

Following adoption of that amendment, Rochester and many other communities reverted to closed political caucuses. A few weeks ago, I understand, the Rochester City Council passed a resolution once again opening its caucuses. Another fifty or more municipalities have also adopted the approach of the pre-1985 Open Meetings Law.

On September 9 of this year, Governor Mario Cuomo appeared before our Commission and stated the dominant purpose of the 1985 amendment, "was to protect the confidentiality of state legislative caucuses. I regret," said the Governor, "that it went beyond that, denying access where clearly access should be allowed." He noted that in the last two legislative sessions, he has proposed corrective legislation which has not been enacted.

In my travels to nine areas of this state over the summer months, I learned...
IN RE: OPEN MEETINGS LAW

about the concern on the part of many citizens, as well as the press, about the transaction of public business in closed political caucuses.

Surely in order to have public faith in the integrity of government, there must be as much public business transacted in the open as is possible. Democracy behind closed doors, as I see it, is not democracy at all. I am aware of the view in certain circumstances there is a need for private discussions among government officials. As Governor Cuomo has stated, however, "Some things need to be secret, but they are far fewer than government officials are inclined to believe."

Today our Commission hopes to cast light on these and other issues raised by the 1985 amendment to the Open Meetings Law, and on the experiences with New Yorkers with the Open Meetings Law in the last several years. Our Commission will then reach its own independent conclusions and make recommendations to Governor Cuomo.
IN RE: OPEN MEETINGS LAW

I would now like to introduce those who are with me today. To my right is Commissioner James Magavern. To his right, Kevin O'Brien, chief counsel of our Commission, and I might indicate a native of the City of Rochester. And to his right is Nicole Gordon, who is counsel to the chairman. To my immediate left is Mark Davies, who has spent a good deal of time over the past month or so developing these hearings. He's a full-time member of our staff, and prior to joining our staff was a law professor teaching on the faculties of Fordham Law School and at another point at St. John's law school, and before that he was a practicing attorney in New York City. And to his left is William Small, assistant to the chairman for communications.

Before we call the witnesses who represent both sides on the issue we will be discussing today, Kevin O'Brien will briefly describe the Open Meetings Law.

MR. O'BRIEN: Thank you, Mr. Chairman, and I will try to be brief, just
IN RE: OPEN MEETINGS LAW

for a little legal background. The Open Meetings Law was passed by the state legislature in 1976 with the following preamble. "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 the 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 common will will prosper and enable the governmental process to operate for the benefit of those who created it."

Now, the law, as initially passed, I can summarize very briefly. It makes every meeting of a public body open to the general public, except where specifically exempted by the statute. Some of those exemptions don't directly pertain to us.
IN RE: OPEN MEETINGS LAW

Here. They concern sensitive matters such as law enforcement matters, also judicial or quasi-judicial proceedings are also exempted from this requirement.

The one exemption that does concern us, which I will talk about a little bit more in a minute, is that for deliberations of political committees, conferences or caucuses, the so-called political caucuses exemption. The law also provides for certain enforcement measures. Courts are authorized to declare any action in violation of the Open Meetings Law void, in whole or in part.

Now, this law, as the Commission sees it, raises several issues. First and probably the most important is the status of the political caucus exemption. The caucus has -- this exemption, rather, has a somewhat interesting history, which I think we can summarize in three phases.

The first phase, from roughly 1976 to 1981, we can call the pre-Scioliño phase, in honor of the case which originated
IN RE: OPEN MEETINGS LAW

here in Rochester. During this period, it was not clear how far the political caucuses exemption extended to private meetings where public business happened to be discussed, private meetings, that is meetings outside the auspices of a governmental agency. If all the Democratic or Republican members of a given body met at the home of one of the members, that would be a private meeting, and as I see under this first phase, it was not clear exactly how far the open meetings mandate applied to such a meeting, even if public business was discussed at such a meeting.

The second phase from roughly 1981 to 1985 we can call the post Sciolino phase. In the wake of Sciolino and a number of other decisions around New York State, it was made clear that the exemption does not apply to private meetings to the extent that public business is discussed. That is to say, those meetings also have to be open to the general public in accordance with the statute.
IN RE: OPEN MEETINGS LAW

And the third phase from roughly 1985 to the present is the new amendment phase. In the wake of these decisions and their implications, the governor signed into law an amendment to the statute, which made clear that private meetings are exempted from public attendance, even if public business is discussed and those present discussing public business constitute a majority of the applicable body. That's where we are now in this state level.

As Chairman Feerick pointed out, recently the Rochester City Council added a fourth phase, which essentially was a reverse back to the post Sciolino phase. But of course, this new phase only applies to the Rochester City Council. It doesn't bind any other body or agency throughout the state. That's one of the major issues, perhaps the major issue that we're here to discuss and learn about today.

The only other issue I will mention has to do with enforcement. Does the law have enough teeth to effectively enforce
IN RE: OPEN MEETINGS LAW

its provisions and deter violations. For example, does the law need criminal or civil penalties to be truly effective? Right now, the law has no such provisions.

There also appears to be a loophole in the law. The language that I summarized earlier for you that a Court may nullify or make void any action in violation of the provisions can be circumvented. A body can deliberate in private, then vote in public and because the vote is in accordance with the statute, it can’t be voided. That seems to be an end run around the statute, and something we’ll have to consider both in these hearings and subsequently.

I don’t want to take up too much time, because the meat of these hearings are going to be conducted by Mark Davies, who is an assistant counsel, so I will turn the proceedings over to him, at this point.

CHAIRMAN FEERICK: Let me just add a note. I just want to say that I’m grateful to you, Mayor, for your presence today, and certainly well aware of your
IN RE: OPEN MEETINGS LAW

distinguished career in public service for a
great many years, and we appreciate very much
the day after election day you appearing
before us early in the morning.

I would like to emphasize a few
of my comments. Namely we're here in
Rochester because of the historic role that
it has played with respect to the subject of
the Open Meetings Law. We are here with an
open mind in terms of the law. I speak now
on behalf of our Commission. We want to
learn more about the operations of the Open
Meetings Law. We have made no judgment at
this point with respect to the relationship
between the Open Meetings Law and the subject
of integrity in government.

As I mentioned in my statement,
Governor Cuomo, who appointed our Commission
and created the executive order that is our
constitution, urged us when he appeared
before the Commission to examine that
subject, indicating his own views on the
subject and his own interest in making this a
subject of legislative reform. We are
IN RE: OPEN MEETINGS LAW

looking at it independently of the Governor, and we will arrive at our own independent judgment with respect to the issue.

I also would like to highlight that during the months of July, I met, along with Mr. Small and Nicole Gordon, with roughly a hundred citizens in nine different areas of the state in informal sessions, and I was made aware, really for the first time in terms of my own knowledge of the subject, of the operations of the law in different areas of the state. And a number of citizens and representatives of citizens' groups before the Governor appeared before our Commission, under our Commission to examine this subject, as well. So it's in that total context that we decided to examine the subject and come to your beautiful city. And I'm grateful to be here, and I would now like to recognize Mark Davies, who has been, as I mentioned before, intimately involved in the development of this subject for our commission.

MR. DAVIES: Perhaps, Mayor, you
IN RE: OPEN MEETINGS LAW

can proceed with your statement.

MAYOR RYAN: Thank you. I won't bother to read the statement I have submitted, and I will make a few general comments and try and answer whatever questions you have.

I think the first question was the relationship between open meetings, closed caucuses and the question of ethics in general, in government. And I think city councils in Rochester have, for the last at least fifteen years, used caucuses, and yet at the same time, I don't believe there's probably any other city or municipality in this state or the fifty states, in terms of ethical standards or performance, has met the same standards that we have here in terms of our public officials and elected officials generally. So based on just that very limited empirical observation, there would seem to be very little relationship between closed caucuses and ethical standards in general.

Secondly, anybody who in my
position who appears before a committee like this and takes a position must have been a kamikaze pilot in his former life. I know generally what I have seen with the list of speakers. I know I can tell you what most of them are going to say. Nevertheless, I -- my concern is in how well government functions and what has to happen in terms of making -- local government particularly; that's the one I'm most familiar with -- function well.

And I think the issue really has to be redefined somewhat. The issue is not open government versus closed caucuses. We're all for open government. The issue is really when do the limitations you put on open government have an impact on those people who are elected to make decisions, and I think that's where we have the division of opinion as far as the whole issue of open meetings.

Let me just try and give you some of my background. We had a city manager, council manager forum government up until two years ago. I was the mayor who was
IN RE: OPEN MEETINGS LAW

selected by city council for twelve years. I have been the directly elected mayor for the last two years. So my position is comparable to what the city manager's position was before. I'm chief executive officer for the city.

I made the same argument when I was on city council that I make now, that is you could watch the city manager spend years, months, with outside consultants, a lot of very talented city staff, dealing with very complex issues, put legislation together that's as thick as a telephone book, and then send it to nine-part-time city council members who have to try and analyze, understand the legislation and generally make decisions about how they are going to vote on it in a relatively short period of time. That they are supposed to do without the benefit of any discussion with their colleagues.

Under the Open Meetings Law, they can sit down -- if there's eight Democrats and one Republican in city council,
IN RE: OPEN MEETINGS LAW

they can sit down with three other members of the Democratic party, and discuss it. They can't sit down with four other members, because that makes five, and the thing is illogical. I assume that if it's a question of sharing information, getting the collective wisdom and judgment of their colleagues on city counsel to try and understand some very complex issues that are put together by the staff, they need all the help they can get. And city counsel does not have or did not have then any professional staff to help them in analyzing the proposal that came from the administration. They still don't. And it seems to me that if you're talking about having open meetings with the press there, that the council members are not going to get the same level of information that they really need to make decisions.

There are a number of things you can talk about in terms of limitation, but I think just saying that they can't caucus or they can't meet is basically unfair. It is a
IN RE: OPEN MEETINGS LAW

mismatch in terms of what they have in terms of resources to deal with issues. At present, I'm on the other side of the aisle. As I say, I'm now in the same position of the city managers before. We prepare the legislation sent to city council, and probably from my perspective, any time four or five of them can't meet would be good. But I still feel very strongly that it is unfair, the part-time elected officials with no staff, to say they can't sit down and meet.

We have, in the past, two years since I have been elected, have sat down with the council members, the majority, and talked about issues coming up. We haven't dealt with specific legislation. Frankly some of the times, we are talking in the basis of problems. It's a basis of brain storming. I would say they represent a large part of the city, city residents. They have ideas. They have viewpoints, and those things are valuable to us in terms of how to put a program together that is going to be
IN RE: OPEN MEETINGS LAW

incorporated in legislation. And I see nothing wrong with that. I think that's part of their job as an elected official to have input in the administration. But to say that they can't do that at a caucus because there is more than four of them present is just unrealistic.

If there was some limitations in terms of what they could caucus on when -- in other words, if there's legislation pending that's already been submitted by someone, whether it's a council member or the administration, I would not have any difficulty with that type of thing.

Let me try and go through and tell you what the process is we follow now in terms of submitting legislation so that — as a matter of fact, this afternoon, we will have our usual agenda briefing with the members of the press. But twelve days before council meeting, we submit all the proposed legislation to the clerk's office. That legislation consists of requests from department heads who want various types of
IN RE: OPEN MEETINGS LAW

legislation with the supporting documents, why they need it, comments from the budget bureau if there's any fiscal impact, and the actual legislation itself is drafted by the Corporation Counsel's office. All those documents are filed in the clerk's office twelve days before the council meeting.

Sometime over the weekend, the following Monday, the president of the city council makes the referral of each of those items to the various committees. There's then a list of committee, the date and the times they are going to meet and generally they meet the Thursday before council meets on Tuesday, so that seven days before the committee meetings, all the members of the media have the copies of legislation, what committees are going to be dealing with the legislation.

And today is -- the committee will meet tomorrow. This afternoon, myself and my assistant will meet with all the members of the media. Frankly, we probably have about eight or nine radio stations,
IN RE: OPEN MEETINGS LAW

three television stations, two daily newspapers, three or four weekly newspapers in this community, and at any given time, you're very, very fortunate if there's more than two people from the media present at any of these committee meetings.

At the agenda briefings themselves that I conduct, there probably will be four or five members from the media there that ask questions. So the availability for legislation -- the committees make their judgment. They set their items out for action the following Tuesday night. They have a large number of questions asked to the administration that we try to respond to sometimes by Monday afternoon. There is no confusion about a closed process or any secret meetings. We have about twelve days where everybody knows what's going to be acted on at the following city council meeting.

So we believe in process, and we believe in openness, and I think that my concern is there have been changes in terms
IN RE: OPEN MEETINGS LAW

of local political structures. The parties
do not play the role they used to in terms of
making up of caucuses. The Democratic county
chairman -- within my memory, and I don't
think I'm that old, would call up a
commissioner of public safety and tell him
who to hire. That doesn't happen anymore.
In terms of ongoing business, I very seldom
have any contacts with the county chairman,
as such. So the parties don't play that
role.

The biggest problem today, in
terms of local government, is number one
getting good people to run for office, and
the biggest problem in government in general
is trying to get some kind of cohesive
majority out of the people that are elected.
Part of that is the increase in single issue
candidates, the increasing influence of the
packs. The fact the individuals, whether
they are Democrat, Republican, Liberal,
Conservative, go out, raise their own money,
conduct their own campaigns, so you don't
have that sense of party collegiality that
IN RE: OPEN MEETINGS LAW

you used to have in terms of legislation. That's true in city council. It's true in legislature. It's true in congress.

That is the single biggest problem in government today. It isn't a question of closed meetings or anything else. It is the ability to govern we have to be concerned about. Talk to any chairman, Liberal, Conservative, Republican, what is the biggest problem in government today is to get good people to run for office. And good people are not going to run for office if they feel their personal life is going to be continuously invaded. There's nothing duplicitous or devious about it, but successful people do think they have a right to some personal life, as far as that's concerned. The biggest problem is to get good people.

And I think that it's very difficult to legislate morality, and I think indirectly that's what we're trying to do.

But anything that inhibits the flow of information to elected officials and has an
IN RE: OPEN MEETINGS LAW

impact on our ability to get good people to run for office, I think has to be seriously looked at.

We have the whole question of Freedom of Information laws. Nobody talks about -- we comply with the law. I think meticulously in terms of what we do, but nobody talks about the staff time that we spend in responding to those freedom of information requests. They are getting to be a serious problem.

We had a Freedom of Information request last week that asked for a copy of all the Freedom-of-Information requests for the past year. Some reporter was afraid maybe he missed a story, and they asked for copies of every single employee, civil service classification, position, title. That took two people something like two weeks to put together. And God forbid if we should make a mistake in one of those three thousand employees.

But those things are a disincentive in terms of getting good people
to run for office. So we don't apologize to anybody in terms of the management things we have done in the city over the last fourteen years, the reductions we have made in our budget in terms of cost. We have twenty-five percent fewer employees than we did twelve years ago, but I think that was done largely with the group of council members were committed to the city, did not have agendas on their own in terms of running for the public office. I'm concerned about the whole government issue raised by some of the proposed legislation. And I think that's the most serious problem we have to be concerned about.

MR. DAVIES: Mr. Mayor, you're obviously a wealth of political information on the history of the political process here in Rochester. Perhaps before we get to that, we can turn to a couple of the issues you raised in your statement.

First of all, this issue that you raised repeatedly that it's hard to get good people to run for government, and
IN RE: OPEN MEETINGS LAW

certainly I think many of us involved in
local government could echo that, but what
specifically is the impact of the Open
Meetings Law, whether you have opened
caucuses or closed caucuses, upon the ability
to get good people for government.

MAYOR RYAN: First of all, to
get good people in office, there has to be a
sense of satisfaction in the position they
have. There has to be a feeling that they
have the opportunity to contribute. There
has to be a feeling that they are
participating. That's -- I think that's very
important.

MR. DAVIES: How does the open
meetings affect that?

MAYOR RYAN: If four or five of
them can't get together, I don't know how the
sense of participation in terms of meeting is
going to be encouraged. That's one of the
things.

Secondly, if I'm a council
member, and if they -- they have had
caucuses, I'm not going to sit there in terms
IN RE: OPEN MEETINGS LAW

of asking questions in front of a reporter to indicate how little I know about a subject. And I can show you examples that went on back in '78 and '79. We had a Democratic majority in the legislature at that time, and I can show you some of the articles that were written about the Democratic caucuses. They were brutal, had very little to do with the legislation or substantial of the discussions they had. They talked about what legislator X said about legislator Y. Frankly if I think that happened to me once, I would never go to another caucus. Those things are counterproductive in the sense of image of the people sitting there reading the article.

MR. DAVIES: You don't think the voters are entitled to know who is informed, who is uninformed?

MAYOR RYAN: They will find out when the people go out and vote, when they go to committee meetings, public council meetings. Don't define the issue as closed versus open. I think people have the right
IN RE: OPEN MEETINGS LAW

to get information the way they want. If I
have a friend who happened -- some
legislation comes, and I happen to have a
friend who's an engineer or something, and he
can answer questions, I call up and ask him
something, it's a personal conversation, he
answers questions for me. Do I have to turn
around and file disclosure, I have talked to
an engineer? I mean that's -- it's part of
the same trend.

So I think that -- it's not an
issue of open government versus closed
government. That's not the issue. It's a
question of getting information so that
the -- I think -- I believe in the public
process. I think people ought to stand up
and be accountable. But it goes back to the
point I'm making. If you say that four
legislators can get together but not five,
all right, and you want to know -- the
argument I've heard from reporters, "We have
a right to know what your intellectual
process is in terms of making your
decision." If that applies to five council
IN RE: OPEN MEETINGS LAW

members, why don't it apply to four?

MR. DAVIES: Isn't the answer to

that the minority in caucuses should be open
too?

MAYOR RYAN: I'm talking about

majority caucuses. We have nine counsel
members. Five make up a majority. If we
have four Democrats at a caucus, that's
legal. Four Democrats can meet at two
o'clock and four more at four o'clock. But
if the reason for the press to be there is to
follow the intellectual process, why doesn't
that apply anymore when there's four members
present instead of five?

MR. DAVIES: Should the law be
changed to make the law apply to four
members?

MAYOR RYAN: If the law is
changed, it should be changed in the other
direction.

MR. DAVIES: The two-thirds for
example proposed --

MAYOR RYAN: I think if you're

going to do anything in terms of eliminating
IN RE: OPEN MEETINGS LAW

caucuses -- first of all, it's very difficult

to just define what caucuses are going to

be. If the president of the council says

would you meet with three or four council

members, I walk into a meeting, they may have

political issues. They may have issues

really governmental. They may have issues

that are half and half, so just defining what

is purely a political discussion and what is

governmental is not that easy to begin with.

If you're talking about limiting caucuses,

once legislation has been filed, in terms of

discussing that specific legislation, then at

least we know what the prohibition is.

MR. DAVIES: In other words, you

could not discuss legislation -- in private

discussion legislation that was already on

the books -- not on the books, that was

already introduced?

MAYOR RYAN: That was pending.

In our case that would mean something like --

that would be thirteen or fourteen days prior

to a council meeting.

MR. DAVIES: Would that be just
IN RE: OPEN MEETINGS LAW

legislation in terms of local laws, or would you include resolutions or so forth? A lot of action, I assume, is not just taken by local law but by resolution, for example the resolution to open the caucus?

MAYOR RYAN: I assume it would apply to local laws, resolutions and ordinances, which I think are the three forms of legislation that are enacted by city council generally.

MR. DAVIES: One other point. Counsel members do not get the same level of information if the public and the press are present during their caucuses. Now, why is that?

MAYOR RYAN: Well, I'm speaking for myself, I said if I were a council member, and there was an item on the agenda, and I didn't frankly know anything about it, I would be reluctant -- I may ask if a staff person was there, I wouldn't be reluctant to ask the staff person -- and that goes back to the point I made about how it's treated by the media. And I cited the example we had
back in 1978 or '79 with the Democratic majority in the legislature with the open caucuses. I'm not going to sit and ask questions to indicate how little I know about the particular subject, when I'm going to have some reporter writing about it the next day.

MR. DAVIES: Let's return to the history in Rochester. As I understand, you were elected in 1967 to the city council.

MAYOR RYAN: Correct.

MR. DAVIES: Now, at that time, who was in the majority, the Republicans --

MAYOR RYAN: Democrats.

MR. DAVIES: And those were closed caucuses I assume, from the -- the caucuses were closed up until 1981 in the city council, the Democratic caucuses?

MAYOR RYAN: Yes, I believe they were, yes.

MR. DAVIES: And then in 1981, the Sciolino lawsuit came down, Sciolino decision, and then the Democrats, as I understand it, opened their caucuses in
IN RE: OPEN MEETINGS LAW

response to the mandate of the Court. What was the impact, as you saw it, at that time, specifically? What was the impact upon the caucuses in 1981 when they were opened in response to the Sciolino lawsuit? What were the problems, or were there problems?

MAYOR RYAN: There were problems, and part of the problems relate to the things I was talking about before.

MR. DAVIES: Can you give us some specific answers?

MAYOR RYAN: In other words, four counsel members could meet one time, and then four others, and that is the whole question of, you know, being part of a majority, being part of a city council, being part of an administration, that whole sense of participation was affected. They just didn't meet together.

MR. DAVIES: Can you give me any -- I know it's been awhile --

MAYOR RYAN: Not that it's been awhile. It's an intangible thing.

MR. DAVIES: You can't give
IN RE: OPEN MEETINGS LAW

specific examples of how it affected specific legislation, like you did with respect to the Democrats and the county legislature back in '78 or '79?

MAYOR RYAN: The problem then -- and it goes back to the part I'm talking about, some kind of a cohesive majority in the legislation. I think that sense of participation was affected during those, and I think -- I'm probably not defining it or articulating very well, but that is, I think, a very important thing, particularly with the change in the role of the parties. There's very little glue to hold the majority together, and I think the personal relationships are very important.

MR. DAVIES: Stressed in a closed caucus.

MAYOR RYAN: It isn't a closed caucus. It's being in the same room with six or seven of your colleagues at the same time on an ongoing basis.

MR. DAVIES: Of course you can be in the same room. The question is do you
IN RE: OPEN MEETINGS LAW

allow the public in or not allow the public in, and you're saying, as I understand it, that allowing the public in or allowing the press in somehow prevents that cohesiveness from developing among the majority?

MAYOR RYAN: I think the answer to that is obvious. I don't think there's any question about it.

MR. DAVIES: Now, during the period '81 to '85, when the caucuses were open, did the -- as I understand it, correct me if I'm wrong, as I understand it, there is procedure adopted by the city council of rotating members out in the hall, so you didn't have a quorum present at any one time.

MAYOR RYAN: We complied with the law.

MR. DAVIES: I'm not saying this is a violation of the law. I'm asking if that procedure was adopted, that one member would sit in the hall or two members, whatever, so you would have one less than a quorum?
IN RE: OPEN MEETINGS LAW

MAYOR RYAN: There was no reason for anybody to sit in the hallway. If we had meetings, we had no more than four council members. It meant I spent a lot of time talking to council members that weren't at meetings.

MR. DAVIES: So you had four council members, and you meet with another three other council members?

MAYOR RYAN: And frankly, after awhile, some of them just wouldn't show up.

MR. DAVIES: Because --

THE WITNESS: The point I was making early.

MR. DAVIES: Namely, I'm sorry, so the record is clear.

THE WITNESS: The question of participation. I mean --

MR. DAVIES: They just didn't feel a part --

MAYOR RYAN: That does not does probably not sound very important. I think in terms of getting people to make difficult decisions -- and frankly we have
IN RE: OPEN MEETINGS LAW

gone through the late seventies, with the
Heard Waldert decision, a very difficult
period, and I think the city council, unlike
a lot of other cities in the state, dealt
very responsibly with those decisions. I
don't think they could have done it if they
did not have caucuses.

MR. DAVIES: One last question
before I turn it back over to the chair. You
mentioned that it's -- I'm sorry. I think
you have already addressed that. Let me ask
anyway, if you addressed this already, please
correct me. You said it's difficult to get
good people to run for office. Now, why does
the Open Meetings Law affect the ability to__
get good people for office?

MAYOR RYAN: I'd be glad to
answer it again.

MR. DAVIES: I don't see the
connection. I can understand why people
don't want to -- there's a lot of problems
running for office in terms of the time or
lack of cohesiveness or whatever, but why
does the fact that meetings are open prevent
IN RE: OPEN MEETINGS LAW

going good people to run for office?

MAYOR RYAN: Well, first of all, it is the whole question of relationship with the administration, and I'm taking about it at the city level and the feeling that there is a possibility to make some changes, to do some things that you want to do. Those are very difficult, if you're one out of the nine council members to do it by yourself. It's very difficult to do without some support or assistance from the administration, and that's the type of relationship that I think is affected.

MR. DAVIES: I'm thinking of new candidates, getting new candidates to run. I understand why that may discourage them with the process. New candidates don't know what it's like.

MAYOR RYAN: New candidates are affected by the people there. If council members are sitting there saying we get a package from the administration once every three weeks with the bills we want. Isn't there any discussion. We have a committee
IN RE: OPEN MEETINGS LAW

meeting. We go to a council meeting, you know -- we don't feel there's any sense of participation as far as the administration. It will have an impact on people who are thinking about running for city council.

MR. DAVIES: In other words, new candidates would see the moralization, whatever you want to call it, of those in the office who simply don't want to run and face the same thing?

MAYOR RYAN: I think that's an accurate statement, yes.

CHAIRMAN FEERICK: Thank you, any other questions? Commissioner Magavern.

MR. MAGAVERN: Mayor Ryan, it seems obvious that legislators have got to have some area of privacy and have got to be able to talk to some people on their own terms informally and to have a free deliberative process, and I think you have made that point very clearly. On the other hand, we do have situations from time to time in some areas where you can carry that process to an extreme, and what happens
IN RE: OPEN MEETINGS LAW

formally on the record is merely the formal vote, and the impact, on the public perception of what's going on, then, is that the -- their representatives are keeping things secret. They are not leveling with the people.

My question is whether it may be possible to find a common sense of balance in between, admitting the difficulty of drawing a line and admitting that if you have four members, it's legal, but if it's five it's illegal, and therefore it seems very arbitrary to say, okay, one person has to stay away, and we have to deal with that person separately. Recognizing the difficulty of drawing that line that is not going to have some arbitrary impacts on the margin, do you think it makes sense to try to establish some -- to draw a line in order to permit the kind of private deliberative process on the one hand and at the same time at least reduce the amount of cynicism that you can get where you just have everything as pre-conceived, prearranged, rammed through
IN RE: OPEN MEETINGS LAW

without any public debate, without maybe even
any statement of reasons by the legislators
when they do vote?

Is it possible to draw a line somewhere in there where you can strike a
healthy balance and based on your experience -- which is very extensive in
this, how can you do that where you're going to get it to work practically, if at all, in
your opinion, without just creating charades and rotating members and the like?

MAYOR RYAN: Well, I had suggested earlier that if you're thinking about any absolute limitations in terms of meetings, there's the possibility of limiting it to any legislation that's pending. At least we know what those subjects are. We know what the legislation is. But --

MR. MAGAVERN: I'm sorry, could you elaborate on it a bit. You mentioned it earlier, but I didn't fully grasp it.

MAYOR RYAN: I assume if council members themselves are talking about introducing a resolution, if they talked to...
IN RE: OPEN MEETINGS LAW

their colleagues, whether they had four or five or six colleagues in the room at the same time to talk about it, there would be nothing illegal about it. Once they filed a resolution, it's a matter of public record.

I think one of the things you have to realize is that council members don't have any staff to help them in dealing with some of these issues. And I think it is a question of using the collective wisdom of the council as majority, I think is helpful to them individually, but I think that then brings up the whole question of relationship or connection with the administration, in terms of when can administrators talk to council members in terms of privacy. So I think that if we're talking about doing anything, that's the type of legislation that would make some sense. At least you can define what it is. You know legislation is pending.

In our case, that's two weeks before -- generally before the counsel meeting itself. But, you know, you can go
IN RE: OPEN MEETINGS LAW

back to the other question about charade
about a caucus and people just sitting there
and voting, I think the -- you have to rely,
I think, to some extent on the voters and
their ability to know whether or not council
members are just voting yes or no or whether
or not they know what they are talking about,
and I think that comes up when you go through
the process of re-election, and as I
indicated, how is the public going to know if
the reporters don't cover the committee
meetings, and they don't cover the agenda
briefings.

So what if the council members
show up and they articulate all the reasons
and the committee reasons why they are going
to support a particular piece of legislation,
and there's nobody there to report it? What
has that done in terms of the fact that they
have done their homework? Their other eight
colleagues and the city clerk who's there may
know about it, but nobody else.

MR. MAGAVERN: Thank you.

CHAIRMAN FEERICK: Nicole
IN RE: OPEN MEETINGS LAW

Gordon.

MS. GORDON: You make a very powerful point, it seems to me, in your statement about comparing legislature to chief executive officers, and pointing out that chief executive officers don't have any requirement that's parallel about keeping open meetings, and that occurred to me by an analogy the judiciary, of course -- their private deliberations are protected. Although in that case, that's very much defended because judges are required to write up very often quite detailed reasons for their decisions.

Do you think that it would be workable at all to have some kind of similar requirement of legislative bodies or for political caucuses that even if it protected the ability of people to meet privately, required that in order to avoid this kind of rubber stamping process that Commissioner Magavern was alluding to before where all the deliberations are private and then the public vote is really just the only thing that
IN RE: OPEN MEETINGS LAW

happens in public, whether it would be
workable to impose some kind of requirement
that a statement of reasons for a legislation
that's passed or any measure that's passed
should be required of municipal or county or
any other level of legislatures?

MAYOR RYAN: Well, in city
council, there are extensive minutes kept of
the committee meetings, and the discussion is
incorporated in a set of facts they have. So
I think that at least partially meets your
suggestion about having some written
document.

But as far as the judiciary, I'm
not so sure the fact they reduce their
decisions to writing is the reason they are
protected in terms of confidentiality. There
are a lot of decisions with no opinions.
You're right about the impact, but that's
not -- I'm not so sure that's the sole
reason.

And I -- but the point that you
pick up on, and that is the -- is the work of
the legislature any less important than the
IN RE: OPEN MEETINGS LAW

chief executives, the local, state, national level, who can meet with consultants, staff, make policy decisions. Executives make policy decisions as well as legislators. There's no suggestion those meetings be open.

CHAIRMAN FEERICK: Mr. Small.

MR. SMALL: Mr. Mayor, a couple of weeks ago your council voluntarily passed a resolution to reopen the caucuses. Were you surprised?

MAYOR RYAN: Well, at my stage in life, I'm not surprised at anything.

MR. SMALL: Let me put it another way. Why do you suppose, in your opinion, they did that?

MAYOR RYAN: I wasn't part of the decision.

MR. SMALL: I understand.

MAYOR RYAN: I think the president of the council will be here tomorrow. Maybe she will be able to explain better, but you know, it probably reflected some political reality. I mean being on the
IN RE: OPEN MEETINGS LAW

side of proposing an Open Meetings Law is not, in terms of the press particularly, in terms of the press around here, is not exactly a side to be on in terms of elected officials, so I think that had a lot to do with it.

MR. SMALL: You think they did it because the election was upcoming, and they were concerned about press criticism?

MR. SMALL: I think they probably already had the criticism. That element had been discounted, probably, as far as the election, but that, I think, there was some concern probably, but it -- obviously, the press had very strong feelings about it. I'm always amazed at some of the inconsistency.

Of course they say they are private corporations, but we had a decision here to combine the two editorial pages of the two newspapers, and Al Neuharth didn't come here once for a public hearing to satisfy what the public and the city thought about it. It was a decision made, period.
IN RE OPEN MEETINGS LAW

They combined the two editorial pages, but I'm sure some of the council members felt there was a lot of political pressure on, and I say that frankly that's the position I'm in now. Frankly, if anything, eliminating caucuses would probably be good for me.

MR. SMALL: Why?

MAYOR RYAN: Anytime four or five of them can't get together, it lessens my area of the concerns, as far as administration, what they are going to do. I still thing it's wrong, in terms of the government issues, and that's why I'm concerned about it.

MR. SMALL: Mr. Mayor, if there being an open caucus makes your job easier, wouldn't it also make your constituents, the average citizens, understand better the workings of their city counsel situation?

MAYOR RYAN: If it was reported, it would, and if it was reported well, it would help a lot more.

MR. SMALL: Let me ask you a question about reporting. You described it
IN RE: OPEN MEETINGS LAW

as brutal from '81 to '85.

MAYOR RYAN: '78 to '79 in the

county legislature.

MR. SMALL: Right, was it any

less brutal, in your opinion, when you had

closed caucuses?

MAYOR RYAN: What I'm talking

about --

MR. SMALL: Obviously you're not

nominating the local papers for Pulitzer

Prizes for their coverage.

MAYOR RYAN: That's not my job.

It was a personalization, some of the

articles that were written, in terms of what

various legislators had commented about, and-

that's why I think the comments was made by

one of the other commissioners, about the

ability of elected officials to get together

and talk about issues is important. In this

case here, they talked about issues in an

open caucus in front of reporters.

MR. SMALL: Hasn't it been true,

at least we have heard from some of your

colleagues on earlier visits, the local press
IN RE: OPEN MEETINGS LAW

has personalized their evaluations of council
members, as well as others in city
government?

MAYOR RYAN: It is the first
question they are asked when they go over for
endorsements at election time, what is their
position on the Open Meetings Law, closed
daucuses.

MR. SMALL: That was not
precisely my question. My question is is it
not true that unrelated to this issue and the
feeling of many of your colleagues that the
press has been too personal and, as you put
it, brutal in their coverage of activity in
city government?

MAYOR RYAN: Let me make a
clarification. The comment I made about the
coverage being brutal related to the articles
in '78 or '79 in terms of those specific
caucuses that were open to the press. And
I --

MR. SMALL: My question is when
they were closed, was it any different? Or
was it much considerably different?
IN RE: OPEN MEETINGS LAW

MAYOR RYAN: At least -- there was criticism of the caucuses as such, but it didn't resort -- it did not involve the personal type of criticism you had from reporters sitting in a caucus where obviously people disagreed on issues. And I think that's one of the things that members of a majority or minority ought to have a right to do is to try and meet or find out what the areas are that they can agree on.

MR. SMALL: If I may ask one last question. What we found in other parts of the state where the practice of closed caucuses has existed -- and I think we ought to stress there's nothing illegal under the '85 amendment in the closed political caucuses. I don't want to leave an impression there's an illegal act going on. We found members or attendees of closed caucuses say that hell, the reporters get the stuff from individual members anyway, and it all gets out. And then one of the problems they have is that sometimes it becomes distorted because it is being fed to the
IN RE: OPEN MEETINGS LAW

press by individuals who have their own
agendas and may not reflect what actually
happened?

MAYOR RYAN: If I had that

complaint and that experience, I just

wouldn't go to the caucuses if I were those

people, and that --

MR. SMALL: My question is has

that been the experience in Rochester, a lot

of the material that is discussed gets

reported anyway?

MAYOR RYAN: I'm not in a

position to talk about the last two years.

Prior to that, that did not happen,

generally. As a matter of fact, I don't

think it ever happened in terms of materials

being leaked.

CHAIRMAN FEERICK: Mr. Davies.

MR. DAVIES: I have one last

quick question, the Committee on Open

Government has proposed that the legislature

amend the Open Meetings Law to permit a court

to assess a fine up to one hundred dollars on

any individual member of government who
IN RE: OPEN MEETINGS LAW

knowingly and intentionally violates the Open Meetings Law. I wonder if I could just get your view on what you think the impact of such a provision would be on, number one, compliance with the law, and secondly, on the ability to govern and obtain candidates and so forth.

MAYOR RYAN: Well, obviously I'm opposed to the law, but if the law is passed, I suppose there ought to be some teeth put into it so everybody complies with it.

I should make one additional comment, and that is that I assume that going back to the question of city council here, making a decision about to open the caucuses, I think there's probably a point to be made for the fact this ought to be something that each of the local governments decide themselves in terms of what they are going to do. Each town board, village board, city council, county legislature, to make their own decision, and -- about whether or not it is reasonable and what they decide to do, and it will be judged by the voters when they run
IN RE: OPEN MEETINGS LAW

for re-election. And that's why -- I think that's the first reason how to propose legislation. If it's going to be passed, there ought to be teeth in it to make it enforcible, and I would assume it would apply to state legislature and not just to local governments.

For a long, long time nobody did anything about enforcing the law with the state legislature, and when they did, that's when the amendment was passed. But obviously, if the law is passed, there ought to be some teeth in enforcing it.

CHAIRMAN FEERICK: Mr. Mayor, can I get your sense of the public perception of closed caucuses or closed meetings?

MAYOR RYAN: I haven't done any polls. I do know that for twelve years there was not a Democratic council member defeated for re-election. This is during the period that we had closed caucus, so I -- you know, I would assume that to some extent that reflects what the public considers -- I mean their opinion on the issue itself. We didn't
IN RE: OPEN MEETINGS LAW

have have an incumbent for twelve years who
ran for re-election and was defeated.

CHAIRMAN FEERICK: I want to
thank you very much, Mr. Mayor, for your
participation in the hearings. Thank you.

MAYOR RYAN: Thank you.

CHAIRMAN FEERICK: Mr. Freeman.

Mr. Freeman, before you begin, perhaps -- and
this would be something I would say to all of
the witnesses, that to the extent to which
statements have been filed with us, some of
us, at least, if not all of us, have examined
the statements. And in order to allow more
time for questioning, I would ask you, Mr.
Freeman, and others if you could perhaps
synthesize the essence of your statement to
enable us to have more time for questions.

Before you begin, I also would
like to make the comment that as I mentioned
before, I've spent a good deal of time over
the summer in the meetings I described and
became more familiar with the Open Meetings
Law and became more familiar with the
operations of your office as reflected to us
by a number of citizens, and I think you're entitled to know, certainly from me, in terms of the meetings that I have described, that uniformly there was praise of you and the operations of your office, and I don't think it would be in the interest of fairness to not have that reflected in the record of these hearings. So I would like you to know that, and I'd like to welcome you to our hearings, as well.

MR. FREEMAN: Thank you. I certainly appreciate that, and I'd like to make the point that all I can attempt to do in my role, which is purely advisory, is to call them as I see them, based upon what I think the law says, but I appreciate your comments.

Certainly I appreciate the fact that you're holding the hearing on this subject, and I would like to express my views, as well as those of the committee on open government, if I may, synthesizing, if I can.

And I think at the outset,
IN RE: OPEN MEETINGS LAW

perhaps it would be worthwhile to talk a little bit about philosophy, about the philosophy of the Open Meetings Law and where it came from.

The concept, as you know, is not new. Our statute has been in effect for just over ten years, but there have been Open Meetings Laws historically in existence for approximately a century. New York was among the last of the fifty states to enact an Open Meetings Law.

Why do we have public bodies?
The law applies to public bodies, school boards, legislative bodies, zoning boards of appeals. Why is it that we make a distinction in some cases between an executive as opposed to what may be a governing body? I think historically the reason is that each sector of a community should have the opportunity to be represented and to have its point of view known to the public.

Certainly the intent of bringing together those people is not to find those
IN RE: OPEN MEETINGS LAW

who might agree. I would conjecture that the
idea of creating a public body is to bring
together those who might disagree in order
that various views of the community can be
represented in a public forum.

Why is there an Open Meetings
Law? The obvious answer is that public
bodies meet to discuss issues that affect all
of us directly or otherwise, and with that
power, in my opinion, there is a need to
require accountability. The members of
public bodies, after all, work for us.

Often I raise the question, "Who
are these people working for?" And the answer
is that members of public bodies work for the
public collectively. As Mr. O'Brien
mentioned a few moments ago, the statement of
legislative declaration in the Open Meetings
Law refers not to the public's capacity to
know what has happened. It refers to the
deliberative process, and I think that's the
key to the Open Meetings Law. Very simply, I
believe the intent is to open up the
deliberative process in order that members of
IN RE: OPEN MEETINGS LAW

the public can find out how those who
represent them feel on a given issue or
issues. It's clear that the intent of the
law indicates that the whole decision making
process is intended to be subject to the Open
Meetings Law, rather than the decision
itself.

In addition, I'd like to make
the point that when members of public bodies
are elected, by and large we're stuck with
them until the next election, and part of
holding public office, in my opinion,
involves relinquishing certain elements of
one's privacy.

I think Mayor Ryan alluded to
that a few moments ago, the fact that when
you take public office, a great deal of your
personal life may become known by virtue of
the news media to the public at large. I
think that that's part of the deal.
Certainly I agree that members of public
bodies, representatives of government, do
have a right to some privacy. However, when
I think you take your oath of office, part of
IN RE: OPEN MEETINGS LAW

the oath should be something like this, "I hereby recognize that upon serving as a member of a public body, I relinquish an element of my privacy, as it relates to the performance of my official duties."

I'm not sure people when they run for public office or when they have reached public office, necessarily view their function and their lives in quite that way.

Often, members of the public bodies have called me and said, "Well, if I have to discuss this issue in public, I'll look ignorant." My answer is very simple, and it's the same every time, you're allowed to look ignorant, because nobody knows everything about everything. I feel particularly badly for municipal attorneys, because they do have to know everything, and nobody does.

But in addition to that risk, I try to suggest that if you're ignorant week after week, meeting after meeting, perhaps you won't be re-elected. I think the Open Meetings Law provides the public be the tool
IN RE: OPEN MEETINGS LAW

to find out how members of public bodies feel about given issues, and how well they are prepared to deal with those issues.

What should open meetings law require? I've dealt with open government for thirteen years. I started with the committee as a kid in 1974, and I've come to realize that at least in my opinion, there is one basic principle that should be applicable with respect to open government laws, and that is they should be based upon the idea that everything is open, whether it be a record subject to the Freedom of Information Law or a discussion conducted by a public body, unless there is a good reason, based upon common sense, and potentially harmful effects of disclosure, for closing a meeting. And if we look at the general structure of open government laws in New York State, that is what they provide.

Under the Freedom of Information law, records are presumed to be available, except to the extent that they fall within one or more grounds for withholding those
IN RE: OPEN MEETINGS LAW

records, and most of those grounds are based upon some harm that would arise as a result of disclosure. Similarly, and we haven't talked about this yet, at least we haven't heard it, the Open Meetings Law contains eight grounds for entry into a so-called executive session. And an executive session is a portion of an open meeting during which the public may be excluded.

Prior to entry into an executive session, a public body is required to indicate in its motion the general subject to be considered. Those grounds for entry into an executive session are also based upon the idea that public discussion of certain issues would, in some instances, result in harm to an individual, perhaps in terms of that person's privacy or reputation, or perhaps damage to the capacity of government to carry out its duties effectively. So we're talking about laws that I think are based or should be based upon a presumption of openness and a good reason for closing a meeting from the public should such a reason arise.
IN RE: OPEN MEETINGS LAW

An additional point, and that is that it's very simple to get around the Open Meetings Law, and I use that phrase "get around" loosely. The Mayor referred to situations where people would like to get together to talk to each other, perhaps one on one. Certainly the Open Meetings Law doesn't preclude any members of public bodies or their staffs from doing that. There's no law that should preclude members of public bodies from getting on the phone with one another and talking about issues over the phone. I think that that probably is part of the responsibility of members of a public body, to become educated with respect to the issues.

In the City of Rochester, apparently members of the city council have twelve days to review written documentation before they actually convene to potentially take action with respect to proposed legislation, for example. I tend to think that that time that enables people to prepare, to think, perhaps to converse one on
IN RE: OPEN MEETINGS LAW

one, is a good system, and it does enable
people to -- people on the board to become
familiar with whatever the relevant issues
might be. If anything, that, in my opinion,
would diminish the need for so-called closed
political caucuses, and it would, by enabling
people to prepare effectively for meetings.
Certainly the public should be able to attend
those meetings during which the members
express their points of view concerning given
issues.

In addition, the Open Meetings
Law, as much as anything else, is based upon
good faith. As I mentioned earlier, before a
board goes into an executive session, a
motion has to be made in public, which
indicates generally what the board seeks to
discuss. Assuming that the board -- the
motion identifies topic A as the subject for
discussion in executive session, people ask
all the time, and I assume that this is true
in all of the fifty states, how do we really
know that topic A was, indeed discussed? How
do we know topic A didn't drift into topic B
IN RE: OPEN MEETINGS LAW

and into C? And the answer is that we
don't. And the problem is that we may have
no way of knowing what, in fact, is discussed
during a legal executive session or a legal
political caucus.

The remedy, in some instances,
involves the reporter who might find the
person on the board who's willing to spill
his or her guts after the meeting. I think
in some instances that's the distinction
between a good reporter and not so good
reporter. But as Mayor Ryan mentioned, in
some instances, the member or members of a
board who do speak after the fact may offer
self-serving statements. They may offer
their own points of view to the exclusion of
the points of view of others, and I tend to
think that even those meetings in many
instances would serve the public and
certainly members of public bodies better
than the closed caucus.

With respect to the issue of the
political caucus, itself, the 1985 amendment
has given us a law which, by and large, is
IN RE: OPEN MEETINGS LAW

based now upon voluntary compliance. And I applaud the common council in Rochester for enacting a resolution that requires it to conduct its meetings as if the amendment had not been passed. Prior to the amendment, as you know, several courts held that if a majority of a public body convened to discuss public business, that gathering constituted a meeting subject to the Open Meetings Law, irrespective of the political party affiliation of those in attendance. As you may know also, the Committee on Open Government expressed its agreement with those decisions, both prior to the amendment and after the amendment.

The problem I think is that a political caucus is exempt from the Open Meetings Law. It's just as though the law doesn't exist. What we're left with is a Catch-22. Unlike an executive session, which is a portion of an open meeting, and all meetings have to be preceded by notice, when an exemption applies, the Open Meetings Law does not. The Open Meetings Law, for all
IN RE: OPEN MEETINGS LAW

intents and purposes, might not exist. There is no notice requirement, no minute taking requirement. A caucus can be held wholly in secret. And I think that that's most important in many communities where you have not only a lopsided majority of members from one political party, but often you have public bodies, legislative bodies, that consist entirely of Republicans or Democrats, and they have the capacity now to meet legally to discuss anything in private in a closed caucus. It might be the Monday night football game or the World Series, but then again, it might be the budget.

And one of the problems that has come up many times is the question, how do you know that political caucuses are being held? And the answer is that we don't. The reason, I think, is that we have no right to know, even that a political caucus has been held. And again, the result really is we have a law applicable to legislative bodies that is based upon not only good faith, but voluntariness on the part of the members who
IN RE: OPEN MEETINGS LAW

might choose or not choose to conduct their business in public.

Also the amendment has served as an escape valve. In many instances, the public body might be discussing a hot topic, and they might want to go into an executive session. They look into the list of grounds for entry into an executive session, and find none is applicable, and the response might be, "Well, if that's the case, we'll enter into a political caucus." And the public has no choice but to sit by and watch members of the public body discuss what may be the most controversial issue of a meeting behind closed course.

The problem is that the Open Meetings Law in that kind of situation becomes empty, and there is no legal recourse, at least there is none that comes to mind, that would preclude a public body or enable a member of the public to challenge that kind of activity carried on a public body. In short, it has become too easy to avoid the principles of openness and
IN RE: OPEN MEETINGS LAW

democracy upon which the law is based. And
the use of the political caucus may
effectively negate the capacity of the public
to know how their elected representatives
feel about issues or arrive at decisions.
And I wonder how other elected
representatives can maintain integrity,
unless the public can know where they stand.

A lot of talk has occurred
concerning the legislation recommended by the
Governor which tends to distinguish the state
legislature in terms of the possible
application of the Open Meetings Law from
other legislative bodies. I believe, and I
think my committee believes, that the state
legislature and local legislative bodies
should meet the same standards of openness
and accountability. At the same time, I
believe there are valid reasons for
distinguishing the state legislature from
local legislative bodies, generally, and
perhaps most significant is the fact that the
state legislature is bicameral.

Also, there are procedural if
IN RE: OPEN MEETINGS LAW

not constitutional provisions that call for a greater degree of openness and a greater degree of -- a greater capacity on the part of the public to know what the state legislature is doing. Any legislation before it's passed has to be printed and made public for at least three days. That's a requirement of the state constitution, before it actually can be taken. The legislation is reviewed by committees in the Senate and the Assembly, and often the two houses engage in what might be a debate, either on the floor or elsewhere.

The last step, should legislation pass, is that it is sent to the governor. The public has the capacity to express its views to the governor before his final action is taken on legislation. As a consequence, there are at least five opportunities and perhaps more for the public to find out generally what the state legislature is doing.

Conversely, at the local government level, all legislative bodies are
IN RE: OPEN MEETINGS LAW

unicameral. The opportunity for debate or public knowledge of issues might not exist for a local legislative body might deal with an issue only once, and it need not disclose the substance of its proposed action prior to the taking of action.

I'd like to point out too in conjunction with the Mayor's testimony, there seems to be an inordinate fear on the part of some members of public bodies to discuss issues in front of the public. I can understand their fear, because sometimes people say brilliant things. Sometimes they say ridiculous things, but without that kind of disclosure, again, I don't know how the public can find out how its elected representatives stand on a given issue. And certainly I don't see why members of public bodies should be fearful to express their points of view in public. Sometimes they will be right. Sometimes they might not, and I think that the Open Meetings Law continued to give public bodies the opportunity to demonstrate to the public that the issues
IN RE: OPEN MEETINGS LAW

that government faces are complex. They are difficult. There may be no single right answer to a problem.

By deliberating in public, thereby enabling the public to know how difficult those tasks may be, I feel that openness can only enhance the integrity of government and the respect that people have for its elected representatives. On the other hand, by conducting public business behind closed doors under the guise of a so-called political caucus, public confidence in government, in my opinion, can only diminish.

The other issues that have been raised involve the penalties that can be assessed when the Open Meetings Law is violated. Currently there are two penalties. One involves the discretionary authority of a Court to award reasonable attorney fees to the successful parties in a lawsuit. Relatively few lawsuits are initiated, and there are reasons for that. One is that the award of

COMPUTER REPORTING SERVICE
IN RE: OPEN MEETINGS LAW

attorney fees really doesn't penalize the
members of a public body. When a court
awards attorney's fees to a member of the
public or news media, those attorneys' fees
are payable by the public body as a whole by
the public corporation. In other words, the
public, the taxpayer, ends up footing the
bill in a situation where there may have been
a violation of the law.

The other penalty, and I believe
that Mr. Davies alluded to this before,
involves the discretionary authority of a
Court to nullify action taken in violation of
the law upon good cause shown. As maybe it
was Mr. O'Brien indicated before, the problem
with the provision as it currently exists is
that a Court seemingly has the authority to
invalidate action taken behind closed doors
in violation of the Open Meetings Law. The
problem arisen from there is that a board
might deliberate in secret in violation of
the law, return to an open meeting for the
purpose of voting, taking its action in
public, and in those situations, there are a
IN RE: OPEN MEETINGS LAW

couple of courts, including the Appellate Division, Fourth Department here in Rochester, which have indicated that the taint is cured, because the action was taken in public, and as a consequence, there is nothing to be invalidated.

As such, to avoid the most significant penalty that might be opposed by a law, a public body can deliberate in private in violation of the law but escape the penalty by taking action in public. There are relatively few instances in which action has, indeed, been invalidated, and I agree invalidation may be an unreasonable remedy in some situations.

Certainly, if a zoning board of appeals, for example, violated the Open Meetings Law and the recipient of a variance, for example, has begun construction of the porch on the back of his house, that person shouldn't be penalized by means of invalidation. If a board has deliberated with respect to its budget behind closed doors, and the Court hears the issue six
IN RE: OPEN MEETINGS LAW

months after the budget is in effect, certainly it would be unreasonable to invalidate the board's action due to the violation of the Open Meetings Law. The problem is that in those kinds of situations, there is little reason to mount a lawsuit, and there is little in the way of a deterrent to further violations.

We, meaning the Committee on Open Government, has recommended a couple of amendments to the law. I don't believe that they are terribly onerous. I think that they are intended to serve more as deterrents than anything else. One would give a Court the discretionary authority to invalidate action taken by a public body, when any aspect of the meeting was closed in violation of a law, whether or not the vote was taken during an open meeting or a closed session. Our legislation specified that a court would not invalidate when the result would be undue hardship to any person or governmental entity.

Secondly, as Mr. Davies pointed
IN RE: OPEN MEETINGS LAW

out before, we have recommended that a Court be given discretionary authority to fine members of public bodies individually and without indemnification up to a hundred dollars when the law is knowingly and intentionally violated. Certainly the imposition of that kind of fine wouldn't bankrupt a member of a public body. Nevertheless, I would hope that it would sufficiently embarrass members of the public body, as well as public bodies in the surrounding area, perhaps within the coverage area of a newspaper, and serve as a deterrent to future violations.

There is a great deal more that I'd like to say, but I'd be more than happy to take any questions that you might have.

CHAIRMAN FEERICK: Before I turn it over to Mr. Davies -- thank you very much for your statement. You have made some references to enhancement of integrity and a lowering of confidence in government. Now, we can say that in terms of abstracts and our interpretations, I would be curious, because
IN RE: OPEN MEETINGS LAW

you have been on the front line of dealing
with the public in this area in this state, I
would like to ask you the question I asked
the Mayor, and that is what is your sense of
the public perception of closed meetings?

