CITIZENS LEAGUE REPORT

Public Meetings for the Public's Business

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FOR THE PUBLIC'S BUSINESS

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Public Meetings
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INTRODUCTION

The 1970's have produced vastly increased demands upon government for openness and accountability. Much of this emphasis has come from a deep felt suspicion of public institutions, and a strong feeling that decisions made in full public view will better serve the public interest.

This increased desire for openness has not by-passed Minnesota. In fact, the vast majority of our public officials have gone well beyond their colleagues in many other states in subjecting themselves to public scrutiny and meeting the public's increased expectations for openness.

The evolution of the Minnesota open meeting law provides clear evidence of this move toward openness. Although the law was originally adopted 20 years ago, it has been strengthened significantly in the 1970's by actions of the State Legislature and State Attorney General. Compliance with the law is also increasing, as a result of growing support for openness among public officials and vigilant enforcement of the law by the media and others.

In general, we found Minnesota's open meeting law to be an important aspect of our state's tradition of open and competent government. The law provides a broad statement of policy requiring that meetings of governmental bodies to discuss or decide on important public business be open to public attendance. We were able to identify no one willing to challenge this very reasonable and desirable public purpose.

We did identify a number of criticisms of the open meeting law, however. Some were offered by public officials who feel that the law sometimes has side-effects or repercussions which are contrary either to the public interest or to the private rights of individuals. Other criticisms were offered by public interest groups who feel that the law still needs to be strengthened. The news media have responded to these criticisms by vigorously depending the open meeting law, both in print and before the Legislature.

We found the open meeting controversy still an important one, even though its intensity has calmed considerably since the period immediately following the Attorney General's opinions of 1974 on what "meetings" are covered by the law. In some cases, we found merit in criticisms of the law which are being made. We have not hesitated to endorse changes where we felt they would both improve and strengthen the open meeting law.

Beyond those changes we have proposed, however, we believe it is now time to broaden our emphasis on openness...to implement the true spirit of the open meeting law through improvements in the provision of *notice*, maintenance of *records* and the general *conduct of meetings* covered by the law.

In urging this broader emphasis, we recognize that more open and accountable government will not result from

legislative policy alone. Our actions--as public officials, the media and the general public--are now needed to actually *achieve* those goals which are only made *possible* by the open meeting law.

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

1. The current definition of "meetings" covered by the Minnesota open meeting law* provides a reasonable safeguard against use of small gatherings of public officials to avoid discussing important public business in a public meeting. It should not be altered by the Legislature.

2. The open meeting law should apply to all public bodies in the state, including the State Legislature and University of Minnesota Board of Regents.

3. Private or quasi-public organizations which receive substantial amounts of public funding should take steps to open their operations to the broadest possible public scrutiny and participation. They should not be made subject to the state open meeting law, however.

4. Two specific statutory exceptions to the requirements of the open meeting law should be provided: (a) for public bodies to discuss positions to be taken by their representatives in collective bargaining negotiations, and (b) for initial screening of applications for high administrative positions.

5. "Safeguard" provisions should be added to the open meeting law setting forth notice and other requirements which would have to be followed by public bodies using legal exceptions to the law. Some type of public observer at a legally-closed meeting is needed.

6. The Minnesota open meeting law should be amended to require each public body covered by the law to adopt an "open meeting policy." This policy would establish procedures and requirements for that particular body's notice, minutes and general conduct of meetings.

7. Additional penalties for convictions of violations of the open meeting law are not required at this time. Informal enforcement, through the effects of unfavorable publicity, provides a very effective deterrent to potential violators of the law.

8. Much more attention should now be focused on analyzing and improving factors which contribute to the openness of government, but which are outside the parameters of the state open meeting law. Beyond adoption by each public body of an "open meeting policy," particular attention should be given to encouraging more and better informed citizen involvement, and to evaluating the needs for and transmission of public affairs information.

*As interpreted by the Attorney General. See the Appendix for an explanation of the Attorney General's opinion which defines "meeting."

BACKGROUND
OPEN MEETING LAW IN CONTROVERSY

The law has become a major focus of the drive for openness.

Open meetings and the Minnesota open meeting law have become a major focus of efforts to improve governmental decision-making and to increase public understanding, awareness and acceptance of governmental decisions and actions. The law, which was first adopted in 1957, prohibits closed meetings by virtually all state and local public bodies which must transact business in meetings. Because of its broad coverage and almost total absence of exceptions, the law is considered one of the most stringent of the open meeting laws in effect in the fifty states. (For a summary of open meeting laws in other states, see the Appendix.)

Separate open meeting laws originally applied to state and local public bodies in Minnesota. They were merged in 1973. Important amendments adopted in 1973 also added committees and subcommittees of public bodies to coverage of the law and imposed penalties for violations.

The law itself is fairly short, leaving a number of aspects of its application to Attorney General's opinions and decisions of state courts.

Unless otherwise noted, all references in this report to the Minnesota open meeting law are meant to include interpretations of the law by the courts and opinions of the Attorney General which are currently in effect. (See the Appendix for the full text of the law and a summary of important Supreme Court decisions and Attorney General's opinions on the law.)

Its visibility has increased since 1973-74.

Although the Minnesota open meeting law has been in effect since 1957, it has only recently become a subject of considerable controversy. Prior to adoption of the 1973 amendments, public bodies could legally hold private meetings on important public business in committees and subcommittees. As a practical matter, the law also had less effect since it contained no provision for penalties.

Perhaps even more important to the visibility of the law were two 1974 Attorney General's opinions. The opinions defined "meetings" covered by the law to include discussions between as few as two members of a five member public body. The opinion said meetings involving *deliberations* as well as *decisions* were covered by the law. The issuance of these opinions set off a strong reaction particularly from local officials who believed the opinion made unlawful much of their interaction with one another, including informal conversations about their personal affairs.

Following the 1974 Attorney General's opinions, attention of both proponents and opponents of the open meeting law quickly shifted to the Minnesota Legislature. Bills specifically

defining "meeting" as a quorum were introduced, as were proposals which would make it legal to hold closed meetings to discuss certain controversial issues. Considerable energies were expended by lobbying organizations for local officials to generate support for the proposed changes. And, considerable coverage was given the issue by the electronic media and on both the news and editorial pages of Minnesota newspapers.

The 1975 Legislature took no action on the open meeting issue, choosing instead to conduct a series of House hearings around the state during the 1975-76 interim. After initially indicating that it might favor limited changes in the law, the House committee tabled the proposed changes during the early part of the 1976 session. The major proposals offered by the local officials organizations in 1976 were not reintroduced in 1977 and no hearings on the issue were held.

Several arguments are made against changing the law.

In successfully resisting changes in the open meeting law, proponents of the law have argued that:

- Decisions made in the open are better decisions. Facts presented by staff and others, for example, can immediately be exposed to public scrutiny and be challenged if they are not accurate. It is argued that staff dominance of public bodies may be reduced as a result. Members of a minority faction of a public body may also have a better chance to get their positions stated and understood if discussion takes place in open meetings. And, citizens have a chance to know what matters are being discussed and may be able to make their feelings known to public officials in advance of decisions.

- Requiring all meetings of public bodies to be held in the open will increase public awareness of important decisions and actions of government, making for better informed and more effective voters and citizens.

- The public will have more confidence in government knowing that decisions are being discussed and made at public meetings and knowing that they may attend all meetings if they wish.

- The public has a right to know how and why important decisions are made on the use of their tax dollars and other important functions of government.

- Any exceptions to the open meeting law allowed for discussions of specific issues will give public officials the opportunity to discuss in private the full range of important and controversial topics before that public body at that time. Allowing public officials even limited opportunities to meet privately in subquorum groups is an open invitation to move deliberation on controversial subjects from public to private meetings.

Several arguments are made in favor of changing the law.

Some public officials, on the other hand, argue that adhering strictly to the requirements of the open meeting sometimes produces results which are contrary to the public interest. Local elected officials and other proponents of changes in the law argue that:

- Conducting all discussions of public bodies in the presence of the media and members of the public inhibits discussion on the part of elected officials and results in

increased reliance on staff for making critical policy decisions.

• The conducting of land acquisition strategy sessions in the presence of reporters and members of the public gives the opposing party an unfair advantage and may unnecessarily increase the cost of government.

• Good faith collective bargaining is fundamentally inconsistent with the requirements of the open meeting law. It is not fair for one side in collective bargaining to be able to listen in on the other side's strategy sessions. Also, negotiators are not able to make the kind of compromises in their positions which are required to reach a settlement when their constituencies are represented in the audience. As a result, the negotiation process lengthens and more contracts end up being settled through mediation and arbitration.