MR. FREEMAN: I think that the
sense of closed meetings generally is when a
public body excludes the public, they must be
hiding something. I think that probably is a
rule of human nature. When a board closes
its doors, people scratch their heads and
say, "Gee, this must really be interesting."

At the same time -- and this is
a little bit off to the side of your
question. I think that the public does care,
even though the Mayor alluded to situations
where only reporters attend meetings. There
are many situations where I have given public
forums or talks or what have you, that have
been preceded or perhaps held as the result
of controversies that have arisen in a given
community. And in some cases those
controversies appear to deal with a fight
with the press, as opposed to government.
IN RE: OPEN MEETINGS LAW

That may be so, but in most cases, I think that's not necessarily so.

My feeling is the law succeeds or fails based upon the aggressiveness on the part of the news media, and the knowledge on the part of the news media that the law exists, certainly reporters, as well as members of public bodies, should know when an executive session, for example, is permitted.

The problem is that we rely, in some cases, too much upon reporters to find out what's going on. I don't know that there's a good reason, necessarily, for somebody to come to the city council meeting in Rochester on a Tuesday night in February, when it's four below zero, if the public knows that it can read about it the next day.

Another problem -- and this to some extent is my doing, and I have no control over it. We get in the neighborhood of two thousand calls every year from reporters. And my sense is that if a
IN RE: OPEN MEETINGS LAW

reporter calls, raises a question, and I say something like, "In my opinion, the board had a proper basis for excluding the public from the meeting" that doesn't get into print, because nothing went wrong. It's not newsworthy.

On the other hand, if I offer an opinion suggesting that perhaps there was a violation of the law, that does go into print because when something goes wrong, it becomes newsworthy, and I think that it's unfortunate that often the attention focused upon the Open Meetings Law or simply the mention of an Open Meetings Law is made in conjunction with what may have been a violation of law, rather than the successes that I think the law has brought about.

CHAIRMAN FEERICK: From my examination of your reports in 1985 and 1986, I have a sense that you received certainly in terms of written requests, far more communications from members of the public about the law than the press. Is that your experience?
IN RE: OPEN MEETINGS LAW

MR. FREEMAN: Yes, it is. I tend to think that members of the public often are somewhat intimidated by government. It's difficult, in my opinion, for somebody to pick up the phone or write to a federal agency in Washington. It's perhaps a little less difficult to contact a state agency, and less difficult than that to deal with local government. But the fact is that people do have questions and complaints about open government laws. We receive many more telephone inquiries from government than we do from members of the public, because government people are used to talking to other representatives of government, and generally speaking, it's a free call. It's not out of their own pockets.

But for John or Jane Q. Public to pick up the phone, it does cost money. I think people often expect to get the run around or have to make a half dozen calls before they reach the appropriate person, and for that reason, people, members of the public, ordinary citizens, write to us in
IN RE: OPEN MEETINGS LAW

CHAIRMAN FEERICK: Let me, if I can, dialogue with you on something that you said. In the course of your statement, you made reference to I think I'm accurately quoting you, how easy it is to get around the Open Meetings Law. Let's stay with that.

If one were to change the Open Meetings Law along the lines of recommendations of your committee, and it's easy to get around with Open Meetings Laws, why should we change it then, because to change it and end up with a situation that's easy to get around, isn't that going to breed more disrespect for government and produce greater lack of confidence in government?

MR. FREEMAN: Certainly I would hope that's not so. I think that the vast majority of members of public bodies and people in government, generally, do act in good faith. More often than not, when a violation of the Open Meetings Law occurs, my feeling is that it's simply because people who serve on public bodies are not as
IN RE: OPEN MEETINGS LAW

familiar with the law as perhaps they should be. And as the Mayor pointed out, many who serve on public bodies do so solely on a part-time basis. And in the scheme of things, the Open Meetings Law is often not at the top of their list of priorities in terms of knowing the substance of issues that come before or whatever the body might be.

But at the same time, as I mentioned, I think that it is simply too easy to get around the Open Meetings Law, if members of a public body want to do so. I think it should be tougher to do so, and if the law is strengthened -- and assuming that members of public bodies do seek to act in good faith, and I believe they do. I tend to believe that members of public bodies will comply with the law in good faith.

The other point I think that's important to make is that supposedly, at least I have read some statistic to this effect, the membership on local boards changes by one-third every year, and as a consequence, boards and the Committee on Open
IN RE: OPEN MEETINGS LAW

Government are constantly in the process of educating and re-educating. And I think that if you have a strong or strengthened Open Meetings Law, which is clear on its face, and which provides the ground rules that are readily understood by members of public bodies, members of the public and members of the news media, that the law will simply work better. I think -- again, I think there are rare situations where there is an intent to violate the Open Meetings Law, and this amendment, in particular, makes it too easy to comply with the law on the one hand, but at the same time, violate its spirit.

CHAIRMAN FEERICK: Thank you, and just one technical question. You made a recommendation that there should be some sanction involving fines. Who would you have impose the fine?

MR. FREEMAN: Presumably it would be the Court.

CHAIRMAN FEERICK: I didn't know if your proposal contemplated some commission or some committee with that power, as under
IN RE: OPEN MEETINGS LAW

the recent ethics legislation.

MR. FREEMAN: It's interesting

that you mentioned that. When Governor Cuomo

was a member of the committee, both as

secretary of state and lieutenant government,

he suggested the committee should be given

the authority to sue, to attempt to compel

compliance with the Open Meetings Law. I

have mixed feelings about that proposal for a

variety of reasons, but the fact is that no

bill in the legislature was introduced when

we made those recommendations, and I would

guess that the legislation would not be

willing to give, certainly not the Committee

on Open Government, that kind of power.

CHAIRMAN FEERICK: Thank you.

Mr. Davies?

MR. DAVIES: Mr. Freeman, I'd

like to focus on some of the issues the Mayor

raised specifically. Now, if I can summarize

his testimony, I hope accurately, as I

understood it, his position is basically all

things being equal, we should allow all open

meetings, but all things are not equal, and
IN RE: OPEN MEETINGS LAW

therefore open meetings are sometimes not good. They are not in the best interest of the public. One point he raised was that counsel members simply do not get the same amount or quality of information if the press and the public are present. They are afraid to ask questions, or they simply don't receive the sufficient information. What would be your response to that?

MR. FREEMAN: I don't know why that should be so. I don't know why, particularly, as is the case in the City of Rochester -- it appears the members can be fully prepared prior to a meeting. It appears they receive documentation in advance of a meeting, which they study, and again presumably, Member X can get on the phone with member Y and talk over an issue.

The other side of it is that -- let's take a bad situation where a member simply doesn't care, where that person is lazy, and says, you know, "Well, maybe I will have an opportunity to read the materials, but let's face it, the board is now nine
IN RE: OPEN MEETINGS LAW

Democrats, no Republicans. My vote is not going to make a heck of a lot of difference anyway. I will just go along with the majority." I think in that situation, that person would do the public a disservice. I think by opening meetings generally, if not caucuses held to discuss public business, the public has a better capacity or would have a better capacity to know how serious their elected representatives might be about their jobs, how well prepared they are, and where they stand on whatever the issue might be. And I think that that is part of the Democratic process. How do we know how to vote on election day unless we know where our elected representatives stand?

MR. DAVIES: You make the point that people are allowed to be ignorant. Isn't that somewhat facile? Isn't one of the worst possible things that could happen to a politician --

MR. FREEMAN: Unquestionably, but I can't help but think of a statement made by Roman Drusca, who was accused of
IN RE: OPEN MEETINGS LAW

being mediocre. He said there were a lot of mediocre people out there. They should be represented too. Maybe so, but I think the public has a right to know whether so and so is a bang-up legislator, who is as familiar with the issue, whether so and so is ignorant most of the time or whether so and so is familiar with some of the issues some of the time.

The other point, and this may be somewhat crass, and I have tried to make it time and time again particularly to local government officials, and it involves what I call the love letter syndrome. When most people, and maybe not politicians, but when most people see their names in the newspapers, it's a magical event. They read the article over and over again, the way any one of us would read a love letter, and we read in every conceivable nuance and every shade of meaning. It's a big event in our lives. The reality, I think, is that while we, the subjects of those articles, where our names might be mentioned, view those events
IN RE: OPEN MEETINGS LAW

as significant and important. I think we're so bombarded with news that most of the public, if it gets past the headline, will forget about it within fifteen minutes or a day or two or something like that.

And I have suggested if you are a public official, whenever your name appears in print, generally speaking, it's good news, unless it has the words murder or indictment next to it.

I think, too, that disagreement among members of public bodies is what the function of those bodies is all about. I certainly feel that comments that may appear in print or that may be stated at open meetings, which indicate a variety of points of view, is healthy. I think it's healthy for a democracy generally. I think it's healthy for a community, and I also think it's healthy in what usually, is a two party system.

MR. DAVIES: It seems to me from what the Mayor said, that maybe it's not so healthy. If it's demoralizing for the
IN RE: OPEN MEETINGS LAW

members of a majority, the fact they cannot
get together to obtain that collegiality, to
discuss things, to rant and rave in private
and so forth, and therefore they are
demoralized, and they don't do their jobs as
well, and it makes it more difficult than it
is now, and it's extremely difficult, we
can't get good candidates for government.
Shouldn't we have some closed meetings to
permit that collegiality?

MR. FREEMAN: Again, we're
talking in terms that may be too general.
The law does permit often what may be
controversial issues to be discussed legally
where members of a board are free to rant and
rave at each other.

Secondly, I question how many
members of public bodies are, indeed,
demoralized by the Open Meetings Law. It --
unless I'm mistaken, most incumbents run
again and again and again, and invariably
they win. If you look at the state
legislature, how many incumbents lost last
year? That's I suppose a rhetorical
IN RE: OPEN MEETINGS LAW

question. I think the answer is none. I think that the answer is none, and if political life were quite so demoralizing, I think we would see people leaving public bodies in droves.

MR. DAVIES: Maybe state legislature is a bad example. We're only concerned about the local level, I think, for the most part here. And isn't -- I mean won't you agree it's very difficult to get good candidates at the local level? At least that's certainly been my experience. Mayor Ryan certainly echoes that.

MR. FREEMAN: I think that's a problem. And I think one of the problems -- one of the reasons for that is that we do have such lopsided majorities representing one party that we have, and I think that that's true in various places within the state. I think it's difficult if you're running for public office in the City of Albany to be anything but a Democrat, because Democrats always win. That's simply the way it is. In my town, and I mentioned this to
IN RE: OPEN MEETINGS LAW

Mr. Small before, last night there was a Democrat elected for the first time in a hundred and ninety-three years to any position in town government. I think it's very difficult to attract candidates in situations where generally speaking you know that one party is dominant. I'm not sure that that necessarily has anything to do with the capacity to attract good candidates.

MR. DAVIES: Let me look at one other issue that the Mayor raised. The -- he stated if four council members can meet in private, why can't five? That is a majority. If they are not taking any formal action, and there are already rules that govern formal meetings, why not? Why do you make the cut-off there?

MR. FREEMAN: I think the simple answer is, as a general matter, five members of a public council of nine, have the capacity to do what the public body can do. Except in rare situations, a majority vote cast by a majority of the membership of a public body, will carry whatever the motion
IN RE: OPEN MEETINGS LAW

will be, again except in rare circumstances. I think the distinction, granted it's artificial, but I think it's one pervasive throughout government. When you have a majority convened for the purpose of conducting public business, that should be a meeting, because that number of people have the capacity to do, the power to carry out the power that the body is empowered to carry out.

MR. DAVIES: If that's the case, why does the Committee on Open Government propose two-thirds instead of one half?

MR. FREEMAN: I'll be completely honest, I think whatever the proposal might be, it's going to be extremely difficult to get anything through the state legislature. Secondly, if our recommendation were to involve a simple majority of the total membership, we would, in effect, be going back to the rule evoked in Sciolino versus Ryen, and again, speaking in terms of reality, I don't think that we would have a chance in the world of going to legislature.
IN RE: OPEN MEETINGS LAW

and saying, "Well, let's go back to the way things were," when they so quickly passed an amendment changing all of that, and revoking the Sciolino decision. Two-thirds, I suppose, is based upon the idea. And again it's not magical to some extent it's arbitrary, but with two-thirds, unless I'm mistaken, a public body can always do what it's empowered to do. And in some instances a two-thirds affirmative vote of a membership of a public body is required to take certain actions. That is why I believe we recommended two-thirds.

MR. DAVIES: Well, can't you make the opposite argument, if two-thirds is also enough the take action, one-third is sometimes enough to stop action, so shouldn't you at the very least prohibit one-third of the members of a public body from discussing certain issues, for example bond resolutions or anything else that requires a two-thirds majority?

MR. FREEMAN: I think that's an interesting point, but at the same time, I
IN RE: OPEN MEETINGS LAW

think the two-thirds requirement, unless I'm mistaken, arises so infrequently that it would be rare that a gathering of one-third of the members of a public body would have the effect of giving that group the capacity to negate the vote of the majority, and I point out, too, that in -- although we didn't make this the recommendation in 1986, in 1985, we did recommend that amendments to the law be enacted that would deal not only with the majority caucuses, but also with minority caucuses.

MR. DAVIES: Now, additional points, suppose that a public body, in order to evade the Open Meetings Law, they institute the rotating chairs in the hall. Number one, is that a violation of the Open Meetings Law since there is no quorum in the room?

MR. FREEMAN: So far I think the answer is no, and I say so far, because I don't know of any judicial determination that has dealt precisely with that situation.

MR. DAVIES: Even if there is an
IN RE: OPEN MEETINGS LAW

intent?

MR. FREEMAN: I was getting to
that. There is a decision which dealt with a
situation in which less than a quorum of the
members of a board of education met
frequently to discuss a certain topic. In
that situation, the Appellate Division found
there was no apparent intent to convene less
than a quorum, in order to evade the
requirements of the Open Meetings Law.
However -- and the Court didn't reach the
issue because of the absence of any finding
of such intent. I believe the Court inferred
that if there had been an intent to evade the
Open Meetings Law by insuring that less than
a quorum be present, that perhaps the result
would have been different, that perhaps a
violation would have been found.

But I think at this point the
question is conjectural, and our general
advice is that a public body doesn't become a
public body until a quorum, a majority of its
total membership, has convened.

MR. DAVIES: Another point the

COMPUTER REPORTING SERVICE
IN RE: OPEN MEETINGS LAW

Mayor made that you picked up was how you distinguish the state legislature from the local bodies. He said if you're going to change the laws, you should apply it equally to the state legislature. I gather actually the current proposal does. The two-thirds proposal would apply to the state legislature?

MR. FREEMAN: No, the governor's bill would not apply to the state legislature.

MR. DAVIES: Even the two-thirds bill?

MR. FREEMAN: Correct.

MR. DAVIES: But isn't it a fact that -- how can you make this unicameral/bicameral distinction, because really don't we have more information available to us with respect to our local government than we do from Albany? I as a citizen sitting here in Rochester, don't I know more about what goes on in Rochester than I do in Albany?

MR. FREEMAN: You may know when
IN RE: OPEN MEETINGS LAW

the snow is not cleared efficiently, but in terms of the working of your government, it's not inconceivable to me that you may have more information and more up-to-date information regarding the state legislature than you do about your local government, particularly in an area which may not receive daily coverage by a daily newspaper. I know that in my community, the weekly newspaper generally contains much more information about town government than does the daily newspaper.

The other point is this, the state legislature is routinely covered by dozens and dozens of reporters. As I mentioned earlier, before legislation is enacted, before it's signed into law, a variety of actions must occur, within committee on both sides of the legislature, eventually on the floor of the legislature, and after that, by the governor. All of that is open. All of that can be known.

In my town -- and I'm not suggesting that they do this -- until last
IN RE: OPEN MEETINGS LAW

night, the five members of the town board could meet in private to do absolutely anything, and nobody would have the right to know about it. The possible result of that is that we may not know of action taken in the open meeting during which a vote consists largely of a rubber stamp of previous closed door discussions which occurred.

So I tend to think that yes, we have more direct contact with our local government than we do with our state legislature, but if, for example, a governing body, a legislative body routinely discusses its activities in private, in a closed political caucus, my guess is that we have a greater capacity to know what the state legislature is doing than we do about that local legislative body.

MR. DAVIES: One last point, again raised by the Mayor. He has suggested that this really should be a matter of local concern and that the locality should take care of that on their own, and it shouldn't be shoved down their throats by the state
IN RE: OPEN MEETINGS LAW

legislature. I note on your Committee on Open Government report in '85, you write that public bodies across the state have spontaneously opted to conduct their business as they did prior to the 1985 amendment, by adopting resolutions. Why shouldn't we leave this up to the municipalities rather than have the state legislature, perhaps in contrary to at least the spirit of home rule, shove this down the throat of localities?

MR. FREEMAN: Again, I think that democracy is too important and too precious to enable members of public bodies to decide voluntarily whether or not to disclose what they do to the people that they represent. Certainly I applaud those public bodies that have taken the steps in enacting resolutions that preclude themselves from going into closed political caucuses, but particularly now, I think life is -- has become much more complex than it had been a very few years ago. I know we have to deal with issues that simply didn't exist a very few years ago, and as a consequence, if
anything, there is a greater need for openness now than ever before.

And I don't know what the nature of your other inquiries have been, but all of us have met during the past year or two about a series of scandals involving government. They might have involved local government, with the highway superintendents taking bribes. They have involved, in some cases, the state legislature and its process. I think that now more than ever it should be difficult for public bodies to withhold information from the public. It should be difficult to withhold records from the public. I think there's a greater need for accountability now than ever before.

MR. DAVIES: I'm sorry, just one last quick point. The Mayor raised an issue or at least an idea that I had at least never personally heard of before, and that was rather than simply rescinding the closed a caucus amendment, that rather that it be rewritten in such a way that it would limit or prohibit closed caucuses with respect to
IN RE: OPEN MEETINGS LAW

pending legislation, resolutions or
ordinances or local laws that have been
actually introduced. What would be your
response to that? Do you understand my
question?

MR. FREEMAN: I think so.

You're saying caucus could be held for
anything but pending legislation or
resolutions or what have you?

MR. DAVIES: Local laws.

MR. FREEMAN: I would have to
think about that question. I suppose I
wonder what a public body would be doing for
the most part other than considering
legislation or resolutions or something like
that. The remainder of its business would
probably deal with -- he mentioned
resolution. A resolution could be anything.
It could be a discussion to expand the police
force or -- I think I would need more
information on the nature of his proposal to
make an effective comment. I think it would
be a step in the right direction. I think
that certainly the terms would have to be
IN RE: OPEN MEETINGS LAW

defined precisely, because practically
everything a local board does involves
consideration of a resolution.

A problem I think is that in
some instances, particularly as the units of
local governments become smaller, there is no
staff at all, and in some cases, the first
time that even the members see a resolution
is on the night of the meeting. So in those
situations, again, I think that the
deliberative process is in terms of the
public's capacity to find out what's going
on. And if bodies are that small or react
that quickly, there may be no resolution in
print and no capacity to know what's going on
until the action actually occurs.

CHAIRMAN FEERICK: Thank you,
Commissioner Magavern.

MR. MAGAVERN: I have several
subjects I want to discuss with you. I'll
try not to take too much time. First, you
recognize that some kind of private
deliberation is legitimate, and that being
so, I would incidentally suggest that any
IN RE: OPEN MEETINGS LAW

attempt to characterize efforts to channel deliberations into legitimate means that don't violate the law should not be characterized as an intent to evade. It's an intent to comply with the law, and if the law sets out -- says this is okay, and this isn't, and you say I'm going to do it, it's okay, and you're complying with the law, and to characterize it as evasion is misleading and not a workable approach to handling the rotating chair type of situation.

My more fundamental concern is that if you do not exempt caucuses, per se, then you're likely to have two impacts, and the Mayor suggested them. One is to divert deliberation into other channels, which are legitimate, and the other may be to just reduce the amount of deliberation. People may just not bother anymore.

My question is do you have any evidence that would indicate that without the exemption, in the period before we had the exemption, you got as a result a better quality of deliberation, more deliberation,
IN RE: OPEN MEETINGS LAW

and more responsible deliberation? Is there any reason to think the removal of the exemption would, in fact, improve the deliberative process?

MR. FREEMAN: I don't know that there's evidence to that effect, but at the same time, it's clear this amendment involving political caucuses involves only legislative bodies. It does not apply to school boards or planning boards or zoning boards, committees, subcommittees.

There are a variety of public bodies that comply with the general provisions of the law and which cannot invoke an exemption concerning political caucuses. And I don't think those public bodies have complained that the exemption doesn't apply to them. I think they have complied or attempted to comply with the Open Meetings Law, notwithstanding the fact that others may have the capacity to close the doors when they don't. I don't know whether that's a good answer.

MR. MAGAVER: Do you know
IN RE: OPEN MEETINGS LAW

whether the effect is to bring more
deliberation into the open or to the
contrary, to push more deliberation off into
these more informal channels which you admit
to being legitimate?

MR. FREEMAN: I wish I could
answer the question, but I don't know what
the answer is, and I think that public bodies
generally do what works for them. I think
that there are public bodies that have long
winded members or that as bodies may be long
winded generally. There are others that deal
with their work quickly, and I think a great
deal has to do with the degree of preparation
that these members have done before the
meetings. A great deal might deal with --
pertaining to political party struggles
within a municipality, for example. I think
it's impossible to generalize.

MR. MAGAVERN: There are some
people who feel that decline of party
cohesiveness is a problem in our political
system. Do you have any notion as to whether
taking away the exemption from political
IN RE: OPEN MEETINGS LAW

caucuses might aggravate those problems?

MR. FREEMAN: Again, I don't
know what the answer is. I tend to think
that at the local government level, the
distinction between Democrats and Republicans
often is whether you're in the ins or the
outs. I don't know that there are a lot of
theoretical or philosophical party
distinctions among those who serve on local
government. I don't think it's a political
party issue to fill the potholes or to want
to keep the streets clean. And if anything,
if indeed the political party structure has
become somewhat fragmented, the exemption we
have got now becomes more artificial. It
gives the members of a political party who
serve on a public body the capacity to
discuss the issues behind closed doors,
notwithstanding the fact that there may be
completely different points of view and that
in name only, they may be Democrats or
Republicans as the case may be. I think
that's one of the problems with the
amendment. It's very artificial. In a town
IN RE: OPEN MEETINGS LAW

like mine, where we have had only Republicans for a hundred and ninety-three years, the board, in essence, has been Republicans. In the City of Albany, it's always been Democrats, and I don't see that political party designation or affiliation should alone be the reason or rationale for enabling members of a public body to close the doors.

MR. MAGAVERN: Turning to the distinction between state legislation and local legislative bodies, you pointed to a number of opportunities for notice to the public for pending legislation in the state legislature. I have two thoughts. My understand is a local law must sit on the table for seven days, at least at the county level. I'm not certain about the other local levels. And they -- at least if there's an executive form of government, it does go to the executive. I think any local law requires a public hearing, regardless of local government. They normally have committees.

In other words, most of the same
IN RE: OPEN MEETINGS LAW

procedures you refer to at the state level, exist at the local level, and if they don't, perhaps the remedy is to require such procedures at the local level. The distinction between state and local government has a bit of an aura, to me, an aura of hypocrisy, and to have the state say we're going to make the localities comply with standards we're not willing to accept ourselves, strikes me, very personally, as a bit offensive. That's really not a question, but I appreciate your response.

MR. FREEMAN: Can I make a point, and I think it's relatively rare, and I could be mistaken, that towns or villages enact local laws, per se. I think that much of what they do involves the passage of resolutions, a discussion of a budget, for example. Town boards may spend weeks in the development and discussion of a budget. Now, that doesn't result in a local law, but certainly it's a crucial aspect of their business. It's something that's crucial to members of the public.
IN RE: OPEN MEETINGS LAW

MR. MAGAVERN: There's also, I believe, there are all kinds of, in the budgetary process, there are all kinds of schedules, and something can't happen before this. There's provision for vetoes.

MR. FREEMAN: I agree. That's true in the case of the adoption of the budget. It's true in the case of adoption of a local law, but what if a public body chooses not to go the local law route, and just in the context of what we're talking about today, these public bodies that have chosen to reject their capacity to enter into political caucuses, and I don't know what the answer is, but I wonder how many have done so by means of local law or perhaps by means of a resolution. The resolution would not require the same kinds of notice that are required with respect to a local law. There probably is no publication requirement.

MR. MAGAVERN: Maybe their action is invalid. Maybe they had a secret caucuses to decide to polish glasses.

MR. FREEMAN: Certainly I agree
IN RE: OPEN MEETINGS LAW

that it's difficult to accept the possibility of distinguishing the state legislature from the rest of the world. I do believe that there are valid reasons for making those distinctions. Whether they are justifiable is another matter. But at the same time, I think that the impact of this legislation on local government is much more significant than it is on the state legislature, generally.

CHAIRMAN FEERICK: Kevin O'Brien.

MR. O'BRIEN: Mr. Freeman, it seems underlying this is it's a good thing to have every strategic decision of a political official made in conjunction with his colleagues subject to direct scrutiny, and I'm wondering if that's always a good thing, because it might -- assuming that the law is complied with in good faith as you suggest, it might compel politicians to forget the difference between short term and long term.

We know log rolling is part of the art of the politics. The reason you're
IN RE: OPEN MEETINGS LAW

able to get a consensus on certain difficult issues is a given member agrees to sacrifice his objection to some issue raised by another member in exchange for some later benefit or some larger good as he perceives the good for his constituents.

The problem with opening up those kinds of deliberations where log rolling goes on is that the constituent group out there perceives their interest to be sacrificed by their representative. And if that kind of pressure to not do that can be brought to bear through open meetings, then obviously the member of the body is going to be tempted not to make the sacrifice. And if he's tempted not to make the sacrifice, it seems to me that's going to mean a lot of public business simply won't get done.

Doesn't it trouble you the idea of opening up all of these meetings in all their minutia will inhibit the ability of officers, officials, representatives, to make compromises, which in the long term, not the short term, but the long term for the good of
IN RE: OPEN MEETINGS LAW

their constituents?

MR. FREEMAN: I suppose my answer is if I thought that would really happen, yes I would be very troubled. But again, I think looking at the way human nature is and the way reality is, much of that will not occur at a meeting attended by all the members. It will occur on a one-on-one basis or perhaps in groups consisting of less than a majority.

The other point is I think often the kinds of issues you're talking about can validly be discussed during an executive session, from which the public can legally be excluded. Often issues involve patronage. Are we going to hire a Democrat or Republican or this or that. Certainly discussions regarding who may be hired or fired can legally occur during a closed session.

MR. O'BRIEN: For the record, I think if I'm not mistaken, the executive session exemption really falls under certain very specific subject matter, not just any issue.
IN RE: OPEN MEETINGS LAW

MR. FREEMAN: No, that's right.

MR. O'BRIEN: The building of a sewage system in some sector of a district, for example, wouldn't fall within any of the exemptions, I wouldn't think.

MR. FREEMAN: You say it wouldn't, but some aspects of it might. Not to digress, but if you look at section 105, subdivision 1-F, which is generally cited as the so-called personnel exception, it also refers to corporations. And it says a public body can enter into an executive session to discuss the credit, medical history of a particular person or corporation, et cetera. So there will be certain situations where there may be aspects, who do we hire, what are the qualification of the firms we hire, those kinds of issues, could be validly discussed during an executive session.

One of the problems with a political caucus is I think that minority members may have no opportunity to participate in those kinds of discussions. If a board is unbalanced, if it's seven to
IN RE: OPEN MEETINGS LAW

two or eight to one, the minority members may have no opportunity at all to join the majority in the deliberative process, and I think that's a draw back to the caucus amendment that hasn't come up yet. Does that answer your question, in part?

MR. O'BRIEN: In part. It still seems to me that in principle there are large areas which could fall under this chilling effect because of the openness.

MR. FREEMAN: I suppose I could ask a rhetorical question. I don't know why in every instance there would be such a chilling effect. I don't know why a member couldn't say, in public, "I will agree with you now, because I think that a more important issue is such and such. And I expect to devote my information to that issue." I don't know why that should necessarily be inhibiting in terms of members of a public body's capacity or desire to speak in public or to express their points of view.

MR. O'BRIEN: I think you're
assuming that voters are rational to the same extent that a well informed professional legislator or representative is, and the fact that they are not is precisely why we have elected representatives. It seems to me in some measure --

MR. FREEMAN: But don't we have to assume that the voters are rational?

MR. O'BRIEN: Not to the same extent.

MR. FREEMAN: If we throw out the principle, what are we left with?

MR. O'BRIEN: They are not rational to the same extent. They don't have the same breadth of scope. They don't have the entire district as their concern. They have their concern, say, my backyard. That breadth is why we have elected representatives. You have to give them some kind of breathing room to make those kind of long range judgments which may be unpopular in the short term.

MR. FREEMAN: Again, I don't mean to belabor the point, but if I'm a
IN RE: OPEN MEETINGS LAW

legislator and I have an interest in my
district, and I'm at loggerheads with
somebody in a neighboring district, I can't
imagine those two would not get together and
discuss their problems, outside the scope of
the Open Meetings Law, completely legal,
completely legal, and I think it's something
that probably should be done.

CHAIRMAN FEERICK: Any other
questions?

MR. SMALL: Bob, let me take you
through a hypothetical and really picking up
Commissioner Magavern's point about
differences between bicameral and
unicameral. You pointed out a series of
steps that you look upon as protective of
public discussion. Let us say that in the
state legislature there was a measure that
was extremely popular with all members, which
they virtually agree, and yet might be
harmful to the public at large or perhaps in
the opinion of some. And so that the
leadership gets together. They draw up a
bill. The bill is printed. There's no

COMPUTER REPORTING SERVICE
IN RE: OPEN MEETINGS LAW

discussion of it. It rests for those three required days, maybe even four. There are no hearings, no witnesses called forth. No one asked if they would support the bill publicly or not. It’s passed quickly, overwhelmingly. The governor hurriedly signs it. His statement indeed is made with everything else, but it’s a vague and generalized statement. So you have gone through the process in the course of a week where a bill has been passed, and none of the protective things that you associate with bicameral has happened. Could that not happen?

MR. FREEMAN: Unquestionably it could, and I’m sure it does.

MR. SMALL: And did two years ago in the passage of this very amendment.

MR. FREEMAN: Well, there were a few people who knew about it, but for better or for worse, we didn’t have the time, I suppose, to mount a challenge to the enactment of the law. But I agree, and I don’t want to get onto this topic
 IN RE: OPEN MEETINGS LAW

necessarily, but I think that often the way
the state legislature operates is subject to
some criticism, particularly during the last
two weeks of any given session.

MR. SMALL: Yes, sir, we're
familiar with that. But the point here, I
think, is that the very amendment that we're
talking about was done in a manner that's
contrary to what -- why would you exempt the
legislature? Isn't it true the real reason
you want to exempt them is you think clearly
it would never get passed otherwise?

MR. FREEMAN: I think I said
that. I thought I was completely honest
about that. I would love to see an amendment
on this issue equally applicable to all
public bodies, irrespective to the level of
government that a public body might
represent. But at the same time, I think
that we have to be at least a little bit
realistic.

Fortunately in this position --
and I've loved it for fourteen years, because
I can be idealistic. I can attempt to talk
IN RE: OPEN MEETINGS LAW

about things that in my opinion are based upon philosophy and idealism, and I think there's room in government for those kinds of considerations.

At the same time, there have been proposals that have been raised that I might have thought have been good, but if the Committee on Open Government or Bob Freeman raised those proposals, we would be laughed out of town.

I guess that I don't -- again, I don't have a good answer for you. I don't want to attempt to justify philosophically a distinction between the state legislature and the rest of the world, but again, realistically, I would like to see the law improved. And let's face it, the Open Meetings Law applies to thousands of public bodies across the state, city councils, town boards, village boards of trustees, whatever they may be, and there are thousands of bodies that are not subject to this political caucus amendment.

My personal point of view is
IN RE: OPEN MEETINGS LAW

that if we can improve the law and improve
the law based upon or in conjunction with the
principles upon which the law is based, you
would be more than happy to accept that kind
of improvement.

MR. SMALL: I don't want to
intrude on Professor Benjamin's time, but let
me ask you one quick question, in the travels
that were conducted this summer, we ran
across at least one incident where a
non-political body used the amendment as an
excuse to hold closed sessions. Is that a
unique circumstance, or do you find that --
it would have to be a political body, right,
a non-partisan school board, for example,
could not take advantage of that?

MR. FREEMAN: Correct. The
amendment clearly only applies to legislative
bodies, and the law specifies which
legislative bodies. Clearly the amendment
would not pertain to a school board, for
example.

I suppose I could go back to --
and I don't want to blame anybody. When news
IN RE: OPEN MEETINGS LAW

articles are written on a given subject, in
some cases they are rather general. In some
cases they may be read but not quite as fully
read as they should be. Obviously there are
going to be misinterpretations of the law.

To this date, I hear the phrase
"work session," and I don't know if you're
familiar with it, but when the law was
enacted in 1977, public bodies -- and this is
very much related to what we're talking about
today -- the term meeting was defined at the
time to mean the formal convening of a public
body for the purposes of officially
transacting public business. All over the
state, school boards, city councils, town
boards, what have you, were saying, "Well,
we're just going to sit down and talk. This
is a work session. It's a study session.
It's an agenda session." Maybe now they are
saying it's a political caucus. But they
were saying, "We have no intent to take
action. We will not be transacting public
business. As a consequence, they contended
those kinds of gatherings were outside the
IN RE: OPEN MEETINGS LAW

scope of the public meetings laws.

In any case, the issue reached
the Court of Appeals which held very simply
any time the quorum convenes for the purposes
of conducting public business, even if there
is no intent to take action, irrespective of
how the gathering might be characterized,
that's a meeting. And that law has been --
that case has been cited in practically every
decision rendered under the Open Meetings
Law. It was issued in 1978, and to this day
people still call and say would we close our
work session.

So I guess in response to your
question, the answer is that people make
mistakes. People often are not as fully
familiar with the law as they should be. I
think that that's why I still have my job,
because the phone rings constantly with
people having questions. And the majority of
our calls come from representatives of
government who I think call most often in an
attempt to find out how to comply with the
law rather than attempt to evade the law.
IN RE: OPEN MEETINGS LAW

CHAIRMAN FEERICK: Thank you.

One final question, Nicole.

MS. GORDON: You said in response to Mr. Small earlier that the distinction between the state and local legislative bodies was a practical distinction that was being made. Do you think in the current atmosphere where the press has given a great deal of attention to the subject of corruption in government, to some extent that has certainly been responded to with the passage of the ethics legislation, the appointment of this commission, do you think that perhaps in the next legislative session because of what's going on right now, that perhaps there isn't some possibility that the legislature would be receptive to what you might call an idealistic approach, actually, to take care of the whole matter once and for all for everybody equally?

MR. FREEMAN: I am an optimist by nature, and I think that if there was ever a time for institutional reform, this
IN RE: OPEN MEETINGS LAW

certainly is the time. Nevertheless, I can't envision an amendment to the Open Meetings Law that would open up the legislative process to the extent that you suggested. I would like to say that yes, I think it's a possibility, and it may be, but certainly I'm doubtful about the prospect of something like that.

CHAIRMAN FEERICK: Thank you very much for your participation.

MR. FREEMAN: Again, I appreciate your giving me the opportunity to speak.

CHAIRMAN FEERICK: I appreciate the cooperation you have given us. There has been a good deal of communication between our staff and your office, and you have been very helpful in providing us with a great deal of information.

Professor Benjamin. I regret the delay in getting to your statement, Professor. I want to express our appreciation to you in participating in our hearings. I recognize you have made some
IN RE: OPEN MEETINGS LAW

adjustments in your schedule that you didn't foresee, as a result of the time. So we do appreciate you being with us at this point.

I indicate as I did to Mr. Freeman that a number of us are familiar with what is in the statements and writings of different witnesses, and I have, myself, examined the materials that bear your name before us. So to the extent to which you can summarize and synthesize would certainly be helpful and enable us to put questions to you that more quickly. Thank you.

PROFESSOR BENJAMIN: First, I would say that I changed my schedule so I can remain as long as you wanted to have me here, and I will try to be succinct.

CHAIRMAN FEERICK: Thank you.

PROFESSOR BENJAMIN: First of all, I'll identify myself. I have -- I wear two hats at this hearing. I'm a professor of political science at SUNY New Paltz and majority leader of the Ulster County legislature and have a particular interest in this matter, a practical interest, as well as
IN RE: OPEN MEETINGS LAW

an academic interest.

I'm honored by your invitation to speak. Before I begin, however, I must make a disclaimer. Currently, I am on leave from my academic position, and I'm serving as the principal research advisor to the New York City Charter Revision Commission. Nothing in my remarks today should be construed as being in any way connected with my role on the staff of the New York City Charter Revision Commission or a position of the commission or a motion of the staff of the commission or any member of the commission. These are my views alone.

I have submitted for your record two short essays I have written on this subject and will not try to reiterate what's in them. I also note that many of the questions that have been asked of previous witnesses or speakers have raised the points that I would wish to raise, so some of the points that I would make are going to be in very summary fashion, but that's because they have already been raised here.
IN RE: OPEN MEETINGS LAW

CHAIRMAN FEERICK: And I would say it's no accident, perhaps, that some of those questions were raised, in light of the fact that we did have the benefit in advance of today's hearing of your views. Certainly that's true in my case.

PROFESSOR BENJAMIN: Thank you. First, I would agree with the previous witnesses, that there should be a presumption for openness. We are talking about when there should be an exemption to the presumption or when that presumption should be modified.

We know that in general, lots of values have to be accommodated in a democratic society. It seems to me that the value of openness is a particularly appealing value in this society. However, it should not be a sole value.

I have had the experience of living and teaching in Asia, in Japan, and where a closedness is said to be a style of interaction. And some Japanese students have told me that the American posture of openness
IN RE: OPEN MEETINGS LAW

is a way of hiding rather than revealing
American positions, but the value at least is
a pre-eminent one. In our experience, values
clash.

I think the Mayor of Rochester
raised the point of the need to govern and
that there might be a trade-off between the
need for openness and the need to govern.
Experience tells me at least that the frank
and open exchanges in a group that has the
responsibility for governing is desirable.
It also tells me that people who have
partially formulated views are hesitant, I
would say reluctant, to reveal them in a
public forum. Perhaps because they may
appear ignorant, but also because they may
not have fully formulated the views, and they
are testing those views in a process of
interaction.

And accountability for each step
of the way would not be productive for the
formulation of a consensus position or an
appropriate rationale and desirable policy in
my opinion, although accountability for the
IN RE: OPEN MEETINGS LAW

result is absolutely essential and debates on the result are essential and ought to be revealing of the strengths and weaknesses of the policy result.

I'm fond of pointing out, and you have probably heard this more often than you care to hear, that the constitutional convention of the United States was a closed meeting.

CHAIRMAN FEERICK: I don't think we'd get away with that today.

PROFESSOR BENJAMIN: And perhaps unfortunately. And also, although I made my previous disclaimer, there is special process that the Charter Revision Commission of New York City have private hearings, so -- and that was on -- I don't know how that was formulated, but it is an acknowledgement of necessity for such hearings for some bodies for some purposes.

Both parties in the state legislature as you well know have closed conferences. Their experience told them these conferences were needed. When court.
IN RE: OPEN MEETINGS LAW

decisions narrow the application of the many political caucuses exception in the law, the legislature -- the legislative forum was used for the legislature to redefine or reassert what it meant by that provision of the law. It clarified its intent. In other words, this has not arisen by error, but is I think a reassertion of the intent of the original legislation.

Now, I want to make a structural point that has been made in another way here. Most local governments in New York State are unicameral legislatures with no separate executives. Therefore, I think we are prone to a false analogy based upon a separation of powers model that we carry around in our heads as Americans. I think the appropriate model for understanding most local bodies in this state is the parliamentary model in which a group of people is collectively responsible and governs.

If a group is collectively responsible, then they need a forum to form a
IN RE: OPEN MEETINGS LAW

collective position. Now, accountability of public -- we had an election in Ulster County yesterday, and we have a county legislature now that has far more than two-thirds of its members Republican, which would bring us under the proposed -- the governor's proposed legislation. However, we contested the legislation_very vigorously, and the Democrats did, as well, and others did, outside of the two major parties. And issues were raised.

That is the process that produces the accountability, and our choice to have an election every two years in many bodies produces the accountability, and the security that public officials have, even though they might be perceived by others as secure, also produces accountability. That is a psychological fact. And so the outcome, as long as there is accountability through the competitive process, and that is an important -- to the degree that doesn't exist, that's an important failure, we can -- we will have issues raised, and we will have
IN RE: OPEN MEETINGS LAW

them discussed, and we had important issues raised and discussed in our county, for example, construction of public buildings, a public waste facility, which will cost a very large sum of money and so on.

Somebody noted here that this is an anti-party measure, and it is. It is not popular to have pro-party positions in New York State or in the country, and yet there is a committee of respectable political analysts called the Committee on Party Renewal that suggests that parties are absolutely essentially. In fact, some great political scientists, American and not American, have said parties are the only effective way of mobilizing people with less knowledge of politics, less money, less resources, less intellectual commitment to understanding the political process.

Maurice Duverger, the French political scientist, said a regime without parties is an inherently conservative regime. And I think we are on the road toward non-party politics in New York State.
IN RE: OPEN MEETINGS LAW

I think that's unfortunate. Parties, if -- if collectivities need to govern, groups within parties need to be able to formulate positions for which they are accountable as groups.

In addition, there is significant openness required by the law now. I understand that when we have -- are going to adopt a local law, we have to have public hearings. We have to have notice. Our practice is to publish our resolutions a week before they are going to be taken up on the floor. We have a very developed committee process in our county, and it's a relatively rural county, so we do have an ongoing process that citizens and others can use to elicit information.

In other words, it's not a question of fear for accountability. It's a question of the locus of accountability and the balance between values. And giving the pre-eminence to one value, when there are others that need to be brought into play, at least needs to be examined very closely.
IN RE: OPEN MEETINGS LAW

Now, I am not going to critique
the Governor's proposal in detail, because
that's already been done. I would make the
following points in summary. State
government has often been dominated by one
party, as a local party often is in New York
State. So the distinction between state and
local government -- and I think it may well
be dominated by one party in the near future,
as well. Unicameral system has at least
greater rationale than a bicameral one for
confidential caucuses. The intersession log
jam has been brought up here. The governor
can even suspend the waiting period for
legislation. Media coverage of local
government is vigorous. We have lots of --
technological change will make it more
vigorous. Lots of newspapers, lots of radio,
and increasingly cable TV.

I'm not as sanguine about the
coverage of state politics. I don't think
it's good at all. I think it's pap
journalism, and I don't think we know what
government is doing in New York State from
IN RE: OPEN MEETINGS LAW

the media. We know what a few institutions
are doing in their most visible moments or at
their peak moments. So just as the argument
is state government doesn't need to have
certain rules apply to it because it's too
visible, I question that, and I question
whether local government needs those rules
because it's invisible.

I think that access to public
officials and committees has been pointed out
here. In the Shoprite, there's total access
to me as I try to buy my groceries, and
people don't enjoy that access to officials
at other levels of government, or at least
the ratio of the time I'm available and the
governor is available in Shoprite is I think
different.

The convening of public caucuses
in order to close the caucuses it seems to be
burdensome and unnecessary. Everybody knows
when we are having a caucus in Ulster
County. We don't secretly call each other to
hold a caucus. So it seems to me that's a
remedy without an evil.
IN RE: OPEN MEETINGS LAW

The two-thirds majority requirement as the cut off has been raised here. I think as long as there is one -- I think my argument fails when there is no minority in the body. I think that's my most difficult case. I think as long as there's one member -- minority member, if that member is vigorous, you can have an accountable process. The technical point would be majority and minority calculated and waited voting schemes, how would that be calculated. That's a purely technical aspect.

I am questioning of the penalty to each individual member who attends a meeting. I think my state association has pointed out that penalties that go to individuals for their behavior as public officials are rare law in state law. I am not an expert on this, but this would be exception and therefore make this area of law a rather exceptional area of law if that is the case, and we would need to ask the question why is this so important as to make
IN RE: OPEN MEETINGS LAW

this exceptional so the penalty would be
directed to individuals for their behavior as
public officials.

With regard to the role of the
press, I think that fundamentally, the press
is a party interest in this matter, and the
conflict has been to -- between the press and
government officials in this matter, and yet
the press also presents itself as sort of the
arbiter in the matter, that is the definer of
the public interest.

I think that the press is
inappropriately in both roles here, and I
would also point out that some very great
reporters, like I.F. Stone, have done some
very great reporting simply by sitting home
and reading public documents. There's a
difference between what's required to have
government accountable and what's desirable
to make the job easier to do, and I think we
ought to examine that point.

Also the question is raised what
is the public interest? Is there one, and
who says what it is? That's a point that's
IN RE: OPEN MEETINGS LAW

been raised here before. I think
fundamentally the media is interested in
conflict, and they want to get in at where
the conflict is. People who govern know
there is going to be conflict but are
interested in coming to a position of
consensus so policies can be decided, and you
can move forward. The press is defining the
situation on the basis of individuals and
their positions. We're defining it in terms
of my county in collectivities and the
collective position arriving at consensus.

Conflict is news. Consensus is
not news. However, it seems there's
particular conflict on the floor between the
parties. We don't have to -- you can sell
papers with that. You don't have to sell it
with conflict within the parties.

Finally, will the law work. The
Mayor indicated that Rochester obeyed the
law. We did too. We divided our caucus and
met in two separate groups. We will obey the
law if the law is changed. We will try to
find a way to meet our needs for a
IN RE: OPEN MEETINGS LAW

confidential forum and obey the law. If we can do that, we will. I think the need for such a forum is so compelling to people who make decisions in order to create the majority, that it really has to be given very strong consideration in the law as it's framed. I won't say that the law would be disobeyed, but I think people will be driven to find techniques so they can have such forum. Thank you.

CHAIRMAN FEERICK: Thank you very much. Professor Benjamin, do you see an ethical failure in a situation where the majority party in caucus has access to government information or is recipient of government information that might be relevant to the particular legislative matter under consideration, which information isn't presented to the minority because they are not present at the caucus?

Again, that may be sort of a hypothetical and exaggerated kind of situation, but it has been alleged to us that sometimes the political caucus is used in
IN RE: OPEN MEETINGS LAW

such a way that those in the caucus have the
benefit of government information that's
relevant to the topic under consideration
that the minorities group might not have and
might not receive in the context of
formulation of its own use.

PROFESSOR BENJAMIN: I think
probably the issue is more the timing of the
availability of information than its
availability. Our staff -- I do find an
ethical problem with that, and I would say --
but that's not the object of this
legislation. Our staff knows that they work
for the legislature, and they respond to
requests for information equally from
everybody.

The minority perceives, however,
that the staff works for the majority and
might not ask for or expect to -- ask for
information, expect to receive it or expect
to receive it fully, so our instruction is
different than what they might ask. Further,
they might approach the majority leader or
chairman first with information, so there is
IN RE: OPEN MEETINGS LAW

a time lag.

But we don't raise or seek to
raise -- use the caucus as a way of getting
governmental information and keeping it from
the minority. However, as I say, I must
admit that in the extreme case of every
member being in one party, there is a
problem.

CHAIRMAN FEERICK: On the other
hand, if the record indicated to you that
there was a use in the political caucus or
conference of access to information by virtue
of other officials of government coming to
the caucus, communicating information about
their department, and that information wasn't
being made readily available to the minority,
that would present, in your mind, a more
serious issue?

PROFESSOR BENJAMIN: It seems to
me you have to be able to have your
caucuses. That doesn't mean you have
exclusive use of governmental information in
your caucus. I would think that I would have
a problem with that.
IN RE: OPEN MEETINGS LAW

CHAIRMAN FEERICK: I've asked
the other two witnesses a question which I'd
like to put to you, if I might. Your sense
of the public perception concerning closed
meetings.

PROFESSOR BENJAMIN: Well,
closed meetings has been an issue
systematically raised by -- I prefer to call
them confidential caucuses, because I think
what we call them makes a difference. But
for the purposes of this discussion, that has
been raised by the Democrats in our county
systematically over six years, as an issue.
And it has no -- it has had no apparent
effect on election outcomes.

Now, we know that's sort of a
disingenuous answer. But as I have campaigned
in the last two months in my district, which
includes four rural and semi-rural towns, I
have not been asked once about that issue,
although there's been some effort to raise it
in the literature of the opposition, and
certainly the press has raised it as an
editorial matter. It has not been raised by
IN RE: OPEN MEETINGS LAW

people with me personally.

MR. DAVIES: Professor Benjamin,

if I could focus for a moment on a couple
issues you raised, and I just read briefly
from the commentary that you wrote for Empire
State Report, July, '84, "The exception for
political caucuses is important because
legislative majorities, especially in counties
such as Ulster, where I serve in the
legislature and where there is no separately
elected executive, are held collectively
responsible by the voters for what they do.
A tax cut or increase, for example, is
'Democratic' or 'Republican,' and is debated
as such on the hustings during the campaign
period.

"If a group is to be held
collectively responsible for its actions, it
needs a confidential forum, in which its
members can frankly discuss alternatives and
hammer out compromises. Applying the Open
Meetings Law to public caucuses inhibits
intraparty compromise and thus collective
responsibility."
IN RE: OPEN MEETINGS LAW

I have to admit at the start, this idea of collective responsibility is a bit foreign to me, but do I understand you to be saying, then, if I can avoid that word for a moment, that the idea is that the barter system is important to the function of our government, not only nationally but on a local level, as well, and that party system is substantially weakened if there is no ability to meet as a party to discuss issues before that body? Is that a fair statement?

PROFESSOR BENJAMIN: It's essentially what I tried to say when I said parliamentary model rather than presidential model was the appropriate analogy. The party exists, generally scholars say, it exists in the people. It exists as an organization. It exists in the government. It has three locations. The party in the people is diminished by their lack of loyalty to party, and that's a social phenomenon. The party as an organization has been diminished incrementally over time by law, and in fact, by the changes in the communications and
IN RE: OPEN MEETINGS LAW

technology of politics, and the financing of elections.

The party in government is very strong in the state legislature, significant in the state executive, but is under assault in a variety of ways, probably indirect, some direct and some indirect, in state government and the local government. I think on balance, we are destroying something important and valuable. I am not saying the purpose of the Open Meetings Law is to destroy parties. I'm saying one consequence is to take one more step that will be damaging to parties.

MR. DAVIES: Now, in your statement there that especially in counties such as Ulster where there is no separately elected executive, that you need these confidential caucuses that you call them, would you be amenable then to an amendment that would at least, in the county level, would permit or require open caucuses where there is a separate elected elective, where I would assume, therefore, the party has
IN RE: OPEN MEETINGS LAW

perhaps -- am I wrong, is your assumption the party has less of a role when there is a separate elected executive?

PROFESSOR BENJAMIN: I don't think that -- that would be probably damaging to a political coalition against the Open Meetings Law, but -- so from a political point of view, I would have a question about it. From a conceptual or ideological, I would have to think about it. I think most local governments have no separate executive, even where we call somebody a supervisor or a mayor. That person is one, a member of a board. That's still so in New York State. And the large governments are exceptional, like the government of this city has apparently become the -- the Mayor says he's separately elected now, for a fixed term, not a member of a council.

MR. DAVIES: Your comment that "Applying the Open Meetings Laws to political caucuses inhibits intraparty compromise," and that members can't frankly discuss alternatives and hammer out comprises in
IN RE: OPEN MEETINGS LAW

open. I guess my question is, is that not part of the learning process? In other words, if in fact open meetings are imposed in situations such as you face in Ulster County, wouldn't there, over the years, be a process by which legislatures would, in fact, learn to express their ideas in public, their partially formulated ideas and so forth?

PROFESSOR BENJAMIN: Well, I guess this is entirely a judgment and not an empirical -- not something that would be grounded at all empirically. My feeling is no. I think we have people who enter politics for a great variety of reasons. Some are interested in policy. Some have psychological needs that are being met for status. Some are interested in power and so on, and I think that of the people who I encounter, only a few are comfortable with difference, with conflict and conflict resolution as a process.

I think that adheres with their character and the kind of people they are and the kind of people we attract into politics,
and therefore in order to get a decision process that includes them, we have to take account of that. I don't think that by opening up the process we're going to change their fundamental approach to dealing with problems.

MR. DAVIES: Now, returning to this questioning distinguishing the state and local legislative bodies, bicameral and unicameral, so forth. Is there not another distinction which I think you touched on, but I don't think you focused on this point, mainly the state legislature is very different, in that it has an executive committee system. It has a large paid staff. It has very frequent public hearings, and so forth, and where as you don't have that in the local level. Isn't that discontinuation perhaps another reason why the state legislature perhaps is less in need of open meetings than the local level?