• The requirement that all discussions of government be conducted in the open may result in unnecessary harm to the reputations of innocent parties. This may be particularly true for unsubstantiated charges later proven false about an individual's personal conduct, or mental or physical health.

• The requirement that all discussions of public bodies be conducted in the open may unnecessarily slow down the operations of government and reduce the ability of public bodies to make compromises, make decisions, and initiate action. In many cases, the ability of public officials to meet privately may be in the public interest if better decisions--which could not be made publicly--are the result.

U of M study assesses effects of the law.

A comprehensive survey of the effects of the Minnesota open meeting law was conducted in 1976 under the direction of Professor Michael Gleeson, of the School of Public Affairs, University of Minnesota. (Hereinafter, this survey will be referred to as "the Gleeson study." Further background on the survey may be found in the Appendix of this report.)

The report of the Gleeson survey included a number of generalizations drawn from the responses made to the questions which were asked. In many cases, the responses to questions were based on opinions rather than facts. They included:

• The open meeting law has resulted in an increased awareness of the desirability of open government and a reduction in the number of meetings of public bodies held in private.

• Some public bodies have changed the way in which they give notice of meetings, as a result of the open meeting law, but most have not changed the way they keep records of meetings.

• One-on-one meetings between policy-makers and increased dependence on staff are being used to some extent to avoid discussion of controversial issues at public meetings.

• There have been some short-term effects on the operations of public bodies resulting from increased openness. These effects have included:

  . Somewhat more time being spent in meetings.

  . An increase in the length of agendas and, in some cases, changes in the nature of issues placed on agendas.

  . Some increased reluctance on the part of public officials to speak out at public meetings.

• Little change has occurred in the number

or quality of policy decisions as a result of the open meeting law.

- A strong feeling exists that the open meeting law has increased the cost of labor settlements, but there is little evidence that the price of land acquisitions has been affected.

- The law appears to have had little effect on public understanding or confidence in government. Although these goals are not necessarily legislatively intended purposes of the law, they are often stated in opposition to changes in the law. The findings of the study were that few jurisdictions reported the law had increased or changed any of the following:

  . The amount of media coverage of local government.

  . The accuracy or completeness of media coverage of meetings.

  . Public knowledge and understanding of the local government decision-making process.

  . Public acceptance of policy decisions.

  . Public confidence in local government.

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

PART ONE: "MEETINGS" COVERED BY THE OPEN MEETING LAW

Findings

Virtually all meetings are covered.

The Minnesota open meeting law, as interpreted by the Attorney General, requires that virtually all gatherings of members of the same public body to discuss or decide on public business must be open to the public.

The law itself provides simply that "all meetings, including executive sessions...shall be open to the public." Prior to 1974, many public bodies interpreted this requirement to apply only to meetings at which *decisions* were made. Many public bodies routinely held background or briefing meetings with their staffs between decision-making meetings. Also, notice and other requirements of the law were often not followed for meetings involving fewer than a quorum of the public body.

The 1974 Attorney General's opinions held that *deliberations* of public bodies are an important part of the decision-making process and should be covered by the law. The opinions also held that meetings of fewer than a quorum of members should be considered subject to the requirements of the law if the deliberations could have a significant influence on decisions made by the public body. For example, a meeting between two members of a five member body is subject to the requirements of the law since those two members represent a majority of a quorum of that body and could take action based only on deliberations held in a private meeting.

As noted above, the Attorney General's opinions have been a major focus of efforts to change the open meeting law. While the opinions have been challenged on policy grounds in the Legislature, they have not been challenged in the courts as faulty interpretations of the law. And, while the opinions technically apply only for the factual situations which were identified by the public body which requested the opinions, they do tend to be considered as if they were part of the law.

Personal communication is continuing.

Despite the Attorney General's definition of "meeting," most public officials appear to be continuing to communicate on an individual basis with other members of the same public body without complying with the notice or other requirements of the open meeting law.

The Gleeson study reported that 88 percent of the elected and appointed public officials who were interviewed said that there are at least as many

private discussions going on now among officials before meetings as were taking place prior to 1974. It is not clear from the survey, however, how many of these informal discussions could actually be considered violations of the open meeting. Our testimony from Attorney General Warren Spannaus was that one-on-one meetings are illegal only if their intent is to violate the purpose of the open meeting law, i.e.; only if the intention was to avoid deliberating on important public issues in public.

Our testimony from public officials and others was that one-on-one meetings, telephone conversations, written communications, and using staff as the intermediary are all being used by public officials to avoid compliance with the requirements of the open meeting law.

Few charges of illegal sub-quorum meetings have been made.

Our informal analysis of newspaper coverage of this issue identified at least forty-five alleged violations of the state open meeting law which were reported by Minnesota newspapers between late 1974 and early 1977. Virtually all involved meetings of at least a *quorum* of a public body, or of a full committee or task force of a public body.

One of the exceptions involved a meeting over lunch attended by the mayor and several key members of the Minneapolis City Council to discuss budgetary matters. Another involved the hiring of a liquor store manager by three members of the Center City Council. In both cases, it was alleged that notice of the meeting had not been provided.

Other than these two cases, however, no articles or editorials included in our analysis accused public officials of violating the open meeting law by meeting informally with fewer than a quorum of members of the same body to discuss public business. And, of the very limited number of alleged violations which have resulted in lawsuits, none has involved meetings involving fewer than a quorum of members of a public body. (A more complete summary of our analysis of newspaper coverage of the open meeting issues may be found in the Appendix to this report.)

Some groups ask to re-define "meeting" as a quorum.

To address the concerns which have been raised over the Attorney General's definition of "meeting," legislation has been proposed to limit coverage of the open meeting law to gatherings of at least a quorum of members of a public body.

Supporters of the proposal introduced in the 1975-76 Legislature included the League of Minnesota Cities, Minnesota School Boards Association and Common Cause. That proposal was not reintroduced in 1977. A different proposal authored by Independent-Republican legislators was offered early in 1977 which would have defined "meeting" under the law as a quorum of members of the public body. No hearings on that proposal were held in 1977.

Conclusions

Current definition of "meeting" is a reasonable safeguard.

The current definition of "meeting" provides a reasonable safeguard against the use of small gatherings of public officials to circumvent the intent of the law. We believe the intent of the law as interpreted is to discourage public officials from intentionally meeting in subquorum groups to avoid deliberating in public on important

issues. The intent of the law is not and should not be to unreasonably disrupt the lives of public officials.

We found that, despite the Attorney General's opinion, most public officials are continuing to meet and talk by phone on an individual basis with members of the same public body. Yet, we were able to identify no convictions or even formal charges of violations of the open meeting law for participation in meetings of less than a quorum of members.

These findings have led us to conclude that a change in the definition of "meetings" covered by the open meeting law is neither needed nor desirable. We believe it is proper to have a public policy which discourages the use of private deliberations to avoid public awareness of factors which led to a particular decision. Without such a policy, public bodies could meet privately in groups of fewer than a quorum to deliberate on and decide major questions which could then be dealt with without discussion at open meetings of the full body. We believe such an opportunity would be contrary to the basic intent of the open meeting law which is to allow the public to know how and why important decisions of public bodies are made.

At the same time, it is clear from our findings that the prohibition against meetings of subquorum groups of public officials is being enforced in a reasonable manner. We believe it is important to have a recourse available to discourage the most flagrant use of subquorum meetings to violate the basic intent of the open meeting law. But, we also believe the evidence indicates that the Attorney General's definition of "meeting" is not resulting in unreasonable intrusions in the social lives of public officials.

Attorney general's definition needn't be made statutory.

While we agree with the Attorney General's opinion defining "meeting," we do not believe it is necessary that the opinion be formally incorporated into the open meeting law.

It would be a futile and unnecessary task to attempt to list all possible definitions of "meeting" for different types and sizes of public bodies. Any definition other than a quorum, which we would not support, would almost certainly require refinement by the courts or another Attorney General's opinion.

While the existing Attorney General's opinion may not, technically, apply to all government jurisdictions, it has carried considerable weight. The fact that critics of the opinion are directing their energies toward the Legislature, rather than the courts, suggests that the opinion and the law are regarded as one and the same. By not making specific statutory changes in the definition of "meeting," the Legislature has given the Attorney General's opinion even more credibility. As such, there does not appear to be anything to be gained from adding a more specific definition of "meeting" to the Minnesota open meeting law.

Recommendation

Make no change in "meeting" definition.

We urge the Minnesota Legislature to make no statutory change in the definition of "meetings" covered by the Minnesota open meeting law.

PART TWO: PUBLIC BODIES COVERED BY THE OPEN MEETING LAW

Findings

Virtually all public bodies are covered.

The Minnesota open meeting law applies to state boards, commissions, and other appointed bodies established by government. It also applies to governing bodies of local governments, school districts, metropolitan agencies and special districts, and to all committees and subcommittees of public bodies otherwise covered by the law. The exceptions to coverage of the law include:

- The State Legislature, its committees, subcommittees, conference committees and caucuses. The state constitution now requires that all sessions of either house must be open to the public "except in such cases as in their opinion may require secrecy." Rules of both bodies require that all meetings of committees, subcommittees, and conference committees shall be open to the public with 72 hours notice provided of meetings "insofar as practical." Both political parties in both houses have opened their caucus meetings as a matter of practice. The current requirements for openness do not apply to gatherings of fewer than a quorum of any legislative body. The requirements also provide no means by which a citizen could seek to ensure their enforcement. And, no civil or criminal panalties for convictions of violations of the openness of requirements are provided.

- Meetings of the Minnesota Board of Pardons and Minnesota Corrections Board are specifically exempted by the open meeting law from its requirements.

- The Board of Regents of the University of Minnesota may not be subject to the requirements of the open meeting law because of the University's traditional constitutional immunity from state statutes of this nature. The Regents have adopted formal policies or by-laws applying the requirements of the open meeting law to themselves voluntarily. The Regents appear to be complying fully with the requirements of the law. As with the Legislature, however, there would be no means by which a member of the public could seek to enforce voluntarily established policies of the Regents. And, no penalties for violations could be assessed.

- The law also does not apply to private or quasi-public arts or other organizations which are not established by law or by action of a governmental body, even though they may receive public funds. It appears that the key factor in determining whether a governing body is covered by the law is whether it was *established* by government.

Proposals have been offered to extend coverage.

Proposals have been made by some proponents of changes in the open meeting law to extend its coverage beyond those public bodies who must now comply with its provisions. They include:

- Proposals have been offered specifically to add to the listing of public bodies covered by the law, the state Legislature, its committees, subcommittees, conference committees and caucuses.

- Efforts to bring the University of Minnesota Regents under the law have focused on two fronts: adding the Regents specifically to the law and repealing the provision in the Minnesota constitution which has been used to justify immunity for the University from state statutes of this nature.

• Although no legislation has been introduced, some persons also feel that private organizations receiving public funds should be specifically added to coverage of the open meeting law. This would include the governing boards of arts and cultural institutions and organizations, public broadcasting stations and others. With limited exceptions, we found that few such organizations have established formal policies on the openness of their meetings. Most told us that they would not turn away persons who sought admittance, that they do not regularly notify persons other than members of their governing boards of meetings, that they would prefer to retain the right to ask persons to leave meetings at which particular matters were being discussed, and that openness of meetings was generally an issue that had not come up. Among those quasi-public organizations which *have* established a policy on openness of meetings are the governing boards of Minnesota Public Radio, the Guthrie Theater and Minnesota Historical Society.

Conclusions

Exemption for Legislature is not justified.

We were not able to justify to ourselves an exception to the general state policy on openness of meetings for the public body which initially established that policy.

We are very conscious of the considerable strides which have been made in recent years to open the operations of the Minnesota Legislature to public scrutiny and participation. We have no reason to believe that the present Legislature will not continue its policy, established through rules and practice, of opening all meetings of committees, conference committees, subcommittees and caucuses to attendance by the public.

We would prefer, however, to have legislative openness guaranteed by law rather than by rules. Rules can be changed at any time, by either House acting independently, and without the approval of the governor. Rules are in fact, changed routinely at the beginning of each legislative session. Perhaps even more important, there is no recourse for a member of the public to use in attempting to ensure enforcement of rules. And, there is no penalty provided for violations.

We recognize that, constitutionally, it is questionable that one Legislature can bind the procedures of the next. Concerns have also been expressed that the "separation of powers" concept may not allow the Legislature to subject itself to a determination by the courts as to the adequacy of its internal procedures.

In dealing with these concerns, we believe that it may be possible to have a general statutory policy of open meetings which applies to the Legislature but which could be altered by adoption of rules. The open meeting law would then apply to the Legislature but each legislative session could establish rules which would override particular aspects of the law. If this approach still does not meet the test of constitutionality, it may be that a constitutional amendment would be required to apply the requirements of the open meeting law to the Legislature.

Exemption for University is not justified.

We recognize that the University of Minnesota Board of Regents has voluntarily adopted by-laws affirming its intention to comply with the requirements of the open meeting law, including the controversial Attorney General's opinion defining "meeting." We were presented with no evidence to suggest that the Regents are not

complying fully with their open meeting by-laws.

As with the Legislature, however, we were not able to justify an exception to *statutory* open meeting requirements for the University Regents. We do not believe that the Regents are fundamentally different from governing bodies of other post-secondary education systems in the state which are subject to the law.

Our primary motivation behind preferring a statutory guarantee of openness, however, rests with the means of enforcing those policies. A legal recourse *is* available to citizens under the state open meeting law to bring suit against alleged violators. No such recourse is available presently for alleged violations of the University Regents' by-laws.

Again, applying the open meeting law to the University Regents involves serious constitutional issues. If it is not constitutional to specifically add the Regents to the open meeting law, it may be that a constitutional amendment would be necessary.

Quasi-public bodies should be open, but not by statute.

We strongly believe that quasi-public organizations receiving significant amounts of public funding should take steps to open their operations to the broadest possible public scrutiny and participation.

We believe it is important to recognize the privileged status such organizations hold in society. In addition to their receipt of public funds, non-profit organizations are exempt from federal, state and local taxation. Many are eligible to receive tax deductible contributions. And, most are established to provide services or operate facilities in the public interest.

As a matter of general principle, however, we do not believe that the requirements of the Minnesota open meeting law should be extended to private or quasi-public organizations. We believe that accountability for the expenditure of public funds should be maintained through the governmental agency which administers those funds. We believe it is essential to minimize the level of governmental interference in the governance of private organizations. We would not like to see government telling the governing boards of private organizations when and under what conditions they could conduct business.

Recommendations

Add Legislature and University regents to law.

We urge the Minnesota Legislature to amend the state open meeting law to specifically add itself and the governing board of the University of Minnesota to those public bodies covered by the law.

Establish voluntary openness policies in private organizations.

We urge the governing boards of quasi-public organizations receiving significant amounts of public funding to adopt specific policies guaranteeing the openness of their meetings to attendance by the public and providing for timely and adequate notice and records of those meetings.

PART THREE: EXCEPTIONS TO THE OPEN MEETING LAW

Findings

Law now covers meetings on virtually all subjects.

The Minnesota open meeting law now applies to virtually all meetings of members of the same public body. The only exceptions allowed by the law, by State Supreme Court decisions or by opinions of the State Attorney General, are:

- The law specifically exempts from requirements of the law "any state agency, board or commissioner when exercising quasi-judicial functions involving disciplinary proceedings." According to our testimony, this provision was added in 1973 at the request of the State Medical Practices Board. We are uncertain as to the extent that the exception has actually been used.

- A State Supreme Court decision has exempted from requirements of the law "strictly social get-togethers" where public business is not being discussed.

- A 1976 State Supreme Court decision exempted from requirements of the law meetings between a public body and its attorney to discuss threatened or pending litigation. The exemption would not apply to normal consultation between a public body and its attorney on matters other than litigation. The court did not establish procedural requirements which public bodies must follow in using the exception.

- An Attorney General's opinion has exempted from requirements of the law training sessions of local elected officials where public business is not being discussed by members of the same public body with each other.

- The law specifically exempts from its requirements exceptions which are allowed by other statutes. These would include:

  . Collective bargaining negotiation sessions which have been closed by the State Director of Mediation Services.

  . Teacher termination and student expulsion hearings unless they are requested to be open by the teacher or student involved.

Specific exceptions have been proposed.

Proponents of changes in the open meeting law have urged that additional specific exceptions to the requirements of the law be added for discussions of particular issues. The proposed exceptions have included:

- Collective bargaining strategy sessions.

- Collective bargaining negotiating sessions.

- Land acquisition strategy sessions.

- Discussions of the character or physical or mental health of a single individual unless that person requests that the discussion be open.