PROFESSOR BENJAMIN: I think the distinction is entirely an accommodation of political reality and is not -- cannot be
IN RE: OPEN MEETINGS LAW

rationalized on the kinds of distinctions
that have -- that the governor tried to make
in an accompanying memo to the bill or that
has been -- the attempts that have been made
to rationalize the bill. I think the key
decisions in New York State are made by three
men in a closed room with their closest
advisors, the speaker, the majority leader of
the senate and the governor, and then those
people accountable to different
constituencies, some -- negotiate those to
different constituencies and sell them back
to the constituencies and deliver them
through the process. Essentially the locus
of decision on most matters, including the
budget, for example, is a closed room with
three people doing the negotiation. That's
the reality.

MR. DAVIES: Getting back to the
question of party -- strength of the party
and the importance of the strength of the
party and so on, can an argument not be made
that is the very weakness of the party
structure at the local level is, in fact, an
IN RE: OPEN MEETINGS LAW

argument in favor of open caucuses, because without the -- where you have one party that's strongly in control -- let's set aside where you have no minority at all. You have one party that's two-thirds, let's say, in control. One party is one-third in control, and that's a weak party. Isn't that precisely the case where we need open caucuses, unlike the state level, where you have two strong parties?

PROFESSOR BENJAMIN: I think we need reforms -- you held hearings on public finance of elections. I was interested in the press accounts of them and had occasion to talk to the professor from California who spoke with you the day before. I think we need reforms, for example, to help finance elections through parties and require that be done. I think we need reforms that strengthen parties, not reforms that acknowledge that parties don't exist, and therefore continue to -- to create disincentives for their survival and vitality.
IN RE: OPEN MEETINGS LAW

Once we acknowledge that the problems we have had with parties and party leaders notwithstanding, they are viable and important institutions that help do things for a Democratic society that needs to be done, then we can begin to structure our system so that intentional or unintention damage isn't done to those institutions.

MR. DAVIES: I just have one final question. This is a quote from a Republican, at that time, the sole Republican member of the city council here in Rochester, now Judge Sciolino. This is said with respect to holding closed city council caucuses. The public has a right to know who is contributing, who is not, who is being petty, who is being stateman-like. Unfortunately, when doors close, nobody knows who is doing their job.

Now, you touched on this before. Maybe you can focus on this again. Isn't the public entitled to know who really is doing their job and who is sitting back and just hosting during these sessions when...
IN RE: OPEN MEETINGS LAW

their work is supposed to be done? How can the people, to pick on something you mentioned, you said citizens properly informed can hold us all responsible. How can they be properly informed when they don't have access to the meetings that's going on?

PROFESSOR BENJAMIN: I think that Judge William, who I'm not acquainted with, is a good politician, because he sees an issue that would be helpful to him. But I think in reality, given the way reporting occurs and what reporters are interested in, and given the limited resources that could be devoted to communicating information, and giving propensity to attend to public life only when they have a a very strong and personal interest in outcomes, for example a solid waste facility in their neighborhood, I think that lots of information is communicated, and lots of people have an interest in communicating a range of views without an Open Meetings Law. I think that an energetic reporter can communicate effectively. I think that public interest
IN RE: OPEN MEETINGS LAW

groups pay attention to issues and communicate alternative points of view. I think dissenting members of majorites who are sophisticated can seize upon relationships with reporters, and without attributution to themselves personally, publicize alternatives. In other words, I don't think the process requires denying unnecessary forum to decision makers in order to communicate the effective amounts of information and range of information to the public.

MR. DAVIES: I'm sorry, one last question. I'm not sure if you heard Mayor Ryan's -- I'm not sure I can characterize it as suggestion, but at least his idea that perhaps the closed caucuses could be prohibited with respect to an issue on which legislation has been introduced. In other words, once legislation has been introduced, you cannot meet in closed caucuses on that. What would your view of that be?

PROFESSOR BENJAMIN: That would be a change in form but not in fact.
IN RE: OPEN MEETINGS LAW

MR. DAVIES: What do you mean by that?

PROFESSOR BENJAMIN: We will schedule our filing dates so as to accommodate the law. I don't -- I'm with Mr. Freeman in that I don't -- I wouldn't do reforms that are symbolic but not real.

MR. DAVIES: Thank you.

CHAIRMAN FEERICK: Commissioner Magavern.

MR. MAGAVERN: I'm interested in your assessment of the proposed amendment by Mr. Freeman's committee, which would take away the exemption at such point as you have two-thirds of the legislative body present. And particularly in light of your Ulster County experience of having had to split the caucuses in order to comply with the law, my question is, if you do have something like, say, the amendment proposed by Mr. Freeman's body, and as a result you have bodies resorting to such things as plating a caucus or rotating chairs or informal meetings among little clusters and cross meetings or
IN RE: OPEN MEETINGS LAW

something of that sort, based on your experience in Ulster County, is there really a detrimental effect on the quality of deliberative process and the quality of the outcomes?

PROFESSOR BENJAMIN: We didn't like it when we split our caucus. We did it because we didn't want to violate the law, and we felt very strongly we wanted to have a confidential caucuses.

MR. MAGAVERN: Did it have any adverse outcome?

PROFESSOR BENJAMIN: We had members that occasionally felt they could have benefited from things sent in the other rooms, when we sent messengers and emissaries, we didn't indicate the full sense of the rage from one room to the other.

MR. MAGAVERN: Recognizing the awkwardness of that, the balance would have to be a negative, although how strongly, I don't know, was there an offsetting benefit and you got more discussion in the full open meeting?
IN RE: OPEN MEETINGS LAW

PROFESSOR BENJAMIN: The leadership of the legislature liked it, because it was divide and concur. We could bring in -- I wasn't a majority leader at that time, but we could bring in twelve or thirteen votes in one room, without all those people having had the benefit of some kind of articulate critique. So within the caucuses, it changed the balance of power.

MR. MAGAVERN: And it wouldn't necessarily, then, lead to a further disintegration of party cohesiveness?

PROFESSOR BENJAMIN: It doesn't fit my model of the way a partisan group should come to a decision. Whether it served the interest of a leader or not is another matter. The two-thirds seems to be arbitrary. I think that Mr. Freeman is most compelling on -- in the case where there's no minority member.

MR. MAGAVERN: Let me rephrase the question. If you have something like that where you permit meetings up to some point, majority, two-thirds, and in any
IN RE: OPEN MEETINGS LAW

event, some meetings are going to be permitted, might it work effectively to kind of balance off the disadvantages that you called attentions to very thoroughly, might not there be an offsetting balance in bringing more of a discussion into the open meeting of the full legislative body?

- PROFESSOR BENJAMIN: My argument is a vigorous minority, no matter how small, can do that. You see the size of the minority is not, to me, is not determinative. The minority -- this minority member even has the power of saying, "Hey, wait a minute. I'm being left out. Something important is going on here." So in terms of the substantive question, in terms of the substantive question on that matter, the debate will occur. In terms of the accountability of each individual member, I guess that I'm more interested in the accountability of the majority for its position on the issue. There's a lot of suggestion in Ulster County that we're sheltering the weak members. You know,
IN RE: OPEN MEETINGS LAW

that's an argument that's made. I hasten to
add I wouldn't identify any member as weak,
but that's an argument that's made.

MR. MAGAVERN: Did your split
caucus arrangement have a discernible effect
upon what happened in the deliberations of
the full body?

PROFESSOR BENJAMIN: That's a
very hard -- it's hard for me to know that,
hard for me to say. We still had debate in
public with the Democrats on major matters.
If that's what you mean, with regard to the
deliberation in the Republican caucus, I
think it damaged the deliberation, because
we -- you know, we have some very forceful
people whose views were missed by half or
slightly less than half the group.

MR. MAGAVERN: Thanks.

CHAIRMAN FEERICK: Can I go back
to the question I originally asked that in
view of -- you're able to share with us your
experience. Did you find in terms of the
operation of your caucus that the quality of
the information made available to the
IN RE: OPEN MEETINGS LAW

majority party in caucus, bearing on the
issues that you discussed, was far greater
than the quality of the information made
available to the whole legislative body in
its functioning?

PROFESSOR BENJAMIN: Well, let
me just briefly describe what happens. We
have a caucus. Prior to the caucus, we
prepare a bill package, and we prepare -- we
have the staff prepare summary memos for the
leadership on each resolution. In
addition -- and the Democrats are provided
with the package of resolutions that are
filed by the resolution deadline and the
summary, as well, so the minority leader and
the majority leader both have that, as does
the chairman.

In our caucus, there is -- the
county attorney sits in the Republican
caucus, so in a way, there's that resource.
The Democrats have a staff person who -- they
have appointed a part-time attorney to that
position, so they have an attorney present
who is not a member in their caucus. We
IN RE: OPEN MEETINGS LAW

probably -- our attorney probably knows more specifically about the issues, because he deals with them on a daily basis than the attorney they have present. They sometimes call our attorney out. Other staff people are called in on an as-needed basis, and they have that privilege, as well. I -- I can't imagine -- I can't imagine that the staff is more responsive to them than the majority. They are probably more responsive to the majority, because they are pointed at the majority at the top, and they receive the majority as in control and directive, but they are supposed to respond to the minority. They are directed to respond to the minority, and so the difference of information is incremental. We -- you know, there's no systemic availability of written or documentary information to one party and not the other.

CHAIRMAN FEERICK: Would it happen in your experience that the county attorney would be sitting in the caucus of your party, would be asked to follow up with.
IN RE: OPEN MEETINGS LAW

some additional information on a particular issue?

PROFESSOR BENJAMIN: Yes, and the minority also asks him for that, and although they are not always trustful of him and would sometimes have another attorney do it, because they have a political agenda or policy agenda they don't want to reveal to our attorney -- there's perhaps a Freudian slip -- to the county attorney.

CHAIRMAN FEERICK: I'm just wondering, getting back to the original question I asked, whether there isn't an ethical issue here. I certainly can understand the gist of the argument that a political party majority wants to communicate with each other and to formulate, perhaps, thinking and strategy on public issues, but the extent to which other resources of the public intended for the public in general becomes part of that process, doesn't that get you into some ethical issues that we ought to work through as we think through this subject?
IN RE: OPEN MEETINGS LAW

PROFESSOR BENJAMIN: Well, if you were to recommend the passage of a law that said, "Information gathered by government for governmental purposes should be available to all elected officials," I would be hard pressed to object to that. I would say that on all our important decision processes that are governmental, we try to include the minority leader, and the reason we do that is to forestall the precipitate definition of the issue in partisan terms.

If we're going to build the building or take the asbestos out or take a social policy initiative of some consequence, we bring him aboard early. Perhaps if it was a different person, we might not do that, but he might say that we had a pre-meeting, and of course we do have meetings without him. But to us, creating early an adversarial kind of structure is not desirable. And we don't do it, as a matter of course.

CHAIRMAN FEERICK: Certainly the extent to which using the example of the county attorney, he or she provides
IN RE: OPEN MEETINGS LAW

information to the majority, is it your feeling that that information should be equally available to the minority?

PROFESSOR BENJAMIN: Yes.

CHAIRMAN FEERICK: Even though it may, arguably, touch upon some issue of confidentiality in terms of --

PROFESSOR BENJAMIN: Well, you know, the county attorney would probably -- the tone and kind of comforts of his consultation with the majority would perhaps -- would probably be different than -- it would be naive to think it would be exactly the same in intensity, commitment, et cetera, as his consultation with the minority. But at least in the formal sense, the resources should be available. We don't have classified documents in our county, nor do I think there should be documents that governmental officials who are elected by the people should not be able to see in any government.

CHAIRMAN FEERICK: I would think he would have ethical responsibilities under
IN RE: OPEN MEETINGS LAW

the code of professional responsibility.
He's an attorney, or she's an attorney, of
the body and not of any particular group of
the body, and to have confidential
communications with any sub group of the
total certainly raises, it just seems to me
coming at this for the first time, some
issues professionally under our code of
professional responsibility. But we need not
work through that here, but if you have any
comment on that, I certainly would welcome
it.

PROFESSOR BENJAMIN: I know the
minority leader has said to me on occasion
that he -- there might be some things that he
wouldn't ask the county attorney. I also
know that, as a matter of policy, we don't
instruct the county attorney to deny
information to a minority leader.

CHAIRMAN FEERICK: Thank you.

Mr. Small.

MR. SMALL: I know we're pushing
the lunch hour, Professor Benjamin, but I'd
like to take you back to your colloquy on the
IN RE: OPEN MEETINGS LAW

press. You talked about I.F. Stone sitting
at home and reporting simply by identifying
documents. But if Izzy Stone were covering
your county, Ulster, or this county, Monroe,
the matters involving caucuses, there is no
paper trail. No minutes are kept. There are
no documents. Even the provisions for
executive sessions of various governmental
bodies require a minimal documentation,
subject matter, et cetera, at the time of
meeting, but none of this applies to a
political caucus.

PROFESSOR BENJAMIN: Well, my
experience isn't that -- I'm fond of lots of
reporters, some of whom are here. My
experience is not that reporters make
enormous demands for public documents, as the
Mayor indicated. My experience is reporters
call a couple people up and write a story. I
think that a lot could be discovered about
local government simply by going to the
county office building and asking to look at
documents. Now the fact we don't document
the caucus, it's absolutely true. But if
IN RE: OPEN MEETINGS LAW

Sylvia Saunders who is now in Albany but was in Ulster County, or Laura Nicholson wants to know what happened in the caucus, they find out. It's a question of when they think it's important to know.

I'll tell you the stories that came out of our debates on, say, raising the salary of members, something that's particularly interesting to the public, for reasons that I sometimes wonder about, since the salary has been raised only to eight thousand dollars a year. But in any case, the reporter on that, it seems she had a transcript, you know. So I think that vigorous reporting can reveal what happens in the caucuses when the reporters think that it's worth knowing. So I think that between the usual techniques of reporters and the documents they don't examine, they can certainly do a very effective job now of covering county government in Ulster and do a far better job of covering government in any level in my opinion.

MR. SMALL: One last point, you
IN RE: OPEN MEETINGS LAW

described the press as a party at interest,
and if I recall correctly, you were saying
that the interest for the press was that they
sought controversy as good fodder for news
coverage, as opposed to more mundane
matters. Is that an accurate --

PROFESSOR BENJAMIN: In this
particular law, they are saying we want to
come in when we want to come in for our
purposes in every -- you know, in virtually
every forum where there's a majority of
members present.

MR. SMALL: I understand that.

PROFESSOR BENJAMIN: And I'm
saying what may be in the interest or the
perceived interest in the media may not be in
the public interest. Their definition of
public interest is not necessarily -- if
there is such a thing as an objective public
interest, it may not be what they define it
to be. They are adversarial with government
in this matter on this law.

MR. SMALL: But isn't that their
law as both witness and watch dog of the
IN RE: OPEN MEETINGS LAW

government?

PROFESSOR BENJAMIN: It is appropriate as watch dogs they try to get as much as they can, but at the same time to define what the public interest is, for that to be accepted without question is another matter. I mean it seems to be that in this debate, people are regarded as self-evident. Most people or at least the discussion seems to be framed by assumption it's self-evidently desirability to have open meetings for almost all purposes when a majority is present, and I think that context has been defined by the media, without sort of questioning whether they are a party to a conflict about a matter of public policy.

CHAIRMAN FEERICK: Well, thank you very much, Professor Benjamin, for coming here and participating in our work and also providing us with information you did in advance of the hearing. We appreciate having you.

PROFESSOR BENJAMIN: It's an honor to be asked, and it's not something
IN RE: OPEN MEETINGS LAW

that commonly happens to me. So thank you very much.

CHAIRMAN FEERICK: Thank you very much.

(Recess taken for lunch.)
CERTIFICATE

I, JUDY A. GING, hereby certify that I did report in machine shorthand the foregoing proceedings had in the above-entitled matter at the time and place hereinbefore set forth; I do further certify that the foregoing transcript, consisting of 169 pages is a true and correct transcript of my said stenographic notes.

Judy A. Ging, C.S.R.
STATE OF NEW YORK
COMMISSION ON GOVERNMENT INTEGRITY

A PUBLIC HEARING

IN THE MATTER
of

THE OPEN MEETINGS LAW

A Public Hearing held in the above matter at the Rochester Riverside Convention Center, Room 102-C, Rochester, New-York, on Wednesday, November 4, 1987, commencing at approximately 2:00 P.M., before JOHN D. FEERICK, Commission Chairman, and JAMES L. MAGAVERN, Commissioner.

OTHER PANEL MEMBERS:

NICOLE A. GORDON
KEVIN J. O'BRIEN
MARK L. DAVIES
WILLIAM J. SMALL
IN RE: OPEN MEETINGS LAW

CHAIRMAN FEERICK: I'd like to bring this afternoon's session of the hearing to order and ask Mr. Kutzer if he might join us. Thank you for your understanding on the readjustment of the schedule for today. I know you have transportation plans, I think 3:30 or so this afternoon.

MR. KUTZER: I think I will be able to make it. Mr. Chairman, members of the Commission, thank you for this opportunity to appear here today to address questions surrounding the Open Meetings Law. My name is John Kutzer. I'm the executive director of the New York Newspaper Publishers Association headquartered in Albany. My organization represents publishers of virtually every New York State daily and Sunday newspaper in the state, with a combined circulation of the membership in excess of eight and a half million copies.

We're here today to assert our firm belief that the 1985 legislative action amending the Open Meetings Law in effect crippled that law. We propose, in addition,
IN RE: OPEN MEETINGS LAW

if we are to have an effective law, it must include some reasonable provisions for enforcement.

We would like to examine several aspects of the open meetings subject in the order suggested by the Commission's counsel in his communications regarding the hearing.

First, the purpose and effectiveness of the Open Meetings Law and the relationship between the law and integrity in government. I will abbreviate these remarks as some of what I have to say is contained in the formal written copy.

No clearer statement of the purpose of the Open Meetings Law exists in our view than the words appearing in the legislative declaration that constitutes the first section of the law. I won't take the time to quote that wording, but it is, as I mentioned, contained in my prepared remarks.

The words are clear, unequivocal. It is essential that the public business be performed in an open and public manner, that our citizens be able to attend
IN RE: OPEN MEETINGS LAW

and listen to the deliberation and decisions
that go into the making of our laws. This
statement of purpose is in keeping with the
traditions of government in a democracy is at
the heart of the open meetings controversy.
It formed the basis for the judicial
decisions in pré-1985 cases requiring a
number of governmental bodies to open up
their proceedings. Thus we feel it became
the target of legislative leadership, which
in 1985 passed a measure that by any
interpretation simply contradicts what the
legislature declared to be the purpose of the
law nine years earlier.

In regard to the effect of the
law, it is our belief that overall, the law
has provided beneficial to the governing
process at all levels. We say this because
of in spite of its lack of effective
enforcement mechanism, the law has served as
an inspirational base of supporters of open
government. They include the newspapers,
whose insistence brought about the
legislation in the first place; their readers
IN RE: OPEN MEETINGS LAW

who we think have become more and more aware of what is at stake here; and the numerous local government units which, also aware of the law's intent, have determined that unlike the state legislature, it is in their interest to operate in the spirit defined by original legislation.

One of the first local governmental bodies to act in this regard was the Suffolk County legislation on Long Island. Five months after the state hastily threw up its open meetings road block in 1985, Suffolk County lawmakers passed a resolution stating fourteen of their eighteen members had agreed not to discuss public business in political caucuses. Their resolution also asked that the state legislature exempt Suffolk County from the amendment.

Certainly there is evidence here and other localities where government bodies conduct their business openly, that the law has brought positive change in the way we are governed.
IN RE: OPEN MEETINGS LAW

While we praise that heightened awareness of the need for open government brought about by this Open Meetings Law, we hasten to add that its effectiveness remains in question, and there are two reasons we feel.

The first of these is simply an honest lack of knowledge on the part of many governmental bodies about the specifics of the law and their practical applications. That point was made by a number of newspapers contacted in preparation for this hearing.

Coupled with it is a lack of any sense of urgency about the subject in the absence of local controversy. Effectiveness of the law, then, we feel is dimmed when governmental bodies move behind closed doors without actually knowing they are acting illegally, and in cases where it continues to be done simply because no serious objections are raised.

The second reason for lack of effectiveness is because some people in government have perceived it as their right,
IN RE: OPEN MEETINGS LAW

apparently, to deliberate and decide
privately the questions that come before
them. We hear repeatedly and consistently
from the politicians that they find
themselves unable to deliberate or negotiate
comfortably before any audience. In cases
such as this, the law's effectiveness is lost
as a result of conscious and deliberate
efforts to circumvent their provisions,
whatever the reasons for those efforts.

It is in the cases of the latter
sort we feel the question of integrity in
government becomes involved. We understand
that from the beginning, the Open Meetings
Law recognized and providing for the right of
political party caucuses and committee
meetings to meet privately to discuss their
private political affairs. Beginning in
1981, however, New York State highest courts,
and we feel fairly consistently held, as Mr.
Freeman had pointed out earlier and in his
annual report to the Governor and the
legislature, that the law prohibits any
discussions of public business at such
IN RE: OPEN MEETINGS LAW

meetings when a quorum of that body is present.

Yet the legislature, at the behest of its leadership, in seven days simply reversed what the courts had repeatedly upheld to suit its own desire to keep its operations behind closed doors to keep out the press. The courts have recognized political party affairs must be kept separate from the operations of government. Those elected to serve all the people can hardly expect to be able to move behind closed doors by simply donning the cloaks of Republican or Democrat, and claiming to be exempt from scrutiny, on the grounds they are no longer acting in the realm for which the public chose them to act.

We feel the hastily enacted 1985 amendment represents and should be viewed as an attack on two of the basic principles of integrity in government, the right of the people to know what is going on and the obligation of those in government to be
IN RE: OPEN MEETINGS LAW

accountable to those people for their actions.

The commission seeks response on three far more specific and related questions. The first of these is whether the 1985 political caucus amendment should be abrogated in whole or in part.

In a survey of its membership last year following the legislative action, our association asked essentially the same question. We found an overwhelming sentiment in the New York State newspapers. First of all, they strongly oppose and seek to have the legislature-redress its action. This majority recommended that the ideal correction would be to restore the law to its previous state, with both state and local government bodies prohibited from moving behind closed doors, except for the specific and narrowed exclusions specified.

The association has in its possession more than a hundred and sixty clippings of news stories, columns, editorials dealing with open meeting problems.
IN RE: OPEN MEETINGS LAW

in various localities across the state.

In Albany's city government, the common counsel continues a tradition of single party caucus meetings. Albany County government arrives secretly at decisions recently of the nature of costs and locations for the civic center, for which an additional ten million dollars is sought without a plausible explanation.

In Ulster County, twenty-five legislators, of a total of thirty-eight, routinely caucuses to decide public business, then as in Albany, go into public session to rubber stamp the earlier decisions. There have been two successful legal actions over open meeting against Woodstock, a town in the area. Ira Fusfelt, Kingston Daily Freeman publisher, comments that before the amendment, "It was becoming controversial. Now it's blatant."

In Erie County, Buffalo News sued the Erie County Housing Authority which editor Murray Light said was conducting the bulk of its business behind closed doors.
IN RE: OPEN MEETINGS LAW

We suggest that a measure of respect and reason about open government can be restored by a reversal of the ill-considered ruling to block out the press and public from the decision making process.

It is particularly important that this action be reversed as it affects the unicameral and frequently single party legislatures of local governments. Here, closer to the people, we can see more vividly the impact of secret government.

This Commission's question whether the Open Meetings Law should be amended to provide additional penalties for violations must be answered strongly in the affirmative. Among the editors with whom we have talked, there was unanimity that the Open Meetings Law was ignored, because those so inclined to do so have recognized penalties are insignificant and difficult to achieve, as well as costly to those with the zeal to seek them. The law needs considerable strengthening along the lines proposed, with no success by the Committee on
IN RE: OPEN MEETINGS LAW

Open Government. Change should be in keeping with regulations in many other states more serious than ours, apparently, in bringing government into the open.

The Committee -- and I refer to the Committee on Open Government -- has urged without success legislation permitting Courts to invalidate actions taken behind closed doors when any aspect of a meeting is closed in violation of the law, provided such invalidation would not result in some unreasonable situation. It also has proposed fines up to a hundred dollars for individual members of public bodies if they engage in flagrant or continuing violations. Such sanctions, the committee points out in one of its reports, are neither unique or unusually stringent in comparison to provisions enacted in other states.

The executive editor at Gannett Westchester, Lawrence K. Beaupre, tells us the big problem is not local government but the state legislature. Albany is not accountable to anyone, he says, with regard
IN RE: OPEN MEETINGS LAW

to local governments. There's no way to know. Even if meetings of public business are to be held, no advance notice is required.

A view echoed by other editors was expressed by the Jamestown Post-Journal editor Chris Herbst, who commented even when private meetings were supposedly prohibited, they could act with impunity because there was no oversight, no enforcement provision, no penalties from the legislation. Enforcement has been left to the public and the newspapers she said.

At the Corning Leader, the managing editor Rob Roberts echoed the belief there is no way the public or any newspaper can really know when meetings to transact public business are being conducted. We strongly urged that the law be strengthened by the additional provisions for accountability, with reasonable but specific penalties to help insure compliance.

The final subject of the Commission's concern, whether an amendment
IN RE: OPEN MEETINGS LAW

should permit a Court to void any action of a public body when any portion of the meeting of that body is closed in violation of the Open Meetings Law is, we feel, in fact, closely associated with the penalty issue in category two. It raises, in addition, rather complex legal questions, including whether such a ruling would have unreasonable consequences, as we mentioned earlier.

We feel the courts or some agency, such as the Independent Commission in Connecticut, which has the power to oversee and regulate open meetings compliance in that state, should be given the power to void actions of a public body in the circumstances described. While we are not qualified to express a legal opinion, we would agree with Mr. Freeman's expressed views once again that a provision for invalidation should exist, unless it resulted in undue hardship or other unreasonable result, in which case an alternative penalty such as a fine could be imposed.

In this connection, we would
IN RE: OPEN MEETINGS LAW

like to propose to this Commission that the cause of integrity in government would be well served by the establishment of some permanent, official body charged with responsibility for oversight of compliance with not only the open meetings law but the Freedom of Information and Personal Privacy Protection laws. The body we envision would serve as a kind of first line of defense against attacks on these basic laws, perhaps with the power to issue administrative rulings and/or opinions that could relieve our judicial system of all but the most serious disputes in this area of government. We suggest in this regard the obvious body to do the job is the Committee on Open Government. Its unique advisory role in this state over the years has given its personnel not only the expertise and experience in the field to accomplish the task, but has resulted in both national and international recognition and acclaim for its unbiased service to both government and the public.

I appreciate this opportunity to
IN RE: OPEN MEETINGS LAW

bring you our views and thank you for your attention.

CHAIRMAN FEERICK: Thank you. I would like to focus you on the issue of integrity in government. Let's assume the current law permits caucuses and conventions, and a particular political party, majority, is complying with the law. They are having the caucus, which is allowed in the present law to be in private. It would seem in terms of one definition of integrity, that's compliance with the law, and hence that doesn't implicate an issue of integrity in the sense of a violation of law. There's no violation there. I take it that it's your position concerning the integrity in government is not premised on what's going on as somehow corrupt, or there is some dereliction of duty going on in these private meetings. I take it that's not the way you come at integrity of government.

MR. KUTZER: We would have no way of knowing what goes on, so we have no way of knowing whether it's being held in a
IN RE: OPEN MEETINGS LAW

proper situation.

CHAIRMAN FEERICK: The way I see the integrity issue as you have expressed it is there ought to be and there are standards of accountability and that the people should know how government is functioning, and to the extent that you close government, you fall short of meeting those standards of accountability. And people have a right to know how its government is functioning, and in that respect, as I see your statement, that you raise the issue of integrity in government.

MR. KUTZER: That's correct.

CHAIRMAN FEERICK: Do you have, aside from your constituency, which is obviously a very active constituency in terms of involvement in government and interest in government, do you have a sense that beyond your constituency in terms of the ordinary citizen, that there is a perception that the ordinary citizens have with respect to integrity in government based on closed meetings and the operation of the Open
IN RE: OPEN MEETINGS LAW

Meetings Law?

MR. KUTZER: My sense is the average citizen is not aware of the issue, in spite of our many editorials in newspapers. I don't think it's a major concern, except as it might relate to something that's actually happening in their own hometown.

CHAIRMAN FEERICK: Thank you.

Mr. Davies.

MR. DAVIES: Let me pick up on that. Would I be correct, then, in understanding you to agree with the criticism that a number of persons have made about all this, that this is really just a press issue. There's no public outcry. There's no public outrage. It's simply a request that has been raised by the press, has been thought by the press, that really the public doesn't care much about it in one way or the other?

MR. KUTZER: I wouldn't say the public doesn't care one way or the other. I have no way of knowing. I have not conducted any research in that area, but I would
IN RE: OPEN MEETINGS LAW

suspect that there would be public interest if it was brought to their attention, and perhaps public outcry, and as I mentioned earlier, I don't know if the news stories and editorials that have been written on the subject have had any impact on the feelings of the public.

MR. DAVIES: Let's focus for a moment, if we can, on the role of the press in open meetings. And that has been contended by some, including some of those appearing today, that while open meetings may make the press' job easier, in the sense that you have access to the legislative process, it's not necessarily good for the community in two respects.

First of all, that when the press is present, your legislators are in a fear of being misquoted or being misrepresented, that they don't put forth opinions that might be somewhat controversial and not developed and so forth, and the result is we have a lowest common denominator in terms of intellectual quality that we
IN RE: OPEN MEETINGS LAW

receive.

MR. KUTZER: I disagree. I don't think that the press -- the presence of the press nor the presence of the public should have or has a great impact on the decision making process of those elected to government.

MR. DAVIES: What about with respect to participation by the public, and I suggest here it's maybe less the press than the presence of cable television, with the bright lights and so forth. As we're all aware, a lot of people, ordinary citizens are finding it quite difficult to speak up in public, and with the cameras rolling, maybe it's entirely impossible. Should the press, perhaps, in some instances be excluded from meetings, or should meetings be held with only a few members of the public present, in order to allow people to speak without being afraid of being quoted in the press or somewhat?

MR. KUTZER: Are you referring to elected officials or interaction with the
IN RE: OPEN MEETINGS LAW

public? I'm not sure I understand.

MR. DAVIES: Interaction of the
public, members of the public.

MR. KUTZER: I guess I couldn't
really -- I don't have a handle on that. I
couldn't answer that. I don't think it
should have any impact on the government
officials or anyone attending the meeting. I
just don't agree with that at all.

MR. DAVIES: Now, one point
Mayor Ryan made this morning was that he
believed that if the law is changed with
respect to political caucus amendment, that
should really be left up to the
municipalities. I mean don't you think it's
more democratic to allow the municipalities
to decide whether to have a state
legislature?

MR. KUTZER: Perhaps it is, but
I don't think it would happen, so I would
have to say that it would have to originate
at the state level through the legislation on
the state level.

MR. DAVIES: If that legislation
IN RE: OPEN MEETINGS LAW

was passed, if the political caucus amendment
to some extent was rescinded is there, do you
think, a strong possibility that the result
would simply be more meetings over coffee,
less than a quorum of the legislators, or
rotating the chair in the hall, what's the
point?

MR. KUTZER: Well, rotating the
chair in the hall is a concept I was
unfamiliar with until today. It's certainly
a novel approach to defeat the purpose of
good government, but I don't -- would you
please repeat the --

MR. DAVIES: The point is, is
there much point -- I think we agree we
shouldn't pass a law that doesn't have any
effect, and if we pass -- that's to say if
the legislature rescinds the '85 amendment,
won't the result simply be the rotating the
chair, splitting up your majority into two
separate caucuses, as Ulster County has done
and so forth, and if that's true, what's the
point of rescinding the amendment?

MR. KUTZER: I think that
rescinding the amendment would, in most cases, except in those areas that want to meet in private and are going to meet in private no matter what, will have a good effect in most areas. I think it will be taken at heart, in most governmental entities. Those who wish to defeat the purpose of the meetings law will find a way, no matter what. If there's not a quorum meeting in face-to-face, one on one, I don't think anybody has any problem with people discussing public business, but when there's a quorum present that it can actually vote, has the power to vote on an issue, that's where we -- that's what we find very difficult to accept.

MR. DAVIES: And one last question, maybe you already addressed this. If you did, please tell me, that is what is your view on the specific proposal of the Committee in Open Government that the law be changed not to rescind in its entirety the '85 amendment but rather to, in effect, only require open caucuses when the two-thirds
IN RE: OPEN MEETINGS LAW

majority is present.

MR. KUTZER: Ideally, I would like to see the amendment rescinded. From a practical standpoint, we have no problem with a two-thirds situation as proposed by the Committee on Open Government. It wouldn't have any effect, even if that's the only portion of the amendment, wouldn't have any effect on, say, the state senate Republicans meeting. They don't have a two-thirds majority.

MR. DAVIES: If it were possible, aside from political realities, would you prefer that minority caucuses be open, as well?

MR. KUTZER: Well, I think it would certainly serve the public well to be able to know what the majority and the minority are thinking on given issues, but I don't think that's going to happen.

MR. DAVIES: Thank you.

CHAIRMAN FEERICK: Commissioner Magavern.

MR. MAGAVERN: A few quick
IN RE: OPEN MEETINGS LAW

questions, Mr. Kutzer. 'I take it from your answer to Mr. Davies,' questions, you would accept the proprietor of informal private conversations between legislators and between legislators and members of the executive branch up to the point where you have got a quorum of the legislative body present?

MR. KUTZER: That's correct.

MR. MAGAVERN: Now, if the impact of withdrawing the exemption then would be to -- I shouldn't assume an impact. Is it your impression that if the exemption were eliminated, that most legislative bodies would not resort to such techniques as splitting the caucus or finding rather regular means to conduct -- to do caucus-like work but without running -- do you think most communities would, in fact, not resort to those techniques?

MR. KUTZER: Oh, yes, I believe so. I don't think in most communities governmental representatives are looking at ways to hide what they are doing. I think they are proud of their position in the
IN RE: OPEN MEETINGS LAW

community and wish to serve the constituents.

MR. MAGAVERN: Do you think there might be a more subtle effect of discouraging people from talking in caucuses, and either therefore reducing the amount of debate that actually -- say a piece of proposed legislation might receive, or in getting them to try to work things out in advance in more informal ways?

MR. KUTZER: It would have that effect, I would assume, but I don't see where that would have a poor effect on governmental actions.

MR. MAGAVERN: Okay. Thanks very much.

MS. GORDON: If I could ask you a little bit of a philosophical question. I would assume that anyone connected with the newspaper world would defend closed editorial board meetings. Would you be of that view?

MR. KUTZER: I am of that view.

MS. GORDON: I'm just curious to know whether you would see that -- whether
IN RE: OPEN MEETINGS LAW

you would think that the principles on the
basis of which you would defend the notion of
closed editorial board meetings would equally
apply to closed meetings of governmental or
political groups?

MR. KUTZER: I don't think
there's a comparison at all, and for one
reason, newspapers aren't -- editorial boards
aren't making decisions, policy decisions
that have effect on the lives of the citizens
in the everyday world.

MS. GORDON: Someone argued,
perhaps, the decisions are made by
newspapers, and what they print and say in
their editorial pages affect a lot more
people than decisions made by small municipal
bodies.

MR. KUTZER: I think there are
those that believe it. I'm not one of
those. I can cite many times over editorials
in support of candidates for office, and
those candidates are never heard from again.

MS. GORDON: Going back to what
was raised a little earlier, I think you
IN RE: OPEN MEETINGS LAW

heard Mayor Ryan and Professor Benjamin talk
about what you might even call a chilling
effect that they have seen from press
presence at various kinds of meetings. Is it
your view that -- did I understand you
earlier to say that you don't believe there
is any effect on that process because of the
presence of the press? You just disagree
with their understanding of what goes on?

MR. KUTZER: The presence of the
press at any meeting certainly would have
some impact on what is said. It may even
help to clean up some of the language that
might go on behind closed doors, but I don't
think it should have any effect on the
decision making process, the ultimate
decision. It should not have. I'm sure it
perhaps does in some entities. I don't think
you can make a sweeping statement and say
it's going to have effect in every meeting of
any body. It just isn't so.

CHAIRMAN FEERICK: Thank you.

Can I just maybe wrap up, and I'm aware that
you have a plane to catch, and I appreciate
IN RE: OPEN MEETINGS LAW

your participation. Maybe your own citizen's judgment -- you don't have to give a citizen's judgment. You're here in a representative capacity, I understand. With reference to this proposition, on the one hand, I would think that a great many people in this country would say that the two party system has served us well. It's an important part of the structure of American government. It's been through some difficult days. It's going through some difficult days, and yet, it would be a mistake to hasten in furtherance the decline of the two party system. So that particular point of view would say it's an important value in terms of the contribution that's made to accountability, moderation and so forth, in American life to have a two party system.

And part of having a two party system is to recognize the need for each of the parties to be allowed to formulate party strategy, which overlaps with government business, of course, because it's strategy with respect to the government business. So
IN RE: OPEN MEETINGS LAW

that's an important value, and let's keep that -- the argument; keep that value in mind.

At the same time, a government should be open. People should have a pretty good sense of what -- how government functions, so -- and at the same time, maybe it's not necessary to get into the political party caucus, if these other processes are working, hearings, legislation has to be filed, and six or seven or eight days in advance, if it's going to be acted on, and after all the public party does come into session and does function as a public party, sometimes in more abbreviated form than other times, but at least there's a process so that the Open Meetings Law as presently framed strikes the right balance between those competing values.

I've just -- I'm trying to capture what I sense is part of the debate we have heard today, and part of the debate I suspect we're going to be reflecting on in our own work. If you have any comments on
IN RE: OPEN MEETINGS LAW

that, aside from the comments you already have, I certainly would appreciate them.

MR. KUTZER: As a man in the street or in my --

CHAIRMAN FEERICK: Either way.

MR. KUTZER: As a man in the street, certainly I would have to agree that the two party system has served this country, the state, very well. I don't, in my capacity as executive director of Association of Newspaper Publishers, I must say it's my firm conviction that -- and I'm not as naive to believe that what goes on in a political caucus is strictly related to who's going to run against whom in the next election, but I would sit here and say that I think that political caucus should be strictly related to politics. Use your executive exemptions and the other exemptions of law to meet and discuss public business.

CHAIRMAN FEERICK: The argument, just to stay with you a second, when you resort to the executive sessions, that's the executive session of the whole body, both
IN RE: OPEN MEETINGS LAW

parties that might be represented, so it wouldn't be limited just to the particular group or particular party, and I guess the argument that a political scientist might advance is that part of the function of the party is to decide what its position might be with reference to public issues in that you can't -- the two intertwine in such a way that you just can't separate them.

So if you recognize the value that a party should have an opportunity to dialogue in private on political kinds of issues, and those political issues do involve positions on public issues, don't you end up with the kind of law we had, if you say that's a very, very important value to protect, and you satisfied the need of the public to know because you have public hearings?

You have legislation that must be filed X days in advance, and then you have a public session of that public body that presumably has to be mindful of its accountability of the public session in terms
IN RE: OPEN MEETINGS LAW

of how it discharges its obligation in public. So that the current law does balance the various competing values, and I recognize your position is that it ought to be improved. And I just leave you with that debate, which I sense will be probably part of our own discussions before we formulate our own view of the subject.

MR. KUTZER: I appreciate that.

CHAIRMAN FEERICK: Thank you.

Miss Schwardt. Thank you very much. I appreciate your patience. I know you have been delayed considerably, and I appreciate you remaining to appear before us.

MS. SCHWARDT: Thank you. I've enjoyed being here all morning, actually, to hear the other testimony. That was one of the reasons I was here, as well as my own testimony. I won't, as many of the former people have chosen, I won't read you what I have handed you. It reiterates the law. It reiterates the support for the withdrawal of the 1985 amendment.

The league has worked many years
for open government in principle, and we agree that it is a reasonable request to have political party meetings somewhere, sometime but not for the purpose of discussing public business. The party members of a government should not be permitted to meet in private at all for the purpose of conducting public policy discussions.

Since the public outcry over the amendment and we -- there was a public outcry. It wasn't simply from the media. It wasn't simply from the good government groups. There was outrage in all the communities. The League of Women Voters monitors governmental bodies throughout the state, and they were hearing and reporting to me, actually, that incensed citizenry at the passage of this law. Part of it came from the misunderstanding of the law, saying, "Well, why do they need this amendment? What's new about it?" And that gave the league and other government groups a perfect opportunity to explain the law and the horror story that goes -- that went with the 1985
IN RE: OPEN MEETINGS LAW

amendment.

Since that time, very little legislation has been proposed. The governor's program bill, number 139, which we have been alluding to, in 1986 was never -- never went up the flag pole. No one ever grabbed it to sponsor it. And Assemblyman Zimmer's bill, which mirrored that pretty well, not in every fact, never went anywhere during the '87 session.

We will continue to work with our legislators and throughout the state at the local level to pressure all legislators to pass something which removes the amendment and improves the open meeting situation.

I'd like to just add for our own sake that we haven't worked in the dark, and we haven't worked unrecognized. I have to say this for public record. The league was honored by New York State Society of Newspaper Editors for its many years in working to promote open government in July of 1985. We were the first group to receive that distinguished recognition. Individuals
IN RE: OPEN MEETINGS LAW

had formerly been recognized.

I have informal remarks, and I certainly hope you will be asking me questions following them. The public's right to know has been mentioned here. The public's right to know is the primary component of the true democratic process. Accountability is not served by a representative government conducted in the closet. It is this public right to know the deliberative process that we are protecting with the Open Meetings Law.

It's not only the right to know, however, it's public participation, and with the system of hearing, open hearings, open committee meetings, you have some public participation. You have the opportunity for the public to speak. You do not have -- you provide the opportunity to have public awareness of the deliberative process.

How each legislator has arrived at their decision, the give and take, the weaker versus the stronger legislators, the decisions are made not on the floor. We
realize that. They are made somewhere else. The factors that go into that decision should be presented to the public. The public should be the first -- should be a firsthand witness of the legislative process.

We have heard today about the importance of the media. The media are important. They do report to the public. At the New York State legislature level, we rely on the media totally for reporting the decisions of the New York State legislature. That's also true in the local government. Do we want the media to be the interpreter and the reporter of our legislative decisions all the way down to the zoning boards of appeals? I know that doesn't pertain because of the caucus aspect we're discussing here, but the public should be on the scene and should be able to see how and why the legislature made its decision.

And it's a point of fact that newspapers around the state do not report New York State legislative news. We heard about the bicameral system. The bicameral system
IN RE: OPEN MEETINGS LAW

may preclude some of the necessity for an open meeting situation of caucuses. I'm not saying it does. It might. The newspapers around the state do not report New York State legislative activity. National news and local news are covered extensively. I know in the Gannett press here, we have a column of about five inches on a daily basis, unless there is some larger issue that has taken place which requires a little bit more coverage. It's given less coverage in the Monroe County and Rochester region than local accidents on the highway, and we don't want to rely on the media for legislative coverage, because we're liable not to get it.

I'd like to address the enforcement aspect that you were -- you had listed as a concern. The hundred dollar fine for violation sounds like a good idea. It almost sounds like a token, but it isn't a token. Robert Freeman pointed out it has worked well in other states to have this sort of fine, and I will have to quote him. He
IN RE: OPEN MEETINGS LAW

said it's an embarassment for a local
official to reach into their pocket, and
publicly pay a fine if they have acted
outside the Open Meetings Law. That
certainly is a deterrent in a small town.
Local embarassment weighs heavy in a small
town.

And the possibility of voiding
action that has taken place, if any violation
of any aspect of the Open Meetings Law, the
league doesn't have a strong position on
that. It looks like it would work if it was
done with discretion. You couldn't do it in
each case. It could not be put into effect
in each case. As was pointed out earlier,
budgetary considerations would have already
have been in effect for six or eight months,
perhaps, before court action was decided. A
certain category -- I think I would only have
to say in certain cases could that be
implemented.

I'd like to refer to the survey
or the activity that the league pursued
immediately following the '85 amendment. We
IN RE: OPEN MEETINGS - LAW

asked that municipalities around the state
pass resolutions to the effect that they
would ignore the amendment and go ahead and
meet in public and have their caucuses meet
in public. We had some success. We had --
we approached fifty percent of the
communities in New York State. We were
active in fifty percent of the counties. Not
all municipalities responded at all. Some of
them responded negatively. Some of them
outright refused to pass these resolutions.
Those who did, did so in good faith saying we
were meeting in public all the time. We'll
be happy to say we will continue to meet in
public. They didn't know what the problem
was.

And here again, it was a public
education effort on our part. We found
ourselves in the position of explaining the
law to public officials.

You have asked other testifyers
of what the public interest really is in this
whole thing. I think we are in a
particularly good position to reiterate
IN RE: OPEN MEETINGS LAW

public interest. The League of Women Voters monitors governing boards around the state, just as I have been sitting here monitoring this hearing, I guess you might say. We have found throughout the state that agendas are shorter. There are fewer discussions of the resolutions and ordinances to be passed, and it is an insidious occurrence -- the problem is hard to pinpoint, because you can't say to the town supervisor, "Where did you meet to decide all this?" Because if you do, they would indicate that they had exchanged information and done their homework, and they weren't -- they didn't need to have any debate on the issue.

Time and time again, League of Women Voters people come to me and write me notes saying, "We know something is happening, but we don't know how to get at it." And I must say it's happening in my own town and in many towns around Monroe County. Secret meetings by definition are secret, but because they are meeting in someone's dining room or meeting in Tom's Diner and calling it
IN RE: OPEN MEETINGS LAW

a social meeting, indicates to us that the entire legislative body is meeting in private to discuss the agenda, and we know it's happening in Ulster County. We heard so -- we heard it documented this morning.

The point of public interest, I think, is that public education is an important factor. If they are educated to the fact that their town board is meeting at Tom's Diner, they will be incensed, and if there's a local issue which was decided precipitously, the public certainly becomes involved. It has to affect their backyard in order to have public interest. But as soon as it does, they go after it.

There was a case in Monroe County, and I'm not going to be naming towns unless I'm asked, but the town board recessed two or three times during the course of the meeting, didn't go into executive session, didn't declare it was anything. They were just recessing, and "We'll be back in fifteen minutes." And the public was left sitting there. It was a budgetary meeting. They
IN RE: OPEN MEETINGS LAW

were dealing in a total body of the town board discussing the town budget.

... So we know it's going on, and the law needs to be changed. The caucus needs to be open to the public. That's where the action is. That's where the information is received by town officials, that's true, but that's also where they digest it and where the leadership is determined. The public has the right to see where their good leaders are and where their less adequate leaders are.

I don't know what other comments I might have. I hope your questions -- I was going to talk about political party strength. The league has long believed that the political party system is the basis for elections and candidacies as we see them today. It's where the organization -- unfortunately where millions of dollars are raised to run candidates for election, and that's a whole different issue. The political party system would be strengthened with open caucuses. It would relieve the
IN RE: OPEN MEETINGS LAW

public cynicism on what happens in that smoke filled room. For simply that reason, they should be opened to the public. And I think I will conclude my remarks with that.

CHAIRMAN FEERICK: I want to thank you. You have made a very, very strong statement, certainly, in support of the change. I don't want to characterize it beyond that, except to say that I have found your statement very, very strong and very very effective. Why don't I, at this point, see if anybody here has any questions to ask you.

MR. MAGAVERN: I have one subject I would like to pursue briefly. Do you accept the legitimacy of any meetings among legislators to discuss forthcoming legislative items, privately and informally? Two legislators, say, in adjacent districts, and there is something that may affect their districts. They have coffee together to discuss it, maybe work out a compromise before going -- before even going to committee meeting or caucus or anything of
that sort. Would you consider that to be appropriate or inappropriate?

MS. SCHWARDT: I think that's appropriate. That's part of the information gathering. I think it's a responsible activity on the part of the given legislator to bounce ideas off of a colleague.

MR. MAGAVERN: If there's a larger group, and they want to work out a compromise before they freeze themselves in a public group on something, would you consider that to be appropriate, say four legislators out of a body of twelve?

MS. SCHWARDT: I would have a problem with that. You're talking numbers, you're going from two to four to six.

MR. MAGAVERN: I'm trying to find a sense where there's an appropriate place to draw a line. Your earlier statement indicated even the most informal statement between two legislators would be inappropriate. I could recognize your position is you would draw the line as a very low --
IN RE: OPEN MEETINGS LAW

MS. SCHWARDT: I would draw it at low numbers yes. You're talking about informal. I think that may be a key. The fact that it's an informal nature almost would require that it would be a private meeting. I'm talking about --

MR. MAGAVERN: Some private meetings are okay, and at some point you reach the stage --

MS. SCHWARDT: Right.

MR. MAGAVERN: It's an unfair question. I don't think anyone in the room could answer it. Do you have any idea how you would draw the line to permit that kind of meeting that would be appropriate and then prohibit the larger kind that you would consider inappropriate?

MS. SCHWARDT: I think if a majority of the legislative body were to meet, that would be the line to draw.

MR. O'BRIEN: Miss Schwardt, it sounds like your organization is very sensitive to local concerns and has a good feel for that pulse. My question would be
IN RE: OPEN MEETINGS LAW

what, in your canvassing and your opinion, would be the most egregious examples of practices permitted under the 1985 amendment? What strikes you as the most serious -- I'm not talking about illegalities now. I'm talking about what's legal under the new statute: Which cases strike you as the most serious?

MS. SCHWARDT: Should I name names? There was a county legislature in their wisdom who, a year after the '85 amendment was passed, closed their caucuses. Now, when the amendment was passed, they were meeting and declared to continue to meet openly, but a year later, they began to see that it would be advantageous to them somehow to close their caucuses, so they did. Rochester City Council quickly closed its caucuses.

MR. O'BRIEN: Can you think of any specific decisions where the vote was particularly uninformative or a sham, cases where the minority was frozen out and minority member or members weren't even
IN RE: OPEN MEETINGS LAW

informed what was going on the agenda until
the official vote itself, cases like that
where the process was really impaired as a
result of a liberal interpretation of the
amendment?

MS. SCHWARTZ: I think the
Rochester City Council is an example on
that. I don't have any information of any
others. Most of the others are one party
legislatures and boards, anyway, with no
minority members.

I might say when we were asking
for resolutions, the boards with one party
didn't think the law applied to them. The
amendment didn't apply because they never
caucused, because there aren't politics in my
town. We are all of one party. We heard
that over and over. Again, an education
process, I suppose, of what a caucus really
is, and we didn't want to explain it, because
afraid they would take advantage of it then,
as a matter of fact.

CHAIRMAN FEERICK: Mr. Davies?

MR. DAVIES: If you could, you
IN RE: OPEN MEETINGS LAW

touched very briefly on the League of Women Voters' campaign to attempt to get municipalities around the state to, on a local level, return the 1985 amendment. I was wondering if we could get that on the record. First of all, you say you were active, you being the league, was active in about fifty percent of the counties. Of the municipalities that were approached, could you give me an estimate of what percentage of those municipalities actually adopted a resolution.

MS. SCHWARDT: Fifty percent.

MR. DAVIES: Only half of them adopted the resolution?

MS. SCHWARDT: That's a rough figure, but that's about it.

MR. DAVIES: What about the Monroe County legislature, what was the result with that?

MS. SCHWARDT: Monroe County legislature did pass a resolution. I'd like to say that we had successes in having towns pass these resolutions. We had successes in
IN RE: OPEN MEETINGS LAW

having villages pass these resolutions. We had very little success in having cities and counties pass these resolutions.

What we heard from the counties and the cities in particular, probably the counties more often, was, "We won't pass anything like this, because the New York State legislature isn't being affected. And if those people in Albany could meet privately in caucuses, why can't we?"

MR. DAVIES: Did the municipalities that refused to pass any legislation give any reasons for not doing so?

MS. SCHWARTZ: They wanted a place to let down their hair. They didn't want to be in the glare of the public eye. They wanted to be able to ask stupid questions. In one case, the -- I guess it was the mayor in this one particular case, said that the public presence is a distraction and a nuisance. So we heard all that.

MR. DAVIES: Now, the -- could
IN RE: OPEN MEETINGS LAW

you characterize the types of resolutions
that were passed? Were there one or two or
three types or --

MS. SCHWARTZ: They primarily
followed the pattern of, "We will continue to
abide by the Open Meetings Law as it was
stated before the '85 amendment." They often
went on to say, "We will send a message to
the New York State legislature to remove that
amendment."

MR. DAVIES: What is the current
status of this campaign? Is it still going
on? Has it been concluded, and if so, why
was it concluded?

THE WITNESS: It ran out of
steam. Our workers had approached all of the
municipalities that we had workers to
employ. The Chautauqua County legislature I
think was approached just this fall or was
acting on a resolution that had been sitting
on some shelf for awhile. I haven't heard
the result of that, as a matter of fact.
That was the most recent.

MR. DAVIES: If I could follow
IN RE: OPEN MEETINGS LAW

up on that, based on that -- well, Mayor Ryan
this morning made the point that he believed
that this issue should be one that's resolved
by municipalities, by the local
municipalities and not by the state
legislature. Based on your experience, what
is your opinion? Should it be resolved by
local municipalities, or should it be
resolved by the state legislature?

MS. SCHWARTZ: I feel quite
strongly it should be at the state level.