- Discussions or evaluations of the job performance or conduct of an employee.

- Discussions involving the initial screening of job candidates.

"Safeguard" procedures also have been proposed.

Some public interest organizations and

other proponents of changes in the law have also urged the establishment of "safeguard" procedures covering the use of existing or proposed exceptions to the requirements of the open meeting law.

The intent of such procedures would be to discourage issues other than those specifically allowed from being discussed at legally held closed meetings. The current law, opinions and court decisions which allow exceptions do not make any requirements about how those exceptions may be used.

"Safeguard" proposals include a requirement that the decision to use an exception be made by a recorded vote taken in an open meeting, that notice of the closed meeting be required, and that some record be kept of the meeting (tape, transcript, or detailed minutes) which could be examined by a judge if charges were made that topics other than the legal exception were discussed at a closed meeting.

Most alleged violations cover other subjects.

While there are fairly frequent charges in the press that violations of the open meeting law have taken place, most alleged violations appear to be for discussions of issues other than those for which exceptions to the law are being proposed.

Part of our informal analysis of newspaper coverage of the open meeting issue from 1974-77 looked at the types of violations of the open meeting law which were being charged.

In about 84 percent of the forty-five alleged violations of the open meeting law reported in the articles, issues were being discussed for which exceptions to the law are *not* being proposed. In some cases, the issues were of potential embarrassment to the officials, such as having to borrow money to finance a budget deficit. Others involved controversial local issues such as awarding a contract, filling a city council vacancy, reviewing liquor license applications, or considering a downtown development issue.

Many of the alleged violations also involved the adequacy of notice, particularly for special meetings. Some involved 'briefing sessions' which were still being held before regular meetings. One League of Women Voters chapter complained that whenever city council members wanted to discuss a particularly sensitive issue, they would all 'huddle' around a member or the city manager, away from their microphone and out of earshot of the audience. Another city council was charged with having reconvened its meeting to conduct business after one meeting had been adjourned and the press and public had gone home. Still another was accused of using references to written correspondence from the city attorney to avoid public mention of certain matters.

A few of the alleged violations involved ignorance of the law, or ignorance that the law applied to committees or special task forces. Only seven involved meetings devoted exclusively to specific exceptions being proposed. Four of these involved the attorney-client privilege exception which has now been allowed by a decision of the Minnesota Supreme Court. The other three involved collective bargaining strategy.

Conclusions

Bargaining strategy sessions merit exception.

We realize that factual evidence is not available to document the effects of the open meeting law on the cost of wage settlements made through collective

bargaining. As a result, we do not believe that holding down wage settlement costs can or should be used to justify an exception to the open meeting law for collective bargaining strategy sessions.

We do believe, however, that the nature of the collective bargaining process and the requirements of the open meeting law are fundamentally inconsistent. Without some carefully limited opportunity to discuss collective bargaining strategy in private, we are in danger of losing the important interaction and deliberation of members of public bodies on salary levels, benefits and other important conditions of employment which are set through the collective bargaining process.

Our testimony was that many public bodies are simply not discussing and deciding upon their collective bargaining positions in public meetings. Instead, they appear to be meeting on a one-on-one basis with their hired negotiators who must then develop collective bargaining positions without the benefit of deliberation *among* the members of the public body. For smaller bodies which do not have a paid negotiator, the problems are even more severe.

We have very serious concerns about the declining participation of elected public officials in collective bargaining which appears to be taking place. In most governmental jurisdictions, the largest share of tax revenues is spent on salaries of public employees. Increasingly important, too, are the fringe benefits and other conditions of employment which are established through the collective bargaining process.

We believe it is unrealistic and unfair to expect that public bodies will discuss and develop positions to take into collective bargaining sessions in meetings at which public employee union representatives may be present. The apparent side-effect of open meeting requirements in this case--lessened involvement by public officials in setting wages, benefits and conditions of employment for public employees--is undesirable and should be avoided.

A major reason for our conclusion was also our ability to distinguish deliberations on collective bargaining strategy from all other deliberations of government. In collective bargaining, an *accommodation* must be reached, a *joint decision involving two parties* must be made.

To address concerns about other business being discussed at closed collective bargaining strategy sessions, we believe adequate safeguard procedures can be developed. Such procedures should require that a decision to hold a closed meeting to discuss collective bargaining strategy be made at an open meeting by a recorded vote of some extraordinary majority of the membership of the public body. Adequate and timely notice of the meeting should be required stating clearly the purpose of the meeting and the fact that it will be closed. A tape recording, transcript or detailed minutes of the meeting should be kept and made subject to judicial review if it is believed other matters were discussed. It should be clear that discussion of any matters other than collective bargaining strategy at such a closed meeting would constitute a violation of the open meeting law.

Negotiating sessions should be distinguished from strategy sessions.

We believe it is important to distinguish the development of collective bargaining strategy from the collective bargaining negotiation sessions themselves. We do not believe that a specific exception

to the open meeting law can be justified for negotiating sessions.

The major argument made for allowing closed meetings for collective bargaining negotiation sessions is that, in open meetings, time is wasted while negotiators are "playing to the galleries." It is also argued that negotiators on both sides are unable to retreat from previously established positions--in order to achieve compromises--when their constituencies are represented in the audience.

While a specific exception to the open meeting law for collective bargaining negotiation sessions might make it easier for negotiators to "save face," we do not believe the problem being addressed is severe enough to merit changing the law.

We found that an increasing amount of negotiating for public bodies is being done by hired staff, attorneys or consultants. Meetings involving such persons are not subject to the requirements of the open meeting law.

In the event that open meetings are inhibiting the progress of a particular set of negotiations, the State Bureau of Mediation Services is also empowered to close negotiations under the Minnesota Public Employee Labor Relations Law. We feel more comfortable leaving such a determination to the mediator--to close meetings only when necessary--than to have a general policy of allowing closed negotiation sessions.

Land acquisition strategy need not be set in private.

We recognize, on one hand, the concerns that public officials have about discussing possible purchase prices for land while the buyers or sellers of that land are seated in the audience. It doesn't seem fair that one side can listen in while the other side sets upper and lower limits for its negotiator to use.

In many ways, arguments for this exception to the open meeting law are similar to those made for closed collective bargaining strategy sessions. In many ways, the two proposed exceptions are quite different, however. In collective bargaining, an *accommodation* must be reached. There is no competition between potential suppliers. It may well be in land acquisition, however, that more than one buyer or seller is available. The "market place," in other words, is more likely to have an effect on the outcome of negotiations than one side being able to listen in as the other side sets a purchase price.

Again, no specific evidence was brought to our attention to document the effects of the open meeting law on the price of land being purchased or sold by public bodies. Again, we do not believe that the burden of proof--which rests with those proposing changes--has been met.

In addition to our general concerns about discussions straying to matters other than the specific exceptions, we would be particularly uncomfortable about closed discussions about land acquisition or any other major purchases being made by public bodies. The potential for abusing the public interest in closed negotiations is considerable, and outweighs any possible cost savings resulting from closed land acquisition strategy sessions.

Exception for sensitive personnel matters not merited.

The two most often sought exemptions in the personnel field involve discussion by public bodies of the job performance of an individual, and discussions of a person's physical or mental health.

Generally we believe that discussions of this nature do not belong at a level which would be covered by the requirements of the open meeting law. When such discussions involve the top administrators of the public body, it may well be that they *should* be held in public.

In some cases, it may also be that a public discussion on a sensitive personnel matter is more humane to the individual involved than a private meeting followed by unsubstantiated rumors and false charges. These types of matters do tend to get out in rumor form and the interests of the individuals involved may be best served by the story being accurate.

We believe the increased openness of government and of society in general is making all of us more sophisticated in dealing with sensitive matters such as chemical dependency, mental illness, marital difficulties, etc. While some short-term awkwardness is apparent, an adjustment in public attitudes about such matters *is* taking place. And public officials seem increasingly willing to expose themselves to the public as the human beings that they are.

While we have no specific conclusions in this regard, it may be that corresponding adjustments will also have to be made in the ethical standards used by journalists in reporting such matters. In the interim, we are concerned that any statutory exemption from the open meeting law for discussions of sensitive personnel matters could be extended considerably beyond what might be desirable. Any language proposed is likely to include broader categories of personnel matters than need to be covered. In the absence of more specific evidence to the contrary, we do not believe such a broad exception to the open meeting law can be justified at this time.

Initial job screening for high administrative positions merits exception.

It is often difficult to attain a strong list of candidates for a vacant administrative position. We have heard testimony from persons involved in the search for and hiring of top administrators, to the effect that, in their opinion, some of their best candidates refused to apply when informed of the open meeting requirement.

Applicants for public employment who are employed by another body are frequently not willing to let their present employer know that they are interested in another job. Public employees are no different from private employees in this respect. Public bodies should have the option to keep confidential the *initial* list of applicants for vacant administrative positions. However, before the selection process has narrowed the candidates down to one, the names should be made public. This will give candidates the chance to explore job possibilities without revealing their interest to their current employers. Job applicants will be informed that if their names remain in consideration down to the final selection, they will be made public. If, before such time, applicants are still not comfortable in making their names public, they may remove their names from the list of candidates.

Safeguards essential for all meetings where exceptions are permitted.

Current safeguard proposals to close a meeting on a recorded vote taken in an *open* meeting, to give notice of a closed meeting, and to keep a record of a closed meeting are desirable, and should become statutory requirements. The major concern is our ability to prevent discussion in a closed meeting from moving off the

permitted subject, onto other subjects. An adequate system of safeguards must be designed, no matter how many 'excepted subjects' there may be. These should apply to all meetings now or later permitted to be closed, by the law or by the courts.

Another important safeguard that has been suggested is that of a public observer at closed meetings. A public observer would be someone who is not a member, employee, or appointee of the public body. The physical presence of a public observer would be a strong deterrent to discussion of subjects not specified in the vote to close the meeting. We were unable to determine precise procedures for selecting a public observer, or for the filing of a report by such a person, following a meeting. We therefore make no specific recommendation on implementation of the public observer concept. However, we do urge the Legislature to develop a mechanism providing for a public observer at closed meetings and to make that statutory, along with the other safeguard procedures.

Recommendations

Provide legal exception for strategy sessions on collective bargaining.

We urge the Minnesota Legislature to provide a statutory exception to the requirements of the open meeting law for meetings of members of public bodies to discuss positions to be taken by their representatives in collective bargaining negotiations.

Provide legal exception for initial applications for adminstrative positions.

We urge the Minnesota Legislature to provide a statutory exception to the requirement of the open meeting law for meetings of members of public bodies to discuss initial applications for administrative positions in government. Also excepted would be the names of applicants for the positions. However, the final list of eligible persons would have to be made public. The public bodies would have to specify some number of applicants, greater than one, to be designated the final list. The option would remain with public bodies and applicants to make their names public at any time during the application process, if they so chose.

Provide safeguard procedures for legal exceptions.

We urge the Minnesota Legislature to amend the state open meeting law to mandate procedures to be followed by public bodies when conducting legally closed meetings. Such procedures should, require:

- A decision made at an open meeting to call a closed meeting voted by at least 60 percent of the membership of the public body, with the subject matter to be discussed at the closed meeting identified when the vote is taken.

- Written notice of the meeting stating the time and place of the meeting and the nature of the subject matter to be discussed. Such notices should be filed with a designated central office in each county.

- A tape recording, transcript or detailed minutes of the meeting which could be reviewed by a court of law if it was suspected that matters other than the legally allowed exception had been discussed.

- A certificate to be filed with the regular minutes of the public body, noting the time, place, duration, subject matter, and attendance at the closed meeting, and certifying that the subject matter discussed was limited to that designated

in the original vote to close the meeting.

- That in review proceedings on the legality of a closed meeting, the burden of proof rest with the public body to demonstrate that the subject matter discussed was limited to that designated in the original vote to close the meeting, and in subsequent notice of the meeting.

Deny other proposed exceptions.

We urge the Minnesota Legislature to refrain from authorizing additional exceptions to the open meeting law for discussions of matters other than collective bargaining strategy.

PART FOUR: NOTICE, MINUTES, AND THE CONDUCT OF MEETINGS

Findings

No specific notice requirements now in law.

The Minnesota open meeting law itself makes no requirements for notice of meetings. A State Supreme Court decision has interpreted the law to require "adequate and timely notice" to the public of the time and place of all meetings covered by the law.

Under this interpretation, special notice need not be made of regularly scheduled meetings. Special notice does have to be made of special meetings, however. The notice does not have to be made in a newspaper or by mail or phone. It may be made by simply posting a notice in a public place such as a city hall. An agenda does not have to be included as part of the notice. The requirements for notice may be dispensed with in emergency situations. In determining what constitutes such an emergency, the court said the governing body "should be guided by considerations of whether the situation calls for immediate action involving the protection of the public peace, health or safety."

Procedures used for notice vary greatly.

The procedures used by public bodies to provide notice of their meetings vary greatly. The minimal requirements of the open meeting law seem generally to be complied with, although we found adequacy of notice to be the most frequent focus of alleged violations of the law.

The Gleeson study found that many public bodies (42.1 percent) have changed the way in which they give notice because of the open meeting law. From testimony made to the committee and our survey of state and local public bodies we found that:

- Most public bodies establish a set meeting schedule at the beginning of each year for regular meetings, supplemented by posted notice of special meetings at the office of the public body.

- A majority of public bodies surveyed (57.4 percent) mail notices to anyone who asks to be put on the regular mailing list. This percentage is much higher for state and metropolitan bodies than for smaller cities, school boards and counties. Most local government bodies use select mailing lists for notices which usually include the press.

- While most public bodies surveyed mail notices of meetings, their regular distribution lists are relatively small. Over 90 percent of smaller cities, 64 percent of larger cities, and 80 percent of the counties mail 15 or fewer notices of each meeting. Metropolitan and state boards mail larger numbers of notices.

- For those public bodies which mail notices, virtually all are sent more than three days in advance of the meeting. About 45 percent of the public bodies surveyed mail notices five or more days in advance.

- Policies and procedures on notice of meetings are generally handled administratively, rather than by the public body itself. Some public bodies have established specific policies, however. For example, the Apple Valley City Council has adopted a policy requiring posted notices and agendas at city hall and two supermarkets in the city for all regular, special and informal meetings. The policy also provides that the posting requirements may be waived for emergency meetings, so long

as all members of the council are present and the official city newspaper has been notified by phone.

• Most public bodies provide mailed notice by mailing *separate* notices of all meetings to persons who request them. There are, however, the beginnings of efforts by public bodies to *jointly* provide notice. The Metropolitan Council, for example, mails a weekly newsletter to several thousand persons in the Twin Cities area which contains notices of all Council, committee, and advisory committee meetings. Publications listing notices and agendas of committee meetings are distributed each week by the State House of Representatives and State Senate. The *State Register*, which has about 850 paid subscribers, also contains notices of meetings of some state boards and committees. (Use of the State Register for notice of meetings of state agencies is not required.) The Secretary of State's office maintains a mailing list of about 500 persons who are notified of *public hearings* of state agencies. The agencies are required by law to provide notice to the Secretary of State's office for distribution in this manner.

• In addition to the notice provided by public bodies, many newspapers regularly run notices of public meetings. Our survey found that notices of about half of all public bodies are published by a newspaper. This varies greatly by the type of public body, with county boards (100.0 percent), school boards (71.9 percent), and smaller cities (62.5 percent) most apt to have their notices published. On the other hand, metro boards (37.5 percent) and state boards (17.6 percent) are less likely to have their notices published by a newspaper.

Agenda items often not included.

Because of the large number of public meetings being held, choices often have to be made by reporters and citizens about which meetings are to be attended. Advance notice of what business is to be taken up can be critical in making such a decision.

We found that most public bodies send advance agendas to at least some persons not on the body. Just over 20 percent do not, however. And, the number of persons actually receiving advance written agendas appears to be quite small. A higher percentage of large cities (89.7 percent), school boards (71.9 percent) and county boards (80.0 percent) send advance agendas to the press than do metropolitan boards (25.0 percent) and state boards (37.1 percent).

Only about one fourth of the public bodies we surveyed have their agendas published by a newspaper in advance of meetings. This percentage was highest for cities and schools (about one-third) and lowest for metro and state boards (0 percent and 9.7 percent respectively).

Statutory requirements for minutes are limited.

The open meeting law makes no requirements for minutes or other written records of meetings of public bodies except that:

• Votes of members must be recorded in a journal which must be available to the public.

• The vote of each member must be recorded on appropriations.

Minutes vary in depth and quality.

Although our survey of public bodies found that all keep minutes, we found

that they vary considerably in depth and quality. We found, for example, that metropolitan and state boards and large city councils keep the most detailed minutes. By far the least detailed minutes were submitted by school and county boards, although there were some notable exceptions.