MR. DAVIES: Because --

MS. SCHWARTZ: Because
municipalities don't -- in many cases don't
know they are doing anything wrong if they
are meeting privately to discuss public
business. They are not acquainted with the
law well enough, the state law as it is now
to abide by it, and if it was left up to
them, they would ignore it, as they have --
the ethics legislation, they have let it
ride, don't have their own code in place.

MR. DAVIES: Is the League of
Women Voters currently involved in the Open
IN RE: OPEN MEETINGS LAW

Meetings Law in any way?

MS. SCHWARDT: We are monitoring it continually and collecting information on an ongoing basis.

MR. DAVIES: With respect to Rochester, specifically, I have heard, and I'd ask if you're aware whether this is true or not, that after the Sciolino decision, that the Rochester City Council employed this so-called rotating chair approach where there would be one less than the quorum in the room. One of those members would be rotated out in the hall, and one of those members would be rotated in. Were you aware that was happening?

MS. SCHWARDT: I was told that was happening. I didn't observe it myself.

MR. DAVIES: Thank you.

CHAIRMAN FEERICK: Just one wrap up question. You made reference to what you perceive to be the history since the passage of the '85 amendment. You made reference to information that the league has received from the field to the effect that the agendas have
IN RE: OPEN MEETINGS LAW

been shortened, discussions of surrounding resolutions have been fewer, and you had, in the course of your remarks, other descriptions of what -- as the league sees it, what has happened in the state since the amendment.

I don't know if the league has available or might have available some aggregation of this information that could be shared with our commission. It may be what the league does need to be shared as a matter of policy with the public, but if there was some kind of aggregation of the experience under the amendment that you have developed in terms of data, we certainly would appreciate very much receiving that, and it would be certainly helpful in connection with our own work.

MS. SCHWART: Thank you. I will do that.

CHAIRMAN FEERICK: Thank you very much. Mr. Farrell. Will you be joined by Mr. Haber and also Mr. Crawford? Thank you very much.
IN RE: OPEN MEETINGS LAW

MR. FARRELL: Thank you. We accept the opportunity to speak to you today, and copies of our testimony are being distributed. I'm Edward Farrell. I'm the executive director of the New York State Conference of Mayors, and with me at the table to my right is Edwin Crawford, who is the executive director of the New York State Association of Counties. And to my left is Jeffery Haber, who is the executive secretary of the New York State Association of Towns. Collectively, we represent all units of general purpose government in New York State. We will not read our remarks -- we will not read our testimony, but we will make some remarks and answer questions, and we hope that the Commission at a later time when it's more convenient will review and read our testimony. The first comment I wanted to make is with the hearing notice itself, and the first question that is on the agenda, whether a 1985 amendment to the Open Meetings Law creates a loophole that should be closed.
IN RE: OPEN MEETINGS LAW

And from our perspective and as it was reiterated, and I'm sure you have read the 1985 amendment and the legislative intent, rather than closing a loophole, the legislature reinstated what in fact it had publicly stated was its intent all along, that open meetings did not apply -- the concept of the Open Meetings Law did not apply to political discussions.

In light of that, I think I'll just read one of the sentences, because I know you have gone through this yourself, but in the legislative intent section it said, "The performance of the legislative functions requires the private, candid exchange of ideas and points of views among members of each political party concerning the public business to come before the legislative bodies."

In terms of the legislature, they obviously felt and reiterated this was an important aspect in the efficient functioning of government.

I also wanted to point out that
IN RE: OPEN MEETINGS LAW

it's also been clear that the judiciary branch of government was exempt from this law. And the concepts and the reasons why the judiciary is exempt was so that there would be a frank exchange of ideas. And with local governments, we're talking about elected officials who are accountable to the people.

And as you all know with the judiciary and the appellate and Court of Appeals branches, there is no election by the people, and there is no standing of re-election by the people.

So-I think in terms of a frank and open discussion and in terms of arriving at a consensus, that distinction was made, but we think that same concept and rationale also applies to the deliberative processes of the legislative branches of local government.

I heard some references made to the distinctions between legislature -- the legislature itself at the state level and the legislative branches at the local level. I
IN RE: OPEN MEETINGS LAW

think it's important for those of you who are in smaller communities -- and the vast majority of our membership, both with the Association of Towns and with the Conference of Mayors, are smaller communities. A local board meeting or a meeting of the village board of trustees is a big event in the village. It's normally very well publicized, contrary to the deliberations of the state legislature itself.

All of us are involved in the state legislative process, and we know it's extremely difficult to keep track of what's going on there. In fact, you would have to hire a computer system to do it, and even with a computer system you can't keep track, because there are meetings off the floor and bills reported out of committee before the bills are in print and a whole series of other things that make it more difficult.

We think those problems do not exist at the local level. If anything, the contrary the true. A meeting of a village board of trustees is a very big event in most
IN RE: OPEN MEETINGS LAW

villages and very well covered both before
and after the meeting.

Just briefly on two of the other
points that were raised in the hearing
notice. One had to deal with fines, and the
second had to do with overturning actions of
the public body:

We don't think that the fining
of local officials is an appropriate way to
move at this point. One of the things that
we found in the insurance crisis that
developed over the last few years is that in
some instances, there is difficulty in
encouraging people to run for local office,
especially in some of the smaller
communities. It wasn't publicized, but there
were some elections in which no one would
run, and that was primarily related to the
liability question in villages operating
without insurance, and smaller entities
considering themselves self-insured but
without being insured. I think anything that
further expands the exposure of the local
officials is not the way we should be going
IN RE: OPEN MEETINGS LAW

at this point.

My final comment on the ability to overturn the actions for a public body. If it were determined that a meeting was held in violation of the concepts of the Open Meetings Law, I think an existing remedy exists in the statute now, concerning a specific action that may have been -- that may have resulted from the violation of the law. We don't think that concept should be extended to any other business that was conducted that evening. I think that's just too broad, and it goes too far.

I will call on my colleagues to make further comments.

MR. CRAWFORD: Thank you. I will not read my testimony either. I would call the attention to the Association of County's testimony. There are two letters attached, which were developed last year in response to requests from Mr. Zimmer and the assembly who chaired the standing committee considering the legislation to amend political caucuses. And also there's a

These were both given by our association to the leadership in either of those houses to explain our particular position, and I would refer you at your leisure to those letters.

Allow me to make a few points as did Mr. Farrell; and then we would be happy to take any questions you may have. First, to reiterate what he had said, the proponents of changing the law as to the political caucus exemption stress the loophole. We have heard that a number of times. I would again like to remind the Commission and remind the proponents that a loophole was not created. The -- when Chapter 136 was adopted, it was made very clear by the legislature, also in the governor's memorandum, that it was intended to preserve and define what had always been, and that was the intention for the legislature to exempt political caucuses.

A second point, some in presenting testimony here today and at other places could very well argue that the state
IN RE: OPEN MEETINGS LAW

legislature should continue to receive the
benefit of the exemption, but for goodness
sake, get at it quickly, and urge changes of
the law as it applies to the local
governments, the sixteen hundred local
governments that we represent.

They argue that there are
adequate checks and balances at the state
level of bicameral legislature, et cetera.

Overlooking completely what we do at the
local level with respect to the adoption of a
local law, the local budgets, publication of
the notices of meeting, the agendas, the
committee meetings, the coverage and the
attendance. In our view, there is far less
likelihood of compromising the public's right
to know and to understand at a village or
town or county meeting than in the state
legislature. And to be very honest with you,
we are hearing references to the fact there
are mechanisms built in in Albany that
preserve the public's right to know.

I think any of you who have been
around the legislature, you don't have to be
IN RE: OPEN MEETINGS LAW

around very long know that in a given session there may be three or four bills come on the floor that haven't been conferenced, and it's in those conferences where the decisions are made on that legislation by the majority, either house. It doesn't make any difference which party it is.

And I do think, and we have always thought that what we do at the local level is fully supportive of the Open Meetings Law as it now exists. The committee -- the public is far better protected. I think that's also borne out by the fact -- and I must confess I go back thirty-five years when I was first town attorney in a town in this section of the state, there are not, at least in our view, when you consider there are sixteen hundred local governments, and those sixteen hundred local governments are related to about seven thousand different types of districts, fire, water, sanitation, whatever it may be, there are precious few complaints, we feel, that are lodged about political caucuses.
IN RE: OPEN MEETINGS LAW

And in view of that -- and I have a continuing discussion with many of our friends in the media who become quite excited about these kinds of things. That excitement doesn't carry over to the state. It is confined to local villages and towns and counties. That before we make any dramatic change or this Commission recommends a dramatic change, if there are those kinds of complaints, we should analyze it and continue to preserve the political caucus where political matters of interest to either party can be discussed.

I might also add, and this has been reviewed with our board of directors, that should at some future time it become the policy of this state to prohibit or seriously curtail the activities of what goes on in political caucuses, Republican caucus at Monroe County or the Democratic caucus in the City of Syracuse, then our association, as long as it's applied to all legislative bodies in the state, would be supportive of that action.
IN RE: OPEN MEETINGS LAW

With that sir, I think I'll conclude, refer you to my testimony. Our association thanks you for including us today.

CHAIRMAN FEERICK: Thank you very much. Maybe I should let -- will you make a statement too?

MR. HABER: Yes.

CHAIRMAN FEERICK: I was just going to mention for the record that two of the persons up here have served as -- Mr. Davies as a village attorney and Commissioner Magavern, I believe at one time as a county attorney.

MR. CRAWFORD: Very distinguished county attorney in Erie.

MR. HABER: Thank you. Our annual meeting in February of this year, the membership which represents the delegates from the nine hundred -- approximately nine hundred to nine hundred and thirty-two towns in New York State adopted a resolution which I will read to you.

It says, "The Association of
IN RE: OPEN MEETINGS LAW

Towns supports the open-meeting concept. However, it is opposed to any changes in the present authorization for political caucuses that would not apply equally to the state legislative body. Distinctions between state and local legislative bodies are discriminatory and unjustified. It is unacceptable to consider a double standard with respect to political caucuses."

And I think the point is, and it's been mentioned before, the local governments that we represent have taken up the spirit of the Open Meeting Law very well and in very good faith. In fact, it is, as I state, our strongly held belief that the government at the local level is more open than that conducted in the state legislature by virtue of the fact that there are infinite possibilities for local public participation, input and observation at the local level.

And the -- in the report of 1985 on the Open Meetings Commission, the local law procedure was almost overlooked. And I'd like to call to your attention that the local...
IN RE: OPEN MEETINGS LAW

law procedure applicable to all local governments requires a bill to be in final form upon the desk of the legislators at least seven calendar days before its final passage. Section 20 also requires a public hearing and requires public notice be given of such hearing; and on that basis, we do stand by the fact that local legislative process provides an equal or superior opportunity for real public awareness. I have been in local government.

I have been a town supervisor, and I think that those of you that had a local government experience know that you are continually subjected to the public much more frequently than perhaps our state legislators are, and that if you did attempt to exclude public participation, that you would hear about it, and you wouldn't hear about it just at town board meetings, but in the grocery store and at church and certainly at the voting booth.

And I would like to agree with Mr. Farrell in the fact that I'm concerned
about the possibility of penalties for any violation of Open Meetings Law. I think it's difficult now with all that's going on in terms of responsibilities of local governments, solid waste and police and the insurance crisis and everything else, that many people who perhaps formerly would have -- would have considered it their civic duty and with great interest step forward to run for office, are looking at their own personal liabilities, and how would they be further confronted with the fact that if they -- and they might have personal fines for some violation of political caucusing, and that kind of thing, that they would give that further hesitancy. And it's a decision in light of all the other exposures to your personal life that are going on now.

I think that the towns of New York State that I speak for have really made a good faith effort. In fact, in some cases they probably overcomply. If you take the local town clerk who may be requested for records, they don't bother to go into the
IN RE: OPEN MEETINGS LAW

five days and all the other areas that they
have latitude with. Town clerk usually drops
what she's doing if someone walks into the
town hall looking for something, and goes and
gets the copies and Xeroxes what's needed,
and in many cases doesn't charge.

And I think that the spirit that
the towns have exhibited in this area has
been good. And I don't know as there has
been any instances of abuse that have been
cited. And I would think if the problem is
not there, the system seems to be working
good, working in good faith, we should leave
it alone.

CHAIRMAN FEERICK: I want to
thank you and your colleagues for your
presentations. I would like to pick up, if I
might, Mr. Haber, on the statute to which you
made reference. I don't have it in front of
me, but could you see an additional amendment
to that statute in response to the proponents
of Open Meeting Law change, that requires a
governmental body to state on the record
reasons for the action taken on the occasion
IN RE: OPEN MEETINGS LAW

that the action is taken?

MR. HABER: I'm not sure --

CHAIRMAN FEERICK: Let me
develop that. Our judiciary, more frequently
than not, expresses its conclusions in the
form of opinions and decisions, so that it's
understandable why the action that was taken
by the justification that's expressed in an
opinion or decision. We attorneys are aware,
however, there are exceptions to that
statement where there aren't opinions and
where there's an absence of explanation.

But is there a case to be made
for some additional provision in law that
would require some statement at the time
action is taken that explains, as briefly as
it might be, the reasons for the action? The
reason I say that is in the course of my own
travels around the state during the summer, a
number of citizens said to me and those of
whom have joined me from our commission, that
action was being taken in certain
municipalities, simply on the basis of a
motion, a second and a vote, without any
IN RE: OPEN MEETINGS LAW

discussion, without any rationalization given for that particular action, and that provoked, if my facts are correct, in those communities a very negative reaction to the functioning of government in the community.

Now, if that, in fact, does happen, if the record suggested that that was a practice from time to time in some areas, wouldn't that suggest that there should be, at the very least, some additional provision in law that requires some statement or reasons for the action taken by government?

MR. HABER: Well, let me respond to that, if I can, two ways. Number one, in my eight years' experience as a town supervisor and four years that I was on a town board prior to that, all our town board meetings always included the participation of the residents that came to the town board meeting, and in the local law area, certainly you have public hearings and solicit their comments on this local law, and at that time the vehicle is there for town board members to enter into dialogue, if they wish, with
IN RE: OPEN MEETINGS LAW

the people. And I have never known it to be an occasion which a town board member would not justify his vote, whether he was asked publicly at a meeting or afterwards at a meeting, and certainly at the very least the answer is in my good judgment or what I feel are the best interests of the town I voted for or against this particular issue.

Now, that's my reaction as to why it's unnecessary from that perspective. The second perspective is that the very -- one of the very basic attitudes of ours regarding this whole issue is the fact that what is good for the state legislature is good for the towns and local government in New York State and that the people that hold public office at the local level would have feelings of ill will if they were made to comply to something like this and a state legislator was not.

And I can't imagine a situation under which anything would pass that would require an assemblyman or senator on every issue that he voted on to state his reasons.
IN RE: OPEN MEETINGS LAW

publicly for or against them. We all respond
to the questions when we're asked. And I
think there's no problem in this area.

CHAIRMAN FEERICK: Do you have
any -- any of you, for that matter, any
response to the argument that if we open
caucuses and other meetings that are
presently private under the Open Meeting Law,
we would enhance participation in government
and the two party system, because we would be
communicating more information about the
functioning of government to people, and
that's more likely than not to enhance
participation in government?

MR. FARRELL: We probably all
have some opinions on that. I think one of
the things we have to always keep in mind is
that we have a legislative process at work.
We're not in political science 203, where
we're thinking about a lot of abstract
concepts.

Government has to function, and
the way government functions is to enact laws
and to do the public good. Sometimes it's
IN RE: OPEN MEETINGS LAW

necessary to know or to discuss or to know
that you have the abilities to adopt
legislation. I think it's important, and the
legislature said as much in the amendment to
the law or what they felt they were
clarifying the prior language, that there is
a legislative process at work, and the final
result of that process is a public meeting at
which an official vote is taken. There is
accountability. Everyone is on the record to
one degree or another.

So I think on the one hand at
the local level -- I live in Albany, which is
a good size city. And the Albany meetings of
the common council are covered by the local
newspaper, and they cover all the town boards
and the village boards. And whether it's
absolutely necessary for everyone to know
every word that's said on any given issue, I
really don't think is part of the big
picture.

And in many of the smaller
villages, I have over five hundred members.
I represent cities and villages. Three
IN RE: OPEN MEETINGS LAW

hundred and some odd of my members are under
five thousand in population. If you were to
go back to the confines of the old law, and I
heard you talk about the revolving door and
people walking out of the room. If you have
a village board with five people, and you're
in a small community, and three of them are
at a cocktail party somewhere or three of
them are down at the gas station or they are
at the lunch counter, I mean you have some
very, very basic problems involved in that.
I'll defer to my colleagues if they want to
add anything.

MR. CRAWFORD: I think to answer
your question, yes, there's a possibility
that public participation could help or add.
I think the decision, though, as to whether
the public should come to a caucus should be
with the leadership of the particular
political party. Some of the county caucuses
do admit the public and the media. Some do
not. Some don't hold them.

We have counties around the
state that don't hold any caucuses at all. I
IN RE: OPEN MEETINGS LAW

can't believe there isn't a phone call back and forth once in awhile, but they don't hold a caucus.

Again, we see a confusion between political caucuses discussing the politics of whatever is transpiring in that particular government, and the public aspect of discussion debate. The one thing that I -- going back to your question you asked Mr. Haber, were you considering that each member make a statement or that there be something in the record?

CHAIRMAN FEERICK: I wasn't dealing with -- you have summarized what my question was intended toward. We have -- we received a suggestion that we ought to consider some such requirement where there be some kind of explanation given for action, not necessarily individual explanation but an explanation of the body itself. Now, there's a lot of issues that surround that, I realize.

MR. CRAWFORD: Most of the resolutions contain in the preambles, the
IN RE: OPEN MEETINGS LAW

whereas clauses, the reason why the bill or ordinance is being brought before the body. Sometimes those are amended or changed. It would seem to me, we have legislative bodies that run as high as thirty-nine to have to go around the room on every resolution or activity --

CHAIRMAN FEERICK: I didn't really mean that. That was -- I think what you said is certainly responsive to the suggestion we received. And we haven't, as a commission, we haven't discussed this among ourselves and focused on this. We essentially are looking at the Open Meetings Law at this point.

In this context I did receive the suggestion, and I put it in the form of a question, but not directed to each individual, because I think there's a lot of issues with that, but that somehow if it's -- the suggestion was in response to the observation that some bodies are taking action without any discussion, without any explanation as to the reasons for the action,
IN RE: OPEN MEETINGS LAW

and in response to that, I received a suggestion that our Commission should consider a requirement that would put on the municipality at least the burden of doing what many of them now do as a practical matter, but I gather it's not always done.

MR. CRAWFORD: Perhaps not.

CHAIRMAN FEERICK: And the requirement would cut across everything, basically, that was expressed in terms of law.

MR. FARRELL: I'm not sure the context in which that was raised, but if you think of the actions a local government takes, I mean what are these terrible things occurring? What kind of policy things are they talking about?

MS. GORDON: Maybe I can clarify. I think the point was addressing people's concerns that when it gets to the public level, the real discussion and decision making has gone on behind closed doors in these political caucuses, and that that's why there is an absence of
IN RE: OPEN MEETINGS LAW

discussion. Really the only thing in the
public is a rubber stamping of what's been
privately discussed, and it was a response to
this situation that this thought arose. I
think that clarifies it.

CHAIRMAN FEERICK: That's
correct. I appreciate that.

MR. FARRELL: I notice in your
hearing notice, though, you did not go near
the question of legislative versus local
government, and we have raised it, and --
state legislature --

CHAIRMAN FEERICK: No, and that
has been raised-repeatedly throughout the
hearing today. I ought to mention to you for
the record that the legislation that
appropriated funds for our Commission
specifically said that our Commission had no
authority to use any of those funds in
connection with investigations of the affairs
management of the legislature. Now, to what
extent that provision might be implicated in
our speaking to that issue is not something
we have expressed ourselves on, but I would
IN RE: OPEN MEETINGS LAW

just like to share that background with you.

MR. CRAWD: It will cost you no funds, Dean Feerick, to get advice from us. We're available at any time. I think in the years in which I have been involved with local public meetings, I think perhaps there is an area that is germane. More and more of our local governments have agendas, and boards take up only items that are on agendas, agendas posted appropriately with notice being given. There is always a chance at the end of the meeting after these folks have been there four or five hours that somebody just verbally moves something and seconds it to construct a new addition at the college or to raise their salaries or whatever it may be. But what I'm saying is that sometimes, and perhaps there would be appropriate -- I would hate to think on all such items, but where something like that came up, I think the responsibility ought to be the chair of the meeting to insert an explanation of that particular item, rather than moved by Mr. Smith, seconded by Mr.
IN RE: OPEN MEETINGS LAW

Jones. All ayes. That's the end of it. So perhaps there is something.

So if you have not been out traveling around to our local governments in the last decade, they are becoming very sophisticated. They are trying to comply with open meetings. They are publishing their agendas. Most have rules that do not permit an item to be taken up at a meeting without unanimous consent. There has been an awakening trying to fulfill our responsibilities to the public.

MR. HABER: I think I would like to add one thing. Ed Farrell mentioned in his presentation half the towns in New York State have populations under five thousand people. In most of those cases, the town board members, supervisors, are neighbors trying to carry out a civic responsibility on behalf of their fellow neighbors. They are not people who are looking for a road to the White House or greater glories or anything else. They are providing a service to the community.
IN RE: OPEN MEETINGS LAW

I don't think that these people are trying to put one over on anybody, and I think that—for the most part, they have seriously complied with every intent of the Open Meetings Law. And I think there's a reason to consider the fact that they need to have the ability to caucus and that it provides a worthwhile beneficial service to the community and that all their actions, then, come before the public, and the community itself has the responsibility and the opportunity to attend these board meetings and to become involved. And we can't legislate the individual's lack of interest to attend the meeting.

CHAIRMAN FEERICK: Thank you.

Mr. Davies.

MR. DAVIES: Yes, I have just a few questions. This is really addressed to all three of you. I would like to nail this down for the record. Is your primary objection to the proposal to rescind in part the 1985 amendment that it treats the state legislature differently than local...
IN RE: OPEN MEETINGS LAW

municipalities? In other words, if the amendment was rescinded in whole or in part, but treated the state legislature the same as local municipalities, would you have an objection?

MR. FARRELL: The Conference of Mayros have said that, one, they believe it's effective for the functioning of government to have the ability to caucus. As Mr. Crawford stated before, if the state in its wisdom decided it was not in the public interest, and if that applied to all bodies, the Conference of Mayors would agree with that assessment; yes. The answer is yes.

MR. CRAWFORD: Association of Counties, the answer is yes, that we would approve it the way the Conference of Mayors have.

MR. HABER: I think the point is there that we don't know that it's necessary, but if it is determined that it is, everyone should be included.

MR. CRAWFORD: Mr. Davies, we weren't always fully in support of the Open

COMPUTER REPORTING SERVICE
IN RE: OPEN MEETINGS LAW

Meetings Law. But once it was passed, I think the record of the associations is good in stressing cooperation, and I think we have done it.

MR. DAVIES: Let's take for example a proposal, similar to the proposal that was presented this past year, that caucuses could not be closed where you had two-thirds of the -- where you had two-thirds majority. Would you have any particular opposition to that? In other words, would you go along with that, assuming it applied to state legislature?

MR. FARRELL: The conference of Mayors would not go along with that, because, one, there is a basic concept involved. You either have the caucus or don't, and the two-thirds requirement, in our estimate, is a way of not applying the statute to the state legislature while saying that you are.

MR. CRAWFORD: We would object to any kind of fractional percentage being applied as to whether you have a caucus or don't have a caucus.
IN RE: OPEN MEETINGS LAW

MR. DAVIES: For the same reasons?

MR. CRAWFORD: For the same reasons.

MR. DAVIES: With respect to treating the state legislature differently from local municipalities, when you focused on the question of bicameral as opposed to unicameral, isn't there another distinction as a practical matter, that is in the state legislation, we still have the strong two party system that simply doesn't exist in a substantial number of municipalities in the United States?

MR. FARRELL: I think the party system in the state legislature are more strong, if anything, it leads to more closure rather than more open discussions. The legislative leadership roles in the state legislature are so strong, that Senator Anderson, Speaker Miller and the Governor can sit down, and the three of them will decide what gets taken up and what does not get taken up, and that basically goes down the
IN RE: OPEN MEETINGS LAW

line and is followed to the letter. I think the unicameral function and that is really a cop out. Because when the legislature gets rolling in the last couple weeks of the session, you can have all the computers in the world, and you can't keep track of what's going on. So no, I --

MR. DAVIES: Let's set aside the bicameral, unicameral question. Because you have a strong two party system in the state legislature, you have a watch dog. You always have a minority watching over the majority, whether you don't have that in --

MR. CRAWFORD: Mr. Davies, that's a fallacy, that there is an active strong minority in those houses watching over the majority. That just is not true. If you have read any of the speeches or recent writings of Mr. Rappleyea, the minority leader in the assembly, he for the first time is speaking the truth. I'm not going to argue with the legislature about their system, whether it's right or wrong the way
IN RE: OPEN MEETINGS LAW

they do things, but the control of those legislatures is vested solely in Mr. Miller, the speaker, and in Senator Anderson and their party. That's a fiction. There is no active minority in the assembly or senate. They are active, and they are making a lot of noise and doing a lot of wonderful things, but they aren't getting at the issues you're talking about, and that is disclosing to the public what's going on in those caucuses when they are dealing with public business.

And that is not ever going to happen as long as legislature is shaped the way it is. I can't speak for the mayors or the towns, but that is just not true, and Mr. Rappleyea has been talking in those terms, and I think if you have a few minutes' discussion with members of -- either a Democrat senator or a Republican assemblyman, they will vouch for what I'm saying, that that just doesn't exist, in my view.

MR. DAVIES: If I could turn to a different question. In your experience, does opening these caucuses, at least back in
the period they were opened, say the early
eighties, did that really make any difference
in the way business was conducted in the
towns and villages and counties?

MR. FARRELL: I think it did to

the extent that you have heard earlier, that
you had the revolving door. You had people
trying to reach a political consensus within
the confines of the law, because a political
consensus is necessary for the process to
operate. I think it affected the way
individuals functioned. I'm not sure it had
an overly dramatic change on the overall
process, itself:

MR. CRAWFORD: I don't think it
had any significant change, to be very honest
with you, Mr. Davies. At the county level I
don't know that there were any particular
schemes that were developed statewide to
avoid the implications of the law, but I
really don't think there was a major reaction
to it or benefit from it or adversity from
it.

MR. HABER: I think going back
IN RE: OPEN MEETINGS LAW

to something you said earlier, you're assuming there will always be a different party in control of each branch of the legislature, and I think also if one were to analyze the election results of yesterday, they would find that the one party system in the local governments of New York State is fast quickly on its way out of existence.

MR. DAVIES: Picking up on a point, I think Mr. Farrell you made, that -- with respect to the 1985 amendment as being really not a loophole but trying to undo some of the misconceptions that the court had of the original intent of the Open Meeting Law, and I suppose we could argue over whether that was the original intent or not, but I would note first of all that the very first section of the Open Meetings Law states that it is essential in the maintenance of a Democratic society and so forth that the public be able to attend and listen to the deliberations and decisions that go into the making of public policy.

Don't you think that it is very
IN RE: OPEN MEETINGS LAW

important in order for people of the public
to make an informed judgment, that they be
aware of the deliberations that go into
coming up with legislation, formulating
legislation?

MR. FARRELL: I do think in
instances where people speak on the record
and define their votes and want to stay
public, other than through their official
voting, which is certainly a public
statement -- I go back to what I said earlier
and why the judiciary was excluded from the
process. I think the legislature knows for a
legislative or deliberative body to reach a
consensus, there has to be an opportunity for
candid and frank discussion of the issues,
and I just think that's an important part of
the process.

And the same rationale as to why
you want judges to sit around and talk about
a case, and someone may be talked out of
writing a dissenting opinion. Someone may
decide they are looking at it the wrong way
and switch over and become a part of the
IN RE: OPEN MEETINGS LAW

majority of the decision, just as it is
demed to be essential and productive for
that process to go forward, I think the same
rationale applies to the legislative
process.

MR. DAVIES: In all candor,
don't you think that the reason the 1985
amendment was extended all the way down to
village levels was because state legislature
realized if they didn't do that, that you
fellows and others would be all over them?
Isn't that the reason it's extended to the
local level? Do you think they really cared
about the local municipalities?

MR. FARRELL: I can't read the—

mind of the legislative. I can only read
what they wrote as their legislative intent.

MR. DAVIES: Would you like to
hazard a guess as to what their concern was,
whether it was the concern of legislature or
a concern as to the municipalities?

MR. FARRELL: I don't know. I
think perhaps when the legislature did act,
because they did not act initially when the
IN RE: OPEN MEETINGS LAW

courts had ruled this applied to local
governments, that maybe delay on their action
when they felt perhaps the decision of the
judiciary was coming closer to their own
process, may have spurned them into action.

MR. DAVIES: You know there are
two bills before the legislature at that
time, one that would --

MR. FARRELL: Yes.

MR. DAVIES: One that extended
all the way down, and --

MR. FARRELL: Yes.

MR. DAVIES: And that's the one
they selected.

MR. CRAWFORD: We commend them for the judgment. We don't know the
reasons. Incidentally, along the line of the
locals working for the state, it may be
appropriate for the Commission to consider
this. It may not be. In the Committee on
Open Government, which is the committee that
I'm sure has sent you recommendations --

CHAIRMAN FEERICK: Mr. Freeman
tested earlier today.
IN RE: OPEN MEETINGS LAW

MR. CRAWFORD: We all talk to
Mr. Freeman. He comes to our conferences.
He's a very popular panelist. He draws
pretty good crowds, good crowds, and there
are occasionally disagreements with him, but
it's all in good healthy discussion.

The point I'm raising here, and
it's a point we're going to raise with the
legislature next year, that if we are trying
to foster and support even more open
government, and the types of things Mr.
Davies just alluded to in the deliberations
of public bodies and maybe more reasons why
people are voting the way they are, it would
seem as though representation on the open —
Committee for Open Government ought to be
looked at, the present representation.

I think you will find at this
moment only one elected official on that ten
member body. Certainly the League of Women
Voters should be on there. They are. The
advocate groups are on there. The government
should have an appointee, the media
representatives, but to think that their
IN RE: OPEN MEETINGS LAW

officials. We're talking about actions of a duly elected legislative body. Barring some out of control municipalities somewhere doing bizarre things, which certainly I'm not aware of among my members, that such an extension is unwarranted.

CHAIRMAN FEERICK: Commissioner Magavern.

MR. MAGAVERN: We have had two points of view expressed today, both representing empirical conclusions. I want to see what your reaction is. The first point of view is by requiring processes to be open, you will enhance the deliberative process. You will assure deliberation is in public, and the public officials, legislators, will be more fully accountable to the electorate.

The other point of view is by doing that, you're really impairing accountability, because what you're doing is pushing deliberation -- either shutting down deliberation to some extent, restricting it, getting people to just not talk at all, not
IN RE: OPEN MEETINGS LAW

ask questions, not probe, not test each
other, challenge each other in a private way
or even in a public way, or you're pushing it
off into more informal channels, either
through the rotating chair technique or split
caucuses or more likely just through more
informal processes, over coffee or whatever.
And the -- you're thereby weakening
accountability because you don't then have
the party representing. You do have --
you're not enhancing party collective
responsibility.

It's very hard for us, I guess,
for anyone to know what the real effect of
these changes in the law is. We have almost
an opportunity for -- we have almost had an
opportunity for an experiment here. Mr.
O'Brien, our counsel, pointed out to us this
morning that there have been several phases
in the law up until the Sciolino case. It
was unclear whether caucuses were covered or
were not. Then under Sciolino, they were
covered. They were subject to the Open
Meeting Law. Then since 1985, they are no
IN RE: OPEN MEETINGS LAW

longer covered, although many municipalities
have elected to bring themselves back under
the coverage.

Now, with those changes over
time, I wonder if you recall -- and I'd
really like any observations each of you can
give us, what is -- what can we really expect
the practical effect of this question to be,
the practical effect of the decision, whether
or not caucuses are subject to open meeting.
Is it going to be beneficial in the way I
first identified, or is it going to be
adverse along the lines of the second
scenario I outlined? You must have some
experience in that you can give us.

MR. FARRELL: Well, I think
it's -- I'm not sure what experience we can
bring. We did have the period that you
eluded to. From the discussions that I have
had with my membership and we as a group, as
you will see attached to my testimony, we in
fact adopted a resolution as related to this
issue.

I think that the mayors feel
that the caucuses themselves serve a purpose
in making people make better decisions on
what they are voting on. I think that there
are some individuals who would not ask the
questions that they ask, would not raise some
of the issues that they raise, because one,
they would be maybe viewed by some people to
be either uninformed on the issue or ignorant
on the issue when in fact they are trying to
be more informed and more enlightened. I
would venture a guess that I think that the
meetings themselves are more helpful to the
process. It's such a -- it's hard to be more
specific than that.

MR. MAGAVERN: There aren't any
horror stores in the Sciolino case. Until
the amendment, life went on and the
government functioned as it did before. So
we really can't say subjecting the local
government in caucuses to the law was
disastrous. You may not like it, but --

MR. FARRELL: I agree.

MR. HABER: There weren't any
cases the other way, on the other side. I
IN RE: OPEN MEETINGS LAW

...think perhaps I can give you my experience, as I happened to have been a supervisor at a time when I had a board all of one party and then not.

But I found that human nature being what it is, town board members being part-time people that are elected and often meet once or twice a month and that kind of thing, that they would meet in a caucus setting, and issues would be discussed, opinions given and very often probably opinions and background information that a board member may not have the nerve, if that's the word, to state publicly. But then during the active part of the meeting, the vote was taken, it was very often the supervisor who carried the discussion full balance.

I don't think that there were times when something came up and you would say, "Well, I want a motion to do such and such. Look for it. Get it. All in favor. All opposed. Motion carried." That's the end of it. I mean, the supervisor usually...
stands there and explains to the people what the motion is about and why he or if he knows a board to be in consensus, feels a certain way about it.

I don't know, as I stated earlier, these people are not on the way to the White House; but they make very valuable contributions, but some of them who maybe make the most valuable contribution are the least assertive or aggressive in terms of wishing to get out there and, you know, really gab about every issue that's coming to them.

I don't think there's a problem. And I think that's what we fall back to. There is no problem in existence right now. There wasn't before. There isn't after. If it ain't broke, don't fix it. That's the way that everybody feels about it, and it will be a situation where if it's imposed upon the local government and not upon the state legislature, calls for great ill will generated amongst levels of government I would think.
IN RE: OPEN MEETINGS LAW

MR. CRAWFORD: My experience, Commissioner, is that I don't know that we have had enough time since '85 to make a judgment of the era, of the post amendment era.

I continually am amazed at some of the counties I visit. I don't have all the members that my two colleagues do. I only have fifty-eight members, the City of New York and the fifty-seven counties I visit. I am amazed some counties have no caucuses whatsoever, don't have them, don't have a place in the building for them. Other counties will have caucus rooms, majority, minority. They post the times when they meet. Some meet with the media present and the public, anybody that wants to come, and some do not allow anybody in there except the members.

You're absolutely correct. Back in the early eighties, we survived the way the law was written at that time, and I think we're doing -- I think we're doing all right. I think the bottom line, and perhaps
IN RE: OPEN MEETINGS LAW

it's beyond the purview of your Commission, is that we take a look at the sixteen hundred local governments in our state and the seven or eight thousand public districts that are related to them to see what they are doing and what the problems may be. My guess is, as I said in my opening testimony, we're getting along, and there aren't large numbers of complaints against these local general purpose governments and their public districts.

So you pose a very difficult question, and I suppose, given the rough road local governments have had given the last twenty-five years, under governors of both political persuasions, we will survive.

But it makes it just that much more difficult in our view for those counties that want to have political caucuses to have them. They feel it's in the interest of their membership on those legislative bodies to have a caucus. And if they feel a political caucus should be preserved and since we have no statewide policy prohibiting
IN RE: OPEN MEETINGS LAW

them, then they should be -- again, if we
reach a point where those who shape our
public policy and more importantly have the
right to make the decision on it abolish
political caucuses, the local governments
will certainly conform to that wish and
support it.

MR. FARRELL: I would just like
to reiterate a point Jeff made, about the
municipal home rule as it relates to the
actions of local bodies. We don't have
things popping up on the agenda and local
laws being passed without notice and
without -- there are hearing requirements.
There are time requirements, and I just
reiterate that in many of the localities, the
meeting of the village board is the biggest
news that's going to be in the paper that
week. It's not they are doing things in
secret, and it's not there's not an open and
deliberative process. If Trustee Smith votes
and votes either aye or nay and doesn't say
anything, I don't think that, in and of
itself, is necessarily bad public policy.
IN RE: OPEN MEETINGS LAW

CHAIRMAN FEERICK: Mr. O'Brien,

and then Mr. Small.

MR. O'BRIEN: Very quickly, I

think all three of you gentlemen were in the

audience when Ms. Schwardt gave the results

of her canvassing across the state, and I

think she was talking about an attempt to get

resolutions passed, essentially abrogating

the new amendment in the local government.

And I think one of her conclusions was

whereas larger cities were indefinite or

against such a move, she found a substantial

amount of support for such a move at the

level of counties and smaller towns and

villages.

And I'm wondering whether

that's -- maybe we're talking about two

different states, given the positions which

you three gentlemen have made so strongly,

but I'm wondering, seriously, what degree --

what is the grass roots feeling out there in

your view among the large majority of

subdivisions which are small towns, villages,

counties, smaller cities, as to the wisdom of
the amendment and whether or not we should go back to the situation before the amendment.

MR. FARRELL: Well, I think Ed Crawford made the best statement before. In those counties where some use it and some don't, I think if you're talking about the vast majority of my members, I think the vast majority of my members would like to have the option to discuss something that is part of the legislative process in private, if they thought that was necessary to reach a political consensus for the process to move forward. If there are some who chose not to do that and want to not go that route, you know, I don't see anything wrong with that, but I think the vast majority would like to have the option.

MR. O'BRIEN: It sounds as though some of the members have unilaterally taken steps to go back to the old situation.

MR. CRAWFORD: Yes, that's correct.

MR. HABER: They had the option, if they wanted to.
IN RE: OPEN MEETINGS LAW

MR. FARRELL: There are independent rules legislative bodies adopt as to how they will operate. Very many allow whoever comes to the meeting to speak, just get up and talk about anything on the agenda or not on the agenda. That's a local decision. It's a municipal home rule. It's very strong in New York.

MR. O'BRIEN: Mr. Farrell, I guess this would be the follow-up question. Are the mayors of the larger cities generally opposed to this kind of measure or have not acted in the manner that Ms. Schwardt suggested? If so, what would be the reason for that difference of opinion?

MR. FARRELL: I don't know the answer to that. The resolution that was adopted at our legislative meeting in 1985, the vast majority of the people at the meeting were in villages and not cities. So I'm not aware of delineation within my organization between large and small.

MR. CRAWFORD: I'm not aware of the poll nor has it ever been discussed with
IN RE: OPEN MEETINGS LAW

our association, but I think I could agree --
I think what she was trying to say, larger
city entities tend to want to preserve the
political caucus right they have. My
observation of counties would be the same.
We're talking about -- this is just some
speculation in my part -- the six largest
counties we have in our association and the
City of New York all preserve caucus and
caucus procedures. It's very detailed.

When you drop down to medium
size, you begin to get some falling out, and
many of the smaller counties, I don't think
they have them at all. I think the answer to
that probably is in the enormity of the
matters that are brought on the agendas for
city councils. I don't want to speak for Ed,
but county legislatures, meetings that
already go six and eight hours. I saw the
other day the agenda for the Westchester
County legislature. I don't know how they
got through it in a week, let alone one day.

I think to bear out what Ed has
said, if the majority or minority in

COMPUTER REPORTING SERVICE
IN RE: OPEN MEETINGS LAW

Westchester want to caucus to develop political positions or have political analysis of that kind of business, I think that's the way the members get informed. I think they have to do that in order to expedite the business.

MR. FARRELL: It's probably much much more difficult to reach a consensus of a city board that may have twelve members, as opposed to someone with five or six members.

MR. O'BRIEN: Some of the factors you were mentioning earlier would cut the other way. You were mentioning smaller subdivisions of the state. The government offices are part-time people, people who would feel the impact of additional rules and regulations much more significantly than professionals, and also that they have occasion for many more types of informal contact, three people on a five man board meeting at the barber shop, that sort of thing. So I mean if you took those thoughts to the logical conclusion, you would think that the smaller towns or counties, villages,
would have just as much, if not more, 
opposition to attempt to change an 
 amendment...

MR. CRAWFORD: Many of them do.
I was trying to be general, and they were 
very conscious when the three met at the 
barber shop, or when five or six members met 
at a cocktail party. They were very 
conscious. And to me that's an extreme 
situation many local governments don't want 
to be in.

MR. FARRELL: We are talking 
about the legislative body, and even though 
city governments themselves tend to have more 
full-time professionals as department heads—
and a full-time mayor, et cetera, the city 
council are part-time people.

MR. CRAWFORD: So are all 
members of county legislators are part time.

CHAIRMAN FEERICK: Mr. Small.

MR. SMALL: Mr. Farrell, in your 
opening remarks, you expressed an opposition 
to a one hundred dollar fine or any kind of 
enforcement procedure should the amendment be
IN RE: OPEN MEETINGS LAW

reversed, and you drew the parallel with the problem that insurance liability now has on recruiting people to run.

Isn't there a difference between the latter, which says in effect, if we goof as a council and the town or city get sued, a large part of my personal fortune is in jeopardy, and a fine which basically says, if you knowingly violate the law, you ought to have comparatively modest, but a monetary fine?

MR. FARRELL: Just as a matter of principles, the conference of mayors is against any fines of elective local officials.

MR. SMALL: For any violation of law?

MR. FARRELL: For violations of the Open Meetings Law. There may be certain violations of laws that are egregious enough that something should be assessed. The feeling of my organization is these are duly elected officials accountable to the people.

MR. SMALL: How do you enforce a
IN RE: OPEN MEETINGS LAW

law, if there is no enforcement provision?

MR. FARRELL: I think there are certain options that are available under existing law in Article 78 proceedings in voiding the action of the body. I think that's certainly one way to enforce it. Just as a matter of principle, we would not support the imposition of any additional fines of local officials.

MR. SMALL: Let me ask Mr. Crawford, you correctly referenced the Governor's memo when he said it's a return to what had been. On September 9th, the Governor came before the Commission and testified then that he regretted signing it, his understanding of what always had been limited to Albany and the legislature, and that is why for the last two sessions he's tried to reverse the amendment. I wonder if you would care to comment on that.

MR. CRAWFORD: Well, the Governor hasn't seen fit even through an emissary to convey that impression to our association or to any of our members. It may
IN RE: OPEN MEETINGS LAW

be that he regretted that decision, but I can
tell you that if he has, he's never expressed
it to my particular members.

Secondly, it was very clear in
my view when we asked the Governor to sign
the legislation Chapter 136 or whatever it
was, it was very clear and his council staff
clearly understood what the implication of
that was. I can't suggest whether the
Governor did or did not. But certainly very
bright young people that worked for the
Governor understood very clearly why we were
supporting that particular amendment, and
those same young people working at the
direction of the Governor had negotiated this
out with equally bright young people in the
senate and the assembly.

I'm very hard pressed to put
much credence in that kind of explanation. I
do believe the Governor regrets he signed
it. That I can believe.

MR. SMALL: He said it
elsewhere, as well, but not just before the
Committee.
IN RE: OPEN MEETINGS LAW

MR. CRAWFORD: I can't speak for mayors or towns, but as far as we're concerned -- and he comes to our legislative conferences -- he has never expressed that regret in any way to us and to inform us that he was going to seek to put us back where we were prior to Chapter 136.

MR. SMALL: Well, you might ask him at his next appearance.

MR. CRAWFORD: He's very busy these days. He's somewhere else today. I'm sure if he comes to our conference, Mr. Chairman, he will be asked the question.

MR. SMALL: I want to ask you, you are all expressing again and again that you wanted to be treated the same as the legislature. But the fact of the matter is the body of laws in New York, as in almost everywhere else, there are differences. Just to cite one example, the new ethics legislation, disclosure involves only those representing communities over fifty thousand population. That's not a problem on the county level, but in cities, villages, towns,
that the majority of them. So that kind of
dual standard exists there, and I'm sure in
many other places. Why are you all so
sensitive about that? I'm sure it cuts both
ways. I'm sure there are things that
legislature is inhibited by that you're not.

MR. HABER: I think we're
sensitive to the issue because there is no
problem in local government, and we're
wondering why we are being singled out as a
target for this type of legislation when
there is no demonstrative problem in local
government.

MR. FARRELL: I do agree there
are many instances where there are different—
rules for different levels of government, and
even within levels of government of different
sizes. I think what we're talking about here
is the concept.

Both parts of government are
legislative bodies, and they have to be able
to deliberate and come to a consensus and
concede. And as to whether one should be
discussing within a political context certain
IN RE: OPEN MEETINGS LAW

issues that you have to reach consensus on is the same. And I think it's the concept itself that causes us to fail to see any delineation between the two bodies.

MR. SMALL: One final matter, if I may, having had the pleasure and the great learning experience of traveling with the Chairman around the state earlier in the year, the one thing that impressed us more than any other, when you think of government and accountability, the smaller the community, the more accountability there was.

As you went -- in the smallest towns we visited, their officials were the easiest for them to reach out and touch and to ask, pick up the phone, and that indeed the state legislature was most difficult. The state government is most removed from their life experiences. And it seems to me in looking at the original open meetings legislation, there were lots of areas in which they carefully thought out what ought to be exempted and where executive sessions
IN RE: OPEN MEETINGS LAW

would be permitted.

Example, when you all or your constituencies investigate a charge of criminality, in matters involving a purchase that might affect the price of the purchase, all sorts of things that are there that permit executive sessions, that being the indication, and since almost I think all three of you at one time or another today have said that you really can't cite a major difference between the periods when you had to have open caucuses and when you didn't, why is that not sufficient, the provisions now for executive sessions and limiting caucuses as the courts had ruled the original intent to political not public matters?

MR. FARRELL: Well, I think that we all did also allude to the problems that -- the situations that arose because of the prior interpretation and that, in fact, you had the revolving door and that you had a whole series of other things and that the ability --

MR. SMALL: The revolving door
IN RE: OPEN MEETINGS LAW

was an evasion of when you had to have an open caucus?

MR. FARRELL: Correct. Maybe I misunderstood what you're getting at, then.

MR. SMALL: Well, perhaps I misunderstood you. Go ahead, continue.

MR. FARRELL: If there's been no perception of vast change in the various stages that have been alluded to during the evolution of this statute, I think the one difference is that during the time when it was prohibited, that there was the open door, there were a series of other means by which those involved in the legislative process found it necessary to arrive at a consensus— as to how to move the process forward, be that either formal or informal.

I won't say anyone did anything illegal, but there certainly may have been some attempts to legally circumvent the law. Government continued to function. The garbage continued to get picked up. The streets got plowed, and all those other things happened. But the ability of the
IN RE: OPEN MEETINGS LAW

local legislative body to arrive at the decisions that made those things necessary, perhaps there were some extra hurdles they had to jump through, which may have been more conducive had they not had to jump through.

MR. CRAWFORD: Mr. Small, the -- I just think that local governments have -- when you say why don't you just, you know, kind of accept this and go along with it, I think is what you're suggesting, maybe you'll have to use some subterfuge as was done before. I think if you have reached a point where we're going to exempt the state legislature, put them in one category, and all the other legislative bodies will be something else, I think you can reach that conclusion rather easily and rather simply.

But our local officials, even those who don't have caucuses, who don't want caucuses, feel that those other entities that want them should have them, and we have reached the end of our rope with the distinctions. You selected the ethics bill. When Dean Feerick calls us back to have that
meeting on the workings of the state legislature, we have a presentation we can make with you now as to where there are double standards galore in the way the state government treats itself and its officials and its representatives as opposed to locals. It's a very long list, and it keeps getting longer, and I think we're wary of that.

And as we suggested at the very outset, if those who make and execute public policy feel in their collective wisdom that political caucuses should be restricted or prohibited, our local governments will support it. But as long as it's preserved or reserved, I think I should say for the state legislature, we're going to raise the same questions that those of our numbers who want them ought to be able to have them.

CHAIRMAN FEERICK: I would like to --

MR. SMALL: I was just going to make the observation that I would think you would be proud of the fact that you're so
IN RE: OPEN MEETINGS LAW

much more accountable, that you can be more open, but I'm sorry, Mr. Chairman.

MR. CRAWFORD: Right, I think we are.

CHAIRMAN FEERICK: I want to first thank the three of you for your very helpful participation in our own hearings. We have approached these hearings without certainly a collective point of view on a subject, and for some of us --

MR. MAGAVERN: We're going to have a private caucus.

CHAIRMAN FEERICK: For some of us, very much an open mind, and we're very sensitive to the issues of impact on parties, on municipalities, on part-time officials, and we're also very sensitive to the other issues of greater accountability and greater openness in government, in the hope of increasing confidence in government that some would say has fallen, and certainly if you measure it by voting participation, it's alarming. It's not only -- you know, it's alarming in terms of the national
IN RE: OPEN MEETINGS LAW

phenomenon.

So that, we will be working through these issues very carefully and giving appropriate weight to all the different points of view, and all the different points of view have really been reflected today, and it's been a real education for those of us who haven't been steeped in the local government, such as myself, but our Commission itself has not only some of the expertise that I have mentioned before, but in staff others who have been very accurately involved in local government. We have a former mayor of a community in Ocean Beach, Long Island, and others who have been helping us. That's in the past, but he's special counsel to our Commission, so our Commission does have built into it, not only academic strength, but a great deal of governmental and practical strength, as well, in investigation backgrounds and communication backgrounds.

I just mention that to you so that you will continue to have confidence
IN RE: OPEN MEETINGS LAW

that the Commission that's been created here is a commission that's approaching this carefully and thoroughly, and I do hope that we will be speaking to the issue certainly before we conclude our work. I don't know when, at this point, but this has been very helpful to us. Thank you.

MR. FARRELL: We thank you for the opportunity and inviting us.

MR. CRAWFORD: You have a very awesome responsibility. We wish you well.

CHAIRMAN FEERICK: Thank you very much. We may be coming back to you again, because another area we have a strong interest in is the subject of conflicts of interest, across the state.

Ms. Mauser. Welcome.

MS. MAUSER: I think you have copies, but I'm going to read it, because I wasn't quite sure of your format.

My name is Dorothy Mauser, and I'm a voluntary coordinator for Common Cause in Frank Horton's congressional district 29.

Common cause has long been a
IN RE: OPEN MEETINGS LAW

champion of open government and was a contributor to the structure of the original 1976 Open Meetings Law. When the 1985 amendment was passed, we maintained it weakened the law substantially. This legislation which passed within forty-eight hours was an affront to open, honest government.

As changed, the law permits political caucuses to be held with public business being discussed, thus excluding the public. When the change was passed, there was much media exposure. Public support for rescinding the amendment was strong and widespread. Both Common Cause and the League of Women Voters in statewide actions urged withdrawal of the 1985 amendment. Public informational meetings were held. Local government units across the state were urged to pass an open meetings resolution to the effect that each unit would conduct all its meetings in public in accordance with the original 1976 law.

Within less than a year, over
fifty governmental units in the state did just that, for example, the City of Syracuse, Suffolk County Long Island legislature which was mentioned here earlier, and the Macedon Village Board.

However, a number of units, most often one party-dominated units, refused to pass such a resolution. Most complaints of open meetings violations come from localities with one party dominated bodies.

There are hundreds of violations of the Open Meetings Law, according to research done by our executive director, Paul Elisha. He read reports from the New York State Legislative Library, the records of the Association of Counties and the files of the Committee on Open Government, which itself gets over six thousand calls a year on possible abuses -- or perhaps that's a little strong. It might be just questions.

These cases involved mostly one party dominated local governmental bodies, a preponderance of which are towns and villages. There are twice as many complaints
IN RE: OPEN MEETINGS LAW

concerning the one party dominated local unit
as there are concerning the bi-party unit.

Counties and larger cities tend to be
bipartisan, and there are few cases brought
against them. There are still cases brought
against them. Therefore, any reform should
include the local governmental units where
most of the abuses occur.

Any institution, no matter how
high minded, tends to fall into the hands of
an inside clique. It's much simpler that
way. However, no institution, public or
private, can remain alive or vital run by a
little power group. New ideas and criticism
are essential to its health. Dissent is
often the proposal of alternatives. Leaders
need corrective signals from the grass roots,
and a system which continuously examines
alternatives and cross-currents of opinion is
more likely to solve problems creatively.

And I felt the editorial in the
morning Democrat, which you probably all have
read by now, was related to that problem.

We urge open government laws
IN RE: OPEN MEETINGS LAW

which give the citizen adequate information, a means of participating in the decision making process, and measures to ensure the accountability of the system. Common Cause strongly supports reform legislation and urges that the following measures in principle be concluded. Now, if you have those, is there any need to read those?

CHAIRMAN FEERICK: I think you probably can go over that, jump over that, yes.

MS. MAUSER: Citizens are often not aware of their rights or uncertain of those rights at other times. The little booklet entitled Your Right To Know, New York State Open Government Laws and the little pocket guide, New York State Open Government Laws, are excellent references to New York State residents. The booklets are clear guides for citizen participation in local governments. If those booklets could be included in an existing state mailing, such as the state income tax package or the car registration reminder, it would greatly
encourage citizen awareness. In my registration reminder last month, I got this Protect Your Right To Vote, Register By Mail. I think that is excellent.

We found that even though these are given out by the Committee on Open Government, when these are placed in the library or passed out, they disappear. People are very, very glad to get them and very uncertain, and as the man representing the newspapers mentioned, people are not aware of their rights, not always. I mean there is, I feel, a big gap in the understanding of what can be done. So that concludes my remarks.

CHAIRMAN FEERICK: I want to thank you very much. As I focus on the -- your program of action, I would like to ask whether you have any information, focusing now on item number one, on page two, namely that a political party caucus should be prohibited if the minority is not allowed to place items on agendas for discussion.

I'm not aware, one way or the
IN RE: OPEN MEETINGS LAW

other, what the practice is throughout the state with reference to the ability of minority members to place agendas -- items on agendas for discussion. Do you have any information on that?

MS. MAUSER: This recommendation came from our state office, and these six are their recommendations.

MR. MAGAVERN: It refers to the caucus agenda.

MS. MAUSER: No, it would prohibit political caucuses in the main body agenda, I believe. I don't see --

MR. MAGAVERN: There cannot be any legislative body in the state where an elected member of the legislative body cannot introduce a resolution. Can there be such a thing?

CHAIRMAN FEERICK: Let me recognize Mr. Davies.

MR. DAVIES: I think the point is putting an item on the agenda, and I think in order to -- the agenda is set by the chair, and that an item is not on the agenda,

COMPUTER REPORTING SERVICE
IN RE: OPEN MEETINGS LAW

and in order to change the agenda requires a majority vote of the members present. And of course, if you're in the minority, you can't get something on the agenda to change. Am I wrong?

MR. MAGAVERN: I think he can introduce it and send it to committee, and they can bring it back and receive it and file it.

MR. DAVIES: But getting an item on the agenda for discussion, we're not talking about resolution. I think that's the point.

MR. MAGAVERN: I'm sorry.

CHAIRMAN FEERICK: I'll recognize Mr. Davies.

MR. DAVIES: If I could ask you, first, based on your experience in dealing with municipalities, local municipalities and the Open Meetings Law, what did you find to be the public perception of closed meetings? Do people believe their local legislators are doing illegal things behind closed doors?

MS. MAUSER: Yes, yes, you find
that people do -- someone usually knows that they are doing something behind closed doors. I don't know -- some people probably don't care, but there are always people that do.

MR. DAVIES: Now, I think you were here when the previous speakers -- witnesses were testifying, and they were very concerned, Mr. Crawford, Mr. Farrell, Mr. Haber, about treating the state legislature different than local municipalities, and I wonder if you could address that. How can we justify asking the local municipalities to be subjected to the law that the state legislature is not?

MS. MAUSER: My data doesn't cover anything with the state legislature, personally, and also I'm sure the Common Cause feels the state legislature should be open in its meetings, and we object to the secrecy too, but I have no data with me to support that. We feel that the law should cover the state legislature and the local, but the research is based on the local.
IN RE: OPEN MEETINGS LAW

MR. DAVIES: The League of Women Voters, Common Cause, were able to get some fifty --

MS. MAUSER: I thought it was quite a number until I heard the number of governmental bodies.

MR. DAVIES: Shouldn't this be left as a local governmental issue? I mean why shouldn't --

MS. MAUSER: I think it goes back to the paragraph where I said any institution, no matter how high minded, tends to fall into the hands of an inside clique. That's always going to happen. Common Cause will always have an agenda, because this is going to happen to any -- no matter how they plan to be open in their government. I think you have to do what you can to build in steps. Or I think you have to educate the community leaders that discussions interest the public in sometimes many different ideas. It's not necessarily black and white or good and bad. That isn't it at all. It's there are many ideas that should be
IN RE: OPEN MEETINGS LAW

considered.

MR. DAVIES: Thank you.

CHAIRMAN FEERICK: Commissioner Magavern.

MR. MAGAVERN: Your recommendations all refer to, I think, a political caucus; that would prohibit political caucuses under certain conditions that are specified. My concern is with the definition of the term political caucus. I take it that you would not prohibit informal meetings of groups of legislators to discuss issues, and if that's true, I have two concerns, one is philosophical, how can you justify prohibiting such a group on the ground that it happens to be a group identified by party affiliation, rather than some other principal affiliation, and the second is if you do prohibit it as a party caucus, but you do permit other informal groupings, aren't you going to proliferate the informal groupings in place of the party caucus, and aren't you going to perhaps even weaken accountability of certain of the
IN RE: OPEN MEETINGS LAW

parties?

MS. MAUSER: I think this means the political caucus should limit its agenda to strictly political matters.

MR. MAGAVERN: But my point is not that, but that suppose, for example, there's a proposal within a particular city. They are considering increasing the property tax, an income tax or an increase in the sales tax. And suppose that the local party organizations are considering taking positions on that. Shouldn't they be able to, and shouldn't the members of the --

MS. MAUSER: Is it going to matter if it's secret? Well, we're not talking about a secret political caucus, however.

MR. MAGAVERN: This is an absolute prohibition of political caucuses under any circumstances, which I think would be common. The third recommendation would be to prohibit political caucuses when more than two-thirds of the legislative body are of the same party. If I understand that correctly,
IN RE: OPEN MEETINGS LAW

it means that a two-thirds majority of some, say, county legislative body or city council could not meet as that group as, say, the Republicans or the Democrats of that body.

MS. MAUSER: Isn't this like having the meeting and excluding the minority point of view almost? I think what that's supposed to prevent -- it's like you're having a regular meeting, but the minority is not permitted to be there. Therefore, if you prohibit this particular caucus from occurring --

MR. MAGAVERN: Would you permit some other interest group? Would you permit a group of legislators who are particularly interested in, say, an environmental protection and who have banded together on certain matters before, would you prohibit them from getting together to discuss strategy for an upcoming legislative item?

MS. MAUSER: Why would they want to meet? I keep getting mixed up with secret.

CHAIRMAN FEERICK: It's not
IN RE: OPEN MEETINGS LAW

clear to me -- I'm responding to Commissioner Magavern now. It's not clear to me that point that means you can't have a political caucus if more than two-thirds are from the legislative body. The way I understood it is it means that couldn't be a closed meeting.

MS: MAUSER: I think that's what I was referring to.

CHAIRMAN FEERICK: It doesn't mean the political caucus of the two-thirds group cannot take place, but it cannot take place under these recommendations any longer in private. That was the way I understood it.

MR. MAGAVERN: Okay.

CHAIRMAN FEERICK: I agree with your observation that the literal reading of this would suggest you can't have a caucus at all, public or private, but I think the context of the recommendations is broader than that.

MS. MAUSER: I think so, yes.

CHAIRMAN FEERICK: Because earlier --
IN RE: OPEN MEETINGS LAW

MR. MAGAVERN: That alleviates my --

MS. MAUSER: I wasn't involved in the writing of the particular recommendations. That was the state board meeting.

MR. MAGAVERN: Thank you.

CHAIRMAN FEERICK: Are there any questions? I want to thank you very much for your participation.

MS. MAUSER: You're welcome.

CHAIRMAN FEERICK: We'll take a short recess. I understand our next witness is not scheduled to arrive until 5:15, and the witness prior to that witness just notified us that a conflict has developed to prevent his participation at this point, so we will take a short recess.

(Recess taken.)

CHAIRMAN FEERICK: Thank you very much, Mr. Murray, for being with us today. I know this has been a very active period of time for you, and I gather it's going to get more active in January.
IN RE: OPEN MEETINGS LAW

MR. MURRAY: Thank you. My name is Kevin Murray, I'm the minority leader, currently, of the Monroe County legislature.

We have had open caucus in the last two years, not as a matter of law but as a matter of caucus policy. We have previously, in the Democratic majority of 1977, which took office in January of '78, we had a similar policy of open caucuses, which we adhered to for about eighteen months, I believe, and then pretty much abandoned at least the total open caucuses, had sporadic openness, depending on subject matter.

At the time, at least my recollection of why we moved away from it, was the caliber of reporting of the caucuses did, in fact, cause some negative reactions from people. The example I will give is one about a three hour caucus that went until about eleven o'clock at night. At the very end of it, one member of the caucus indicated that if we were going to meet like this continually, we would have to have a salary increase. The next morning, that was a
IN RE: OPEN MEETINGS LAW

headline in the paper was the Democratic caucus that discussed it. That was pretty much the straw that broke the camel's back.

I think if openness is going to be had, you have to have a degree of responsibility from the media that at least at that point was not evident.

Our experiences more recently have been much more positive. I went into having open caucuses in January of 1986, as our official policy of then elected Democratic majority, with some reluctance. My feeling was it was worth giving a chance, but the -- myself and a number of us made it clear to the media at the time that we would be willing to close them down quickly, if a repetition of what had happened in the past occurred.

I'm very pleased to say that that has not occurred. I think the reporters have acted very responsibly. They have taken caucuses for what I think they should be, and that's background material for a better understanding of what goes into the
IN RE: OPEN MEETINGS LAW

discussion and the policy making, thought
process of policy making, rather than chasing
either in or out of context our remarks that
could be embarrassing to people.

By and large, the media has
chosen quotes from our full meetings, the
open meetings, that are related, obviously,
to what occurred in caucuses. But they have
chosen their remarks, and they, I think, have
gotten a much better idea of the spirit of
our decisions from them -- from the open
caucuses, and we have been very pleased. And
I have gone from being a very reluctant
supporter of the open caucus to being a less
reluctant supporter, and would hope to
continue that in the coming year.

I do think that it needs to be
stressed that the quality of reporting and
the type of reporting makes an enormous
difference to the willingness of an elected
official at such a meeting to be candid and
open, if, in fact, the official feels or is
afraid of looking silly or stupid or having a
quote that could embarrass you later on,
IN RE: OPEN MEETINGS LAW

asking a question that might show that you
don't fully grasp the material, et cetera.
Then, in fact, rather than helping the public
understand, I think open caucuses would be a
negative.

Again, that has not been our
experience over the last two years, but
rather the reporters have used it for
background. We have had editorial writers
attend our caucuses during major stories, and
again, I think the reporting has been one of
background rather than the quotes, what had
occurred in our experience in the '79 period
was people, at least one in particular
reporter but also others, chose the
exceptional, chose the remark out of context,
chose things that were divisive in nature,
and that caused problems, and that's why we
moved away from it. That has not been the
case.

I don't know how you could write
laws or write regulations that would include
proper reporting, because I certainly don't
advocate, and I wouldn't ask you to do that,
IN RE: OPEN MEETINGS LAW

but at the same time, our limited experience
in Monroe County in the Democratic caucus has
been the reporter basically determines
whether they are valuable or not.

Our members have felt open.

People have showed anger. People have even
used colorful language on occasion, because
they feel comfortable enough with the people
in the -- from the media who are in the room
that they are not going to see a four letter
word in the newspaper article, but rather
they are going to see when a report is done
upon governmental issue oriented matter, it
will include the substance rather than
peripheral character or wording that might be
not what you would like your neighbors to
read in the paper.

Again, without any regulations,
we had discussed trying to have ground rules,
and at one time the basic belief was there
was no way to have a ground rule with a
reporter as to what can and can't be done.

We had discussed perhaps having, you know, no
direct quotes from it, and decided not to do
IN RE: OPEN MEETINGS LAW

that. It turned out to be unnecessary, because we have not seen it, and when we have seen it, they are quotes that people would have no problem with or people, you know, did not disagree with.

So again, our experience in our body is different from many, I think, in that we have considerable reporting of what we do. Certainly a town board or a city council with today, or at least in January, it will be unanimously Democratic. The school board is unanimously Democrat. Many of the towns are one party towns. In those cases, clearly lack of openness can mean the decisions are merely pro forma, and I think that would be a very real problem and is a very real problem, because of the large amount of publicity in reporting generated by the county legislature and the narrowness of the majorities recently.

I believe it's less of a need to have, you know, strong laws, in the same way the law, as it had been, I don't think ever would have applied to us anyway, because it
IN RE: OPEN MEETINGS LAW

required a majority of the body to be in the room simultaneously. And I know the other party got around that by simply not having one of their members in the room all the time when there was a reporter present. When reporters eventually got tired of showing up, what happened we'll never know.

But it's difficult to get fifteen out of fifteen people in the room at the same time with sixteen or seventeen. It's probably possible that that situation would arise, but we have had a pretty favorable history in the last year and three quarters, almost two years now. I think we will continue it. I think some of the people, including myself, who were hesitant to move in that direction, have given up some of our apprehensions, although not all of them, and I believe, you know, that we will continue the policy in the coming year. And I would hope the reporting would continue to be the same, because I do think the reporting makes an enormous difference, and that's the critical factor insofar as the Democratic
IN RE: OPEN MEETINGS LAW

caucus in the Monroe County legislature is concerned.

CHAIRMAN FEERICK: Thank you very much. I have two questions I would like to ask you. First is to what extent do you get participation in your caucus of members of the public, aside from the attendance?

MR. MURRAY: We have sent out notices, if we have an irregular caucus, we will send notice to all the press of the time and place. Most of the time our caucuses are the same. We are on a three week schedule, so everybody knows when they are anyway. We have not had an enormous amount of participation of walk-ins.

We have had people requesting to make a presentation to the caucus, and we have, I believe without exception, always allowed that, and it has been opened in the last two years. I would say it's about every other or every third caucus we have presentations from one group or another who either want more money or have a particular issue, whatever their particular desire is.
IN RE: OPEN MEETINGS LAW

We do not tend to have, you know, people just walk in.

We do have a public forum before the legislature as a whole and before each of its committees. And those forums we do have citizen input. Those citizens have chosen not to avail themselves of attending our caucuses. I don't believe there's -- I don't believe we have ever had a single person -- we have never turned anybody down, but at the same time, probably because of just the constraints of the room, we meet in a conference room that perhaps will sit twenty-five people tops. We have fourteen legislators and four staff people and three or four media people, pretty much crowd the room. So if you had too many people, it would be somewhat uncomfortable.

CHAIRMAN FEERICK: Thank you.

You also referred in your statement to experiences in towns where essentially there has been a one party domination and the impact on government in those areas. Could you elaborate.
IN RE: OPEN MEETINGS LAW

MR. MURRAY: I don't have great firsthand knowledge. I have attended occasionally town board meetings and city council meetings and school board meetings, and I do recognize, at least I feel there's a large difference between a body that has seven members or nine members, all of whom are from the same part, and they sit down at a caucus and walk out into the room, and all void limited of any debate. Certainly in that particular circumstance it's very difficult for a member of the public or for the media to have any understanding of what went into it.

In our particular situation, again, I think more because of a large number of people, twenty-nine in our body, to the fact that the reporters do spend considerable amount of time not only attending a meeting but on the phone with people and, you know, following the issues, there are regular reporters who cover us, as opposed to a town meeting where someone may have seven towns they cover, and they just go to a meeting,
and they would have no understanding whatsoever of what happened.

In addition, because of the political breakdown in the county government being relatively close, there normally is considerable debate. It is very rare that an issue of any controversy whatsoever is moved, seconded and voted on, you know, without discussion. Each party tries to, you know, make their points as much for the media, presumably as much for the media as for each other. But there is a full and open debate on most issues at our level. I do not believe that takes place to the same extent on smaller bodies, especially bodies that are not as politically contested as county legislature is.

CHAIRMAN FEERICK: Have you observed that in some areas of your county?

MR. MURRAY: I have attended meetings, and perhaps if I attended a county legislative meeting, I would have little understanding, as well, but I think I would have some understanding attending a county
IN RE: OPEN MEETINGS LAW

legislative meeting for the first time by
hearing the debate on controversial issues.
I know of one village and two towns where I
have attended meetings because I was to do
something afterwards with people, where I sat
there and felt like a complete idiot, because
there was no way on earth you would have any
way of knowing what was happening. Issue
would be moved, seconded, and the next issued
would come up. Nothing was debated or
discussed. So there was no way of knowing
what went into the decision.

CHAIRMAN FEERICK: Commissioner
Magavern.

MR. MAGAVERN: I take it the
lesson to be drawn from your experiences is
open caucus would be good if they are
optional, but I take it you feel that you
have got to have the choice in order to have
the ability to cut them off, if you find that
you don't like what the media is doing, and
you find that that's having an adverse effect
on your deliberations?

MR. MURRAY: I hadn't put it in
those words. I believe it is optional, no matter what the law is. I don't think you could possibly write a law that would keep people or mandate that people meet in any way to discuss things if they don't feel comfortable in discussing them. I think that -- I just take that as a given, that there would be no way whatsoever, that that could be done.

If people were unwilling to meet because they felt their statements would be unfairly taken out of context, they simply would stop. I would. I would not attend such meetings. I wouldn't discuss issues at such meetings, and I'm certain that many of my colleagues would feel the same.

In our particular circumstances, as I say, we have been in the minority. I'm talking merely of caucuses, not of the meetings themselves. Now, you can easily get around any regulations. I am not speaking of circumventing law. I'm merely saying that people will stop coming, and that is an experience I assume others would share, that
IN RE: OPEN MEETINGS LAW

if you do not feel comfortable in a
particular environment, you simply register
your disapproval of that process by not
coming.

MR. MAGAVERN: Let me ask you
this, I think you may have suggested an
answer to it, but I'd like to hear it more
fully. We have had two points of view
expressed earlier. One is that with an Open
Meeting Law covering caucuses, we get better
participation, fuller deliberation, and
fuller disclosure to the public what's going
on. The other is that we will get the
reverse, because people would clam up, or
they will revert to little informal meetings,
which won't be reported at all. What do you
think the practical effect of -- which
direction do you think the practical effect
would likely go, and if the present exemption
were repealed, and all public -- any meeting
where there is, say, a majority of the number
of legislative body present, had to be open,
do you think the predominant effect would be
beneficial or adverse?
IN RE: OPEN MEETINGS LAW

MR. MURRAY: Again, I believe the answer is primarily determined by how the media covers those events. That's my personal view. If we had one, and the Democratic caucus will be the majority caucus in January, it will be my belief and expectation that as of January 1, we will continue the policy that we have had for the past two years, whether there is a law or isn't a law.

MR. MAGAVERN: You still have the ability under present law to change that policy?

MR. MURRAY: That's correct.

MR. MAGAVERN: Well, the proposal has been made that the state law should be changed so you no longer have that choice. I'm trying to get a sense of the practical impact of such a change in the state law.

MR. MURRAY: I think in our particular circumstances, in the legislature, if the press reporting were similar to what it has been, we would have no problem.
IN RE: OPEN MEETINGS LAW

whatsoever having caucuses. I'm not speaking of complying with the law. We would comply with the law in any event, certainly, but we would have caucuses and frequent caucuses, and caucuses I think would be valuable to the public and to the press in attendance.

If, on the other hand, the reporting was as it was in '78 and '79, I think we would simply have less attendance, and when we were talking about seventeen votes with fifteen being the majority, you do not require much of a fall off from seventeen to simply having, well, four or five people feel so uncomfortable they won't attend. You wouldn't have a majority. If the other people wish not to have openness, you might not even have caucuses. We will have openness on the floor, and you will have the groups of four and five, you know, talking about issues -- or two.

MR. MAGAVERN: Would you get better debate on the floor if you do that? Could that be looked upon as a benefit?

MR. MURRAY: It's very hard --
IN RE: OPEN MEETINGS LAW

it's hard for me to say. I would think that
the best solution is, I think the law is
valuable, especially in those cases where you
have one party. That's my first position.

In our particular circumstances, I'm talking
about how it would react as a practical
matter in a body I'm familiar with, which has
a relatively close majority.

In that case I think you need
really, for it to work, as I would hope that
the drafters of such a regulation and the
legislators who would pass such a law, would
be that it would not inhibit. It wouldn't be
a game of finding a way around this but
rather it would be a way that would serve the
purpose of having the public informed of what
was going on.

I think that requires some
degree of partnership with the media. I
don't believe you can write that into a law.
I think that's a practical matter in each
municipality with each member of the press.
If they react in a responsible fashion and
dealt with substance, I believe legislators
IN RE: OPEN MEETINGS LAW

will be more than willing -- and our
experience shows it -- to have open, honest
and actual debate and caucuses and go out
from there and have the substance of the
agreement, then, given by normally the
leadership or the committee chairman, as the
case may be, in the open debate on the floor,
but both cases would be open.

That's what I would hope for,
and that's what I think would be best. On
the other hand, it's my belief that if the
media uses caucuses to embarass individuals,
those individuals will not break the law.
They simply will not go to caucuses, or they
simply will not be forthright, if they do go to them, which I think makes the law, while
still on the books invaluable, maybe in other
circumstances, but I think it takes away a
great deal of the advantage.

MR. MAGAVERN: One last little
question -- I appreciate your answer. That
has been very helpful. But I'm curious about
your experience when it didn't work, and when
people stopped coming, and the quality of
your caucuses deteriorated because people were inhibited. What effect, if any, did that have upon the fullness and quality of the debate on the floor of the full legislature?

MR. MURRAY: Well, I think what happened was there was an increase in smaller meetings, smaller meetings took place with "key personnel" whoever they might be, and they would differ depending on the issue. And when they came to something of a consensus in those meetings, I think then the position was given on the floor and most other people, as long as you included the right key people, other people tended to go along, unless they had some major disagreement in advance. The quality of debate, I think, I think the public loses something when that occurs, because they didn't see from the beginning the thought process that went into it. And many people, in that particular environment, had less than their full input, because there was sort of a diversion if you're on this committee, you're
IN RE: OPEN MEETINGS LAW

interested in this, if you're not, you're less interested.

But as a practical matter, again, it doesn't take much -- different dynamics is true in one party or five, seven, nine man person body, you have different dynamics, but in ours, I think the public is better served by an open caucus, as long as it is reported fairly, and granted the people who are going to determine what fairness is are going to be the individual legislators, and if they feel they are being treated unfairly, again, I don't say they will break a law. They will simply not participate, and I think you have lost the value of the open caucuses or open meetings.

MR. MAGAVERN: Thank you very much.

CHAIRMAN FEERICK: Mr. Davies.

MR. DAVIES: One proposal that you are perhaps aware of is by the Committee on Open Government is to provide the two-thirds rule; that is that the caucuses must be open if they are two-thirds of the
IN RE: OPEN MEETINGS LAW

total body present. I wonder if I can get your reaction to that proposal, particularly in light of your feeling that where the majorities are particularly lopsided, that that's where you really -- with a closed political caucus it's a damaging thing.

MR. MURRAY: Well, as a practical matter, I would hope to be in a caucus some day where I would be forced by such a regulation to be open, but it's not too likely in the near future. But I do think that that would be a valuable thing. At the same time I don't want to give the impression that I'm against the same regulation being applied to a simple majority.

MR. DAVIES: What about the majority. Would you impose a regulation requiring that one-third, let's say, if one-third of the members are present, that you have to have a -- it has to be an open meeting.

MR. MURRAY: Again, I'm familiar with my own body of the legislature, where
IN RE: OPEN MEETINGS LAW

we're fairly large, to determining fractions isn't that hard. If you have ten people, that's a fairly substantial number of people, but if you had a body of seven, you're allowed to have dinner with two friends, there's a practical problem that comes down with a very small body. I don't have the answer to that one way or the other.

Again, our experience, we have been open -- I believe we filled all of the requirements or basically all of the requirements of the prior law during the last two years, even though it's not in effect. We have had, on-occasion, actual motions and votes to go into the equivalent of executive session. We simply say to close it, and at that time, we have only dealt with personnel matters, you know, often internal caucus personnel matters, which it's my belief would have been exempt from the openness under the prior regulation.

So I think we have been pretty consistent over the last two years in keeping with the law that wasn't, even though it
IN RE: OPEN MEETINGS LAW

wouldn't apply to it, even if it was, because we were in the minority. And I think that it worked out pretty well. I think the public was well served. I think the reporters did get a much better feeling for what were the dynamics of a caucus, and I do not think it inhibited discussion to any great degree.

In fact, I'm tempted to say I think it helped discussion because when you say at the end of it, does anyone else have any other views, or am I hearing consensus on this or something, it would almost -- there would be a pressure for someone who had some lingering questions, doubts, to bring them up. And I think that's valuable to share in a more informal atmosphere of the caucus, and I think that happens.

I'm basically pleased with what occurred over the past two years, but I want to be very much upfront that I believe that a reporter could come in and could just tear you apart in caucuses. And if that were the case, my views, and I believe that of most other legislators or many of us, would change
IN RE: OPEN MEETINGS LAW

and change radically, and we would either
close them, if that were legal. If there
were such a regulation, we would come up with
alternative mechanisms to accomplish what a
caucus would accomplish better while being
within the law.

MR. DAVIES: Can I just get a
couple dates straight here. As I understand
it, the Democrats were the majority in 1978
and '79?

MR. MURRAY: Correct.

MR. DAVIES: And you also during
that period had open caucuses?

MR. MURRAY: Correct.

MR. DAVIES: And that was also__
the period in which the -- by your account,
the newspaper reports were -- the media
coverage, at least the newspaper coverage,
was rather difficult?

MR. MURRAY: Again, by and
large, I wouldn't say it was unfair, but
there were enough specific examples where one
or more members of the caucus became outraged
at what was reported, that it took away the
IN RE: OPEN MEETINGS LAW

effectiveness of those caucuses.

MR. DAVIES: Was it just the

coverage itself, or was it, in fact, the

activities and actions of the members of that
council different? I mean obviously -- all I

have is a newspaper report reporting the

Democrats at that time as being very

fractious and having fractious divisive
debates at the time. I guess so the question

is was it just the newspaper coverage, or in

fact, was there a problem with the caucuses

themselves at the time? If there was a

problem with the caucuses themselves,

shouldn't that have been reported?

MR. MURRAY: I'm trying to

separate them out. I have no doubt that

there were those horrible words you mentioned

at that time, and I have little doubt that

there will be similar debate, discussion and

strong feelings in the future, and I welcome

that. And I don't think it's a good sign

that government is working if everyone agrees

all the time. I don't think that it's the

people doing their jobs. I don't think
there's any problem with having tough debate and expressing your points, and we encourage it.

Differences of opinion can be reported in many different ways. If they become personal, political people, like I believe any other human being, get very angry. And during a debate on an issue, there are times when someone slips, either inadvertently or through anger or misunderstanding, says something that starts to move into personalizing it, if that is reported, it causes a rift and hard feeling. If it's something that is argued, sometimes it will never leave the table. It was done away with at that point. I don't know if that directly answers what you're saying.

Were there hard debates?

Certainly there were. At the same time, I don't think the substance of the difference, the difference of opinion, would be what individual members would object to. In fact, sometimes tough debates are just for that purpose, so that you can get your strong
IN RE: OPEN MEETINGS LAW

opposition into the media. I know people have a problem with that, but it's when you moved into the personal area that people became very angry. And I think there were times we moved over that, or because you had to get a story, and the caucus was by and large dull, that you just picked something and blew it totally out of context.

I use the example of the pay raise as something -- there are probably ten other things that we did discuss, but public officials are very cautious in that particular area. And to go home and in the morning pick up a paper, some of us, myself included, never even heard the remark, weren't aware of it until later somebody told us what happened, and we're reading about what happened, became very upset over having spent a number of hours in what we thought was a governmental duty, and seeing it reported as though we spent three hours feathering our own nests. And it's a very touchy subject to begin with.

And in addition to that, it was
IN RE: OPEN MEETINGS LAW

not done, and the reporting of that particular thing, I think, caused many people to re-evaluate their views, and that -- I have a particular reporter in mind, certainly of no value of putting a name out, but I don't think the reporter is the issue anyway. I think it's the newspaper or, you know, the radio station, whatever it was.

One person I think can make for open caucuses being very unpleasant and people unwilling to participate, and no matter what -- you can pass a law saying you can't do something, but I don't think you can pass a law saying you have to do something, in this particular area. I personally would favor a law saying you can't do certain things. At the same time, if there isn't some spirit to that law and an understanding on some people, it won't accomplish its aim, because people are not going to put themselves in an environment that proves to be embarrassing to them.

MR. DAVIES: Now, as I understand in 1980, the Democrats lost the
IN RE: OPEN MEETINGS LAW

majority.

MR. MURRAY: Right.

MR. DAVIES: And the caucuses, the minority caucuses were closed until '85 when you took the majority, again, November of '85, and now you made a comment, according to the newspaper, it says Democrats announced they would open private caucuses for the first time since 1980 when the Democrats lost the majority control of legislature. And you were quoted as saying, there's a general sentiment, that is as the majority, you have a different obligation than you do as the minority. I was wondering what did you mean by that? You seem to be saying as a majority, you have an obligation to open your caucuses. Is that what you meant, and what do you mean by it?

MR. MURRAY: Well, certainly there is a difference between being in the minority and majority. The majority, you have a responsibility for pushing programs, and you have also the ability to actually get things done to a much greater degree than
IN RE: OPEN MEETINGS LAW

when you are a minority:

I'm not certain what the context
of the particular article you're reading is,
but I do agree with myself, if that's what I
said, that there is a difference between a
minority and a majority, and the majority has
a much greater responsibility to the public
because the majority has the ability and the
obligation to accomplish things. And as
such, I think you have a greater obligation
to the public to show them that you're
operating in a responsible fashion. So I
think there is a difference.

At the same time, I think it's a
difference of degree rather than kind.
Fourteen versus fifteen certainly is a
difference in our body between control and
minority, but at the same time, I think it's
somewhat artificial, although I recognize if
you write legislation, it has to have a
cut-off point, to say what is allowed for the
fourteen is not allowed for the fifteen.
It's just a degree thing.

MR. DAVIES: Now some people are
contending that open meetings is really just a press issue. It's not something the public is really concerned about. I wonder if you could address that. My first question in that regard is has the open meetings -- question of open meetings ever been a campaign issue for the Democrats in the county legislature?

MR. MURRAY: I think at one time we had some slogans that probably could be interpreted as that. I think the '77 election, we're the lean, clean and seen team. And I guess the clean and seen if not the lean would go along with the openness. And I think we were reacting, at that point, to some I guess you would call horror stories or unpleasant episodes.

We had a budget passage in Monroe County that was done at a nearby restaurant and written on a napkin at three o'clock in the morning. And it had cuts that were subsequently found to be illegal and counterproductive in many ways, and certainly we opened up to a considerable degree, when
we did take the majority, from what had been a pretty closed shop, both legislatively and administratively. I don't think open caucuses, per se, were a major issue, but certainly in my own campaign, I never made reference to them. I would agree with you that the public isn't particularly concerned. I agree with your statement the public is not particularly concerned. At the same time I think they should be.

Is it a media issue for the most part? Yes, but for a good reason. I think media is a window upon which others see what we do through that window. So I don't think as a practical matter, unless you're dealing with specific subject matter where there seems to be abuses, that the public is greatly interested in having reporters in our caucuses, but at the same time, I think there are merits to it.

MR. DAVIES: Are the Republican caucuses open now?

MR. MURRAY: My understanding is they have a policy of being open, in which
IN RE: OPEN MEETINGS LAW

case someone asks to come in, and then they are closed. That has been their policy for about six years. I will note that ninety percent of the time, they are open, because no reporter has ever bothered to ask, because they know the answer.

I also note that we receive more press coverage when we were open ninety-five percent of the time when we closed it for a matter that was allowed, subject matter that was allowed to have closed, the reporters had tremendous -- I'm going back now to '78, '79, had more publicity about the few instances we closed it while never even mentioning or mentioning the very last line of a fifteen paragraph story, that the other party is totally closed. So that the publicity you get is not unambiguous being open when there is no regulation.

MR. DAVIES: Can you assess the impact upon you as minority leader of having open caucuses? Does it make your job easier or harder?

MR. MURRAY: I think I will be
able to answer that better in two months than I can now. In a couple weeks we'll see what people's views are. I think it's made my job easier. I didn't think that when it first happened, but I think by and large it has. I think contrary to at least my expectations, I think it's added to attendance, where as I thought at first that it might cause a problem. But again, I have to say it's in an atmosphere where people are not really scared. Some of the people who are most apprehensive of doing this make jokes on occasion, and if those jokes were ever printed would be devastating to them. But the jokes are offhanded remarks that most people make all the time, and they are not reported. It's the substance that gets in the story, and I think that for that reason, they have been very good. People feel very comfortable by and large in our caucus, I believe, given their views.

MR. DAVIES: Do you think the fact that you have open meetings, open caucuses, has any impact one way or the other
IN RE: OPEN MEETINGS LAW

on your abilities to recruit new candidates
and so forth or new people into the -- as
district leaders or into the party?

MR. MURRAY: I don't think I
have ever thought of it in that context.
Recruiting candidates is normally a very
separate issue. It's a one on one issue,
normally, with people.

I guess if our caucuses were
presented in a negative light, which I think
they were in '78 and '79, for real reasons,
as well as some that we wish didn't occur,
that probably did have a negative impact on
our recruitment: I think it had a negative
impact on your subsequent ability to win
elections. And I think that's why in the
next year, we decided almost unanimously, I
believe, that the experiment was a nice try,
but, you know, we should move away from that,
for a couple reasons, one of which we were at
a great competitive disadvantage, and the
laws are important for that reason. We were
at a competitive disadvantage being open when
the other party was closed.
IN RE: OPEN MEETINGS LAW

MR. DAVIES: You were in the majority, and the other party was in the minority.

MR. MURRAY: That's true. When we made the decision to close, we were in the minority, and they were in the majority, and there was some causal relationship between that.

MR. DAVIES: One last question. Do you think the strength of legislators' electoral support, does that have an impact on how likely he or she is to support the concept of open caucuses? In other words, is a weak legislator with weak electoral support less likely or more likely to be in favor of open caucuses?

MR. MURRAY: I think, and I'm guessing very much, because the normal fact of some human beings being thick skinned and some thin skinned, I would imagine a marginal candidate would have much more of a reluctance being in an environment where a stray remark could be used in a subsequent campaign. That's a guess. If you're winning
IN RE: OPEN MEETINGS LAW

with seventy-five or eighty percent of the vote, I'm not saying you would say let the public be damned or anything, but I don't think you're necessarily worried. On one particular issue you're not going to lose your support.

So I think you're probably more willing to just say what's on your mind, if you're stronger, than if you're 50.1 percent and you're expecting the other party to come after you in the next election, you might be very apprehensive in putting yourself in an environment where a remark might be shown to say, "This fellow doesn't know what he's talking about" or asks a question about an issue important in our district that he should have known years ago. Certainly those things can be put together in a way that would be very embarassing.

MR. DAVIES: Thank you.

MR. SMALL: Mr. Murray, many of the remarks you have made would be cheered by your friends and critics in the press, but you always keep coming back to that line
about when they don't get too personal.
Under our system of government, of course,
while laws can be passed regulating you as an
official, the first amendment will not permit
them to tell your local newspaper not to get
too personal. That being the case, what is
your own -- if you had to make a choice
between the pre-1985 Open Meetings Law and
the present amendment, which, in effect, says
you can close caucuses, what would your
choice be?

MR. MURRAY: I clearly at this
point would favor open caucuses and having
the law so mandate them. I certainly agree
that -- I don't believe there's any way you—
could pass a law.

At the same time I think the
owners of the media and the managing editors
and et cetera down the line, can, in fact, by
what they say to their reporters and what
they think is appropriate, can make it either
work or not work. And as a practical matter,
just as you can't pass resolutions that will
tell the press what they can do, I don't
IN RE: OPEN MEETINGS LAW

think you can possibly pass any law that will
tell a candidate that they have to be open
and honest—and bear their soul if they feel
it's going to be negative to them. They
simply won't do it.

MR. SMALL: Would Monroe County
have been better off if the Republicans as
well as the Democrats had had open caucuses?

MR. MURRAY: I think Monroe
County would have. I think the Democratic
party is better for their having closed
caucuses, because I think closed caucuses
lead to getting out of touch to some degree
with the public; and I think when you get out
of touch, you can make major mistakes. In
this case, at least for purely partisan
reasons, I think we were able to take
advantage of those mistakes.

I think government is better
when it's open, and I think private deals or
things that cause problems and the bidding,
you know, open caucuses is just an extension
of some ways of civil service and bidding
regulations and other things that I think
IN RE: OPEN MEETINGS LAW

have the impact are not perfect and have
problems but are cleaning up government and
making it more responsive to the people.

MR. SMALL: Two more brief
questions, one, an earlier witness, Ed
Crawford, who represents, as you know, your
association of counties, and he and his
counterparts for the cities and towns all
kept stressing that if the law is to be
changed, it has to be changed for the
legislature, as well. We shouldn't be
treated any differently. Does that matter to
you? State legislature, I'm sorry.

MR. MURRAY: I don't see the
difference why something should apply to some
and not to others. I have to admit, I'm not
especially knowledgeable of the inner
workings of caucuses at the state level, so
if there are particular reasons why they
should or shouldn't, I'm not aware of them.

MR. SMALL: I raise the
question, because one of the practicalities
as a still earlier witness, Mr. Freeman,
indicated, was that if you attempted to get
this amendment removed for the state legislature, it would never pass, but there might, indeed, be a chance if it were phrased so that it affected the other governmental bodies.

MR. MURRAY: Absent information that I don't have --

MR. SMALL: I won't pursue it, then. My last question involves enforcement. Even before the amendment, the New York law was criticized by many because the enforcement procedures are so mild. You have to go to court. The court can void the action and maybe even void only part of it.

In other states, including our surrounding states, New Jersey and Connecticut, there is a modest fine, a hundred dollars, for members who knowingly violate their open meetings provisions. Would that be troublesome to you?

MR. MURRAY: Well, right now the -- I guess the slap on the hand is that you subject yourself to negative publicity, which I don't think is insubstantial. At the
IN RE: [OPEN MEETINGS LAW]

same time, it's sort of diffused. If you're not the leader of a caucus or you're not someone what made a big statement on it, someone else will cover you on it. I think if it is a law and it makes sense to have, then some type of fine or something of that nature would be appropriate.

MR. SMALL: Okay.

MR. MURRAY: As long as there was reason that if it was by accident or someone could show that it was not a policy, they didn't realize it or something of that nature --

MR. SMALL: I used the word knowingly or intentionally.

CHAIRMAN FEERICK: This question may be somewhat repetitious, but I think it would be helpful for purposes of the record. In response to Mr. Small, I believe you made reference to you can get out of touch. The government can get out of touch or a party can get out of touch with the public with a system of closed caucus. Would you elaborate on that.
IN RE: OPEN MEETINGS LAW

MR. MURRAY: Well, I think it's more possible, more likely that if you're -- the more closed you are, the more likely you will be out of touch, and you leave yourself open to making very poor decisions, decisions that if they are found out, you may get away with making poor decisions for a long period of time, but the more you make, presumably the better chance is something is going to be unearthed.

I think open caucuses, if people bring up in those caucuses some of the concerns, and thoughtful people hopefully will, at one time or another, get a lot of the possible negatives of a particular course of action. If you have then had to rationally debate them and show how you can get around them, hopefully it will lessen the probability that you will fall into various traps.

CHAIRMAN FEERICK: The concept of open caucuses that you made reference to envisions groups having an opportunity to make presentations, I take it, in the caucus
IN RE: OPEN MEETINGS LAW

meetings.

MR. MURRAY: Well, the way we have operated -- others may very well have different systems. I don't think we have ever given as a right to people to make presentations. At the same time, in my experience, I have been in leadership eight years, I haven't seen a single case where we have ever denied anyone the right to make a presentation, and we have encouraged it when controversial issues come up. We have encouraged that to take place.

In fact, fairly recently, we, in the very controversial item, the chairman of a committee would not allow a particular line of questioning. We, in fact, closed -- asked for a caucus, had those people come in, and we received some answers in an open caucus that you couldn't receive in the meeting, because the chair would not allow it.

MR. SMALL: I hear the room was crowded.

MR. MURRAY: Yes, very crowded.

That's a rare instance where a very
IN RE: OPEN MEETINGS LAW

controversial issue came about, but I think that was a valuable meeting.

CHAIRMAN FEERICK: Certainly in that context, it offers an additional check and balance in terms of the operation of government. Are there any other questions?

Thank you very much, Mr. Murray, for your participation, and you have been very helpful.

MR. MURRAY: Thank you.

MR. SMALL: Mr. Chairman, we have have a request from Jerry Brixer who is a councilman in the nearby Town of Chili to speak to the Commission. He has returned to do so. I have no idea the subject matter, but he assures me it will be brief.

CHAIRMAN FEERICK: We would be happy to hear from him.

MR. BRIXER: Thank you, Gentlemen, for the opportunity of speaking before you. We saw the notice before you yesterday, so I'm delighted to have the opportunity to present a few views from my standpoint. Yesterday was an election for
IN RE: OPEN MEETINGS LAW

the position of supervisor for the council of Chili. I was Republican, and it was a Democratic landslide, and I didn't make it. We made the effort.

The open meetings topic is a topic I am endeared to, if I may. Being on the board for the past five years, I have been in constant continual contact with Bob Freeman on different issues, and I feel very strongly for the need of doing something in this area. I've also been -- about three years ago, the Town of Chili town board imposed a ban on my tape recording of open meetings. This ban, at first, was applied generally to all the spectators and people in the audience. Later, as soon as they found out that that type of ban was impossible to enforce, they rescinded that ban and applied it directly to me as a town board member.

MS. GORDON: I'm sorry to interrupt you. What was the body --

MR. BRIXER: Town board. Well, at that point I was a Democratic supervisor, three Republican council persons who
IN RE: OPEN MEETINGS LAW

supported a supervisor and myself. I was in
kind of like the minority of the minority.
And I found out that things that I was
issuing or saying were taken out of context.
And the only way I could verify what I had
actually said and/or check the minutes of the
body was to tape record.

At first we were doing it in the
back row, undercover in a sense, but as we
spoke with Bob Freeman and others, we found
out we could bring it out. We contacted the
Attorney General's office also, when we had
an opinion from him that it was perfectly
logical and legal to have a hand held tape
recorder.

The Town of Chili in August of
that year, about three years ago, applied to
ban to a total body. There happened to be a
T-U reporter who immediately arose and went
to the phone, evidently made a phone call to
her governing body, her editors, and came
back as a member of the Gannett newspaper,
they object to the ban on the use of a tape
recorder at a public meeting, town board
IN RE: OPEN MEETINGS LAW

meeting.

The following month or the following meeting, that ban was rescinded, and a ban was applied on me using the chain of reasoning that my tape recorder, and I have a very small, nice unit, was disruptive to the proceedings of the town board. The ban was kept on. I kept tape recording. Eventually the ban was lifted after I got support from the CLU, the Civil Liberties Union, I guess it would be, and they assigned a lawyer to me. The lawyer evidently contacted the Town of Chili, contacted the attorney. In a following meeting at 1:30 in the morning, the ban was lifted without any public notice.

So that is an area that I think something should be addressed. I think there should be allowable situation to allow individuals to bring a tape recorder into a public meeting. But we're speaking primarily on open meetings, and in my judgment, the current stature of the open meetings, even before your closing of the caucuses, is a
IN RE: OPEN MEETINGS LAW

joke.

In many cases, the operation of the Open Meetings Law, the effectiveness of the Open Meetings Law is only as good as the ethics of the governing unit. That means the supervisor and the controlling interest on the town board, to apply "an openness" to town government.

And meeting notices are a joke. Meeting notice might be put on a bulletin board, but who is going to see a notice on the bulletin board at the town hall when most of the citizens doesn't get up to the town hall, doesn't even know one notice from another on the bulletin board.

Chili is a town of about twenty-four thousand people. So I would, in general judgment, I would like to see, number one, I'd like to see that -- this particular closed caucus aspect, political caucus be rescinded definitely. And secondly, I would like to see a better method of enforcing what the open -- the Sunshine Laws and the open meeting laws state, allowing for open
IN RE: OPEN MEETINGS LAW

government. I'm not so sure if penalties are the thing, because you're problem is here, who is going to apply the penalty? Who is going to take the action? Who is going to take the initiative? And normally a citizen, of course, is not going -- in my judgment, is not going to take the action.

Oh, I'm not so sure if penalties are it, but I think something should be done in this area so that the citizens -- well, to uphold the text of the law or the content of the law, or whatever, the meaning of the law. And that's in general my comment tonight.

CHAIRMAN FEERICK: Thank you. Are there any questions? I would like to give you the additional opportunity, if you care to present us with a written statement to supplement anything you have -- that occurs to you after today or an elaboration of what you have said, we will be more than happy to receive it.

MR. BRIXER: I appreciate that, and I thank you.
IN RE: OPEN MEETINGS LAW

CHAIRMAN FEERICK: Thank you very much. We will close the hearings today, and we will resume tomorrow in this room at nine o'clock.

(Proceedings adjourned.)
CERTIFICATE

I, JUDY A. GING, hereby certify that I did report in machine shorthand the foregoing proceedings had in the above-entitled matter at the time and place hereinbefore set forth; I do further certify that the foregoing transcript, consisting of pages 171 thru 358 is a true and correct transcript of my said stenographic notes.

[Signature]

Judy A. Ging, C.S.R.
STATE OF NEW YORK
COMMISSION ON GOVERNMENT INTEGRITY

A PUBLIC HEARING

IN THE MATTER

of

THE OPEN MEETINGS LAW

A Public Hearing held in the above matter at the Rochester Riverside Convention Center, Room 102-C, Rochester, New York, on Thursday, November 5, 1987, commencing at approximately 9:00 A.M., before JOHN D. FEERICK, Commission Chairman, and JAMES L. MAGAVERN, Commissioner.

OTHER PANEL MEMBERS:
NICOLE A. GORDON
KEVIN J. O'BRIEN
MARK L. DAVIES
WILLIAM J. SMALL
IN RE: OPEN MEETINGS LAW

CHAIRMAN FEERICK: Good morning. My name is John Feerick, Chairman of the New York State Commission on Government Integrity. And to my right is Commissioner Magavern. To his right is the chief counsel to our Commission, Kevin O'Brien, and to his right is Nicole Gordon, counsel to the chairman on the Commission. To my immediate left is Mark Davies, who has been very much involved in the Commission's work in the open meetings area, and to his left is William Small, who is assistant to the chairman of the Commission for communications and administration.

This is the second of two days of hearings we are holding on the subject of the Open Meetings Law. We received testimony yesterday from a variety of witnesses on the various issues surrounding the subject of the Open Meetings Law. I would say that the testimony yesterday was very helpful in illuminating the Commission concerning the issues.

Today we have scheduled a number
of witnesses who will reflect the historical experience with respect to the subject here in Rochester, and that historical experience has been helpful to us in terms of our enlarged understanding of the subject.

Our first witness this morning was to be Ruth Scott, president of the Rochester City Council, who I understand has been delayed because of an emergency development in her business, and she will be arriving shortly.

Our second witness was scheduled to be Jean Carrozzi. I don't believe she's here yet. She wasn't scheduled to give testimony and statement until 9:45. Our third witness scheduled for ten-thirty is Barbara Henry, who I understand is here, and if it's agreeable with her, I would like to start with Miss Henry.

MS. HENRY: I'm Barb Henry, editor of the Democrat and Chronicle and Times-Union in Rochester. And I have a very simple message to present, and it's one the Times-Union and Democrat and Chronicle have
been espousing for years.

Basically we believe that all public business should be conducted in public. Votes should be in public, and discussions leading up to votes should be in public. Disagreements and different points of view should be heard in public.

I have the perspective of being able to view the Open Meetings Law situation in New York as a newcomer. I have been a New Yorker for eighteen months, and I have to say frankly that I was quite surprised to discover that New York, which I consider a very progressive state, has such a weak Open Meetings Law. I moved here from Nevada which I have heard described in the East as a very unprogressive state.

But Nevada has one of the strongest Open Meetings Laws in the country. It requires all the public's business to be conducted in public, with the only exception being some selected personnel matters. Public officials must be appointed in public, and discussions of their qualifications or
lack of them must be discussed in public.

Salary increases must be voted on in public. Lawsuits must be discussed in public, and settlements of lawsuits must be discussed in public. After all, it's the public's money being used for the settlements. They should know what they are settling for and why.

I was surprised that in New York public bodies can meet in secret in a party caucus, whether or not the business discussed is political or public, and whether or not the political party constitutes a majority of the public body.

I was surprised that in New York there is no incentive to follow the law. There are no penalties for violating it.

In Nevada, violation of the Open Meetings Law is a misdemeanor. Public officials who violate it are subject to misdemeanor penalties including fines and removal from office. The actions they take in illegal meetings can be declared void. In fact, this year a judge fined members of the
IN RE: OPEN MEETINGS LAW

Reno City Council for violating the law, and
I think one of the fines was five hundred
dollars, a personal fine, and some of their
actions have been voided.

But overall, public bodies in
Nevada follow the law, and chaos hasn't
resulted because they are forced to do the
public's business in public. After the law
that was passed, some complained that it
restrained discussion, but after a time, most
public officials realized that meeting in the
open on all topics wasn't such a big deal.

In New York, where the law
doesn't have any teeth in it, public bodies
violate it frequently, and there's really
nothing anyone can do about it. Some
examples I have found in looking at recent
newspapers include:

In July the Brighton school
board met in executive session, and during
that private meeting, the board discussed
asbestos removal from local schools. An
architect appeared before them to answer
questions about the matter. I would think
IN RE: OPEN MEETINGS LAW

that parents with children in the schools
with asbestos should have been able to listen
to that discussion and ask questions in an
open situation.

It's a clear violation of the
law, and the school board was told this in an
opinion issued by the State Committee on Open
Government. With no sanctions, why bother to
observe the law in the future?

In May of last year, the
Rochester Board of Education voted in secret
to hire its school superintendent, so the
public wasn't given a chance to find out how
their representatives voted until thirty
hours later when the newspaper did its own
tally and reported its finding.

Shouldn't the public, who elects
these school board members and pays the
superintendent, have been able to witness the
vote and get the reasons for the vote? It's
a clear violation of the law, but again with
no sanctions, there's no incentive to follow
the law the next time a vote such as this
comes up.
IN RE: OPEN MEETINGS LAW

Last November, a Monroe County task force on solid waste met secretly to discuss how to stay alive. Solid waste may not sound like a real sexy issue, but it's a major issue in this county, and the public has a right to hear any discussion this task force has.

Bob Freeman, who I understand testified yesterday, of the Committee of Open Government, advised the meeting was illegal, but again, why should the task force worry about following the law when nothing happens when they don't.

The Off-Track Betting board, just a few weeks ago, voted in secret to raise the pay of some of its employees. After it was reported that the vote was held in an illegal meeting, the board met to take the vote in public. Perhaps public officials would be a little more careful if they were dealing with a law that had teeth in it.

In July of this year, the Sweden Town Board met in executive session to discuss options for building low income
IN RE: OPEN MEETINGS LAW

housing in town. That's an issue, I think, that the residents of Sweden have a right to know about. Again, so did Bob Freeman, who issued an opinion saying the board violated the law, and again there was no incentive to follow it.

What's not in my written testimony, but what we reported last week, was that the Geneva City Council has concocted a way of getting around the Open Meeting Law by meeting in secret with groups of city council members of four or fewer, not a quorum. The topic of these secret discussions is a very controversial subject, Million Dollar Lake Front project. It's a major issue in Geneva, a topic of intense public interest and concern, but the city council is uncomfortable talking about it with their constituents there, so they devised a way to avoid the law. And again, why not? Nothing happens when they do.

On the issue of legal secret meetings, or political caucuses, several public bodies have voted to ignore the
IN RE: OPEN MEETINGS LAW

political caucus amendment. They hold their
political caucuses in public. In fact, the
Rochester City Council voted last month to
prohibit five or more council members from
meeting privately in a party caucus to
discuss city business.

In a discussion of the vote for
openness, some members say they voted for the
open meetings even though they don't believe
in it. They said the public perception is
that they are doing something wrong behind
the closed doors, even though they say they
are not.

Public perceptions, I think, are
important. Why not meet in public and let
them know for sure there's not anything going
wrong in the secret meeting? One complaint I
hear often about why public bodies shouldn't
meet in public is they can't have frank
discussions. They can't let their hair down
and hash things out if they have to meet in
public. They say it's uncomfortable to have
others listening in on their discussions of
sensitive matters.
IN RE: OPEN MEETINGS LAW

My answer to that is, yes, it is uncomfortable to vote yourself a pay increase 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? Public officials have to take flack sometimes. It's part of the job.

I have also heard the argument from some public officials that the Open Meetings Law issue is a press issue only. The public really doesn't care about that. I disagree strongly about that. The public does care about the issues such as the ones I described above, salaries for public officials, they care about those; the location of low income housing, asbestos in schools, they care about those. And they have a right to hear those discussions in public, and for that matter all other discussions.
IN RE: OPEN MEETINGS LAW

So on the three major issues regarding the Open Meeting Law you have brought up for discussion, my position and the position of the Times-Union and Democrat and Chronicle have taken for years are: The 1985 political caucus amendment should be repealed.

The Open Meetings Law should have penalties attached if violated. Why else would you really be concerned about abiding by it?

And finally, the law should be amended to permit a court to void any action of a public body when any portion of the meeting of that body is closed in violation of the law. It only makes good sense.