About one-fourth of all boards which we surveyed submitted minutes which contained only those motions which were made and adopted. This percentage was 84.0 for school boards and 60 percent for county boards. On the other hand, 35.7 percent of large cities and 57.1 percent of metropolitan boards submitted minutes which contained considerable detail reflecting the substantive content of presentations made, questions asked, comments offered, etc. Several of these minutes began to approximate the depth of verbatim transcripts.

Our survey found that almost two-thirds of the public bodies surveyed record all roll call votes by name. This varies greatly by type of board, however, with cities and county boards much more likely to record all votes than metropolitan, state or school boards. Sixty percent of the minutes submitted by area school boards, for example, contained no recording of roll call votes.

While the size and competence of staffs are probably responsible for some of these differences, it is difficult to ignore the close correlation between these findings and our findings on the frequency with which minutes of public bodies are published in a newspaper. Both county boards and school boards are required by state law to publish their minutes in their official newspaper. Virtually all do, while fewer than a third of the cities we surveyed and no metropolitan or state boards have their minutes published.

In addition to minutes, we found that about 42.5 percent of public bodies surveyed are now keeping a tape recording of each of their meetings. Tape recordings are kept by fewer school boards (31.3 percent) than this overall figure, and by more state (51.4 percent) and metropolitan boards (62.5 percent). Only 2.2 percent of all public bodies surveyed keep a complete transcript of all meetings.

About half the public bodies surveyed send minutes to the press. Half also send minutes to anyone who requests to be placed on the mailing list. There was no indication from the survey of how many copies of each set of minutes are actually mailed, however. Over half the public bodies distribute their minutes within a week or two of the meeting.

Conduct of meetings also contributes to openness.

Beyond notice and minutes, we identified a number of factors contributing to the openness of public meetings which are not covered by the Minnesota open meeting law. They deal particularly with how meetings are conducted.

We found that meetings of public bodies tend to divide into two broad categories: a) those conducted primarily for the convenience of the members of the public body; and b) those conducted with consideration given for members of the public who are in attendance.

Among the factors which distinguish these two types of public meetings are:

• General atmosphere. Is the public made to feel welcome? Are seats arranged so that all can see? Are members of the public body identified?

We found that some public bodies including the Edina City Council and Minneapolis School Board, have made special efforts to introduce the audience to the public body and its

procedures through a written hand-out.

• Ability to follow what's happening. We found that virtually all public bodies (98.5 percent of those responding to our survey) make agendas available to persons who attend meetings. We found that the detail and usefulness of the agendas vary considerably, however. Some provide only the most abbreviated listing of categories of items being considered. Others include all background materials which are being used and discussed by the public body. Our survey found that about one-third of the public bodies responding send background materials to the press in advance of meetings. They were almost all local government bodies. Very few public bodies send background materials in advance to persons other than the press or members of that body.

Our survey found that about half of all public bodies make background materials available to persons attending the meeting until a reasonable supply runs out. About 21 percent said they make *one copy* of all background materials available for the public. Forty-one percent said specifically that they make available background materials to the press who attend meetings.

We found that some public bodies make extensive use of overhead projectors, slides and charts, and have good microphone systems. Others have been charged with attempting to deliberate privately in the middle of public meetings by 'huddling' out of earshot of the public, by referring extensively to materials which are not available or which can not be seen by the public, or by generally conducting the meetings as if only members of the public body were in the room.

• The timing and location of meetings. Because of their employment and other commitments, many citizens can not attend daytime meetings. In recognition of this fact, we found that virtually all city and school board meetings in the Twin Cities metropolitan area are held during the evening. (Minneapolis and St. Paul City Councils are a notable exception.) Our survey also found that all county boards and nearly all metropolitan and state boards meet during the day, however.

We found that most city, county and metropolitan boards almost always meet in their normal location. School and state boards tend to move their meetings around, however. While this policy might make the meetings more accessible to citizens, it also increases the importance of written and widely distributed notice of those meetings.

Another factor in determining the level of participation by citizens in public meetings is their length and frequency. Our survey found that most public bodies (57.1 percent) meet twice a month. Most state boards meet monthly or even less frequently, however. A third of the councils in larger cities meet weekly.

We found that two-thirds of the public bodies surveyed meet for more than three hours at a time. Only 6.8 percent of the public bodies surveyed usually meet for two hours or less. Almost 90 percent of the small cities and nearly three-fourths of the school boards meet for more than three hours at a time. Shorter meetings are held by county and metropolitan boards.

• Ability to participate. Most (88.5 percent) of the public bodies in our survey reported that they allow visitors to speak and ask questions anytime they are recognized by the chair. Ten percent said they restrict

access to a certain portion of the meeting. Two public bodies said they allow persons to speak only at public hearings.

Proposals would specify requirements for notice and minutes.

Proposals have been made to add to the open meeting law specific requirements for providing notice and keeping minutes.

Common Cause, in particular, has proposed that the open meeting law be amended to require public bodies to:

- Keep minutes which include the date, time and place of the meeting; attendance; the substance of all matters proposed, discussed or decided; a record, by individual member, of any votes taken; and any other information that members request be included. The proposal mandates that the minutes of all public bodies shall be public records and shall be available within a reasonable time after the meeting.

- Provide written notice of the date, time and place of all regular meetings at the beginning of each year.

- Provide supplemental written notice of all regular, special or rescheduled meetings at least 72 hours in advance. This notice would have to include the agenda, time, date and place of the meeting.

The proposal requires that this written notice be posted at the public body's office, at the meeting location, and at least three other prominent places within the governmental jurisdiction. Under the Common Cause proposal, this notice would also have to be mailed to all persons who request it.

One proposal also includes draft language for providing notice for emergency meetings. The draft language requires at least two hours advance notice to the media and a report on what took place at the emergency meeting at the next regular meeting of the public body. At that next regular meeting, the public body would also have to adopt, by a two-thirds vote, a resolution waiving notice of the emergency meeting.

Conclusions

Current notice requirements are inadequate.

Adequate and timely notice is essential to the openness of public meetings. Most charges of violations of the open meeting law are actually allegations that adequate notice was not provided. While the Gleeson survey found that many public bodies have improved their notice procedures because of the open meeting law, a majority have not.

Our concerns about the adequacy of current notice procedures divide into the following general categories:

- Too few persons are notified specifically of each meeting. We are particularly concerned about the adequacy of notice for special and emergency meetings of public bodies. Merely posting notice on a city hall bulletin board a few hours in advance of a meeting does not provide adequate notice. Yet this appears to be all that is required in order to comply with the State Supreme Court decision which establishes requirements for notice.

The decision requires no notice at all for emergency meetings.

• Too little attention is paid to the *content* of meetings in providing advance notice. We found very little evidence of publication or broad distribution of agendas of upcoming meetings. In order to decide whether to attend a meeting, a citizen must know what is going to be discussed.

• With some exceptions, provision of notice of meetings is not coordinated between public bodies serving the same constituencies. As a result, the cost to public bodies of providing adequate notice may be prohibitive. Alternatives to sending a separate first-class notice to every person requesting to be placed on every public body's mailing list should be explored.

Public bodies should conduct meetings by considering needs of the audience.

We believe that public meetings should be conducted with consideration given to the members of the public in attendance. This means being able to see and hear the public body at all times; being able to follow the discussion by referring to the same written materials that the public body has; and being able to participate by asking questions and offering testimony.

We found current policies of many public bodies to be inadequate in one or more of these respects. We also found many public bodies meeting at times which are inconvenient for persons who work during the day. We believe that--in scheduling meetings--the convenience of the public should weigh at least as heavily as convenience of the staffs or members of the public bodies. In addition to the time of meetings this principle would also apply to the location and length of meetings.

More complete written records are needed.

Minutes of public bodies should be of sufficient detail to adequately inform persons who were not in attendance what actions were taken at the meeting *and* what deliberations took place. We found the minutes of many public bodies inadequate in this respect by providing only the most cursory reporting of formal motions which were adopted.

We are concerned that one requirement applying to some public bodies--publication of minutes in an official newspaper--may be having the effect of reducing the detail provided in the minutes in order to reduce publication costs.

We also believe that all votes recorded in minutes should reflect the names and positions taken by members of the body. Many important matters voted on by public bodies do not involve the appropriation of funds. Yet only appropriations votes need be recorded individually under the current law.

A requirement for roll call votes need not preclude a notation in the minutes that a particular vote was unanimous, so long as it is clear from the minutes who was present at the time of the vote.

Statutory requirements should not be overly detailed.