Basically, our opinion is that New York State law doesn't have any teeth in it. With these changes, it would, and the public would benefit.

CHAIRMAN FEERICK: Thank you very much. Mr. Davies.

MR. DAVIES: If I could start with the point you made about the Geneva city
IN RE: OPEN MEETINGS LAW

council.

MS. HENRY: I have that story here, if you want a copy of it.

MR. DAVIES: Where they are, as you put it, trying to circumvent the Open Meetings Law by holding meetings with four or fewer members.

MS. HENRY: Right.

MR. DAVIES: If the political caucus amendment were rescinded, that would still be legal, would it not? And if that's the case, what's the point of rescinding the political caucus at all?

MS. HENRY: I'm not sure what the make-up, Democrat/Republic is on the city council, but I would assume they would be able to do that with the breakdown.

MR. DAVIES: Let's assume it's a nine member board, and you have four members meeting together of the same political party --

MS. HENRY: My position is that should be repealed, that the political -- they shouldn't be allowed to meet in
IN RE: OPEN MEETINGS LAW

political caucus at all, whether it's a
majority or not, in private.

MR. DAVIES: Your position --

MS. HENRY: That should be

repealed completely.

MR. DAVIES: Does that mean you
couldn't have two members talking over the
telephone?

MS. HENRY: I think you could
have two members talking over the telephone.
I think calling a meeting or a conference
telephone call to try and get around the law,
which I think this is clearly an attempt to
get around the law, should not be legal.

MR. DAVIES: How do you make the
distinction? What's the distinction between
two members having coffee?

MS. HENRY: I guess the
discussions leading up to those meetings. I
guess you could find through some fact
finding way they decided, "You four come at
4:30, and you four come at 3:30." If that
was discovered, if it got to a court
situation or an investigation, that that
IN RE: OPEN MEETINGS LAW

would be determined they were conspiring to
violate the law, and it would be, I think in
this case, it's clear, they were conspiring
to violate the law.

MR. DAVIES: Don't you think
that if the political caucus amendment were
repealed, that isn't there a danger that the
secret meetings would be driven even deeper
into secrecy, that -- I mean right now we all
know when the city council -- back when they
were still closed, when the city council
caucus met, when the Republican legislative
caucus met, and so forth. We all knew it,
and there was no secrets about it. Wouldn't
it drive it deeper underground and --

MS. HENRY: Well, if we have
devious public officials, yes, it will drive
them deeper underground to violate the law.
I don't think most of our public officials
are devious. In fact, the ones who testified
here and Ruth Scott who I came to listen to
this morning are very good public officials
and work hard for the city.

And if there was a law that said
IN RE: OPEN MEETINGS LAW

they couldn't do it, they wouldn't do it. If
there was a law that provided fines if they
did it, it certainly would give them
incentive not to do it. I don't think
somebody like Ruth Scott or Tom Brown needs
those incentives. Here, the way the law is
constituted now; there really is no reason to
follow it.

MR. DAVIES: On the issue of
fines you just raised, is there a danger that
fines would discourage people from going into
public service?

MS. HENRY: All they have to do
is follow the law, and they wouldn't have to
worry about fines.

MR. DAVIES: If you return a
minute to Rochester, itself, have you ever --
you personally ever seen in Rochester, in the
city council in the legislature, recesses to
caucus in private during the course of a
public meeting?

MS. HENRY: Yes.

MR. DAVIES: And could you tell
us about that?
IN RE: OPEN MEETINGS LAW

MS. HENRY: I was at the Monroe County legislature meeting, and there was a major controversy over who -- over the status of the president of the legislature, who was a Democrat, and before last Tuesday's election, the legislature turned Republican, because one member changed parties. So they were deciding are they going to oust the Democratic president of the legislature, and there was constant Republican caucuses. They left for thirty and forty minutes at a time with a full house there to caucus in private to discuss whether they were going to vote to kick out Ron Thomas, who was the president of the legislature at the time.

MR. DAVIES: What was your perception personally when they caucused in private, went out to caucus in private?

MS. HENRY: I couldn't imagine anything they were discussing in private that they couldn't have discussed in public. Everybody knew it was being discussed in there. They were trying to get enough votes to oust him, and why not just talk about it
IN RE: OPEN MEETINGS LAW

in public. I don't understand why not. It
was obvious what they were talking about.

MR. DAVIES: Did you suspect
that anything dishonest was going on?

MS. HENRY: I don't think it's
dishonest to say, you know, to ask somebody
how they are going to vote and why, but I
don't know why, as a constituent of one of
these men or women, that I shouldn't find out
why they were voting on who the president of
my legislature would be.

MR. DAVIES: Why do you need to
know? Why is that something that you need to
know?

MS. HENRY: I want to know how
public officials arrive at their decisions.
I don't want to know just what the decisions
are.

MR. DAVIES: Why is it necessary
to decide that?

MS. HENRY: As a person who
lives in this community and votes for people
in this community, I'd like to know the
thinking that they go through to come up with
IN RE: OPEN MEETINGS LAW

their decisions. I think it's important.

MR. DAVIES: To determine whether they are doing a proper job?

MS. HENRY: Right, and what kind of public official they are. I think you need to know more than just yes or no on an issue.

MR. DAVIES: Getting back a moment to the caucus that you observed going on in Monroe County legislature.

MS. HENRY: I didn't observe the caucus.

MR. DAVIES: When you observed they recessed to go into caucus, wouldn't that have been a political -- even under the --

MS. HENRY: Sure, there was no question it was legal.

MS. DAVIES: Even if the amendment were rescinded, wouldn't that still have been permissible? Wouldn't that be a caucus to discuss political instead of public business?

MS. HENRY: I guess there might
IN RE: OPEN MEETINGS LAW

be a fine line there. It might be the
public's business who the president of the
legislature is.

MR. DAVIES: I think you pointed
out a problem, how do you distinguish between
public and political business?

MS. HENRY: My feeling is, and
I'm sure this will never happen, they
shouldn't be able to have political caucuses
either.

MR. DAVIES: I think that's not
going to happen. Assume the amendment was
rescinded, and the distinction was to be
made?

MS. HENRY: I think it would be
tough to make that decision.

MR. DAVIES: In fact, if you
make the wrong distinction, you may be
slapped on a fine?

MS. HENRY: I guess if it got to
court, I guess the determination would be
during the fact finding and the testimony
whether -- whether what went on at that
meeting was political rather than public.
IN RE: OPEN MEETINGS LAW

MR. DAVIES: Doesn't that put the legislator on the spot? They have got to guess how a court may ultimately decide in a close case? If they are wrong --

MS. HENRY: That's right.

MR. DAVIES: -- they are fined?

MS. HENRY: So maybe they will decide to meet in public and avoid that concern.

MR. DAVIES: If I could ask you, if you know, currently are the Republican caucuses in the county legislature open or closed?

MS. HENRY: My understanding, and I'm -- you know, there's a new legislature now, my understanding the Democratic caucuses are open, and the Republican caucuses are closed.

MR. DAVIES: What is the -- now Mayor Ryan testified yesterday. One of the things he said -- of course he is -- I think that he was actually going back to the time before he was elected mayor, was that most of the business is done in committee, in
IN RE: OPEN MEETINGS LAW

Rochester City Council, and that the press at that time did not even attend the committees. Now this would have predated your coming on the paper. Now, as I understand it, the press does attend the committee meetings now, but there's virtually no coverage of committee meetings?

MS. HENRY: I think this issue is really clouded by making it a press issue. I don't think it is a press issue. I think that Mrs. Jones who lives down on Main Street should be able to go to any meeting of the city council, whether there's press coverage of it or not. We go there, and we might determine they haven't done anything worth reporting. Who cares. Members of this community should be able to go to those, and I think that the politicians like to make it a press issue, by saying "Hey, they don't cover us, why should we meet in public?"

I don't think that's the issue at all. I think the issue is people who elect them are the ones who should be able to go to those meetings, and whether the press
IN RE: OPEN MEETINGS LAW

goes or not is irrelevant. We have an
interest in it because we like to be able to
go and report on what they are doing and
decide whether it's newsworthy or not.
Everything they do isn't newsworthy,
certainly, but I think we should be able to
go in and find out, and the members of the
public who elect these people should be able
to go in and find out.

MR. DAVIES: You mentioned that
you were in the -- as I understand you were
in Nevada as a journalist for ten years or so
or over a period of time. What was your
experience as a journalist in Nevada, with
the Nevada law? You mentioned you regarded
it as a tough law. Did you have any
experience --

MS. HENRY: As the editor of the
newspaper in Reno, we called on that law
often to force meetings to become open, when
they were considering closing them. And also
on two occasions when meetings were closed,
we sued the city council and won those
suits.
IN RE: OPEN MEETINGS LAW

MR. DAVIES: And how did the law function, how well did the law function, to your observation?

MS. HENRY: I think it functioned very well. I think there was a lot of anticipation on the part of public officials in the beginning that, "Oh, no. Now it's going to be so hard to talk about things in public." But what it ended up being is just a routine thing. They just had meetings in public. They discussed issues in public, and it was -- really it turned out to be not any big deal.

MR. DAVIES: I note the Nevada law entirely exempts the Nevada legislature.

MS HENRY: That's right. That's one of the things the newspaper there and all the newspapers in Nevada really fought and continued to and asked that the legislature include itself in those meetings.

MR. DAVIES: Do you think that's justifiable that you can exclude the state legislature?

MS. HENRY: No, I don't. I
IN RE: OPEN MEETINGS LAW

think it's ridiculous.

MR. DAVIES: One thing, I know
you're not a lawyer, I will ask if you know
this in your experience as a journalist, one
provision the Nevada law says a public body
may close a meeting upon a motion which
specifies the nature of the business to be
conducted. Now in its face, it seems to say
they can close a meeting any time they want?

MS. HENRY: There are other
provisions that specify under what conditions
they can close it.

MR. DAVIES: So that's just a
procedure?

MS. HENRY: Right, if they are
going to close -- I think the purpose of that
part of the law is if they close a meeting,
they have to say what they are going to
discuss in private. We are going to discuss
the mental competency of some employee or
something, and that has to be said in
public.

MR. DAVIES: I know you have
said this isn't a press issue, but what
IN RE: OPEN MEETINGS LAW

impact do you see that the closing of
political caucuses has on your ability as a
journalist to do your job?

MS. HENRY: I suppose I could
say it makes it more difficult -- we're going
to find out what goes on in there, regardless
whether the meeting is open or not. There
are ways to find out what went on, so it's
not going to hamper us from getting the
story. It might take us a little longer to
do it, but -- and I think that when you go
into a closed meeting from the perspective --
and I'm not a public official, but I think
from their perspective I think it should meet
in public, because it makes it a better story
when they are in there in a closed meeting.

Gee, what's going on in there?
The headline is the city council meets in
private. They might be discussing something
so mundane, who cares, but everyone out there
is wondering, "Gee, what are they doing in
there?" And it makes a story which makes
them look suspect, when really they might not
be doing anything, so why not meet in
IN RE: OPEN MEETINGS LAW

public?

MR. DAVIES: Thank you.

CHAIRMAN FEERICK: Thank you.

Commissioner Magavern.

MR. MAGAVERN: I have one

hypothetical I'd like to start with, in view

of your remark that even discussion of

settlement of lawsuits should be open. Do

you mean that under all circumstances?

MS. HENRY: Yes, in Nevada they

have to discuss lawsuits.

MR. MAGAVERN: Suppose you have

a lawsuit against the county because it
didn't build a stadium or something, such as

in Erie County where there was such a

lawsuit, and the county legislature wants to

consider whether or not to settle it and

wants to talk to the county attorney or the

county's retained attorneys on what the

prospects are for the lawsuit, and the

attorney then is going to have to discuss the

strengths and weaknesses of the case. If

it's public, anything that's said can turn up

being used against the county in legal papers.
IN RE: OPEN MEETINGS LAW

the next day. Now, would you insist even then?

MS. HENRY: Well, in Nevada they have to discuss those things in public. A city council or a county commission or --

MR. MAGAVERN: That doesn't trouble you as a taxpayer that the county will not have the right to private advice of an attorney to protect the county's interest?

MS. HENRY: It didn't have much effect -- it didn't have any effect in Nevada. I sat through some discussions of law suits. Basically, a lot of the problem with the lawsuit thing is a county or a government agency will decide to settle a lawsuit for \( X \) amount of money and then seal that amount, that the public can't find out what that amount is. I have a real problem with that, and it happens.

MR. MAGAVERN: There's no question in my mind about that one. Let me turn to another hypothetical. Suppose you have a very difficult controversy over
IN RE: OPEN MEETINGS LAW

adoption of a budget or whether to fund a particular project or the location of a garbage to energy plant or something of that sort, and the proposal maybe comes over from the executive branch. The majority and minority leaders each recognize it's a very controversial issue, and maybe their own parties have this positions in the past which have tended to go one side or the other. Suppose it's very important this be settled, that they reach an accommodation and maybe even a compromise.

Now, would you consider it improper or a circumvention of the law if the first stage, say, the minority leader starts talking to his or her members on the phone or in meetings in the office or whatever, one on one?

MS. HENRY: Yes, I think the discussions of how the compromise comes about should be done in public.

MR. MAGAVERN: What about a telephone call between the minority and majority leader to discuss a compromise?
IN RE: OPEN MEETINGS LAW

Suppose a majority leader calls a minority leader and says, "Maybe we can do this and that, and maybe we can get that resolved."

MS. HENRY: I don't think that's a public meeting. I don't think two people speaking about something is a public meeting, but I don't understand why on a controversial budget matter as you discussed, that the public shouldn't be privy to what's going on. What's so secret about trying to compromise?

MR. MAGAVERN: The conversation I'm discussing might be the crucial thing that leads to the registration, and you seem to acknowledge that's proper, and yet that may be the very most important phase in the whole process in the overall deliberative process, and you at least would permit that much?

MS. HENRY: I don't think that, you know, the law is going to stop a phone call from a minority leader to a majority leader, or there's any way the law can be written to prevent that.
IN RE: OPEN MEETINGS LAW

MR. MAGAVERN: Or should.

MS. HENRY: I don't know. I don't know why they have to do things secretly. I guess that's my position. I'm a purist. I don't think they should be -- but they are going to, but I don't think there's any way the law can be written to prevent a phone call. I think it should be written to prevent a conference call with, you know, four or five members of the city council or whatever, which is another way that, you know, in Nevada once was tried, that they had a conference call around the state with, I think it was the board of regents, and it was ruled illegal.

MR. MAGAVERN: The problem in your view is really just a practical problem of how you can draft legislation that can be effectively enforced rather than any philosophical problem.

MS. HENRY: On the three points that Mark brought up in his letter to me that were under discussion, and the ones I noted here, I think it would be easy to close up
IN RE: OPEN MEETINGS LAW

those loopholes in the law and to provide
some sanctions for -- I think the biggest
thing is having some sanctions for violating
it, because in all the cases I cited here
that were clear violations of the law, they
didn't have any incentive to follow the law
and still don't and won't unless there's
something in the law that gives them an
incentive to follow it.

MR. MAGAVERN: If you have got,
say, two members of a political minority or
even some other minority, say a racial
minority, who see something coming along that
they consider to be very detrimental to their
cause, and they feel that they have not been
given a fair hearing and will not be given a
fair hearing on such issues, can they get
together to discuss strategy on how they can
unite, in order to better --

MR. HENRY: Two members of a
nine member city council, for instance.

MR. MAGAVERN: Yes.

MS. HENRY: Sure, but they are
going to be heard -- I think one of their
IN RE: OPEN MEETINGS LAW

strategies would be go public with their concerns.

MR. MAGAVERN: Precisely. I'm talking about the earlier stages of the deliberative process in which there may be informal communications, and basically just to test your proposition that all deliberative processes have to be open.

MS. HENRY: I don't think if two members get together, I don't think it's a violation of the law, either in New York or Nevada law, and I think the Nevada law is a good one with the exception of the legislature being excluded. I don't think that's a problem. If they went further and went individually to try and draft their strategy with the whole council, I think that it would be a problem.

MR. MAGAVERN: My last question is then if at least some very limited types of discussion are permissible, both philosophically and legally, then might not the effect of outlawing larger meetings be either to reduce the amount of deliberation
IN RE: OPEN MEETINGS LAW

that an issue will actually receive or to
push the deliberation back into the
legitimate smaller meeting channels and
thereby to really impair the sense of
responsibility and particularly even party
responsibility on issues?

MS. HENRY: No, I think that if
the law -- the changes in the law were made
that I have outlined here, that there might
be some uncomfortableness at first in
discussing things in public, but I think that
after, you know, a few months or even less
than that, if the public officials will
realize that having members of the public or
the press or whoever there, it's no big
deal. I mean in -- maybe they won't scream
and yell and fight. I don't know whether
that -- although, you know, it hasn't stopped
people.

MR. MAGAVERN: You still had to
go to court now and then, though?

MS. HENRY: We had to go to
court. A lot less often now than at the
beginning, and they have their discussions in
IN RE: OPEN MEETINGS LAW

public, and they argue in public and disagree in public, and I happen to think that's healthy.

MR. MAGAVERN: Thanks very much.

CHAIRMAN FEERICK: Mr. Small.

MR. SMALL: Miss Henry, in one of the things -- one of the criticisms of opening caucuses is there will be grandstanding if you are there. What was the experience in Nevada? What do you think it will be here, politicians who are showing off because you and television are in the room?

MS. HENRY: I think that was an issue also when it was -- there was an argument over whether cameras ought to be allowed in congress, that they would be grandstanding. Grandstanders are going to grandstand, and non-grandstanders are not going to grandstand, and it depends on the personality of the person.

If you have a grandstander, they are going to do it whether there's television cameras there or not. They get -- it gets
IN RE: OPEN MEETINGS LAW

less and less frequent when they are not
covered. When they are grandstanding, it
isn't a story anymore, because they do it
every time. It's not as much as a story.
Then they tend to stop.

MR. SMALL: From what you have
said about closed caucuses here, your
reporters, it may take them a little longer,
but they pretty much get everything that went
on.

MS. HENRY: Not everything. I
think we find out, you know, as much as we
can about what goes on.

MR. SMALL: Is there a danger of
distortion there in that as we all know, some
political figures are more likely to talk to
your people than others?

MS. HENRY: That's right. I
think it's a lot better for the public body
if they meet in public, and we can hear
everything ourselves, not only members of the
public but us going, as we did on the secret
vote in hiring the superintendent of the
school board, how we had to go to members and
IN RE: OPEN MEETINGS LAW

say, "What happened in the meeting? How did you vote? Why did you vote this way?"

Whereas it would have been firsthand if we had been in on the -- and the public, who has a major stake in who the school superintendent had been there. There is a tendency toward somebody having a different opinion about what went on.

MR. SMALL: Your city council a few weeks ago voted to open its caucuses. Actually my understanding is they voted to rename the open meetings, but they will be open, and they will reserve the word caucus for political only. Why do you suppose they did that at this time?

MS. HENRY: Well, I mentioned in my comments that some members commented after the vote that they really didn't believe that they should be open, but they were voting for it anyway because of the public perception that they were doing something wrong in the closed meetings. Also, there was speculation, although I wouldn't -- I don't know for sure, that because an election was
IN RE: OPEN MEETINGS LAW

coming up, that they voted for openness, but you know, I don't know whether that's true or not.

MR. SMALL: You think that was just speculation?

MS. HENRY: That was probably just speculation:

MR. SMALL: Isn't it true when your editorial board interviews each of the candidates, you ask --

MS. HENRY: We always ask that question, whether they think meetings should be conducted in public, and I think it's a legitimate question to ask.

MR. SMALL: I'm not suggesting it isn't. I'm just trying to find out why after such firm resistance, if one examines the history, as your newspaper has reported it, they switched in October?

MS. HENRY: I think there's probably a little more public pressure on not only the city council but other public officials to do things in public.

MR. SMALL: When your mayor
IN RE: OPEN MEETINGS LAW

testified yesterday, if my memory serves correctly, at one point he had an aside, not unlike things I have heard in the past, pointing out that while you all are pressuring him and others to open everything to your reporters, that you are agenda setters of the public business, but your meetings are all closed.

MS. HENRY: Well, I guess you could -- we're not a public business. The taxpayers don't pay our salaries. We do invite people into our news meetings, and in fact, I think the mayor has probably been invited, and if he wants to sit in on our news meetings to decide what goes in the paper, he could show up if he wanted to. I wouldn't mind having him here. We don't invite all two hundred and some thousand people in Rochester to them, although we have invited people in occasionally. I don't think we should -- a private business is the same as a city council.

MR. SMALL: Let me ask one last question, here in Rochester, those on the
council and past members of the council stress the point that they are quite open in many of the steps of the legislative process. They are very good about posting times of meetings. Their committee meetings are open to you, and they do their actual business, their final votes are always open, that the only thing that hasn't been open is that their opportunity to have one session in that process in which they can talk relaxed with each other, how do you respond to that, other than saying you're a purist?

MS. HENRY: Other than saying I'm a purist, I think that one meeting could be the one where the decisive discussion is held, and I think the public has a right to hear those comments. I really don't understand it.

You know, I say I'm a purist, but I really don't understand why they are afraid to talk about those things in public. You know, I really -- it's beyond me why the city council has to get together and before a vote to talk about how they are going to
IN RE: OPEN MEETINGS LAW

vote. I don't understand why not? Why not meet in public?

The uncomfortableness of raising your pay in public, that's a tough one. I wouldn't want to have to do that either, but the public pays their salaries, and they should have to do it.

Discussing asbestos in a school, gee, you know, there's a lot of parents out there who are kind of upset, and gee, I hate to be out there, you know, talking about it in front of all them, but they should. It's the right thing to do.

Low cost housing, where are we going to locate that? That's a controversial issue. We don't want to talk about that in public. Of all the matters of public concern, that's one of them.

A sixty million dollar lake front in Geneva, one of the hottest issues in that town, so the council decides they don't want to meet in front of the public who have the biggest -- not the press, the public is the ones who really have a stake in that and
IN RE: OPEN MEETINGS LAW

are really concerned about it, and gee it's so uncomfortable to have to meet in front of all these people, gee, I hate to do it. Let's figure out a way where we can -- those are the discussions they want to have in private, and those are the ones that are the hottest public issues. Those are the times that the public bodies want to go behind closed doors, when one of those really hot topics, which are not really the press concerns but the public concerns.

MR. SMALL: Let me close by asking some questions about Monroe County, the man who will be the new president of their legislature, because it's shifted parties this week, testified yesterday, Mr. Kevin Murray.

MS. HENRY: So he decided he was going to be the president? I didn't know that was decided yet.

MR. SMALL: I've decided that. In any case, the minority leader, a likely candidate, whatever, said that they would continue their open caucuses, the Democrats
IN RE: OPEN MEETINGS LAW

would, but complained that in years past it had been open and was closed by the Democrats because they felt the reporting by your newspapers before you came, of course, became too personal and made too many of their members uncomfortable, not because of public business but in-effect personal criticisms. Would you care to address that?

MR. SMALL: Well, I think if it's an open meeting a reporter can be here and all members of the public can be there, I think they have to realize that what they say in there is subject to being reported. And if they want to say personal things about another member of the legislature in that meeting, it's very possible it's going to be reported, and they just have to realize that they are talking in public and decide what they want to say and what they don't want to say based on that. I think it's as simple as that.

CHAIRMAN FEERICK: Thank you.

Mr. O'Brien.

MR. O'BRIEN: Just a few quick
IN RE: OPEN MEETINGS LAW

questions. Ms. Henry, I want to follow up something that Commissioner Magavern was asking you about. Bear with me, because lawyers like to draw lines, but I think these lines are important because you're talking about criminal sanctions here, and I think you would agree it's very important to demarcate clearly which areas are legal and which areas are illegal when you're talking about such sanctions. In response to the commissioner's questions, you indicated that posing hypothetically for the moment, a nine man board, that two people can talk on the telephone about a pending agenda, but that if four people get together or have a conference call that --

THE WITNESS: I guess it would have to be five.

MR. O'BRIEN: I think you were talking about a minority, if I'm not mistaken, you want to do away with the exemption for closed meetings, even for a minority, if I'm not mistaken, is to four people got together and spoke about the
IN RE: OPEN MEETINGS LAW

agenda, that would, under your view, be illegal. My question again is where do you draw the line so as you shift from the two person scenario to the four person scenario, people are clearly on notice that they are entering into an area which is illegal?

MS. HENRY: I think I'm talking specifically about the political caucus matter that I don't think the political caucuses -- there should be a specific allowance in the law for closed political caucuses. If --

MR. O'BRIEN: What is a political caucus?

MS. HENRY: I guess if you call a meeting -- you call the five Republicans on the board, or the four democrats on the board and say, "Hey, let's get together and meet at Joe's Diner and hash this thing out." I think they should --

MR. O'BRIEN: What if you called the three Democrats out of the four on the board?

THE WITNESS: I guess maybe you
IN RE: OPEN MEETINGS LAW

will have to specify that in the change in
the law. Maybe that would have to be
something that's specified. In Nevada it
wasn't really a problem, because the city
council was non-partisan. They didn't have
party affiliations.

MR. O'BRIEN: What was the test
in Nevada?

MS. HENRY: I think it was a
quorum in Nevada can't meet, twenty-three.

MR. O'BRIEN: In situations
where a strong party leader, for example,
could control the other members of his or her
party -- and we heard testimony, yesterday,
for example, yesterday if Warren Anderson
determines the agenda pretty much by himself
in the state senate, in situations where
fewer than a quorum can get together and
determine an agenda?

MS. HENRY: I don't think you
can specify every single thing in the law. I
don't think everything that possibly could
come up it's possible to specify. I think
the idea of a quorum and not allowing closed
IN RE: OPEN MEETINGS LAW

political caucuses during a -- you know, during a regular meeting.

MR. O'BRIEN: So it basically gets down to a numerical test.

MS. HENRY: Yes, in case of the Rochester City Council, it's all Democratic now, so a caucus would be the entire city council. Obviously I think that's -- it's not right to have the entire city council meet in private under the guise of a political caucus.

MR. O'BRIEN: But if the three most powerful members of the eight member --

MS. HENRY: I don't think there's a whole lot you can do about it except try and find out about and report on it if you are a reporter.

MR. MAGAVERN: Can I follow up that? Isn't that going to have a detrimental effect on the participation on all members? You're going to concentrate more power on the most powerful three, and they are going to get together to work out the position, and the other people who are not a part of that
IN RE: OPEN MEETINGS LAW

group of three are going to be excluded.

MS. HENRY: That's politics.

MR. MAGAVERN: They are going to have less information, be less accountable to their constituents.

MS. HENRY: I'm not saying it's right. I don't know whether you can state in a statewide law to cover every possible political situation and city and town in New York. I think you have to have an outline of what's legal and illegal.

MR. MAGAVERN: If the effect of the law is to push things in that direction as a practical matter, maybe we shouldn't have such a law.

MS. HENRY: You asked the question about is it going to push secret meetings underground. Maybe it will, but if those, you know, if those secret meetings are illegal and someone finds out about it and there's a sanction -- in the case of the three, there wouldn't be, but in the case of deciding, well, let's just not meet anywhere --
so they can't find out they are meeting.

Somebody is going to find out. In the case
of the three that say we are going to exclude
the other six Democrats, we are going to meet
and decide everything ourselves, I think that
is a news story that those three are doing
that and maybe the force of the publicity of
it would have a political effect on those
three people. I don't know. But I don't
think you can specify it in the law.

MR. MAGAVERN: The corrective
may be precisely the news story in the
electoral process rather than the law.

MS. HENRY: I don't think gee,
this could happen there's going to be three
powerful ones and leave out the six. I don't
think the answer is just let them have
political caucuses that would be closed, and
it will be okay.

MR. MAGAVERN: On the other
hand, you have to have some sense of what the
effect of the law will be before you can
intelligently propose the law.

MS. HENRY: That's right, and
IN RE: OPEN MEETINGS LAW

the effect of the law could be, as I'm sure
happens now in a lot of places, that three
powerful members of one party are going to
set the agenda and meet together and exclude
the other six. That may very well happen.
It probably happens now. It would happen if
you changed the law, but at least there would
be some teeth in the law that has no teeth in
it now and prevent some of the secretiveness,
like the examples that I cited here, of major
public concerns.

MR. MAGAVERN: Thank you.

CHAIRMAN FEERICK: Nicole

MS. GORDON: Do I understand you
correctly that if it were practical to do so
and you thought it were enforceable, you
would want to mandate openness of meetings
between, for example, majority and minority
leader, even one on one like that?

MS. HENRY: I don't think it's
practical. It would be nice if they were,
but I don't think it's practical. You know,
it just isn't. Usually if they meet in an
IN RE: OPEN MEETINGS LAW

office somewhere, and as they are coming out, someone is going to ask them what's discussed, and they tell you, and if they don't tell you, you can surmise.

MS. GORDON: As a matter of principle --

MS. HENRY: I wish everything was open.

MS. GORDON: If that can be enforced, that's the way you would like to say it?

MS. HENRY: Right.

CHAIRMAN FEERICK: You have been extremely helpful with your time and your comments. I have only one wrap up question, and I'm referring to your experience here in New York, over the period of time that you have been here, and if you could remove the feeling among the press people, do you have any actual experience that there is a public perception that expresses itself and concern about what's going on behind closed doors?

You did make reference to public being interested, certainly, in a number of
IN RE: OPEN MEETINGS LAW

issues, but in your experience, has the

public expressed itself that you have been

able to see in a negative way about

government in terms of closed meetings?

MS. HENRY: Yes, when it hits

home, the public becomes outraged. When it's

an issue that affects them, whether it's

something that affects their children, as in

the asbestos in the schools, or if it comes

out of their pocketbook, like the salary

increase, that's when the public gets

involved in this issue and cares about it.

Overall, I don't think the

public loses sleep over whether the city

council is meeting in private. When they

meet in private on something that touches

their lives or their pocketbooks, that's when

they become interested, and in the cases I

cited, I think those are cases when they

did.

CHAIRMAN FEERICK: And you

experienced that here in New York and --

MS. HENRY: Yes, and their

outrage, it's based on it being reported they
IN RE: OPEN MEETINGS LAW

met in secret to discuss these things, or
they never would have known that they met in
private to discuss them.

CHAIRMAN FEERICK: Thank you very much.

MS. HENRY: Okay.

CHAIRMAN FEERICK: Ms. Carrozzi. Good morning, thank you for being with us.

MS. CARROZZI: First of all, I'm pleased these hearings are being conducted here in Rochester and that I am able to participate in them, and I hope that they do have an effect for change in the state law, because from my experience in the past year on city council, I do believe there is a need for that change. I have submitted several attachments, which I will refer to.

I have to apologize. I didn't get all my testimony written ahead, but I have been involved in a campaign up until the last few days. The first attachment is an article I was asked to write for a magazine, the Monroe Republican. It was the fall 1987
IN RE: OPEN MEETINGS LAW

issue. Attachment B is the proposed open meetings resolution I submitted to city council on October 9.

Attachment C and D are newspapers articles from the Democrat and Chronicle and Times-Union regarding the resolution I submitted by council. I have here.

Attachment E is a copy of a speech by Jim Hendricks, a city councilman before city council on October 13, 1987. When I wrote the article for the Monroe Republican, I was asked to write it because in different times I had discussed with people the problems I had encountered as far as with the closed meetings with the majority of council.

In 1980, Tony Sciolino, who was then the northwest district councilperson, sued the city council for violation of the state Open Meetings Law. At that time, Gannett newspapers also sued city council for similar violations. Councilman Sciolino was fighting for the right to attend briefings
IN RE: OPEN MEETINGS LAW

being held behind closed doors so he might
better serve his constituents. One of the
statements he made at that time was, "I
maintain that my exclusion prevents me from
representing my constituents adequately
because city policy questions are decided at
closed meetings outside my presence."

As he experienced that, I too
experienced that in my time, so far in city
council. No one can imagine how difficult it
makes a job, unless you can experience it
firsthand. There have been agenda
briefings. One briefing was about an
industrial expansion in my district. That
happened to be Pennant Products was the
actual one. Neighbors in the area had
experienced problems with that firm for a
number of years, and there had been many
complaints, and they had not be resolved.
They did not consider them a good neighbor.

The first I knew about any plans
for that expansion were -- there was a notice
that I didn't receive until it was too late
to attend the meeting about an informational
meeting between Pennant Products that were
set up for the neighbors. When I mentioned
something about it, the fact I was notified
too late to another councilperson, the
comment was made to me, "We just discussed
that and went over that in caucus."

So when we had our committee
meetings a few days after that, I requested
the information and was told, "Well, you will
get that information when it goes before
council in July." Now, this was back in
maybe March or April. And so at that time I
indicated I would appreciate receiving the
information then because, you know, this was
something in my district, and if people had a
problem with it, I wanted to be on top of
it. And it took several weeks before I
received that information. Now, I consider
that a handicap to serving the constituents
in the district.

There have been several others,
some of the things I have been told when I
would complain about it is that nothing
happens in the caucuses. Nothing is
IN RE: OPEN MEETINGS LAW

discussed. Well, I tend to disagree with it,
because I have heard comments after. In
fact, people had a tendency at times in other
discussions, without realizing it, to say
something that was mentioned and discussed
there.

Many of the people were aware of
the closed caucus in connection with city
school district budget. It was reporters
that told me about it, and this was during
the budget process, and from what I
understand, the superintendent of schools and
some members of the school board met with the
caucus to brief them on the school district
budget, to give them the line item budget. I
didn't even receive that line item budget,
and council's staff had a copy before I did,
and I had to continue to request it. I felt
I should have that kind of information in
order to make the right decisions when we do
vote on the budget and also to ask the right
questions.

When I asked council president
at the time, and I indicated my displeasure
IN RE: OPEN MEETINGS LAW

that I did not get the same briefing, I was
told they can talk with anybody they like,
and if you want a briefing, you can ask for a
briefing. My only feeling is if somebody
offers a briefing to city council, it should
be to city council, not a political caucus.

And on Wednesday, August 26, one
of the issues at that time was the Genesee
Valley Food Bank, and this was a zoning
question. Wegman's had closed a store and
donated it to the Genesee Valley Food Bank.
Because of not having a definition really in
the zoning text for the food bank, they were
classified as a warehouse. Well, the present
zoning did not allow that type of business to
be operated in that area, and so they applied
for a text amendment.

Again, this was in my district.
And finally, because it was such a hot issue,
I received an invitation from some ministers
in the area where the zoning was going to be,
and they wanted to get the people from the
food bank together, the people from the
community association that opposed it
IN RE: OPEN MEETINGS LAW

together and the other city councilperson whose district abutted it and myself and hopefully on neutral territory get people talking so that something could be resolved. Because they felt, you know, that here was something that -- the food bank does an excellent job for providing food for the needy. It's something that's needed, and they wanted to see what they could do to see if it could come across as a palatable situation for the community around it, if there were some compromises that could be made.

The other city councilperson could not make it because the rest of council was having a caucus that day, and it was stated directly to me to discuss the food bank and what would be done there. After that, we had council meetings where it was, again, a hot subject, and I requested meetings for information, which I never did have any meeting or update on information and discovered that the day before the committee meetings, again, the majority had caucused
IN RE: OPEN MEETINGS LAW

and basically made a decision, which I was
told of after the fact, of what way to go
with the food bank.

And I think that hampers -- I
felt that it hampered me. I worked extra
hard to get the information then and went out
into the area, talked to people at the food
bank myself, but I felt I needed to be in on
those discussions, because I felt I could
have lent something to it, because it was in
my district and that I could have at least
relayed back what I had been told in -- with
meetings, as far as with neighbors in the
area, in my district, and with some of the
ministers and so forth. Granted, people
could say you could discuss it with each one
individually, but if there's going to be a
discussion about a problem or an issue that's
coming up before us, then I think it's
important to have everybody in on that
discussion. I don't feel that the closed
caucuses provide good government for the
city.

The resolution that I
IN RE: OPEN MEETINGS LAW

proposed -- and I want to say to you right now that I had no intention originally of proposing it before the election, although I was running, and it could be a major issue. What did prompt me to really get it together, because I was in the process of working on it, and I had it written, and I felt so no one would use it as a political issue. I felt it was something that needed to be done, and if it was a political issue, that's how people would perceive it.

In fact, I commend you for changing the date of the hearing, and it was scheduled before election day, and I felt it wouldn't have been as effective, because I think people would have thought political members came before you to speak, that it was nothing more than a grandstand.

I wanted to submit the resolution that my predecessor had submitted because he was a very thorough man. He was a lawyer. He had gone through the suit. He was very knowledgeable about the Open Meetings Law, and basically the only thing I
IN RE: OPEN MEETINGS LAW

really changed in his original resolution when I resubmitted this was in the original one it was the city manager form of government, and now it's the mayor form of government, and I submitted that on the Friday before a council meeting.

Now, that would never have come up for discussion. It would have just been submitted. The process normally would be for it to come up in the committee meetings, which would have been tomorrow's committee meeting -- today, this afternoon, we will have committee meetings for next Tuesday. I think it would have been good, because there would have been more discussion in regard to it.

What did happen, and I feel that -- I'm delighted a resolution was passed, but yes, it was political, because most of the people that voted for it that night, the day before said they were against it. But another candidate was -- had signed up to speak on the issue at the council meeting, somebody who was running against an
IN RE: OPEN MEETINGS LAW

incumbent, and all of a sudden it was on the table for a vote without having even gone through committee.

Now, I had a choice then and there to fight it, to say, you know, I wanted my resolution rather than Councilman Erb's or the rest to grandstand, and I had to weigh whether, "Do I want political grandstanding for myself, or do I want to see this resolution go through, which I think is needed?"

And I went along with the resolution, because they both had the same end. His was worded differently. Mine was worded maybe a little more specifically. For instance, mine does say on any occasion when five or more council members shall meet together with or without the presence of any non-council member and when topics of the discussion include public business of the City of Rochester, all council members shall be given timely notice of such meeting and be invited to attend.

It goes on. I have submitted a
IN RE: OPEN MEETINGS LAW

copy of it to you, and I won't go into all
the details. Failure to comply with all or
any portion of the resolution shall be a
violation of the letter, spirit and intent of
the Open Meetings Law, and shall invoke the
full ranges of remedies provided by that law
including but not limited to the remedy that
any action taken in violation of the Open
Meetings Law, upon good cause shown, may be
declared void in whole or in part.

Now, some of the statements that
were made that evening regarding why people
felt -- people who ended up voting for
opening up the caucuses but still made
statements on why a closed caucus was
beneficial, one of the statements that was
made was, "It's a wonderful thing for a new
council member, because it gives them an
opportunity to learn the ropes and not be
embarassed because the press is there if they
ask questions." Well, I have to disagree
with it, because I was a new council member
this year, and I was not invited to those
caucuses, and it made my job much harder,
IN RE: OPEN MEETINGS LAW

because I wasn't given the same information. And many of the meetings did have staff.

One issue that came up was also reassessment. Now, I sat on the citizens task force on reassessment. I resigned when I was appointed to council on December 30. But I had sat in during all the meaty sessions, and I knew the reasons that task force came up with those recommendations. I couldn't wait for council to sit down and discuss this whole issue, because I knew I could lend something to it, because I could say to them, "I know this is why they recommended this, because this and this discussion went on regarding it."

I was never in on those meetings. When they had -- when it had been discussed after the fact, I was invited to co-sponsor a resolution regarding reassessment, which I was pleased to do because of having worked on that task force. And whenever I did mention about I was disappointed that I wasn't able to sit in, the comment had been made to me at several
IN RE: OPEN MEETINGS LAW

occasions, "If you sat in, then the press would have to be invited."

Now, I didn't have a problem with discussing it with the press. I feel that comments that were made -- and I know you mentioned it to Barbara Henry -- about grandstanding, and I have to say the same thing she said to you. If people are going to grandstand, they are going to grandstand. They are going to grandstand anyway they possibly can.

My own feeling is that if the press were there all the time, after awhile, first of all, they would get bored if there wasn't hot issues being discussed. And I think we have to have responsible reporters assigned to that kind of thing that won't try to get personal, "Well, so and so made some dumb remark" or that kind of thing. And I think if, in fact, council members, if a reporter was not acting responsibly, that's the time to go immediately to the editorial board and say, "Look, we're ready to sit down, and we're having our meetings open. We
need responsible reporting, so it doesn't make us look like a bunch of dummies, when it's just normal conversation."

But I think people would also be on their toes, as far as they wouldn't make the personal attacks at each other. They would do their homework. They can lobby on an individual basis, which people do now.

Let's face it, if somebody has a resolution they want to get through, and they feel they are going to need to get votes, they send that resolution to the council members. They say, basically, "If you have any questions, contact me." They will generally even say to a council member, "What do you think of the resolution? Do you have any problems with it?" And then maybe amend the resolution accordingly because people do have those questions.

One of the other issues that had come up was the drug testing resolution, which I'm sure you must have heard of because it went on for such a long time, and I think it got more press than anybody ever realized.
IN RE: OPEN MEETINGS LAW

it would get. And the first four months I was on council, nobody ever discussed that resolution, even though it was the hottest issue, nobody ever discussed it with me.

The council person who submitted it when I first came on, he gave me a copy, and he said if you have any questions -- and several times just said, do you have any concerns? What do you think of the thing, and that type of discussion, okay, went on. But as far as council sitting down in a group or even small groups, nobody even said the word drug testing, and I would have felt that this is the kind of thing that we needed to sit down and discuss. If people had concerns or if people felt strongly for it, here's the time to get that out in the open with each other.

And it gives people a better -- I think a better educated vote in the long run, because then you're aware of the concerns. Many of the things that have happened have been reported in the press as Barbara Henry said. Quite often a reporter
IN RE: OPEN MEETINGS LAW

will find out about a caucus and get bits and
pieces, and I think it does more harm when it
is closed and people don't know everything
that went on and bits of pieces get in the
paper, and then people do feel things are
secret.

People said they weren't
secret. They were private. Well, you have
to look at what the perception is in the
public, and when you went behind closed doors
and the general decision is made, yes, we
have committee meetings, and yes there is
some discussion, but on major issues, quite
often that is discussed in closed caucus, so
there is a unity when it gets to the
committee, and we know whether it's going --
the people know whether it's going to be out
of committee or held in committee.

One of the things that happened
with the reassessment process was I know for
a fact RG&E had a representative offer to
brief city council on what RG&E's stand was
ongoing with the utilities class. I was left
out of that briefing, and it was offered to
IN RE: OPEN MEETINGS LAW

all of city council. I happened to have been
in the city council offices the day the
person came in and briefly overheard
conversation, and I have to tell you I don't
want to say I snoop, but boy I keep my ears
open when I know I am being left out of
things so I can be on top of things. I had
the impression it was being set up.
And later I contacted that
person, and I said, "Is there any
information?" That person did meet with me
and give me the same information that was
given to the rest of council. I don't think
I should have had to do that. I think that
should have been a meeting where if it's
offered to council, it's offered to all of
council.
And it is a handicap, and I
think the public -- I don't think the public
cares about every word that's said in one of
those meetings, and I don't think that
reporters are going to emphasize that
entirely either. I would hope that yes, we
may have some reporters that don't do a
IN RE: OPEN MEETINGS LAW

terrific job, but we also maybe have people in government that don't always do a terrific job. We all make mistakes. None of us are perfect. I know I am not, but I have not had any fear of meeting with them and talking to them and telling them why I vote on something. I knew that came with the job when I accepted it. And I feel proud of the fact that I haven't had to hide anything and that I have been able to say why I believe in these things.

But I hope you will look at the law, and I hope you will make the recommendations these things be open, because you have no idea how it can hamper somebody in the position that I have been in and doing their job. I think it's important -- that's one of the things you look at. And I realize most of the things people look at is the press being in there. I think it's more all of a council, all of a legislature, getting the same information, the same briefing from administration that everybody else gets so that they can represent the people that they
IN RE: OPEN MEETINGS LAW

were put there to represent properly.

CHAIRMAN FEERICK: Thank you very much. I know Mr. Davies has some questions to put to you. I would like to maybe go back to a dialogue that I had yesterday with Professor Benjamin, who is a professor of political science of the State University College at New Paltz and also a majority leader of the Ulster County legislature.

And the dialogue I had with him went something like this, would he comment on the ethics, put aside the illegality issues of a political party in caucus having the ability, because it might be the majority party, to receive information and even have other members of that -- of government in that municipality come before the party in caucus to provide the information that is not made available to other members of the elected body, and he -- I think this is a correct characterization of his testimony in response to my question -- said that that would bother him on an ethical level.
IN RE: OPEN MEETINGS LAW

One of the responses to that series of questions that I think developed in the course of day was, well, the person in the minority who was not at that caucus would have access to that information, would be able to get that information by using one's governmental authority, so that it's not that information is being made available to the majority in caucus. That's not equally available to the minority, if the minority is interested enough in acquiring the information. I would like to have any comments that you care to offer, and I think you have already offered a number of comments on that dialogue.

MS. CARROZZI: Well, I tend to disagree, simply because I pointed out to you on several instances where I requested it. By the time I received it, which was, as with the Pennant Products information, when I requested at a committee meeting. Two weeks later when I hadn't received it, I finally put it in writing to the mayor's office, and then it was again almost a week before I
IN RE: OPEN MEETINGS LAW
received it. So we're talking quite a time
after. What I wanted at that time was to
have information as to what was presented to
neighbors, what the neighbors felt about the
whole expansion, what people did attend, and
by this time, a lot of the process had
started.

What had happened in that
caucus, if I hadn't asked a question, I
wouldn't have even known that this whole
expansion was, you know, was to the -- the
proposed part of it and the process, as far
as it was. This is what's happened in many
instances. It's like finding things out
after the fact. I have no problem asking for
information, but it's getting the same amount
of information and getting the dialogue that
goes with it. I mean dialogue going back and
forth and discussion makes a big difference
than getting something handed to you on a
piece of paper which people can say that's
the information. It's the explanations that
go with it, and whether you're getting the
whole picture.
IN RE: OPEN MEETINGS LAW

CHAIRMAN FEERICK: Is what troubles you mostly about the caucus the fact that others may be present at the caucus, other than the members of the political party, who provide information to those at the caucus in government positions that may not be available without difficulty to other members of the government body?

MS. CARROZZI: Definitely. In fact, the other thing, and I realize the majority will say, that's their prerogative, but council staff also attends. Council staff works with them on agenda briefings. I was never afforded that same thing. I was told I couldn't even utilize the central staff.

CHAIRMAN FEERICK: Why is that?

MS. HENRY: As minority member, they allotted twenty thousand dollars in the budget for personal staff. Each council member -- up until this year's budget, they received three thousand dollars budget in addition to staff in addition to use of the central staff. They doubled their budget.
IN RE: OPEN MEETINGS LAW

In fact, they asked me to cut mine.

I also know they did, during the budget process, the discussion went as to the fact of blaming me to use of the council staff, because there were people that felt why should I have twenty thousand dollars to use. That twenty thousand is for, if I wanted to hire a budget analyst, anything like that, any contracts -- now, I did not even use half of that last year -- legislative assistants and so on.

What happened is there are, let's see, as I count, there's chief legislative assistant to council. There's two research analysts, legislative assistant -- legislative secretary and so on, regular secretary. I was not to even -- the only thing I would be provided was copying service and routing mail. Now that limits you.

Now, there isn't a secretary -- as I looked at that budget, the lowest paid secretary was twenty-two five plus benefits.

Now, out of twenty thousand dollars, I'm
supposed to provide an assistant for myself, a research analyst, if I need it, a budget analyst, a secretary, and you show me where you can find all those jobs and get the amount of hours and help that you would need out of that.

So I felt as though I would have had no complaints -- I shouldn't say I wouldn't have any complaints, but I guess I wouldn't have felt as strongly if people, in addition to having all the council staff, to be doing research and working on these things and getting information from the administration -- there were times administration was even there. I was not afforded any of that, which I felt put many obstacles in front of me.

And I said, when I went before the editorial board, and I say it jokingly but I mean it, I was never a track star, but I have learned to be a high jumper, because I was determined I was going to get over those hurdles. And if I was going to represent the people in my district, I was going to get as
IN RE: OPEN MEETINGS LAW

much information as possible, that when things came to me for a vote, especially if it had to do with my district, it was an intelligent vote. But I don't think it's good government when somebody in government has to fight to get the information they need. I don't think that's something that should exist.

CHAIRMAN FEERICK: Thank you.

Mr. Davies.

MR. DAVIES: Ms. Carrozzi, to what extent do you think your problems resulted from -- your inability to get information and so forth -- resulted from the fact that you were the only minority member? In other words, if there had been two or three minority members, would all this have been -- not been a problem, do you think?

MS. CARROZZI: I think it probably still would have been a problem. It might have been easier to insist, I suppose, if there were like, say, three minority members, then you could have a minority caucus, if you wanted to call it that, and
IN RE: OPEN MEETINGS LAW

ask for the same, okay, you know, "We want
the administration to give a briefing on
this." I don’t know. I really don’t,
because I never had the opportunity to find
out.

MR. DAVIES: Do you think the
greater the majority becomes or the less the
minority becomes, the more of a problem it is
for the minority to do their job?

MS. CARROZZI: Yes, because you
have to realize that in a case, for instance
like mine, when I was the only minority, you
have nobody to really -- I mean being new on
council, even, you have nobody that’s been on
to, say, show you the ropes and show you the
easiest ways to find information and go
through the process. It’s almost like you’re
isolated.

Now, people -- I don’t want to
give you the wrong impression because people
at city hall, generally staff people have
been pleasant to me. But their hands were
tied to a certain extent as to how much they
could provide, and I knew that. I was told
IN RE: OPEN MEETINGS LAW

that from the beginning, that there would be
some things that people just could not do for
me, you know, and would not be allowed to
do. That was part of my orientation, so to
speak, and I find that, you know, very
difficult. I knew it would be.

And I have to say I'm not sorry
that I went through the process, and I served
this year, because I think it's been an
education for me and an experience for me,
and I think you have to learn to be
responsible yourself and try and get
information, but I do think that we would
have had even better government in recent
years, if, in fact, the minority was given
that information and the chance to dialogue
in those working sessions. Those working
sessions, I think, are an important part of
council.

MR. DAVIES: Don't the committee
meetings take the place of the working
sessions?

MS. CARROZZI: Not really.

MR. DAVIES: Why?
IN RE: OPEN MEETINGS LAW

MS. CARROZZI: There are some.

I mean there is a staff there to answer basic questions, but they have already been -- most of the things have been committed to them from the working sessions and the agenda briefings that the majority have. And as I said, they basically have the basic information. Those committee meetings in some cases could even -- maybe might not drag on as long, because I might be asking some of the same questions and things that had already been discussed in these other briefings.

MR. DAVIES: As I understand it, as of January 1, there will be no minority on the Rochester City Council. It will be entirely controlled by one political party.

MS. CARROZZI: Right.

MR. DAVIES: If the city council were to change, rescind its resolution and go back to closed caucuses, what impact would that have upon the quality of government.

MS. CARROZZI: I think it would be a foolish move, because I think it would
IN RE: OPEN MEETINGS LAW

say to the public, "Look, we do have
something to hide."

MR. DAVIES: I understand for
political reasons, they may not do it, but if
they were to do it or if it were closed,
caucuses, where you have no minority members
at all, would that -- what impact would that
have upon the quality of government in your
opinion?

MS. CARROZZI: I really don't
think it would be a good situation, and I
think what happens when it is open, first of
all, the public -- in fact, in this city,
there are a number of community groups, very
active community groups who have been a real
asset to the city and who have asked
questions and who have wanted to be a part of
many of the decisions.

And I think as people see the
process and some of the discussion going on,
they can be a resource, because as certain
things are being discussed, many times there
are things, let's face it -- I mean I have a
broad background of community experience, but
IN RE: OPEN MEETINGS LAW

I don't know everything there is to know about everything. And we may be discussing something and thinking of something one way, but as the public hears it, before we have made the final decision, they may come forth and say, "Look, are you aware this, this and this is how it is right there, and this is the effect it can have." And I think you make a wiser decision when you get that input.

MR. DAVIES: Picking up on that, some have suggested that the answer to this is not to rescind the 1985 amendment and require open caucuses, but instead to require more public hearings. Would that accomplish the same thing?

MS. CARROZZI: No.

MR. DAVIES: Why not?

MS. CARROZZI: Well, a public hearing is different. You put down what you want ahead of time and tell people, okay, you invite them to come and talk about it. Many people first of all are intimidated by a public hearing. Sometimes they are scheduled
IN RE: OPEN MEETINGS LAW

when maybe some of the people that might have
the most expertise to give to you cannot make
it. They can go on -- and many people,
sometimes, don't attend them because they can
go on for hours and hours and hours.

When we had the public hearing
on the drug testing, we were there until
midnight. There was very good testimony, but
after awhile, it's very difficult when you're
the one sitting up there, as I'm sure you can
realize, it's hard to finally keep your ears
listening and really taking in what people
are saying, because you have been sitting
there, two, three and sometimes four hours
listening to person after person talk, and
many of them are saying the same thing.

And I think it's -- it's a whole
different type of thing, and there are people
that feel that open -- that public hearings
-- I have heard the comments, and I try to
discourage people from that, "What good does
it do to say anything, because nobody is
going to listen to me anyway?" I encourage
people to let their opinion be known, because
IN RE: OPEN MEETINGS LAW

I think it's important when people are making decisions to know the effect and what the public feels about it before you make that decision.

MR. DAVIES: Now Rochester, of course, city council has opened up their caucuses. Should this -- whether to open up caucuses, should that be left to the individual public body, or should that be regulated by the state, imposed by the state?

MS. CARROZZI: I would like to see it regulated.

MR. DAVIES: Why?

MS. CARROZZI: Because it can be abused. For instance, what if that hadn't been voted in, and what have if I continued in the position? I would still be just as handicapped in that I would have no recourse whatsoever to change it. At least if it is in the Open Meetings Law, it makes it standard. Then every city or every town is going to be going by the same standards, and I think that's one of the important things,
IN RE: OPEN MEETINGS LAW

is that it be the same across the board.

MR. DAVIES: Now, the Committee on Open Government has proposed that meetings must be open, not if there's just a quorum, but if there's two-thirds present. I wonder if I could get your view on that.

MS. CARROZZI: I hadn't thought about that one. Of course in the case -- I'm trying to think in the case of city council, that would be six rather than five. I think the quorum, because a quorum can pass something. I think that's one of the things you need to look at. I don't believe that if two people talk -- I mean I have heard people discussing that, I think that's going too far. Then we're getting to almost a police state where nobody can have a discussion without it being illegal, and I think it's important for people to have the option of being able to talk on an individual basis to explain their views to maybe other council members.

But I think when a quorum meets -- especially when it was a working
IN RE: OPEN MEETINGS LAW

session, it's one thing a political caucus to say -- especially when you have got a close majority/minority, and you're not sure if you have got enough votes to pass something. That's what I would call a political caucus, what way are we as a party going to vote. That's a little different than what we have talked about as far as working sessions and briefings, and that's where I feel the law as it stands for political caucus, it's abused. It's not strictly political caucuses.

MR. DAVIES: Now, of course one of the problems that's been raised is even if the Open Meetings Law is changed to rescind the '85 amendment, how do you keep people from -- public officials from abusing that law or defying that law? In other words, would you support, as a public official, would you support the institution of fines of individual legislators that violate the law?

MS. CARROZZI: Well, that may be a way of, I guess like anything, then maybe if it's happened once or twice where somebody is fined, then people will say, "Hey, they
IN RE: OPEN MEETINGS LAW

are not joking about this. They really mean this is the law." One of the things that Councilman Sciolo put in his -- and I think this is a good thought -- that if in fact people have violated the law, and then voted on something, that it would void whatever had been passed, because they had met illegally.

And I think if -- I really do think if the law is passed, I think most people will abide by it. Any law, I suppose you're going to find somewhere along the line where somebody will abuse it, and I guess the enforcement part is always the biggest thing, if anything, and seeing it. But I think that with the amount of publicity and the amount of -- the number of people that are interested in this, not only the press but the general public, I don't think people would be so fast to even try violating it because they would be concerned about the number of people that are watching.

MR. DAVIES: Thank you.

CHAIRMAN FEERICK: Commissioner Magavern.
IN RE: OPEN MEETINGS LAW

MR. MAGAVERN: I'd like to follow up on a suggestion that was implicit in Mr. Feerick's questions to you, and that is whether it might be -- do most of the job of remedying the conditions you describe, if the caucus, the political caucus exemption were modified by a definition of caucus that would exclude any meeting at which anyone other than a member of the legislature or possibly a legislative staff member were present, so that at least you could not have one faction monopolizing information to the exclusion of the minority? Do you think that would beat at least a great part of the problem that you have encountered?

MS. CARROZZI: Yes, yes, I do.

MR. MAGAVERN: Let me ask one other question, now that the council has adopted a resolution to open up the caucuses, do you expect or have you seen any signs that that will lead to other means by which the group in control will make decisions, maybe outside the caucus, but by other meetings to the exclusion of the -- you may not have a
IN RE: OPEN MEETINGS LAW

minority, anymore, but maybe to the exclusion
of some members of the body?

MS. CARROZZI: I haven't had an
opportunity, because we just passed it three
weeks ago, and I have to say I have been very
busy in those three weeks. I haven't seen
any sign yet regarding that. There hasn't
been any caucus of any kind, I can tell you
that, at least not any that I have been
invited to, so I don't think there have been
any.

I know there had been a
scheduled caucus for several days after that
council meeting, and it was cancelled because
of that. And I know that staff was going to
be researching to see just -- I know problems
that people felt that they were going to face
is, all right, now, if you have -- if you're
going to have them open, do you have to
advertise them? How far in advance does,
say, the press have to be notified and that
type of thing, and I think those are things
that can hamper it too. I can see that side
of it. I didn't realize that until, like I
IN RE: OPEN MEETINGS LAW

said, the legislation was passed and staff members were trying to research that.

And I think those are things that might need to be looked at and be defined, if, in fact, the law is changed, because you certainly don't want to be unreasonable on that part, because in some cases, what if something came up that was an urgent matter that nobody -- you really didn't have a long period of time in advance to know, and you were going to have to call the group together, and in order to avoid having a closed meeting, if it says, say, that you have to advertise a week in advance, I mean you would really be hampered.

So I think you have to look at that aspect of it, too, so that you aren't really -- you can hamper government in that respect. So I wouldn't want to see the law changed to just this, look at all the things that need to be considered and put into it. For instance, how far in advance people have to be notified. Can, in fact, if an emergency meeting is held, can it just be,
IN RE: OPEN MEETINGS LAW

say, the press be called, you know, that day
and say this is when the meeting is, you
know? Or are you going to say there has to
be three days' notice or whatever to anybody
that meeting is going to be held before you
can hold it. Because there could be times --
you know there are instances where things do
come up that could be an emergency that they
would need to meet immediately on something
and be briefed on something.

MR. MAGAVERN: Let me go back.
I'm sorry to go back. Another question I
opened up and left, and that is the problem
of exclusion of information, your exclusion
of information from the executive branch.
You alluded to it several times, but I'm not
sure we got a detailed description of an
example, and I wonder if you might give us
the description of one or two examples where
you tried to get information from the
executive branch but were really shut off.

MS. CARROZZI: Well, the one, of
course, was, like I said the Pennant
Products, for instance, that was one I had to
IN RE: OPEN MEETINGS LAW

request on more than one occasion, publicly at a committee meeting, and I felt that was the best way at that point. It's in the public records. It's official. I did request it.

MR. MAGAVERN: Was that a request of the executive branch?

MS. CARROZZI: Yes, it was to the mayor's assistant who attends all our committee meetings.

MR. MAGAVERN: I don't want you to repeat that. I hadn't understood the nature of that question.

MS. CARROZZI: I will say, as far as the budget, the copy of the city school district budget, I made that request to council staff. I did not make that to the executive branch, because I saw that staff had it, and I checked to see if I had a copy. And I was told more copies were coming, and there was a wait on that. But the Pennant Products information would be, you know, the main one I can point to on that.
IN RE: OPEN MEETINGS LAW

MR. MAGAVERN: Thanks very much.

CHAIRMAN FEERICK: Mr. O'Brien.

MR. O'BRIEN: Just a few questions, Mrs. Carrozzi. First of all, I notice from your submission to the Commission that attachment A, which is your opinion piece, mentions the fact that you have been studying Mr. Sciolino's old files regarding the Open Meeting Law with great interest. Are those files available to the Commission?

MR. CARROZZI: I turned most of them over to Mr. Davies. I have found a few other things, as I started going through his old files. What he did do was left everything in the files, so if there was anything I needed for information -- not just the Open Meetings Law. I mean everything was there, and one day I just happened to pull out that file, and it was deja vu, because the first letter he wrote regarding his feelings of closed caucuses were exactly the way I was feeling, and that's what, you know, prompted me to look at it.

And I certainly was not going to
IN RE: OPEN MEETINGS LAW

try and submit a resolution in my first
several months on council. I felt I needed
to get some background and also to see if, in
fact, eventually along the way there would be
support from other members of council,
because it does no good to put something
forth if you know it is definitely not going
to get passed.

MR. O'BRIEN: We would
appreciate it, I'm sure, you transmitting
anything you have to Mr. Davies on that issue
and what you feel free to give to us.

MS. CARROZZI: I have no reason
to keep anything else, but anything that I
find -- some things may have been duplicates,
because I did find there were duplicates of
some of the things in the files, but I would
be glad to turn over any of the files.

MR. O'BRIEN: Thank you. You
also talked a little bit about the October
city council meeting which the opened meeting
exclusion was rescinded, and you said that
was a political vote which took place, even
though a number of Democrats expressed their
IN RE: OPEN MEETINGS LAW

opposition to opening up political caucuses. That strikes me as an unusual vote, and I'd just like to explore a little background with you on that.

If I'm not mistaken, approximately a year ago in November of 1986, the city council had before it virtually the same issue, and it voted seven to two against opening up its caucuses. The dissenters, at that time, if I'm not mistaken being your predecessor, then Councilman Sciolino and Councilman Erb.

Then I guess what you're saying is eleven months later this issue came before the exact same council again, not exactly the same council, because in the interim you had replaced Councilman Sciolino, and it was approved by an eight to one vote. And the only dissenter on this occasion was Councilman Curran. Am I accurately stating the history?

MS. CARROZZI: Yes, in fact the number of people, I will tell you, commended Councilman Curran afterwards. I heard
IN RE: OPEN MEETINGS LAW

comments to the fact that he had stated very strongly in the past his feelings against it, and that he stuck with his feelings, you know, that if that was how he felt, that he wasn't changing his mind at the last minute, especially the fact there had been no real discussion.

I mean the two pieces of legislation were submitted on Friday -- well, actually, yes, Councilman Erb sent copies of his to each council member to look at. He hadn't officially submitted. He was going to submit it at the council meeting, and before he could even read it or anything else at the council meeting, the recommendation was made that we bring it up and vote on it.

MR. O'BRIEN: So there's a large swing in votes there over an eleven month period. Did anything happen in the interim that would make members of the city council more sensitive to this issue in 1987 as opposed to 1986?

MS. CARROZZI: I don't believe so.
IN RE: OPEN MEETINGS LAW

MR. O'BRIEN: Let me ask you this, you were contacted by Mr. Davies, I believe, about the possibility of testifying before the Commission in the first week of October. Is that correct?

MS. CARROZZI: Yes.

MR. O'BRIEN: And I think at that time it was contemplated that we would be having a Commission hearing before the election.

MS. CARROZZI: Right.

MR. O'BRIEN: That plan was later changed. If I'm not mistaken, other members of the council were also notified about the possibility of such a hearing. Is that correct?

MS. CARROZZI: Yes.

MR. O'BRIEN: Do you think it's possible or is it a fair inference that one reason why this switch in the vote took place was because of the prospect of a hearing by this Commission before the election on the Open Meetings Law?

MS. CARROZZI: But at the time
IN RE: OPEN MEETINGS LAW

the proposals were made, you have to realize
that the date had already been changed. But
I also mentioned it when I was submitting my
legislation that I felt that this pointed out
the fact that there were some problems with
it, that even Governor Cuomo had expressed --
I don't know how to put it, regrets or
whatever, that the changes had been made
before. And I felt this was an indication
that there should be support for that type of
bill.

And as I said before, I think
you did the wise thing in changing the date,
because I'm afraid that had this been done a
week ago, that anything that I had said to
you or anybody else that was running for
political office, it might have been said
that you can't really take that into account
because it was just a political grandstanding
to get votes. So I think the wisest thing
that you did was delay it to now, so it's an
honest to goodness hearing, and the people
that are testifying are testifying on what
they believe is true, because the votes are
IN RE: OPEN MEETINGS LAW

So I'm more comfortable. Sure, it would have been a great publicity thing for me, you know, if I, you know, had testified a week ago, but I would rather see it now so that possibly we can get some good results from these hearings.

MR. O'BRIEN: Thank you.

CHAIRMAN FEERICK: Thank you very much for your participation and nice to meet you.

MS. CARROZZI: Thank you.

CHAIRMAN FEERICK: Good morning. I understand Miss Scott has not yet arrived, but John Erb, Democratic member of the city council who co-sponsored, as I understand it, the open meetings resolution recently adopted is here, and we're pleased to have you here and hear from you.

MR. ERB: Thank you for fitting me into your schedule. I don't have any prepared remarks. I frankly misplaced the date of this hearing, and I wasn't -- I was in my office this morning, and somebody
IN RE: OPEN MEETINGS LAW

reminded me of it. So I came down.

I would like to comment briefly

on two aspects of the issue. One is the need
to have substantive debate and policy
considerations done in the public forum.

We had a special council
meeting, as an illustration, probably about
three or four weeks ago, where there was one
legislative item to be considered. This
legislative item was delayed from the regular
agenda because there was a lot of -- there
were a lot of issues that needed to be talked
about further before we made a decision. And
yet at that special meeting, which was called
for at three o'clock in the afternoon on a
Thursday, business was taken care of in less
than five minutes. In fact, it was done so
quickly, that I, who was at the council
chambers at three o'clock and was called out
for a phone call approximately 3:10, was
excluded from the meeting.

By the time I got back, the
meeting was done, and this is an issue -- the
particular issue was whether or not the city
IN RE: OPEN MEETINGS LAW

council should spend twenty-four thousand dollars in support of the Christmas decorations for the downtown merchants and the downtown area. And there was a lot of policy considerations, even though the amount of money wasn't that great, should we be spending the government funds for these purposes? How does this stack up in terms of a priority and other items, et cetera, et cetera.

The fact it was delayed from the previous meeting showed there was a lot of interest, both public and among council members in this issue, yet the meeting itself lasted less than five minutes. And as I said, I was actually excluded from the meeting because I was out when it was called to order. So I think there is a need for issues like this and issues of greater magnitude to have the public have access to the policy questions that their representatives, no matter what party, bring to the issue.

Why do they make a final
IN RE: OPEN MEETINGS LAW

decision? The vote is important, but it's also important that the public understand how and why it reached a certain decision. The other issue is the question of -- also on that issue, when you have a legislative branch where one or -- more than one party is represented, there's an opportunity, at least for the minority party, to bring some public discussion on an issue in the public forum, even if they don't have the ability in terms of the caucus. But I think if you have a case where the legislative branch is all one party, then the public has even less chance of hearing the debate, because there may not be someone there who wants to force the debate, bring the issue to the table.

The other issue is the access to the information between the legislative and executive branch. Access to information is very critical in terms of making decisions, and some would say it's the entire game in terms of making a responsible decision. I have had, as the chairman of public works committee and at Rochester City Council have
IN RE: OPEN MEETINGS LAW

had problems getting -- the mayor has flatly refused to testify before our committee on a major policy issue that's been debated in the public forum for over a year now, that is the building of water filtration and treatment plant for our water supply system. Yet there's other issues that -- and information that comes through in party caucuses that's very valuable and I wish would be done in the public forum. I think it's information the public should have access to.

So those two aspects of the issue are the ones that I think are most important. I think state action is very important so that citizens of one particular municipality don't have to depend on the particular attitudes of their governing body, whether or not they have access to public information in this fashion. And that's about all.

CHAIRMAN FEERICK: Thank you very much. Mr. Davies.

MR. DAVIES: Picking up on a point that Ms. Carrozzi was asked, why was
IN RE: OPEN MEETINGS LAW

the opening meetings resolution passed, and
why was it passed at the time it was passed?
Was it just a fact of politics?

MR. ERB: I was sort of

surprised, as the maker of the resolution. I
did not have the intention that it would be
voted on that night. I would have preferred
that it went through the normal committee
process so that there would have been ample
opportunity for the public to participate in
that decision, and I just -- it wasn't my
intent that it would be voted on that night.

In fact, it was sort of ironic, because the
last piece of legislation I introduced was
voted on some five or six months after I
introduced it, and this was voted on five or
six minutes after I introduced it. So I was
quite surprised.

Some people have characterized
the sudden interest in this legislation that
hadn't for six years been voted on
positively, as I have been on council almost
six years now and have supported a resolution
of this nature in the past to the season,
IN RE: OPEN MEETINGS LAW

being the political season, and there were some candidates for city council that were raising this issue of whether or not our meetings ought to be open to the public. So I think those that -- I can't say what people's motivations were. I can say I was very surprised it was voted on that night, and it was uncharacteristic, in that I think people who characterize it as being voted out of some political considerations have solid grounds to make that statement.

MR. DAVIES: I assume by saying there may have been some other political considerations, it was also perceived as an issue of concern to the public?

MR. ERB: Yes, I think there is no question that there is public interest in this. I think the public is interested in knowing what the quality of our decisions are, how we reach those decisions, and what factors influence us in reaching those decisions.

MR. DAVIES: I have just one other question. Mayor Ryan yesterday stated
IN RE: OPEN MEETINGS LAW

his view that by opening up all caucuses to the public, that that prevents the development of a party cohesiveness within the public body. As a result, the members of the public body become demoralized, and it's difficult to attract new people, and it damages the workings and the ability of that public body to function. I wonder if you could comment on that. Do you agree with that?

MR. ERB: No, I wouldn't agree with that at all. As elected officials, we are elected to do the public's business, and in our campaign for public offices, we're asked all kinds of questions and asked to state our positions on any number of issues in the public forum and asked to defend them and explain them.

And I think that this is what it is you commit yourself to when you run for public office. I don't think a public debate of the issues or -- frankly I think just the opposite. I think that in the public forum, there's more of a tendency to focus on the
IN RE: OPEN MEETINGS LAW

business at hand, less tendency to drift off onto issues that are not relevant to what it is you're considering, and I think proper attention and focus on public policy is not demoralizing.

In fact, I find just the opposite. Sometimes I find if I'm coming to a meeting where there are discussed topics A, B and C, people wander off and talk about other things, and they have nothing to do with this, I find that very demoralizing, because I'm there to talk about the water treatment plant or the toxic waste dumps or something like that, a specific issue, and then if we don't talk about that, then I find that demoralizing. In the public forum, attention is more focused, because if you drift off, there will be people there to remind you why you are there.

CHAIRMAN FEERICK: Thank you.

Commissioner Magavern.

MR. MAGAVERN: One question, as far as the mayor's refusal to testify before the committee, don't you have subpoena power
IN RE: OPEN MEETINGS LAW

to provide you an adequate remedy?

MR. ERB: I believe we do, but

it wasn't -- at that time -- I believe we do, but I don't think the majority of the members of council would have wished to exercise that subpoena power at that time. There are only a couple members of council that took the same position I did, so -- and I think the subpoena power is -- I think that's -- I think the president has that power.

MR. MAGAVERN: I see. My only other question is whether given the resolution that has now been adopted, do you expect that's going to have the effect of leading people to have other informal and private means of seeking information and trying to resolve issues prior to the caucus?

MR. ERB: I hope not. We haven't had any caucuses since the resolution was passed. In 1985, when the law was changed, the Democratic majority went to a system where there were four -- they met in groups of four instead of the entire group,
IN RE: OPEN MEETINGS LAW

so I'm not sure what's going to happen from this point on. I would hope that the spirit of the law, as well as the intent, would be carried out. And that's why I think it's important to have state legislation and with more specifics.

MR. MAGAVERN: Any conceivable state legislation is going to leave open the possibility of legal private meetings, maybe amongst smaller numbers, maybe to the real extreme, just no more than, say, two legislators, but if people want to find a way to use such means to conduct some at least exploratory discussions amongst themselves and relay messages back and forth, it can be done under any legislation, I take it?

MR. ERB: Yes, laws are always -- not always. Laws are not always perfect in terms of being able to control all the activity that they are addressing, but I think they set the standards and tell what the intent is, and then --

MR. MAGAVERN: You wouldn't want
IN RE: OPEN MEETINGS LAW

to prohibit all such informal communications, would you, between legislators?

MR. ERB: I think you have to be able to talk to other legislators one on one. If you can't do that, I think you're reaching an absurd situation.

MR. MAGAVERN: Thank you.

CHAIRMAN FEERICK: Mr. Small.

MR. SMALL: Mr. Erb, in the attendance of closed caucuses, in your experience in the last two years, was there anything, in your opinion, that was discussed in that caucus that could not have been discussed in an open session?

MR. ERB: The only thing that I can recall is -- would have to do with personnel matters with our own city council staff.

MR. SMALL: Some of that would be permitted in an executive session of the full council, wouldn't it?

MR. ERB: Right. I can't recall anything of that nature.

MR. SMALL: Why, then, do you
IN RE: OPEN MEETINGS LAW

think there is so much resistance among your colleagues to go back to the pre-85 open caucuses?

MR. ERB: Well, I suppose there is some fear about the free flow of words and ideas and debate around issues, and if issues are pretty much hammered out behind closed doors, then when you go into the public forum, it's more controlled in some ways. It could have something to do with that.

MR. SMALL: The feeling that you said earlier that you don't share.

MR. ERB: I don't share.

MR. SMALL: Just finally, what do you, in your opinion, what's the impact on public confidence and the integrity of council or government in general of the one as opposed to the other?

MR. ERB: I think public confidence would be a lot higher with public meetings. I think people, even if they don't agree with the decision you make, have some appreciation or understanding how or why you reach that decision. I think there's a lot
IN RE: OPEN MEETINGS LAW

more confidence of what you are doing as a legislator.

I think also attendance at formal council meetings and legislative meetings would be enhanced, because you would see more of the true debate in public policy considerations that go into making a certain decision. So I think it builds public confidence, without question, in terms of seeing what is really going on. I think when you have a more staged meeting, I think that it frankly gets somewhat boring, and people begin to wonder what's really happening, the general public.

MR. SMALL: Thank you.

CHAIRMAN FEERICK: Your reference to attendance had to do with members of the public coming to meetings, or members of the legislative body, itself?

MR. ERB: Public, you mean at the council meetings?

CHAIRMAN FEERICK: Yes.

MR. ERB: Yes.

CHAIRMAN FEERICK: Yesterday one

COMPUTER REPORTING SERVICE
IN RE: OPEN MEETINGS LAW

of the witnesses suggested that with open meetings, there would be enhanced attendance by the members of the political party itself, and of course others suggested quite the contrary. So we have had two different points of view on that.

MR. ERB: You're talking about formal committee meetings and council meetings?

CHAIRMAN FEERICK: Yes.

MR. ERB: Well, I think what might happen too, if you had open meetings and the spirit in the law was followed, you might have more substantive debate in the committee meetings, where you can focus on more complexity of a certain issue.

I have experienced a tendency not to have that in committee meetings as much as in the private meetings, and I think it would be preferable if the meetings were open. Then in the formal committee meetings much more of that would go on, and the public would be more likely to go to those meetings.
IN RE: OPEN MEETINGS LAW

CHAIRMAN FEERICK: Thank you very much, Mr. Erb.

MR. ERB: Thank you.

CHAIRMAN FEERICK: Ruth Scott.

Good morning and thank you for your participation. We are aware of the conflict that presented itself, I gather overnight, and I might indicate that we did receive your statement. And I am led to believe by my colleagues here that they have a sense of what's in your statement, and I know they have a lot of questions, so if you're comfortable with summarizing your statement, it will just give us that much more time for questions.

MS. SCOTT: All right. I'll try to do that. I'm sorry that I was not able to be here earlier, and I appreciate this indulgence, and I appreciate this opportunity to make testimony on this subject, which I think has been of great concern to a number of people across the state.

I think the major points that I want to make relate to what the discussion is
IN RE: OPEN MEETINGS LAW

really about. I think sometimes we take a
fairly naive view about a discussion of this
nature. When we talk about the issue of open
government versus the issue of the ability to
have private conversations around issues, I
do think they are different, and I think our
government in this city and my experience in
being involved in it for thirteen or fourteen
years directly and a number of years before
that indirectly, tells me that this
government in Rochester is an open one.

I think, as I have looked over
the years, if I can go back and look at my
correspondence and the discussions that I
have had with people, I have never had
anybody raise this issue with me, except
those organized groups who are formed to
raise the issue, except in the case when we
have been discussing it, and I have -- my
mail runs, I would say I get on a slow day
maybe ten pieces of mail, but some weeks
maybe twenty-five or thirty-five a day. I
can count between my hands the number of
letters that I have had on this subject. So
IN RE: OPEN MEETINGS LAW

it does not seem to me to be a substantive subject in the minds of the public in this community.

I'm also concerned about the fact that while cities are the creatures of states, the legislative bodies are not. We decide on a local option level what kind of legislative body we ought to have, and the public does have the right and the responsibility to turn that body out when they no longer think it works or to change it if they don't think it works. And I think that's been proven in this community, because it has happened on several occasions.

But I would also point out to you that since 1973 in this community, a number of individuals have been returned to their places on the city council in four of five elections. That would say to me there is considerable public confidence in the decisions that are being made and the way in which those decisions are being made.

I also want to call your attention to some of the things that we have
IN RE: OPEN MEETINGS LAW

done in the new form that we have, because we
do have a relatively new form of government
here in this community, and we're in the
process of trying to figure out what is the
most effective way to get the information we
need and to make the kinds of decisions that
will be important for our community.

We decided early on last year,
which may give you a little better sense of a
history of this issue and the vote that was
taken a couple weeks ago, that as far as we
were concerned, we wanted to continue and to
enhance the public's interaction with us and
the public's understanding of the decisions
we make and how we make them. And so we
moved to a system where even in our decision
about who would have most power, the
president or other members of council, that
the most important people in our government
ought to be not the president of council but
the chairpersons of committees.

And so for the most part,
although there are some -- I have only heard
one person disagree with this out of nine
IN RE: OPEN MEETINGS LAW

members. For the most part, any discussion that goes on at all about issues goes on in those committee meetings. The committee meetings not only have the substantive discussion, but in addition to that, we have a person whose responsibility it is to summarize those meetings to try to get in a summary form who said what about the issue at those meetings, and then send those discussions out to the press people who may not have had an opportunity to attend.

I've got to say to you that I am very disappointed that very few times has that information been used and reported on in the local press, although that's been a major attempt of ours to try to get more information out.

In addition, we have a newsletter that we send out quarterly to the people in our community, and we have had a very positive response, certainly wouldn't win a Pulitzer Prize, necessarily, but it's an informational bulletin in an effort to keep people up to date on what's going on.
IN RE: OPEN MEETINGS LAW

with their city council and public issues.

I also have had a great deal of success, myself personally, in being able to interact honestly, effectively and often with the public. I go almost anywhere at any time, if it will fit into the schedule to engage in dialogue with various people in the community on issues which concern them. And most of the council members are quite willing and able to do that, and we do.

What questions do you have?

CHAIRMAN FEERICK: Thank you very much. I appreciate, again, your statement and the time and effort that went into the preparation of your statement. Just on a technical level, you made reference to the activity of your committees, and it's not clear to me whether all members of the council would be members of all the committees or --

MS. SCOTT: No, the committee memberships, we have three persons on each committee, and when we had a minority member from the council on a committee. However,
IN RE: OPEN MEETINGS LAW

let me tell you that since the beginning of
this term, almost every council member has
been at, with the exception of myself because
of my role, has been at every committee
meeting. So, you know, it's a moot point.
It helps in scheduling, and that's about it.

CHAIRMAN FEERICK: Thank you. I
had a question or two to Barbara Henry who
spoke earlier this morning concerning her
perception of the feeling of the public when
closed meetings occur, and in response to my
question, she made reference to, by way of
example, to closed meetings that the public
subsequently learned of dealing with the
housing development, dealing with the
asbestos in the schools, and she cited a few
other examples. And as I recall her
testimony said that there was quite a bit of
outrage concerning the fact that those
meetings had taken place with respect to
those subjects, and the public didn’t have
information concerning what happened at those
meetings.

MS. SCOTT: I'm not sure what
she's talking about because I know of no meetings that there was a caucused meeting on those issue. I think the asbestos one may have had something to do with schools.

CHAIRMAN FEERICK: Commissioner Magavern has pointed out to me that the examples may well be examples of suburban meetings and not here in the city.

MS. SCOTT: Okay. I don't know of any.

MR. O'BRIEN: In any case, they weren't city council.

MS. SCOTT: They aren't city council, I don't think. And that's the issue I keep coming back to when people want to talk about why we want to do this. I'm one of these people that don't believe you legislate morality or you legislate people being effective or their being responsive and open. It just doesn't work. If people want to get around that type of thing, they will do it, regardless of what you legislate.

But more important than that, I think you hold people to an integrity
IN RE: OPEN MEETINGS LAW

standard that relates to how the community perceives them. And if there were such an outrage, I am sure that council, the current city council would respond to it. But in the first place, there's very little that we ever discuss that has anything to do with the issues that people tend to think we are discussing.

CHAIRMAN FEERICK: Thank you.

Mr. Davies.

MR. DAVIES: You said today, and you have been quoted before as saying you simply don't see the open meetings question as being a burning issue in the public eye. And I guess my first question is if that's -- and you also stated your view that all these open caucuses are not to the public benefit. Then if that's true, I guess I would have to ask why did you support and vote on a resolution opening the caucuses three weeks before the election?

MS. SCOTT: I think that's a legitimate question, and I would suggest to you that I don't know how to answer your
IN RE: OPEN MEETINGS LAW

three weeks before the election issue, because that has nothing to do with it. But why did I vote. I -- there are occasions, I discovered as president of council, when it's important to affirm the feeling of the majority. And at that point when I had to vote, the majority had decided that that was the way the issue was going to go. Had I voted no, there would have been a constant question about whether or not you as president are going to carry out faithfully what the majority has said they want you to carry out.

And so my vote, which I explained at the time I made it, was simply an affirmation that indeed, if anybody was looking for a way out of it, I did not intend to give anyone that way out. If the majority felt that's what they wanted, that's what we would do. I think that's what representative government is all about.

MR. DAVIES: If you know, did other persons in the majority vote in favor of the resolution, even though they, too,
IN RE: OPEN MEETINGS LAW

believed that it was not necessarily the best
interest of the public?

MS. SCOTT: I believe several
people so stated that evening. However none
of those people were running, so it had
nothing to do with the election.

MR. DAVIES: Back in the period
1981 -- first of all, when did you first come
on the city counsel?


MR. DAVIES: During the Sciolino
period, if you want to refer to that, the
1981 to 1985 period, did open caucuses, in
your view, make any difference in the way
that the city council conducted its business
and also on the quality of the government?

MS. SCOTT: I think it made it
very difficult to get information.

The one thing that I realize I
did not say in my summary statement, which I
perhaps need to correct, is part of the
problem with the issue of whether or not all
of these meetings should be open is the fact
that when you have a government that is run
IN RE: OPEN MEETINGS LAW

by a person who has three thousand individuals at their disposal, to bring them information and proposals, and all the council ever gets is the end of that process, unless that person is willing to invite them in and give them something different, makes it very difficult.

I was in both -- I was on council during both times, both when we did allow and did have meetings that had a majority of the people at them. What we found when we moved to the other system is that we never knew what the city manager was really doing or was planning to do. If you have a large number there, you can ask at least enough questions so the pertinent answers get put on the table, or that person knows they have got to respond to you on certain issues.

After that happened, what essentially happened is the city manager would talk to one group of people and get one set of directions. He would talk to the next group and get another set, and if it was
IN RE: OPEN MEETINGS LAW

something that the person didn't want to do,
the manager didn't want to do, he simply
didn't have clear direction, so he didn't
have to do it. I think holding the people
who work for you responsible is very
difficult under those circumstances, when
you're talking about the legislative body
versus the administrative body, and I don't
think that there's any way for you to mandate
that the mayor of the city, for instance,
make available every bit of information or
discussion that led up to whatever the
proposal is in putting on the table.

And yet you have a part-time
council, who is attempting to act responsibly
on issues that are fairly complex. You also
have varying degrees of experience on the
council, so if you have a number of people
whose experience is fairly simplistic, and
you have some people whose experience is more
indepth, those people being together to raise
those questions is probably a better process.

MR. DAVIES: As Ms. Carrozzi
pointed out, if the newer council member is
IN RE: OPEN MEETINGS LAW

in the minority, that person does not have
the benefit of that process, does she?

MS. SCOTT: In some cases they
would, and they certainly do at committee
meetings, and at this point it's a moot
question in this community.

MR. DAVIES: Now, referring to
your previous answer, does it make any
difference whether the form of government is
a city manager form of government or a strong
mayor form of government in terms of the
impact on whether -- the question of whether
caucuses should be opened or closed?

MS. SCOTT: I think it's worse
in a situation where you have a strong mayor
versus a legislative body, and in the
beginning at least. I think in terms of the
fact that the head administrative person of
that group is not answerable to anyone except
the general public every four years, and so
if you're going to be really conversant with
what's going on -- for instance one of the
things that I think has been most confusing
to people in our city government -- most
IN RE: OPEN MEETINGS LAW

outcries that people have made have been made based on the fact, for instance, that they wanted the mayor to do something that he did not want to do in this case, or he was working on a solution and did not particularly feel that he ought to share it with the public at that time, and I think that's his prerogative. On the other hand, the council did not have any input into those kinds of decisions, either, because that's his prerogative with his three thousand people who work for him.

MR. DAVIES: Now, getting back to the period, '81 to '85, we had heard, and I just wondered if you could either confirm or deny this, that during that period that the Rochester City Council in effect kept a chair out in the hall and would rotate people through that in order that they would have less than a quorum at any one time.

MS. SCOTT: I don't recall that. That doesn't make any sense to me.

MR. DAVIES: Why not?

MS. SCOTT: I mean it just seems
IN RE: OPEN MEETINGS LAW

like a lot of ruse to do nothing. I don't believe that that was the case.

MR. DAVIES: Can you tell me why Councilman Erb's resolution as opposed to why Councilman Carrozzi's resolution was adopted?

MS. SCOTT: I'm trying to remember. Can I just consult with my chief of staff?

(Discussion off the record.)

MS. SCOTT: I needed to refresh my memory. This is one of I don't know how many pieces of legislation we have passed in the last month.

Being refreshed in memory by Mr. Sullivan, the process of the meeting was that Councilman Giess asked to be recognized to suspend the rules, to vote on the Erb motion, and having dealt with that, you know, in the normal procedural way, Carrozzi's resolution was not on the table. So, you know, presumably that would be the reason. And you would have to ask Councilman Giess why she chose to suggest that one rather than the
IN RE: OPEN MEETINGS LAW

other one.

MR. DAVIES: Now, I think one of the statements — one of the reasons you have given in your testimony for having an opportunity to have closed caucuses is the politicians or legislators are less inclined to ask questions to offer innovative solutions that they haven't run by their colleagues before, and so forth. And I guess the question arises — and are afraid of looking stupid if they ask uninformed questions and so on. I guess the question arises, isn't that public entitled to know, as Mr. Sciolino said, the public has a right to know who's contributing, who's not, who's being petty, who is being statesman-like. Unfortunately, when the door is closed, nobody knows who has done the job.

MS. SCOTT: If I can assume that, what you have to realize, the public doesn't see the meetings whenever it's held. So it's the selectivity of the third state decides what the public sees or does not see about them.
IN RE: OPEN MEETINGS LAW

I'm sure you yourself, if you take out any newspaper and read it, and you look at the headlines, and you read the story, it's often a different story than what the headline says. And very often the papers tend to do or to capture that part of the statement which is sensation, which may or may not be what the person meant or what they thought or what they were proposing.

And so once that kind of thing gets out, it's very difficult to recapture it. It's very difficult to say, "What I meant was X," or "what I was thinking about was X." So no matter how you do it, the public does not get the whole scenario, and so I think it's really, it's sort of like we're haggling over something which is not substantive, as far as I'm concerned. The public, as long as you have public discussion and debate at your meetings, I don't think you can really control what happens beyond that.

MR. DAVIES: Is there public discussion and debate at the meetings
IN RE: OPEN MEETINGS LAW

necessarily?

MS. SCOTT: Yes, there is. Yes, there is, I think it might be partially the view of some of the press people, maybe based on their lack of experience in the kind of community we have. But for the most part, there's a lot of frustration, they say, about the fact that we do not disagree with the mayor more often.

We pass from twenty-five to fifty or sixty items on a given council night. Most of those items have to do with things that were already set in the budget. They are not things that, indeed, require any substantive discussion, if you have approved the budget.

You could haggle over them for haggling's sake or for headlines' sake, which a lot of our people sometimes do, and my fear is if all of the discussions are going to be that way, that that's what people would tend to do. They would use them as a kind of -- it's a headliner. "Let me see if I can say something the press is going to pick up and
IN RE: OPEN MEETINGS LAW

quote, rather than what I think or what I believe." And we do have ample opportunity for people to say those things if they wish to. Many times they do not.

MR. DAVIES: I assume that something goes on when you have closed caucuses. I mean there are discussions back and forth, and there are deliberations?

MS. SCOTT: No, there are no deliberations about laws that have been introduced that are in front of us. We do not do that. And that's of our own choice, although that's not what the present law says.

MR. DAVIES: I'm talking now about before you opened your meetings, recently.

MS. SCOTT: No, I'm telling you, before then. In this administration, in which I have been the head of, our discussion has not been about laws that have been in front of us.

MR. DAVIES: What about whether or not a law should be introduced, do you
IN RE: OPEN MEETINGS LAW

have discussions along those lines?

MS. SCOTT: Only in the very broadest sense.

MR. DAVIES: Shouldn't the public be entitled to know about the pre-deliberations?

MS. SCOTT: It's not a deliberation. If somebody says, "I'm probably going to introduce something that has to do with open housing", that we don't discuss it substantively, we might say, "When do you expect to do that?" We might say, "Then you need to talk with the staff about developing the position." We might say, "Do you need any support in terms of the background information?" And then we instruct the staff to give them what they need.

MR. DAVIES: Maybe I'm a little confused. Exactly what goes on, at least before you opened your caucus, what went on during the caucus?

MS. SCOTT: Generally speaking, for the most part we were discussing
IN RE: OPEN MEETINGS LAW

political issues which nobody has a right to know.

MR. DAVIES: Let's set those aside.

MS. SCOTT: For the most part, that's all the caucuses were about. You asked me was there ever any occasion when indeed something might be brought up about legislation. I told you we cannot discuss legislation that would be in front of us, because that was a rule we agreed on in the beginning of this two year term.

In a cursory way, if somebody said, you know, I've been hearing from a lot of people that this is an important issue, and I'm going to probably introduce something, and I need X, I need this kind of information, then we, at that time, would instruct the staff to gather that kind of information for them.

MR. DAVIES: But the occasion would not arise when, let's say even before the two year period, even back before that, that someone would say --
IN RE: OPEN MEETINGS LAW

MS. SCOTT: I don't remember much back.

MR. DAVIES: "Please don't introduce that legislature. That's a bad idea." Or, "That's a hot topic. Let's drop that."

MS. SCOTT: No, no, no, because my feeling has always been, and I have stated this to each of my colleagues, any colleague has a right to introduce what they would like to introduce. That's their prerogative, and if they have a group of people who are their constituents who feel like something is important to have discussions -- I think there's this kind of mindset is what we're doing is keeping the council from ever discussing issues that are important and that the public would want them to discuss in public, and that is not true.

MR. DAVIES: I guess one question is though that may be the case with the Rochester City Council. It may have been the case for many years, but there's no way of knowing if that's the case, and there have
IN RE: OPEN MEETINGS LAW

been indications that's not the case with perhaps the school board or -- in a suburban area, towns, villages, whatever. I guess that's the question is how do we know if that's the case?

MS. SCOTT: How do you ever know? If somebody decides that it's, "important," which I don't necessarily believe, that it's "important" to have a preliminary discussion about something, how do you ever know that, if everybody agrees that that's what they are going to do?

I mean I'm saying I don't feel that's something you can legislate. I think you have to depend on the integrity of the people who are elected.

My staff person does indicate to me that one of the things I ought to indicate to you is that we do occasionally have presentations by the administration in meetings that they generally call.

MR. DAVIES: One point Mayor Ryan made yesterday is that the open caucuses has a negative impact upon party
IN RE: OPEN MEETINGS LAW

cohesiveness, upon party structure, upon the
ability of a party to feel that you're part
of a party, and therefore tends to
demoralize. Did you find that to be the case
from '81 to '85?

MS. SCOTT: Yes, I did.

MR. DAVIES: Could you give me
specific examples?

MS. SCOTT: I think it was the
whole issue of not being able to get enough
information at the same time -- this is
administrative presentations at this point,
so that you could ask all the questions that
needed to be asked, so you could really raise
the issues of what impact does this have on
the party.

One of the things so interesting
about the Democratic party is you have many,
many factions in the Democratic party, so if
you don't have a number of those factions
together at the same time when you're
discussing issues, it's very difficult to
really come to any kind of cohesive outlook
or feel like you're part of some group.
IN RE: OPEN MEETINGS LAW

We also find -- when we went to the meetings of having smaller groups, one of the problems I think was that very often whoever wasn't in a specific group with a specific person somehow felt that information probably wasn't shared with them that was shared with everybody else, and therefore they were left out, and so I think that is -- was divisive for the party. I did not feel, personally, in any way excluded, but I do know that there were people who did.

MR. DAVIES: Would you care to make any prediction on whether after January 1 the open meetings resolution that was passed will be rescinded?

MS. SCOTT: Rescinded? In eleven years I have been on council, we have never rescinded any resolution, so I doubt it very much, and I think the degree to which there would be any substantive caucuses, anyway, probably will depend on the leadership for the next two years, and we don't know who leadership will be. If I were the leadership, there would be no question about
IN RE: OPEN MEETINGS LAW

the fact. We would continue to do as the
resolution suggested.

CHAIRMAN FEERICK: Can I pick up
on something you said in response to Mr.
Davies, and maybe put it in a leading
question kind of way?

You said, I believe, that during
the period that the closed caucus was
functioning, at least during the recent
period the closed caucus was functioning,
that your party adopted an operating
principle that there shouldn't be any
discussion of pending legislation. Is that
because of a view that once you got into a
discussion of pending legislation, that was
something that should be shared with the
public because of the power of the majority,
you know, in caucus?

MS. SCOTT: Yes, I think our
concern was that the perception would be one
that might not be our usual mode of
operation, and so people might distrust
that. So it was our feeling that -- in fact,
one of the things I said to Barbara Henry
IN RE: OPEN MEETINGS LAW

some time ago when she questioned me quite extensively on the whole issue of open caucus was that my feeling, in terms of where we were this past year and where we had been years before, is that we really had moved significantly in that direction.

And that my guess was that before long that would be something that would happen as of its own right and that I thought legislation might slow it down in terms of people feeling that they had a right to reserve their right to private conversations, rather than to enhance it. But we have been moving in this direction, and that may be, in an answer to a question that was answered earlier, that may also be a major reason why the people voted to do it, you know. We have been close to it for a long time.

CHAIRMAN FEERICK: I take it it was your feeling when you adopted this operating principle that good government would be served by having such a principle, particularly for caucus of the majority
IN RE: OPEN MEETINGS LAW

party?

MS. SCOTT: Don't put words in my mouth now.

CHAIRMAN FEERICK: I don't want to do that.

MS. SCOTT: Let me just say, I think in terms of the principle of, "open government," I absolutely believe in. Do I believe that principle is always served by an Open Meetings Law? I do not.

And I also think that -- you know, one of the interesting things about passing laws is people have a tendency to feel, you know, we have a lot of things wrong or we have some things wrong in one part of our community, and the way to settle this is to pass a law. Laws are agreements among people of good will and people of civilization that we will enter into a contract to do things a certain way. That principle usually exists long before any law can be reasonably enforced, and that's what I'm suggesting to you is that the reasonable enforcement of such a law ought to rest with
IN RE: OPEN MEETINGS LAW

a local body and not with the state.

CHAIRMAN FEERICK: Thank you.

Commissioner Magavern.

MR. MAGAVERN: I don't want to make this a personal matter at all, but I think it's important to explore one significant area that seems to be a problem, and I'm referring to Council Member Carrozzi's description of incidents in which she felt that she was unable to get information from the executive branch, because the information was being transmitted in caucuses, and she tried to get it by other means, and she was not getting it effectively.

And one of the suggestions that came of that discussion was perhaps the present exemption could be amended so as to exclude from the definition of a caucus a meeting at which third parties were present, members other than of the legislative body, executive or other.

MS. SCOTT: Oh.

MR. MAGAVERN: In your remarks
you have indicated that you feel precisely
you need the informality of a private
discussion, even to elicit information from
the executive branch. What -- I guess I'd
like your response which would cover the
question whether, in fact, you saw it as a
problem, that a minority member of the
legislative body was not able to get good
information from the executive branch. If
so, what can be done to address that
problem? Should a distinction be made
between caucuses solely of the legislators
where they can iron out their own
differences, and meetings where there are
third persons present presenting information
which is relevant to all of them, and --
well, let me leave it with that.

MS. SCOTT: I think you have got
a lot of questions, and I'll try, and what I
don't hit, you can reask. In the first
place -- I don't want to make it personal
either, but I think you need to understand
the context out of which each person comes to
this podium to discuss their concerns. I
IN RE: OPEN MEETINGS LAW

remember being a new legislative person, and
I have to say to you, that as much camaraderie
as there was among party members, that there
were many times when I personally did not
feel, as a new legislative person, that I
knew what I was doing or that people had
shared with me fully all the information that
I thought I needed to have to make the best
and the most reasonable decision. Now, a
couple things have happened since that time.

One is that I have come to
realize, as a council member, that you cannot
know everything about every subject, and
that -- it's funny as I look at it now from
that distance, and I'm not suggesting that's
all Carrozzi's fault, as I look at it from
that distance, what I realize was what I was
attempting to do was to try -- each law I
needed to know everything there was to know
about it before I could say, "This is my
decision."

What I have come to realize is
that's what committees are for. That's what
your council staff is for. And the council
IN RE: OPEN MEETINGS LAW

minority in this case, incidentally, had a person which they hired for twenty thousand dollars or could spend any way they wanted for twenty-five thousand dollars -- for twenty thousand dollars to seek out the answers for information.

On several occasions, all council members have said to me, "I'm not getting information on X, and I want to know why, and it's your responsibility as president to see if we can push the administration a little bit to give us that information more quickly and to give it to us right away." And I took to the Mayor Councilman Carrozzi's issues, as well as the issues of the other council members. I did not make a distinction in that.

What sometimes happens is the person who's asking all the questions doesn't think about the time it takes or the administration spent to give that kind of information out or whatever it is. I don't think that should stop us from asking the questions.
IN RE: OPEN MEETINGS LAW

I think part of what is viewed simply because she was alone, she was an individual, rather than there being two or three, was the feeling that she was somehow left out. I think probably she had more information than any minority person that I have ever worked with on the council, and I -- ever since I have been on the council, we have had individual members.

So I think it's a perception thing, as well as, you know, I'm not a part of party group. I think your question about whether or not -- if you're going to have legislation, which obviously I don't want you to have or I don't think you should have, I think I would hope that you would address both issues, that there would be an opportunity for legislative caucuses, as opposed to -- that could be bipartisan, if they needed to be, and party caucuses, that there ought to be an opportunity for both, and you know, the law ought to speak to that, if it's going to speak to anything.

MR. MAGAVERN: When the
IN RE: OPEN MEETINGS LAW

administration is presenting its case and information, background information to a group of legislators, I can see where they, in a closed session, they might loosen up a little and be more frank, and the legislators may be more frank in probing them, and yet there's got to be a lot of just basic information imparted that ought to be available, frankly, to anyone who asks the question.

MS. SCOTT: We have had discussions that were of that nature. For instance, when the downtown reconstruction project reached—what seemed like an impasse, and we had a number of questions, and we wanted an update on that issue, I called for a meeting with the administration of all council members, so it isn't as though that doesn't happen.

I mean the impression may be left somehow in our discussing this that never does anybody get in on administrative information, and I'm suggesting to you that it does, particularly, if it's an issue that
IN RE: OPEN MEETINGS LAW

we're in the middle of.

I think the -- one of the -- I
don't know where you draw the line, honestly,
I must tell you, but when you have a
government -- for instance, I know the county
legislature is going to be going through this
process in the county government now, with
the change in party domination. I would
assume that there would -- there would need
to be some strategizing about how we approach
the whole basic issues that need to be dealt
with in this community, through the county
government.

I don't know whether the
preliminary discussion needs to be an open
discussion with everybody present. I don't
know. I mean it's just like if you say to me
that you cannot strategize. You can't meet
privately and strategize about what you're
going to do about something you think the
mayor might propose, then what it means that
I, with my staff of seven or the council with
its staff of seven, is going to not do
anything that the mayor, with his staff of
IN RE: OPEN MEETINGS LAW

three thousand, can't count on, before you get it off the table.

So I mean there's a problem there, which is a realistic, logistical one, in terms of how do you defeat an idea that you don't think is any good, and you just don't go out and say to the press, "I don't think this idea is any good," because that is not indeed how laws get made and changed in our society. You have got to have some opportunity to be able to strategize on those issues.

MR. MAGAVERN: Leaving aside strategy within-the legislature and talking only about communications between the two branches, Mr. Freeman yesterday, I think it was, made the point that in such an initial meeting between the two branches, if it is open, legislators need not really fear appearing dumb and --

MS. SCOTT: Is Mr. Freeman a legislator? Has he ever been elected to anything?

MR. MAGAVERN: He's not. I want
IN RE: OPEN MEETINGS LAW

to put the proposition to you, get your opinion, because you are a legislator, that in early stages when a proposal is just coming over from the executive branch or an inquiry is being made in the first instance from the legislative to the executive branch, that a legislator in the nature of things should not have a lot of difficulty in asking probing questions on an informal and attentive basis, even if the meeting is open.

MS. SCOTT: Let me tell you what my background is. I am a debater, by years and years and years of experience. I would say to you -- and between that and my work in human relations with the city school district, I'm a fairly comfortable, confident person. I don't think there are many legislative people who have the background I have.

So while I, as an individual, might be able to ask probing questions, there are probably probing questions that would be asked only by a new person, but that new person simply would not, or less experienced
IN RE: OPEN MEETINGS LAW

person, simply would not ask those questions, if they were to appear -- one of the interesting things to me has been the personal fear that legislative people have of looking foolish.

Some of our most distinguished legislators, even at the state level that I have had substantive conversations with and asked them questions about things they should do or shouldn't do and ask them to come to meetings that are public meetings. I will get the answer, "Do you think somebody is trying to embarrass me in this meeting?" Or I have been told often, "I really don't know anything about that subject, and I don't think I want to do that until I get some more background or I get some more information."

I think it's that same kind of human thing that happens with legislative people, and it's just like saying every mother ought to be good to her children. It's a nice broad generalization, and we all believe that because we believe in motherhood and apple pie, but when it comes right down
IN RE: OPEN MEETINGS LAW

to how do you deal with that on a day-to-day situation with individuals, there's got to be flexibility.

MR. MAGAVERN: If you do permit closed sessions between the caucus of the legislative body and the executive branch, do you recognize any problem at all --

MS. SCOTT: Yes.

MR. MAGAVERN: -- of leaving out minority members of legislature?

MS. SCOTT: Sure, sure.

MR. MAGAVERN: How would you address that problem?

MS. SCOTT: I think -- I'm not sure what would be the best way to address it, but what I think you're going to have, as you suggested earlier, Rochester may be somewhat unique in its practices, in some of its political practices, and I think in our current set-up we have a situation where the mayor has generally been open with and worked with the same people for a number of years and has some perception of trust factor there. So I don't think that they are --
IN RE: OPEN MEETINGS LAW

with this kind of situation it can be as
difficult as it might be in other
situations.

But I think that you need to
allow both for, "political caucuses" whether
they are the one party thing, and you
probability ought to have some kind of
measure that would allow for cross, you know,
administrative legislative briefings. Now,
the briefings, you may want to define. Now,
at what point does that briefing really
become -- maybe it's an exploration, and when
it gets to a briefing there is an actual
proposal on the-table, that ought to be
public. I don't know.

MR. MAGAVERN: Let me shift to
another subject, which is I think very
important in trying to assess the impact of
any change in the laws as a practical
matter. What do you expect will be the
effect of your recent open caucus resolution
on your caucuses? Do you think it may have
such effects as, I think you suggested, even
a possibility of dropping the caucuses all
IN RE: OPEN MEETINGS LAW

together?

MS. SCOTT: Some people won't come. At least that's what they tell me. I have some individuals indicate they have no intention of attending such caucus.

MR. MAGAVERN: Do you think that will hold up over a period of time?

MS. SCOTT: It's hard to say.

MR. MAGAVERN: Do you think it will lead to other means, apart from the caucus of informal deliberation in private?

MS. SCOTT: I think if people feel there's a need, it's possible.

MR. MAGAVERN: Do you think that the net effect, then, is going to be for more or less accountable government?

MS. SCOTT: I think whenever you make laws people feel they have to get around, I think they become less accountable.

CHAIRMAN FEERICK: Mr. Small.

MR. SMALL: First, I want to commend you, President Scott, and correct me if I'm wrong, but my understanding is your
IN RE: OPEN MEETINGS LAW

plan is to limit the phrase caucus to purely political caucuses and to label the matters dealing with public business as work sessions or study sessions?

MS. SCOTT: Yes, yes, I think that will clarify for everybody what it is we're doing.

MR. SMALL: I think that's a good precedent for anyone else making the move you made. I'm puzzled. If you don't talk about pending legislation, what do you guys talk about?

MS. SCOTT: I think I have gone through that. I don't know how much more I can say to explain it than what I have already said.