We believe the Minnesota open meeting law should contain statutory requirements for notice, minutes and the conduct of public meetings. Consistent with the general spirit of the law, we do not believe those requirements should be overly detailed.

The Minnesota open meeting law applies to literally thousands of public bodies. Each is different.

Some meet weekly or even daily. Others meet very infrequently. Some are local and serve communities in which media and informal communication is very good. Others have statewide or regional jurisdiction and get little attention from the media and public. Some are staffed and some are not. Some have large public information budgets, while others have no budgets at all.

It seems essential, therefore, that the state open meeting law recognize this diversity by not attempting to specify requirements for notice, minutes or the conduct of meetings in the law. Any attempt to set uniform requirements for all public bodies in the state is not likely to mandate procedures which would guarantee openness for many of those bodies.

Rather, we believe the intent of specific requirements for openness would be better served by requiring each public body covered by the law to adopt a specific written policy on notice, minutes and the conduct of meetings. Consideration and adoption of this policy would no doubt stimulate a very healthy debate within each public body and its constituency about what constitutes adequate open meeting procedures for that particular body. Such a policy could also be used by the public, the media and perhaps even by the courts, in determining whether alleged violations of the open meeting law had occurred.

Recommendations

Require adoption of open meeting policies covering notice, minutes and conduct of meetings.

We urge the Minnesota Legislature to amend the state open meeting law to specifically require:

- Adequate and timely notice of meetings of public bodies covered by the law.

- Written minutes of meetings of public bodies which would include roll call votes on all matters voted on in which a divided vote occurred.

- Adoption by each public body of a written "open meeting policy" setting forth procedures for notice, minutes and the conduct of meetings. The policy would be required to include notice procedures for regular, special *and emergency* meetings. We urge that the law require that this policy be formally adopted by the public body following a public hearing, and that it be filed in a central place which is easily accessible to citizens of the particular public body's jurisdiction.

We urge state and local public bodies to include in the "open meeting policies" specific procedures on provision of notice, minutes and conduct of meetings which provide, at a minimum:

- Notices and Agendas.

  . An advance agenda listing at least the major items to be considered.

  . Posting of notices and agendas in several conspicuous locations within the jurisdiction.

  . Seeking the cooperation of local newspapers, radio and television stations in the regular announcements of the time, date, place and agenda of public meetings.

  . Mailed notices and agendas to all persons who request to be notified.

  . Cooperation with public bodies serving the same jurisdiction in the distribution of notices and agendas.

We also urge public bodies to include provision in their notice procedures

for *emergency* meetings. These procedures should include, at a minimum:

- Notification of the local news media of all emergency meetings by phone or messenger.
- A detailed report at the next regular or special meeting of the body on what transpired at the emergency meeting. This report would then become a part of the minutes of that subsequent meeting.

- Conduct of Meetings.
  - Provide a handout to all persons attending which identifies the members of the public body, its principal staff members present, and provides a brief explanation of the procedures followed by the public body.
  - Provide all persons in attendance a detailed meeting agenda.
  - Provide all persons in attendance reasonable access to all written materials being used and referred to during the meeting of the public body and its staff.
  - Ensure that all persons present can see and hear all members of the public body at all times.
  - To the greatest extent possible schedule all meetings in the evening.
  - To the greatest extent possible, schedule meetings such that they end within a reasonable period of time and by a reasonable hour of the day.
  - Provide at least one regular opportunity during all meetings for citizens to comment on or ask questions of the public body or its staff.

- Minutes and Records.
  - Provide for a tape recording of each meeting which would be retained at least until minutes of that meeting had been prepared and approved.
  - Maintain minutes of all meetings which include the date, time and place of the meeting; attendance; and the substance of all matters proposed, discussed or decided.
  - Distribute minutes to all persons requesting placement on the regular mailing list.

We also urge the Minnesota Legislature to re-examine the statutory requirement that some public bodies publish minutes of meetings in their official newspaper. The Legislature should determine the effect of this requirement both on public awareness of actions taken by public bodies and on the detail of minutes kept by public bodies covered by this requirement.

PART FIVE: SANCTIONS FOR VIOLATIONS?

Findings

Law provides civil penalties.

The Minnesota open meeting law provides penalties through civil proceedings for violations of the law. Anyone may bring civil action in court against a member of a public body charging that person with participating in an illegally held meeting.

If found guilty, the public official may be fined up to $100.

Upon a third conviction for unrelated violations of the law while serving on the same public body, the position held by that official is declared vacant and must be filled in the normal process for filling vacancies. The guilty party may not serve on that public body for the period for which he or she was originally elected or appointed.

Proposal would make actions taken at illegal meetings voidable.

Common Cause has proposed that it be possible for a court to *void* (or in effect repeal) any final action taken at a meeting which was determined by that court to have been held in violation of the open meeting law. A suit to void any final action of a public body would have to be initiated within 90 days of the meeting at which the action was taken.

Use of current penalty provision is rare.

Allegations of violations of the open meeting law are quite common. The Gleeson survey found that 23.5 percent of public bodies surveyed had been accused of violating the open meeting law. This included alleged violations by nearly a third of the city councils in larger cities. Our own informal analysis of newspaper coverage of the open meeting law issue from 1974-77 identified about forty-five city councils or other public bodies which were alleged to have violated the open meeting law. The alleged violators included public bodies in large and small cities, and in both the metropolitan and non metropolitan parts of the state.

Despite all the alleged violations, we found that actual filing of lawsuits charging violations of the open meeting law are very rare. Only five of the articles alleging violations mentioned lawsuits against local elected officials. One, in Paynesville Township, was settled out of court by an admission of guilt. A second article cited a lawsuit against six Brooklyn Center officials as to the adequacy of notice of a meeting. A judge ruled in early 1977 that the officials were not guilty of violating the law. A third suit was successful in securing an injunction restraining the Mounds View School Board from holding additional closed meetings to discuss collective bargaining strategy. A fourth suit filed earlier this year against the Olivia School Board was also settled out of court by an admission of guilt. And finally, the 1976 suit on attorney-client privilege (Minneapolis Star and Tribune Company vs. Minneapolis Housing and Redevelopment Authority) was decided in favor of the Minneapolis HRA.

Other than the out-of-court settlement in Paynesville Township which resulted in contributions to local charities by the parties involved, we were able to identify no actual *convictions* of violations of the open meeting law, no fines levied, and no officials who have been removed from office for violating the law.

Most enforcement of open meeting law is informal.

As noted above, there has been little 'formal' enforcement of the open meeting law through lawsuits, fines and removal from office. Several of our resource persons maintained that, for elected officials, bad publicity appears to be the primary vehicle for enforcing the law. Our informal analysis of newspaper coverage of the open meeting law issue from 1974-77 supported that contention.

After extensive reporting and editorializing by Minneapolis newspapers in 1975, for example, the Minneapolis Board of Education discontinued its traditional practice of holding non-public 'briefing sessions' in advance of each regular meeting.

In several of the cases of alleged violations, we observed a progression of newspaper articles as follows: a) a prominently placed news story would report on the private meeting or alleged violation of the open meeting law; b) a sharply worded editorial would criticize the action, sometimes threatening a lawsuit if the violation were repeated; c) a follow-up article would report on a discussion held at the next meeting of the public body. Some members would admit that they had acted illegally, or would move to change procedures to comply more fully with the law. Several of the follow-up articles contained quotes from city council members such as "we hope that it won't happen again" or "we didn't know we were in violation of the law and appreciate having it brought to our attention," or "I guess that was a pretty foolish thing to do."

Much of this informal enforcement is resulting from attention given the open meeting issue by local newspaper editors and reporters. Some results from concerns expressed by League of Women Voters chapters or other local cities organizations.

Conclusion

Current sanctions are adequate.

We do not believe that additional sanctions are necessary to ensure compliance with the open meeting law. Unfavorable publicity provides a very effective deterrent and punishment for open meeting law violators since it may affect their chances for re-election. The threat of removal from office is also a considerable deterrent to habitual violators of the law.

In particular, we do not believe that it would be wise to make it possible to void actions taken at illegally held meetings. Such a measure would not add any greater deterrent or penalty to violations of the open meeting law. We *are* concerned that innocent parties--either the general taxpayers or persons doing business with government--might become victims of such a policy.

Recommendation

Make no change in penalty provision.

We urge the Minnesota Legislature to make no change in the penalty provision of the state open meeting law.

PART SIX: OTHER FACTORS CONTRIBUTING TO OPENNESS

Findings

Many aspects of public affairs are not covered by the open meeting law.