MR. SMALL: I'm haunted by --

MS. SCOTT: Let me just suggest to you, one of the things that I, as a human relations specialist, believe is that you create a cohesive body by constant interaction with the other members in group settings. And so some of our meetings are just that.
IN RE: OPEN MEETINGS LAW

I have, for instance -- we had a session planned, which unfortunately had to be postponed, where we had someone who was a former media person come in and just talk with us about press relations, the issue of press relations, and how you deal with that and some -- make some observations to us as to how that person viewed politically the group might be appearing, as far as the press, what's put out in the press is concerned.

We have had -- when I first became president, I had someone who came that I asked the industrial management council to appoint to give us an idea of how we ought to be organized in terms of the staffing thing, and that person came and shared with us several configurations that they thought would be a good idea for us to adopt, within the majority, in terms of what the majority staffing looked like, because the minority staffing was purely up to the minority. Those are two camps of things that we discussed.
IN RE: OPEN MEETINGS LAW

MR. SMALL: The witness before you, Councilman Erb, said that it was his feeling that there was virtually nothing discussed in those caucuses that could not have been discussed openly and that, in a sense, a lot of time was wasted, distractions going off on tangents, that people would not do if they were in public session.

MS. SCOTT: I don't recall ever having a discussion that I thought was a tangent in a caucus. I think you have to realize that Councilman Erb has his own way of looking at situations.

MR. SMALL: I assume that each of you do.

MS. SCOTT: Each of us does, you're right. But I'm saying if you go to a ballgame, and there are fifty people there, I would suggest that to you -- I shall just say nine people, nine of the council members, probably there would not be any of them who would have seen it the same way he saw it. So I can't -- I mean I can't qualify that, what he says or how he views it.
IN RE: OPEN MEETINGS LAW

MR. SMALL: In that period that Mark Davies referred to between Sciolino and the '85 amendment where your meetings were all open, in retrospect, comparing that with the last two years, did it really make that much difference?

MS. SCOTT: I'm not sure what you're saying, what you're asking me.

MR. SMALL: That was a four year period in which your political caucuses had to be open, and in the last two years, of course, since the amendment, they have been closed.

MS. SCOTT: It's really difficult to compare those two, simply because, you know, the meetings that we had that were group meetings were open, in terms of the total, if you're talking about all council members being there, or even the majority being there. What I explained to you earlier was that in the '81 to '85 period, what I did find happening was a lack of attention, a lack of focus, a lack of an ability to really get a handle on what the
IN RE: OPEN MEETINGS LAW

City manager was doing.

Our current situation, we're feeling our way, anyway, because we're in a whole new ballgame. I can't honestly say to you that I think this year's experience or this last two years' experience is comparable to anything. I still feel that there is a need to maintain the right to hold private caucuses, if we need to, at least not to be prohibited from it by the state law, because we don't know what's going to happen.

CHAIRMAN FEERICK: Nicole Gordon.

MS. GORDON: Do you think that there would be any justification for making a distinction in the rules of the game, as far as open meetings are concerned, if the body in question, the legislative body in question is completely of one party, or there is only one minority member?

MS. SCOTT: I don't know. It's an issue I have thought about a lot, because that's of course been our situation for a long time. If you go back to the basic
IN RE: OPEN MEETINGS LAW

premise of what I've said, I think I would have to say I don't. In practicality, you may, if you address both the issue of administrative briefings to the legislative body, you would solve part of that problem, that dilemma.

MS. GORDON: Thank you.

CHAIRMAN FEERICK: I want to thank you very much for your participation. I said yesterday when Mayor Ryan was about to testify that we have come here to Rochester with an open mind, wanting to learn more about your experience and the different points of view that been so eloquently expressed here, and the questions we have put to the witnesses are really designed to sharpen our own understanding of the subject. And I must say that you, like the preceding witnesses, have been very helpful to us. Thank you.

MS. SCOTT: Thank you. I appreciate the opportunity, and I would be happy at any time between now and the time you make the final recommendations if there
IN RE: OPEN MEETINGS LAW

are points that either were not clear or some additional information that you would like from me or my office, I would be happy to provide it.

CHAIRMAN FEERICK: Thank you very much.

Mr. Haney, good morning and welcome.

MR. HANEY: Thank you. I apologize for not having copies of my testimony. It literally came out of the word processor about ten minutes ago. I will submit copies to the staff for the files.

Mr. Chairman, Members of the Commission, my name is Paul Haney. I reside at 424 Broadway in the City of Rochester. Let me tell you a little about myself and let me say that I do so certainly not to blow my own horn but to let you know that I am not a Johnny-come-lately to this arena, nor am I just another political hack.

I retired at the end of 1985 after twelve years of service on the Rochester City Council, all twelve of which I
IN RE: OPEN MEETINGS LAW

I was chairman of the finance committee. I have a master's degree in business administration and a certified public accountant and am senior vice president and treasurer at my place of employment.

For ten years, I was very active in the National League of Cities, including two years on its board of directors, three years on its advisory council, and four years on its effective government committee, including one as vice chairman thereof. I was a member of the Founders Committee of the public interest groups that created the Governmental Accounting Standards Board and was an original member of the advisory council of the GASB.

I have traveled extensively visiting many cities in connection with these positions and have met with and discussed these kinds of issues with many municipal officials. Enough about me.

Let me clearly say that I am here for only one reason, and that is to protect the right of the members of the same
IN RE: OPEN MEETINGS LAW

political party in a legislative body to meet
in private, alone, out of the glare of
cameras, that is -- and I trust the goo-gos
will allow me say this -- in secret.

I am proud to call myself a
politician, very proud. I'm proud to have
been in government, and I say to you the test
of government should be its results and not
its processes. Let me also say that good
government comes from having and only from
having good people in government. No degree
of regulation of process will produce good
government without good people. And
fortunately, good people will generally
succeed in creating good government,
regardless of how much procedural regulation
is imposed on them.

However, the latter is becoming
increasingly hard to accomplish, partly
because many good people refuse to enter
government service today, that is they refuse
to submit to the increasing maze of
procedural regulations.

I will defend the propriety and
IN RE: OPEN MEETINGS LAW

necessity of the closed-party caucuses on
five grounds: 

First, the political opposition
there to is strictly politics. Second, the
journalistic opposition is a matter of
selfish self-interest. Third, the attempt to
eliminate them is sheer hypocrisy. Fourth,
there is absolutely no public interest in the
issue. And fifth, there's an outright need
for them to create good government.

First, in some political
circles, it has become fashionable to be
opposed to closed political caucuses. Some
would have you believe that God, the
Constitution and the American way prohibit
closed caucuses. While I don't believe that
God ever addressed the subject, I know the
Constitution doesn't address the subject, and
in fact, I believe that the American way,
which is based on active ongoing competition
between two political parties, supports
closed caucuses.

Thus I have only known three
types of politicians who uniformly oppose
IN RE: OPEN MEETINGS LAW

closed caucuses. The first type is the minority party member. The minority party member in the legislative body opposes closed caucuses because A, the ban doesn't apply to them, and B, the minority is always thrashing about for something to get them some press. And of course, the press is more than glad to give them that on this issue. I've always found it fascinating how often when a legislator becomes a part of the majority, he changes his opinion on closed caucuses.

The second view for politicians who uniformly oppose closed caucuses are malcontents in the majority party. A malcontent in the majority is a very insecure person. He feels excluded, even when he is included. I have seen these in the Rochester city counsel. The malcontent believes there must be another secret meeting somewhere to which he hasn't been invited. They are very similar to minority party members and are in fact minorities within the majority. They oppose closed caucuses for the same reasons minority party members do, plus they need
something on which to blame their insecurity
and political ostracism.

In the third group of
politicians who uniformly opposes closed
caucuses is any politician who is facing
election within the next thirty days and when
he has to go before the annual League of
Women Voters forum. This doesn't require any
explanation. All of this is political
opportunism and certainly is not based on any
sincere belief or any general concern in
nearly all cases.

There are exceptions for the
public's right to know. My second reason for
being opposed is that journalistic opposition
to closed caucuses is clearly understandable,
but hardly a cause for public concern. Open
caucuses make a reporter's life a lot easier,
but I don't think that warrants weakening the
fabric of government. A reporter has to work
hard to find out what happened in a closed
caucus and is terribly frustrated after all
that hard work to learn that nothing worth a
line of print happened.
IN RE: OPEN MEETINGS LAW

My Thursday morning wake-up call regularly came from the evening paper City Hall reporter whose first deadline was nine-thirty a.m., and he was trying to find out what had happened at the previous day's caucus.

The editorials opposing closed caucuses never refer to this reality, namely self-interest, but rather to two issues: Initially they will insist that there is a need to conduct the public's business in public. Of course, and my reaction is, we did. The votes are all in open meetings, clearly recorded, and the legislator is then forever held accountable for them. When this is acknowledged -- and it usually ultimately is in the press discussions -- then the editorials will shift to another position. And that is that the public also needs to know why the particular vote was cast.

To this I say two things relying, of course, only on my personal experiences. First, if the issue was material or in the least controversial, the
IN RE: OPEN MEETINGS LAW

legislator certainly will explain his vote. At a Rochester City Council meeting, there will be eight to twelve reporters, two or three television cameras, and an audience. Do you really think that a legislator is going to miss that opportunity to capitalize on the press? Not on your life. The votes are explained, overexplained, extensively explained and at two a.m., boringly explained, and I did some of the best of that, myself.

Secondly, the press does not understand what goes on in the caucus. The members argue, explain, and defend positions. They exchange and explain information. No great deals are struck. No votes are traded. We frequently would leave caucuses not knowing how people would vote, but we always left with a better understanding of the issue and our colleagues' position on the issue. To an extent that simply would never occur in an open format.

My third case is that the
IN RE: OPEN MEETINGS LAW

so-called abolition, and I stress the phrase so-called, abolition of closed caucuses is sheer hypocrisy. You'll never abolish them.

I always said when I'm council that if abolished in one form, this would only be held in another, even if at midnight in my basement behind the furnace.

When the Court ruled that five city council Democrats couldn't meet behind closed doors, we simply limited attendance to four members meeting behind closed doors.

The poor city manager that had to go to two caucuses a week. Communication between counsel members suffered, but we complied with the Court ruling, but nothing really changed. The Court ruling was a sham, and our compliance was a sham.

I don't care what you did. The essence of closed caucuses will always continue, even if the legislators have to meet in pairs in a pumpkin patch. Efficiency and effectiveness will be hurt when they have to enter into devious alternative means to conduct the necessary private discussions.
IN RE: OPEN MEETINGS LAW

But the fundamental concept of the closed caucus will survive. This is hypocrisy in its truest form.

And you know, just on the side bar, I just have to comment upon how all these discussions always relate, for obvious reasons that you're aware of, as well as I, to local municipal governments and never to the state legislature. And of course the state legislature never intended their original law to apply to party caucuses, never. I have never met a state legislator who claimed that it did. It was the courts that extended the legislation.

I understand that Mr. Freeman, in his appearance before you yesterday, attempted to justify a distinction between state and local governments on such specious issues as the fact that the state is a bicameral legislature. I can't imagine what in God's name that has to do with the issue, whether they have to have two caucuses for two bodies, or we have one caucus for one house legislature, there is no distinction.

COMPUTER REPORTING SERVICE
IN RE: OPEN MEETINGS LAW

And we all know if we're honest with ourselves, that if somebody is looking for someplace where the people's business is really conducted in secret, it's in the majority party caucuses in Albany in the state legislature.

My fourth position, ladies and gentlemen, is the public is not opposed to closed caucuses. I stood before the voters of this city, city wide, six times. Four of those times were after I became the outspoken proponent of closed caucuses. Once was in the midst of the most heated press discussion about closed caucuses. I won every election. Now, admittedly, I had other admirable qualities besides being a supporter of closed caucuses, but more importantly, no voter ever even asked me about them. No voter ever challenged me on the issue. In hundreds of community meetings, the issue was never even raised to me by a single citizen, and that, my friends, is the God's honest truth. It is a non-issue, despite the best editorial efforts of the Gannett press.
IN RE: OPEN MEETINGS LAW

To this, the goo-goos may reply that the public doesn't know what is good for it and must be protected. I say to you that that is the absolute opposite of democracy. It is the self-proclaimed elite determining the rules for the rest of society. It seems to me that I have seen that idea wearing various labels, Naziism, fascism and communism come to mind.

And lastly but most importantly, let me state that there is a real need for closed majority party caucuses. I cite these facts:

The legislative branch of government is supposed to check and balance the executive branch of government. That is a difficult job with constant tension. At the local level, when the mayor and his staff meet to thrash out a position and plot a strategy for dealing with the council or to get a budget passed, et cetera, that meeting is properly closed. It's called a staff meeting. When the legislators meet to do the very same thing, it's called a closed
IN RE: OPEN MEETINGS LAW

If the legislators can't meet in secret to strategize and understand each other's feelings, they enter the check and balance fray with one hand tied behind their back and a gag in their mouth.

Regularly legislative bodies fail in their check and balance responsibility. Abolition of closed caucuses increases the failure rate.

Secondly, legislators must be able to privately and fully express their feelings to their colleagues. If they don't, tensions build which destroy the legislative process. Human nature is such that many people will not engage in such open expression in public, and President Scott just a few moments ago explained that much more eloquently than I could. One of a legislator's worst fears is looking silly or dumb. Thus in public, they will be silent. The human dialogue of the closed caucus is vital to the legislative process.

And thirdly, and if you wish, I
IN RE: OPEN MEETINGS LAW

could speak extensively on this, in times of real crisis, you will never generate the solution to the problem in an open legislative meeting. When the great Heard Waldert decision struck Rochester in May of 1978, and the decision came in about two weeks after the proposed city budget had been presented to the council -- and of course the decision meant that something like, as I recall in the neighborhood of twenty million dollars had to be cut out of the city budget. When the Waldert decision struck Rochester in May of 1978, we dealt effectively with it. Our worst critics acknowledged that we dealt effectively with it. We did it and were able to do it because we met daily in closed caucuses, in closed sessions, to argue, fight, cajole and generally come to a consensus on a solution. Two-thirds, at least, of the kind of discussion that took place in those daily closed meetings under any circumstances would never have occurred in public.

The City of Rochester emerged
IN RE: OPEN MEETINGS LAW

from that crisis in better shape than we entered it. But I can tell you sincerely that without the closed caucuses, it would have been an absolute disaster and a hand to mouth existence, much as happened to our beloved sister city to the west.

Don't steal that tool of being able to conscientiously argue and debate in private among comrades from the conscientious legislative body that is trying to do its assigned task.

I thank you very much for your kind attention, and implore you to preserve the exemption from the Open Meetings Law for the closed party caucuses.

CHAIRMAN FEERICK: Thank you very much for your very thoughtful and deeply felt statement. Mr. Davies.

MR. DAVIES: I just have one question. Now, you refer to the open meetings as a non-issue, and based on your extensive experience as a city council member, in all candor, why do you believe the city council passed an open meetings
IN RE: OPEN MEETINGS LAW

resolution three weeks before the
resolution?

MR. HANEY: I think the answer

is self-evident.

MR. DAVIES: Namely?

MR. HANEY: It was three weeks

before the election.

MR. DAVIES: So it is perceived

as a public issue?

MR. HANEY: In the last thirty
days before election day. But the public
doesn't give a twit about it. I can honestly
tell you that. The rank and file citizen on
the street is interested in what government
does or doesn't do. They are interested in
the results of government. They are
interested in whether their trash is getting
picked up regularly, whether the policeman is
on the corner, whether the fire department
comes when there's a fire. They are
interested in their tax rate. They are
interested in whether there's scandals in the
administration of government, but they quite
frankly don't give a twit -- and in this they
IN RE: OPEN MEETINGS LAW

are very wise -- about how government
achieves the end results of good government,
as long as basic principles of democracy are
maintained, and they have the right on
election date to throw the bum out when they
think the bum is not performing.

MR. DAVIES: If the trash is not
being picked up, and the city council
discusses in closed caucus the trash problem,
you don't think they will be concerned about
the fact it is discussed in closed caucus and
be concerned that something is being done
behind their backs?

MR. HANEY: They don't care in
the least, and I say this in the most sincere
matter I can, and I assume most of you don't
believe me, but I say that in the most
sincereness I can with all the years'
experience I have.

MR. MAGAVERN: Do you see any
problem of exclusion of the minority members
of the legislative body from briefings by the
executive branch?

MR. HANEY: No, and I'll tell
IN RE: OPEN MEETINGS LAW

you why, because I'm sure that astounds some of you, as well. The minority -- the reason is that if the minority party member was there, and the executive had something he didn't want the minority party member to know, he wouldn't present it. And then not only do you not have an uninformed minority, but you have an uninformed majority.

And furthermore, what would then happen is that the executive would simply find another way to communicate that information to the members of the majority he wanted to communicate it to. And you will not have accomplished anything, and I sincerely say that the minority member will not know anything significantly more from attending the majority party caucus than if they don't attend.

MR. MAGAVERN: What proportion of the information conveyed in such sessions is of a sensitive nature in which the executive, if confronting a member of the other party, would clam up, and what proportion is information that the executive
IN RE: OPEN MEETINGS LAW

would be glad to give to everyone?

MR. HANEY: I would say ten percent is probably of the clam-up nature. These are very rough numbers, and ninety percent is of the non-clam-up nature. I would say almost everything in that ninety percent, at least in the Rochester experience, is in the packages that go to the whole counsel, and in fact go to the press.

The weekly council package in Rochester -- I can't speak for the last twenty-two months, but before that, the weekly council package was about this thick, frequently, and that ninety percent that the executive would be talking in the majority caucus about, I would say of that ninety percent, ninety-nine and forty-four one-hundredths percent is in that package that goes not only to the minority but to the press.

MR. MAGAUERN: You have described the Rochester experience in very positive terms, with closed caucuses, and indicated that you're not aware of any
IN RE: OPEN MEETINGS LAW

negative examples where closed caucus did leave the citizens feeling left out and all. Do you have any notion about experience in other communities, whether there may be problems in other communities where the experience has been less happy?

MR. HANEY: I don't believe, and now I'm guessing and gathering from conversations with people from other communities, I don't believe the problems would be the closed caucus. I go back to my original premise that good government comes from having good people and if the people -- if the populous doesn't elect good people to government, they are going to get bad results from government, and those bad results may come out of a closed caucus. They may come out of an open caucus, but those bad results will come in either format.

So that I don't think -- I mean, there -- the tendency is to look at OshKosh, to pull a name out of the air, that may have had scandal about a real estate transaction that was cooked up in a closed caucus, and
IN RE: OPEN MEETINGS LAW

where each council member got a twenty thousand dollar pay-off, you know, as a result of the real estate transaction. And the belief of the press is if OshKosh didn't have closed caucuses, that never would have occurred. And let me say to you, my friends, that that's nonsense. If the people on the council in OshKosh are of the mentality and the spirit that they want to participate in that kind of skullduggery, they are going to do it in the pumpkin patch, if they can't do it in the closed caucus. The results of government come from the quality of the people in government, not the processes.

MR. MAGAVERN: Let me ask for your prediction of the effect of the open caucus resolution recently adopted by the Rochester City Council. What impact will that have on the quality of government in the City of Rochester?

MR. HANEY: I don't think it will have any impact, because I would suggest -- and mind you I'm twenty-two months removed now, and I -- there's new people on
IN RE: OPEN MEETINGS LAW

the council that I don't have the kind of
knowledge of that I had prior -- when I was
there, but I go back to saying that the kind
of things that they would have felt necessary
two months ago to do in a closed caucus they
will still do.

MR. MAGAVERN: You're saying it
will have neither a negative or positive
impact?

MR. HANEY: I don't believe it
will have any positive impact at all. Any of
these things -- like the court decision we
went through. It had no positive impact on
government in Rochester at all, and it didn't
change anything that we did. It had a
negative impact in the context that it begins
to break down the communication that leads to
collegiality between legislators, instead of
having one caucus with eight people present,
we had two caucuses with four people present
at each, and we set up a complicated schedule
so that it wasn't the same four at the same
meeting each week. They were mixed and
matched, so that the membership in the two
IN RE: OPEN MEETINGS LAW

sessions was overlapping, to attempt to
preserve the interpersonal dialogue, et
cetera, et cetera.

The disadvantage was that it
became necessary to do that kind of a thing,
for no ostensible purpose or end, and I
really felt sorry for -- at that time,
Rochester was under the city manager form of
government, and I really felt sorry for the
poor city manager, because he was going
through caucuses a week, which I'm sure from
the manager's standpoint was not fun. It's
not like going to a doubleheader baseball
game.

And more importantly, he would__
talk to session A and sometimes tend to get
one conclusion and talk to session B and
sometimes tend to get another conclusion, and
the whole thing would have to sit until the
next week, then, for some guidance. But he
could go back and the people -- the circles
would evolve. And it dragged out. Things
became less timely and et cetera. I don't
believe there was an iota of improvement in
IN RE: OPEN MEETINGS LAW

MR. MAGAVERN: Council at this time has apparently made another choice, I stress the words apparently, which would be not to have split caucuses in effect, but to rather have open caucuses in an attempt to open up that process. What do you think will be the effect of that?

MR. HANEY: Nothing, because people will still -- I don't care if they get on the phone and talk to each other at nine o'clock at night. The objective and the necessity of the closed caucus will always occur. It's just that it won't occur in a meeting at two o'clock on Wednesday afternoon. They will open the doors, and the press will come in and everybody will sit down, and they will talk about the Elk's Club dinner they went to last Saturday night. And they will try to figure out who is going to the 23rd LD dinner next Friday night. And the intrical function will still be accomplished, but in a different arena.

MR. MAGAVERN: If someone said
IN RE: OPEN MEETINGS LAW

in other communities they have tried open
caucuses and it's worked, and people relaxed
after awhile, and the -- in fact, I think we
even had that at the county level here, that
it did --

MR. HANEY: I could comment on
that, but I won't.

MR. MAGAVERN: If you hear about
such examples in other communities, leaving
aside Monroe County, then, what is your
reaction? You simply don't believe it?

MR. HANEY: When California
started doing a lot of this, and they
adopted, oh, ten years or so ago a lot of
this kind of legislation and disclosure
legislations and all kinds of things, I had
numerous discussions with people from
communities in California.

And when you get over the bar at
the Washington Hilton and let your hair down
and talk about it, I never came upon a one of
them that didn't tell me just what I told
you, and that is that sure, the open caucus
was wonderful. It was a love feast, but what
IN RE: OPEN MEETINGS LAW

was the intent and the function of the closed
caucus still occurred and just occurred in a
different format. And I have been told that
by very reputable municipal officials from
cities in California that went through this
thing.

And as I say, when they were
talking privately with the rest of it, et
cetera, they really admitted that nothing
material changed. A lot of appearances
changed, and that apparently made the press
happy, but in reality, that basic fundamental
need to talk together privately just shifted
to, a different format a different time in a
different fashion.

MR. MAGAVERN: Thanks very
much.

CHAIRMAN FEERICK: Mr. Small.

MR. SMALL: Mr. Haney, we thank
you for your entertaining presentation. I'm
sure council misses both your wit and
frequent expressions of humility.

MR. HANEY: The former probably,
but undoubtedly not the latter.
IN RE: OPEN MEETINGS LAW

MR. SMALL: I must say I am personally very troubled by the word secrecy as it involves government, which I guess makes me a goo-goo by your definition. But when you said that in your presentation, you then went to describe briefly what happens in a caucus and why you felt the press shouldn't be interested, and yet it seems to me that's precisely what earlier witnesses, in favor of open caucuses, said they wanted to hear, namely council members expressing the reasons that they were going to ultimately vote this way or that way or the questions that they had.

MR. HANEY: My response is if the press were there, most of them wouldn't ask those questions, and they would not make those expressions, any more than they will ask the questions on the floor of the council, because the last thing a legislator wants to do in public is appear to be unknowledgeable or dumb or silly.

MR. SMALL: That's never concerned you, has it? You have never been
IN RE: OPEN MEETINGS LAW

centered about asking assuming questions?

MR. HANEY: No, I never was.

MR. SMALL: So I wonder how many
really would feel that way.

MR. HANEY: I would say that of
the -- I guess in the twelve years, I
probably served with maybe fifteen colleagues
on the council. That may be a bit high, but
something like fifteen. Of that fifteen, I
think I would honestly say that I can
definitely think of five or six who most
certainly would not ask those kinds of
questions in public. Some of it was their
personality. Very good people, very well
intentioned, served their constituencies very
well, but just didn't -- they weren't
comfortable as public speakers and speaking
in public.

I'm thinking particularly of one
council member who served for I think it was
three terms, and you know, a man of
impeccable character. He just didn't like,
you know, speaking out in public and raising
those things. He never did and never would
have, you know, asked those kinds of questions in an open forum.

For the other ten of us fifteen, yes, we -- most of us probably would have asked most of those questions in public, but, you know, and I think that's an honest ratio, we're saying there's a third of the legislators who, because of their nature, and some of them quite -- one or two of them, quite frankly, didn't have the intelligence to do it in open, but for most of them, it was just their personality.

MR. SMALL: No names, please.

MR. HANEY: Wonderful people.

I'm not defaming anybody.

MR. SMALL: The hour is late, and if I may ask one last question, the previous speaker, President Scott, said that in the Democratic caucuses they did not discuss pending legislation. It seems to me almost every example you have given is to the contrary.

MR. HANEY: When I was there we used to regularly review the council agenda.
IN RE: OPEN MEETINGS LAW

Now, again, this is before the change in
government and before President Scott was --
we didn't have a council president when I was
there. But when I was there, we would
regularly -- at one time, way back, the
agenda was reviewed item by item. In later
years, because most of the items on a
legislative bodies agenda are totally
non-controversial. I would guess ninety-five
percent of the agenda was boom, boom, boom,
boom, the law requires that so many minute
things be formally voted on by the council,
in later years, it would be done in the
fashion that legislate -- that council
members would bring up items they want to
discuss, but oh, yes, when I was there, there
was no question, we discussed the items on
the council's agenda.

CHAIRMAN FEERICK: I would just
note for the record, my understanding of
President Scott's statement had to do with
the last term, and I believe she very
specifically noted that.

MR. SMALL: She did.
IN RE: OPEN MEETINGS LAW

CHAIRMAN FEERICK: I want to thank you very much for your statement today and responding to our questions.

MR. HANEY: Thank you.

CHAIRMAN FEERICK: Warren Doremus.

MR. DOREMUS: Mr. Chairman, Commissioners, may I preface my remarks by saying that I have been in the field of broadcast journalism, first radio then television, for more than forty-one years, all of that time in this community, and that therein lie the experiences from which these thoughts are drawn.

The 1985 amendment to the state's Open Meetings Law seems to me to stem from two ill conceived notions. One is that professional politicians know what's best for the public, and that if the public will leave them alone from time to time, they will get things worked out.

The other is that by and large and in the main, the populous is not all that interested in the deliberations leading up to
IN RE: OPEN MEETINGS LAW

decisions. Giving lawmakers their due, it is true that all too often when legislative meetings are open, the public's response, which is to say its involvement, is minimal. But it does not follow that because citizens choose not to attend such proceedings, the opportunity should not be there. The public has a right to know what's going on. How it exercises that right is its business.

Media access to legislative deliberations is critical, because television, radio and newspapers cannot discharge their responsibility to meet the public needs to know without it. And just what is it the public's need to know? Not merely that decisions have been made, but how they were made, the thought process that went into them. Were these judgments the result of a concern for the community as a whole or some special constituency? If the people had been present, might a different conclusion have been reached?

Might even, a dozen years ago, have had not just the first woman on its city
IN RE: OPEN MEETINGS LAW

council, but it's first woman mayor.

Recalling her election to council in the mid-seventies, Midge Costanza said to me the other day, she felt kind of cheated when she heard that the decision about who would be mayor was made by a group not including her, the morning after the election.

Now whether what she heard was true or not, or whether Ms. Costanza should have been the choice for mayor at that point is not the central issue. The public was entitled to a vigorous and open discussion about who should be mayor, and that was not had.

Indeed, I do not recall any council before or since openly addressing the question of who should be mayor. Told the voters make that decision, Ms. Costanza said, "I think everything and anything that goes on in government belongs to the public." In 1975, she offered a proposal to city council that all conferences with the city manager and Democratic caucuses be open to the public. After an hour's debate, her fellow
IN RE: OPEN MEETINGS LAW

Democrats, the council majority, voted no.

Former Republican county legislator James Nichols, recalling this week how things were when he was a lawmaker said, he believes that whenever there's public participation, elected officials are more prone to respond to the public's needs as opposed to their own partisan political interests.

A man who served eight years on the county legislature but does not wish his name used, told me caucuses should be open, because he believes it's the only way to secure public awareness of political practice, programs and objectives. He went on to say for a party to do everything behind closed doors, then march out in lock step with decisions already made, doesn't tell the public how that party's decision was formed. The people do not see the basis, the reason, the elements that went into fashioning it.

A lot of times, he said, there were major executive level jobs created without any real governmental reason for
IN RE: OPEN MEETINGS LAW

them, only to be of help to one of the boys.
The decision would be made intramurally, then
presented to the legislature as a whole,
where an hour before there had been no need
for such a decision, now suddenly there is.

He recalled how in election
years when budget decisions were made, it
became a question not so much what the needs
of the community were as what the election
needs of the party were. This person is
convinced things would have been
significantly different if caucuses were open
to the scrutiny of the public.

John Erb, a man who has served
on both the county legislature and city
council, where he is now a councilman at
large, strongly believes in open meetings.
Forgive me here, if I repeat anything he may
have said in his appearance before you this
morning. What he told me this week was the
thing that convinced him the time had come
for a resolution doing away with closed
caucuses was a decision by counsel, September
24th, on the funding of Christmas
IN RE: OPEN MEETINGS LAW

decorations. Said Erb, "There had been
extended private conversations among council
members on that subject, and then in mid
afternoon, in about five minutes, with
virtually no public discussion, the decision
was made."

Three weeks later, as you know,
council approved a resolution calling for
open meetings. A number of things that have
come before our lawmakers in recent years
suggest the need for open meetings. One
would like to have heard the discussions that
went on behind closed doors in the spring of
1975 as city council gave itself the power to
reclaim the purchasing and civil service
departments that had been merged years
earlier with the county's in an effort to
promote efficiency and save taxpayers'
money.

And it would have been
instructive, I think, to know what was said
in those caucuses prior to the vote by
council in the spring of 1974, to continue to
levy property taxes in a manner which the
IN RE: OPEN MEETINGS LAW

state's highest court had previously ruled unconstitutional. Both that ruling, the Heard decision, and the later one, the Waldert decision, forced the city to rebate more than forty million dollars to nearly fifty-one thousand property owners.

Even though council was acting with permission of the state legislature, through a home rule message, the hand was clearly writing on the wall, and taxpayers were taking it on the chin. They didn't get their money back for thirteen years.

Now one cannot necessarily fault lawmakers for doing what perhaps they had to do to save a financially strapped municipality, or can one? Did the public have enough information on which to make a judgment? Did the people know all they needed to know about the decision making process leading up to the resource recovery facility? A sixty million dollar investment in technology which was supposed to answer the areas growing solid waste disposal problem. Hard to tell, but clearly a
IN RE: OPEN MEETINGS LAW

Community is served best when on an issue of that magnitude, every nuance of the deliberation process can be understood.

One can ask journalists just how much time or space they would really give to the meetings of law making bodies, if they were all together open. With the average TV news department in market such as this, allocate enough airtime within its news and public affairs programs to deliver all this new information we say we dearly want? The answer is that in some cases, more time would accrue to stories about the functioning of government, but in all cases, reporters would have the chance to be better informed and therefore to better inform their viewers.

Not everyone with whom I have researched this subject in recent days has agreed with the idea that political caucuses should be opened. One veteran politician said most things are better accomplished when legislators can express themselves in private. "You have the advantage of staff to guide you," and he also added, "there's less
emotion in caucuses that are closed than in meetings that are open."

Well, I have no doubt the product of a closed meeting in which a consensus is reached is neater, tidier than an open session in which ideas must be worked out. But if we are to have the best possible information about why government is doing what it is doing, we must be in a position to observe that work, to see how those elected to make our laws arrive at their conclusions, to determine whether they and the system are functioning as they should.

Clearly, it is time to close the loophole in New York State open meetings law created by the 1985 amendment, which the state legislature should never had enacted and which the Governor never should have signed. I think a couple of amendments are needed, both of which you are now looking into as you meet your obligations under the mandate outlined in last April's executive order.

Fines for violating the Open
IN RE: OPEN MEETINGS LAW

Meetings Law would certainly be a deterrent, in my view, and giving the courts authority to overturn any action of a public body in those cases of a violation is appropriate remedial action.

I thank you for this opportunity to present my views on this very important subject, and I wish you well in your deliberations, which I trust will be open to the public.

CHAIRMAN FEERICK: Thank you very much, Mr. Davies.

MR. DAVIES: I'd like to start first of all by looking at a comment that you just made. You say in discussing what someone told you, he went on to say for a party to do everything behind closed doors, then march out in lock step with decisions already made, doesn't tell the public how that party's decision was formed. The people do not see the basis, the reason, the elements that went into fashioning it.

I guess my question is do the people need to know all of that? In other
IN RE: OPEN MEETINGS LAW

words, is that not part. -- is that not why we have political parties, themselves, to formulate positions, having formulated those positions, to come into the public, present those positions to the public and to the other side and then let's see what happens.

MR. DOREMUS: I think that's a wonderfully idealistic approach to take, if a party poses a certain type of approach to legislation or government practices and standards, that it will in due course follow through on everything it is set up to do. If that's the case, there's no reason why that meeting can't be open to watch that process unfold and to see all the people are doing what they precisely promised they would do when they made their campaign promises.

MR. DAVIES: One of the points Mr. Haney made, I know you were present in the room at that time, was that the fact is if the press or the public is present during those deliberations or those discussions by the members of a party, that that process will not unfold, that is that people will not
IN RE: OPEN MEETINGS LAW

risk being seen as uninformed or stupid or as asking questions or perhaps putting forth ideas that are somewhat speculative and so forth. Isn't that a danger? Won't in fact the process be hurt by having closed meetings -- by having open meetings?

MR. DOREMUS: What would happen under the circumstances as he outlined them, and I think he said that up to thirty-three percent of all the people who are now in lawmaking bodies would probably -- I don't know where he ever got that figure from, but there are a bunch of other things Mr. Haney had to say which I think had very little foundation.

In any event, I have no idea where he would come up with thirty-three percent of all the people elected to public office, people who have chosen to put themselves in the public spot light, and to be accountable for their actions and their decisions, to fall suddenly mute if all of a sudden they were asked to appear before the public that elected them and to discuss
IN RE: OPEN MEETINGS LAW

openly why they want to do whatever.

I must say that in all the years that I have closely, professionally watched legislative process, whether it be city council or a school board meeting, I don't recall ever seeing anybody who sat there in utter silence because he was too timid to speak in public.

Let's assume that -- because I'm sure this is true, that some people find it more difficult to express themselves freely and openly when the world is watching.

Undoubtedly that is true. It may also be true that that particular kind of person will no longer be in the public arena, that is he will not elect to be elected, and therefore we will have people who can present themselves and their ideas in a forceful or at least in a public, if not forceful fashion.

MR. DAVIES: Well, I suppose isn't that fine, if we have a lot of people waiting in the wings to enter public office, but at least it's been my personal
IN RE: OPEN MEETINGS LAW

experience, and maybe I can ask this of you too, isn't there in fact now somewhat of a shortage of good candidates?

MR. DOREMUS: I'm not aware there's a shortage of candidates. I have heard that all my life. The best people do not run for public office. That's something of an insult, I guess, for those who do run for public office and get elected.

We would surely have some different people running for public office from these that are now running, yes, I think that's the case, but shortage, I don't know. Does anyone know whether there's a shortage of office seekers? I'm not sure.

MR. DAVIES: Now, what about after the Sciolino lawsuit, from your observations of the city council at that time, did opening the caucuses make any difference in the way that they conducted their business and the quality of their business?

MR. DOREMUS: I saw no difference whatsoever. In other words, I do
IN RE: OPEN MEETINGS LAW

not believe that anybody who would read the accounts or see the television coverage or listen to the radio stories that followed the decision was in 1980, '81, there, would have found that there was any impairment to the government process, that these people were hindered.

It seems to me there was nothing there for anyone to put his finger on and say, "You see. I told you once these meetings were open, we no longer had as effective government." I think it's an absolutely fallacious conclusion to draw that government substantially changed with the Open Meetings Law enforced.

MR. DAVIES: What about Mr. Haney's point that closed meetings are going to be had, one way or the other, that is if there has to be two caucuses, as the city council ran their two caucuses, if they have to telephone or meet in Mr. Haney's basement behind a furnace or rotate members into the hall, the fact is it will be done. You can't stop it. And if that's the case, what's the
IN RE: OPEN MEETINGS LAW

point of changing the law?

MR. DOREMUS: Well, I think Mr. Haney prefaced that comment by saying good government comes from good people. These are the good people he says would, of course, violate the spirit, if not the letter of an Open Meetings Law.

I think we get people who can be trusted to abide by the law. If you're saying to me, isn't it going to happen anyway, don't I see that those meetings are actually going to take place, I guess one would have to be naive to believe that because the law is in force, that people are not going to compare notes, they are not going to make telephone calls to one another, not occasionally going to get together to do these things.

Look, we enact the laws. We try to enforce them, and we hope that the laws are serving us all well. I don't think you can go into either a speed law on the highway or a parking law or a law in the open meetings with the idea that people are going
IN RE: OPEN MEETINGS LAW

to violate it, and therefore what's the point
of having the law.

MR. DAVIES: I'm not talking
about violations, now, I'm talking about
circumvention. Let's take the Rochester City
Council's practice of '81 to 85.

MR. DOREMUS: Meeting four and
four?

MR. DAVIES: Meeting four and
four. I mean that imposed a burden upon the
staff. It was difficult for the members.
What's the point? What did we gain by having
to meet four and four instead of eight
together? What did we gain by that?

MR. DOREMUS: Very difficult to
quantify that. What we gained, I guess I
would have to say, is that we established a
principle, in this case an Open Meetings Law,
which we expected these elected public
servants to abide by. How they handle that,
and we have heard here this morning that it
was of course handled in a way that might be
expected, meeting just so they could abide by
the letter of the law, but nevertheless did
IN RE: OPEN MEETINGS LAW

pretty much the same kinds of things they
would have done all together, it seems to me
when you have to ask yourself also were we
somewhat better off under those circumstances
by forcing these people to do as much of what
the law requires as you could reasonably
expect. That's the only answer I can give to
that. I just don't know.

What do we gain by having any
law when you realize as one does, when he
goes out on the thruway these days and sees
people going by at seventy miles an hour,
when you yourself are violating the law at
sixty? What do we gain by having that law in
place, when people are not abiding by it?
They are going to do these things anyway.

If you had no law at all, what
would happen? We would be back to where we
were. When we heard Mr. Haney recite for us
the situation that occurred during the time
of the very critical vote on violating the
city's -- violating the state's constitution
by exceeding the city's tax limitation. They
did this repeatedly. They made these very
IN RE: OPEN MEETINGS LAW

vital decisions behind closed doors, and then
came out, and for all practical purposes
simply announced them. I think we would not
have that under the present circumstances.
You would find it more difficult to
accomplish that kind of task, which is a
consensus without public scrutiny, under the
present circumstances.

MR. DAVIES: What about the
point that the public just really doesn't
care about this issue?

MR. DOREMUS: I tried to address
that in paragraph three of my presentation
here. I do not doubt for a minute that Mr.
Haney, and for that matter Mrs. Scott, who
has said repeatedly up until the time she
cast her vote with the majority on the Open
Meetings Law here about three weeks ago, I
have no doubt that neither one of them has
ever heard this issue presented to them as a
burning issue. I think those are the issues
she once used to describe why she was opposed
to this. It's not a burning issue.

There are many things that are
IN RE: OPEN MEETINGS LAW

not burning issues within the framework of public concern. That is, I think if you asked the average man and woman walking down the street here in front of this building, one of the things that you are most concerned about with government in this community, you would hear, "We want vital services, well delivered, and we want low taxes." Those are the two vital issues.

But to say that since no one has ever brought this to me, that the issue therefore doesn't exist is to say that everybody who appeared before this panel favoring open meetings is a non-entity, that his citizenship really has no relativity here, and that until we see people marching up and down on the streets with placards requesting that the government open its meetings to the public, we don't have an issue. You wouldn't be here discussing this with us, if there weren't an issue.

MR. DAVIES: Another point, if the law is changed, isn't it more democratic to leave that change unto the local
IN RE: OPEN MEETINGS LAW

municipality rather than having the state legislature impose it?

MR. DOREMUS: No, I think in a municipality of this kind, where we now have total Democratic control in the city council, there is no political opposition within the nine member city council here as -- or will be as of the first of the year, you see the makings of very dangerous situations. Were you to leave this thing to them, they would do exactly what they did before, which is to, of course, have their closed caucuses, and in this case, closed caucuses with all the members of that council.

This is also true in small towns where one political party has been intrenched for many years. These are people who feel that they know what's best for the public, and they would just as soon not have to have the scrutiny of outsiders there when they go about the business of doing the best they can to provide for the community's needs and welfare.

I think if you have a principle
established and the principle is sound, that the principle should apply. It should not be left up to the whims or capricious judgment or even the considered judgment of local legislative bodies as to whether or not that principle applies to them.

MR. DAVIES: Thank you.

CHAIRMAN FEERICK: Commissioner Magavern.

MR. MAGAVERN: Would you recognize any meetings among legislators in private to be desirable?

MR. DOREMUS: Yes, and I think there are those exceptions built into the law, are there not, those that are super -- those that would deal with super sensitive personnel matters?

MR. MAGAVERN: That would be true even of a meeting of the full body. I'm thinking of matters not within the subject matters of the exceptions that may be -- a budgetary matter, an important project, even dealing, with say, the Waldert decision. In those cases, would you recognize the
IN RE: OPEN MEETINGS LAW

propriety of, say, an informal meeting
between a majority and minority leader to
explore a possible compromise?

MR. DOREMUS: You're talking
about a one on one there?

MR. MAGAVERN: Yes.

MR. DOREMUS: I would see no
reason why something like that couldn't be
done, because you have, theoretically,
-opposing points of view. You have opposing
ideology.

MR. MAGAVERN: You heard Mr.
Haney's decision of the way they responded to
the Waldert crisis.

MR. DOREMUS: I did.

MR. MAGAVERN: I appreciate your
view as to whether it would have been
possible to have reached that resolution had
the private meetings not been possible.

MR. DOREMUS: Well, what he said
was we met daily in closed meetings. We
could never have done this if we had been
forced to discuss this out in the public
forum. I find that just impossible to
believe. I mean I wasn't present, obviously, for the closed caucuses of Mr. Haney and his Democratic colleagues. It seems to me to -- I think the point lacks substance. I just don't -- I didn't hear him say why that would have happened. He just said it would not have happened. What is there about the discussions that went on that could not have been heard by all of us?

MR. MAGAVERN: Final question, recognizing that some small meetings, at least one on one meetings, are proper among legislators, recognizing that there's a strong impetus, apparently, among legislators to explore things privately, do you think the effect of the -- of elimination repeal of the political caucus exemption might be simply to take debate that would otherwise occur in the caucus, and push it off to the other smaller, less informal meetings, and therefore even further blur accountability for decisions and to weaken collective party accountability for decisions?
IN RE: OPEN MEETINGS LAW

That was a point of view expressed by Mr. Haney, Professor Benjamin and others through the last day and a half. I wonder what's your reaction.

MR. DOREMUS: The example you gave me first was one person from one political party and another person from another, people meeting one on one to discuss something. I would see nothing wrong with that at all. In fact, I'm not sure the Open Meetings Law, as I understand, would preclude that, would it?

MR. MAGAVERN: I don't think it would. I'm taking a philosophical position that you have stated and that others have stated, that the basis for public decision, the deliberative process itself should be in the open, and it appears everyone who takes that position recognizes at some stages of the deliberative process at least that is not true, they cannot be open -- at least there should be an area of privacy that should remain available for some stages of the deliberative process, even when, as in the
IN RE: OPEN MEETINGS LAW

case of majority and minority leader, that
may be the crucial stage in the process.
That may be determinate of the outcome. So
that being sold so philosophically, then we
have an awful problem of drawing the line.

MR. DOREMUS: I'm not quite sure
how your question was left, but let me say
this, what this law should do is to give the
public, which of course includes journalists,
the best possible opportunity to hear what is
going on and how decisions are arrived at.

MR. MAGAVERN: Subject to some
area where privacy is required, subject to
that, I think.

MR. DOREMUS: Yes, and thinking
here from the top of my head, I must tell
you, I would find it very difficult to come
up with a subject. I mean I think we could
do this if we were in Washington and we were
talking about the security of the United
States, but there is no -- there's no
security of the City of Rochester, security
of the city or the County of Monroe that I
know of at issue here, and therefore I don't
IN RE: OPEN MEETINGS LAW

know what subject it would be, what
exceptions you would write into this.

MR. MAGAVERN: It wouldn't be a
subject matter exception. It would be a
process type exception, which we recognize is
already there. The one on one we recognize
is already there, and the question is how
much further can you permit the one on one,
and can it be three people instead of two?
Is that still philosophically okay?

MR. DOREMUS: It wouldn't be
with me.

MR. MAGAVERN: As soon as you go
from two to three?

MR. DOREMUS: Yes, because every
step you take down that road vitiates the
opportunity for people to hear what's going
on. Cut it off. I think we need to reduce
this to the absolute irreducible minimum
rather than make all these exceptions to the
law.

MR. MAGAVERN: Thank you.

MR. SMALL: Mr. Chairman, I just
have one question of my old friend, and that
IN RE: OPEN MEETINGS LAW

is that Brother Haney and some other witnesses, in defending closed caucuses, say that after all, the voters have a right to toss them out four years hence. How do you deal with that?

MR. DOREMUS: Well, of course that is about as fundamentally true as anything you could say. The voters have the right every four or two years, whatever it may be, to toss somebody out if they don't like his performance, but the voters should know why a person deserves to remain in office or why a person ought to be taken out of that office, and it is that idea, it is that judgment based on information, if you will, the wisdom of the voter, which is generated by the information that flows to the voters.

And for him to say that we want you to know less about what we're doing and then if you don't like what we have done, toss us out, I think really begs the issue here. It's -- it just doesn't make very much sense.
IN RE: OPEN MEETINGS LAW

I found it rather astonishing that Mr. Haney also would inferentially associate advocates of open meetings with Naziism, fascism and communism. I think in each one of the political spheres, the rule of the day is closed meetings. We'll tell you what you ought to know about what we're doing, and then we will make sure you do what we want you to do. That is the essence of Naziism, fascism, and as far as I know, communism.

The people who advocate open meetings have an absolutely diametrically opposite view. They are saying, "No, you tell us why you are doing what you're doing, and we will let you know what we think about what you're doing. But we need all the information upon which to base our judgments."

I find the idea that once every two or three or four years, we can get rid of you if we don't like you to be beside the point.

CHAIRMAN FEERICK: I appreciate
very much your sharing your views with us and thank you for participating in our hearings. I believe we may have an unscheduled witness who would like to make some comments, and we would be happy to hear from you sir.

MR. LYNN: My name is John D. Lynn. I live in Palmyra, New York, which is Wayne County, a rural county to the east. I have been active in Common Cause and the League of Women Voters, sort of, and those ideas that they expressed are generally mine.

And in the case of this particular issue of open meetings, they have been very active. I have worked with two or three people in our county, also Common Cause members, who undertook a drive within our county to secure voluntary compliance with what you are now trying to get, a change in the law, which was the -- just what the city council did, apparently from what I understand.

Basically, of course we support what you're trying -- we assume you're trying
IN RE: OPEN MEETINGS LAW

to do it in gathering information to do it, and I didn't intend to repeat all the arguments you have heard before. You have heard them, and when Haney got up there and went through his ritual, I didn't -- I was thinking, "Am I going to give a big speech refuting everything he said?" No, because Warren Doremus took care of it.

The thing that we learned in circulating through the county, Wayne County has fifteen towns and ten villages. That means there are two legislative bodies in -- well, there's fifteen town boards and fifteen village boards, not to mention the school boards and all the rest of it.

We went to several of them to urge their adoption of this voluntary compliance rule. Our success was practically minimal, and in the course of it, it appeared to me that they -- if they knew anything about the idea at all, it was very vague. And furthermore, it interfered with their proper running of the government for reasons you have heard stated by Mr. Haney and so
IN RE: OPEN MEETINGS LAW

forth, and also Warren Doremus mentioned it.

Another thing to be said about

our county, it has been Republican since the

first Republican ever voted in this country.

It is two to one, at least, and maybe more,

Republican over Democrat. The boards of the

county and the various municipalities are

controlled by Republicans, most of them

complete control. So why should they be

interested in anybody questioning their

judgment? And thus we found them not very

receptive. I think a couple did adopt the

resolution, just to keep us quiet.

In any case, there is that

attitude in the county, and it does,

naturally, interfere with the rights of

minorities to learn what's going on, and

therefore we support the concept of open

government.

What is more important is -- to

me and what I intended to talk about and

will, now, is the feeling that we are -- we

have heard this mentioned many times, the

people need to know. And Gannett says that's
IN RE: OPEN MEETINGS LAW

the greatest thing on earth because we're
fighting for it every minute. In our efforts
to reach -- get this idea across in our
county, we found it damn near impossible to
interest Gannett reporters in what we were
doing. We would tell them, "Look, we're
raising this issue. We would like to have
you attend the board meeting where we bring
it up" and so forth, complete lack of
interest in any of that. It was interesting
to me to see how Gannett is carrying the
crusade of better government through these
means, open government and all that and then
fails to implement its ideas, because the
education of the electorate is most
important.

And as Warren Doremus just said,
if the electorate does not realize what is
done and why it's done, they will not be able
to make an informed opinion about who ought
to be re-elected.

Further, many of the issues that
are of significance to the electorate in
these various towns and villages have never

COMPUTER REPORTING SERVICE
IN RE: OPEN MEETINGS LAW

seen the light of day, for lack of
information on them in the media. So
basically what I may be saying is this is
something you can't do. You can't order the
papers to send out their reporters, but I did
want that point to appear in your minutes,
that the papers have a great -- the papers
and other media have a great responsibility
in doing a hell of a lot more than they are
doing today in educating the people in what
goes on. I guess that concludes my remarks.

CHAIRMAN FEERICK: Thank you

very much.

MR. MAGAVERN: I have a
question. Mr. Lynn, in those municipalities
that did adopt your resolution, did you find
any beneficial effect as a result?

MR. LYNN: No. That is to say,
I'm sure it hasn't. I haven't seen any great
change. I might be wrong. Their operations
continued as they always do in a small town,
village board, four or five guys get
together. They have scheduled meetings and
all that. They accomplish their work, and
IN RE: OPEN MEETINGS LAW

there have been occasions that I have heard of where they were caught in a sense, evading the law or would have been -- let me get this straight.

Actually they are now operating under the law that permits them to have caucuses and secret meetings and all that stuff, and they are using those weapons, if you want to call them, with some frequency. They do have closed meetings that would seem to be in violation of whatever rule -- I guess the only rules now are on the secrecy business, that is involving personnel matters and things like that, they can have closed meetings on that. But they frequently call them for other reasons, details I can't give you, just a general feeling.

MR. MAGAVERN: Thank you.

CHAIRMAN FEERICK: Thank you very much.

MR. LYNN: You're welcome.

Thank you, gentlemen.

CHAIRMAN FEERICK: Before closing the hearings on this subject, I would
IN RE: OPEN MEETINGS LAW

like to say again for the record that our Commission has and is approaching the subject of the Open Meetings Law with an open mind.

We have not prejudged the issues or questions involved. These hearings have been designed to inform us concerning those issues, and I would say based on having listened to the witnesses over the past day and a half, that we have been greatly informed on those issues by virtue of the diversity and excellence of the witnesses who have appeared before us.

It is our intention to continue to develop information on the operation of the Open Meetings Law. Areas that have been identified here for possible study will certainly be examined by our staff.

At the conclusion of our own fact finding and examination, I would anticipate that our staff will present to the full Commission its thinking and suggestions with respect to the subject, after which the Commission will meet, deliberate and reach what judgments it might on the subject. And then we would, in due course, make known our
IN RE: OPEN MEETINGS LAW

judgments certainly to the chief executive of the state who appointed and established our Commission. And beyond that, I would expect that our conclusions and judgments would be made known as I believe they need to be made known, certainly to the public, as well.

So I thank you all, again, for participating in our hearings, and I would ask if anybody -- if my colleagues would like to make a closing observation, they certainly have an opportunity to, but I don't sense that they care to at this particular point, expecting me to bring the hearings to a conclusion, which I now do. Thank you.

(Proceedings adjourned.)
CERTIFICATE

I, JUDY A. GING, hereby certify that I did report in machine shorthand the foregoing proceedings had in the above-entitled matter at the time and place hereinbefore set forth; I do further certify that the foregoing transcript, consisting of pages 360 through 588 is a true and correct transcript of my said stenographic notes.

Judy A. Ging, C.S.R.