While in no way downgrading the importance of the open meeting law, it seems appropriate to place the law somewhat in perspective. We found, for example, that much of what happens in public affairs happens outside of meetings of public bodies covered by the open meeting law. For example:

- Although most important decisions of government eventually must pass through public bodies and be made at meetings which are required to be open, the decision may be a foregone conclusion by that point.

- The open meeting law focuses largely on the legislative side of government, not covering the executive or administrative branches, except where public bodies exist and decisions must be made in meetings.

- The open meeting law does not apply to meetings conducted by heads of agencies or other staff meetings within state or local agencies unless those meetings are required to be open by statutes governing the conduct of public hearings. Yet, many state agencies *are* headed by single administrators who make the same kinds of decisions as agencies headed by multi-member bodies.

- And, finally, as we have noted above, it is extremely difficult to enforce the requirement that meetings between two persons on the same public body conform to the requirements of the open meeting law. This is particularly true for the significant number of phone conversations which occur between members of the same public body.

Most meetings can't be covered or attended.

We found that, as a practical matter, most meetings of public bodies are not, and can not be, covered by the news media. Many also are not attended by members of the public.

- Based on our survey of state and local public bodies in the Twin Cities, we estimated that there may be as many as 19,000 meetings of public bodies held each year. This estimate includes more than 11,300 meetings of elected and appointed municipal bodies in the seven county metro area alone. This would mean that there are almost 100 meetings of state and local public bodies *every day* in the seven county Twin Cities area. None of our estimates included committees and subcommittees of public bodies; nor did our survey include meetings of the state Legislature, or its committees, sub-committees, conference committees or caucuses.

- Perhaps not surprising after this finding, our survey found that many public bodies are infrequently covered by the press. Seventy-five percent of the metro boards surveyed and over two-thirds of the state boards surveyed reported that a newspaper reporter was at fewer than half the meetings. About 43 percent of the state boards surveyed said a newspaper reporter was *never* in attendance. Only 6.9 percent of the public bodies surveyed said their meetings were always covered by either television or radio. Fifty-eight percent of the public bodies said their meetings were *never* covered by television and radio.

- Attendance at public meetings by newspaper reporters is higher than by radio and television reporters, and local government and schools are much more likely to be covered regularly than state and regional boards. About two-thirds of all cities and more than 80 percent of school boards said their meetings were always attended by newspaper reporters.

- A majority of public bodies surveyed (57 percent) said their meetings were usually attended by fewer than 10 persons. Best attendance by the public was reported by larger cities and school boards with about 60 percent of each reporting an average attendance of between 10 and 100 persons. About 15 percent of the state boards surveyed reported that No one ever attends their meetings. (A more complete analysis of our survey findings may be found in the appendix to this report.)

Media performance also affects openness.

Although we did not make an extensive study of media performance in covering public affairs, we did find that the media play an important role in achieving openness in government. Regular attendance by reporters at public meetings has an important effect on the conduct of public bodies and helps to enforce the open meeting law.

Even when public meetings are regularly covered by the media, however, we found a number of additional factors which help determine the effectiveness of that coverage. The effectiveness of media coverage, in turn, helps determine how well informed persons who do not attend the meeting will be.

The factors we identified include:

- How well the reporter understands what is happening at the meeting.

- Whether the reporter is able to translate this understanding to a story.

- Whether the story gets used by the paper or radio or TV station.

- What kind of placement (front page, size of story, etc.); or amount of air time the story receives.

- Whether the public reads or views and then understands the story.

Media role in open meeting controversy questioned.

Beyond its role of helping to enforce the open meeting law, we found a strong feeling on the part of some of our witnesses that the media have had a major effect on efforts to change the law in the Legislature.

Several legislators testified before our committee that the volume and nature of coverage of the open meeting issues have influenced the outcome of legislative deliberations and prevented an objective consideration of the merits of proposed changes in the law. They argued that many legislators are unwilling to submit themselves to criticism from their hometown editors on this issue and, as a result, have not wanted the Legislature to give serious consideration to proposed changes in the law.

Our own informal analysis of newspaper coverage of the open meeting issue found the press virtually united in its editorial opposition to changes in the law. The issue is given substantial coverage on both the news and editorial pages. The coverage of the issue by the press tends to become particularly intense

whenever it is considered by the Legislature.

We found many of the editorials on the open meeting issue focused more on the motives of those proposing changes than on the merits of the changes themselves. Many editorial writers tend to treat proposed changes as self-serving attempts by public officials to introduce secrecy or closed government.

The media responds by pointing out its responsibility, under the first amendment, to comment editorially on important issues. Many persons in the news media appear to consider their role in matters involving 'open government' to be particularly important.

The media also points out the significant role played in the open meeting controversy by lobbying organizations for local elected officials. Both the Minnesota League of Cities and Minnesota School Boards Association have made extensive efforts to educate their members and legislators on this issue, including the circulation of suggested resolutions of support for legislation proposing changes in the law.

Conclusions

More attention is needed on non-statutory aspects of openness.

While vigilant enforcement of the Minnesota open meeting law is important, it must not be the only focus of efforts to open government. Much more attention should now be given to analyzing and improving other factors affecting the openness and accountability of public bodies.

Much of the focus of these efforts should be on government. We feel our recommendation for an "open meeting policy," adopted by each public body, will help draw needed attention to such matters as notice, minutes and the conduct of meetings.

We would not want the focus of efforts to increase openness to be only on government, however. We strongly believe that increased attention needs to be directed toward the important roles and responsibilities of the media and of citizens.

Better informed and involved citizens are essential to openness.

We were very disappointed to learn of the generally low level of attendance by citizens at public meetings. While building attendance is not necessarily a justification for the open meeting law, we believe it is a desired outcome of increased openness in government.

While open government requires initiatives on the part of government, we believe a response to these initiatives from citizens is also necessary. Citizens also must be prepared to take some initiatives in informing themselves of the time, place and subject matter of public meetings, and for participating in public meetings in a constructive manner when opportunities are provided.

We believe that citizen organizations have a particular responsibility for facilitating the involvement of their members in public meetings and in the operations of government in general.

We also believe our education system has an important role to play in informing and facilitating the involvement of citizens in public affairs. Observing, learning about, and participating in local and state government should be important focuses of this effort.

Communication of public affairs information also is essential to openness.

Most citizens are not in continuous contact with their public officials, either through attendance at public meetings or through other forms of personal communication. The media have become the primary means by which most of us become informed about what happens in public meetings and other aspects of public affairs activity. We also found that the media play an important part in the enforcement of the open meeting law and in legislative consideration of changes in the law.

While our study has focused primarily on the public's need to know what is happening in government, we realize that there are other important aspects of communication between the public and government. Oftentimes, government has information which it wants to communicate to the public. And, the public often wants to communicate *to* government its feelings about matters under consideration.

Unfortunately, we were not able in this study to undertake a thorough evaluation of the needs for all these types of communication between government and the public. Neither were we able to analyze the role or performance of the media or other aspects of the broader system through which we monitor and communicate about public affairs activity.

Such an analysis is critical. As such, we are pleased that a separate study has been programmed by the Citizens League on "public affairs information." Hopefully other groups in the Twin Cities community will also consider our public affairs communications needs and how our broader communications system might be used more effectively to both inform and involve citizens in public affairs.

Recommendations

Encourage more and better informed citizen involvement.

We urge support by public and private funding sources for organizations which are seeking to educate and encourage the involvement of citizens in public affairs.

We also urge secondary and post-secondary educational institutions in Minnesota to make political education a higher priority: (a) by expanding and improving classroom curricula on state and local government; and (b) by maximizing student opportunities to observe and participate in public affairs through field trips, internships and independent study.

Monitor and evaluate the needs for and transmission of public affairs information.

We urge the Citizens League study committee on public affairs information, the news media itself, and other interested parties to analyze and determine the public affairs communications needs of both government and the public in the Twin Cities area. We further urge continual monitoring and evaluation of the performance of the Twin Cities communications system in the transmission of public affairs information.

In such an two-part evaluation, we urge that, at a minimum, the following questions and issues be carefully considered:

- What are the needs of government to communicate with citizens? What needs do citizens have for information about the decisions and operations of government? How well are those needs currently being met?

- What is the role and responsibility of the commercial and non commercial media in coverage of public affairs? How well are the media performing? Do the responsibilities of the different media (metropolitan daily newspapers, suburban and neighborhood papers, radio, tv, etc.) differ in the coverage of public affairs?

- What is the role of other parts of the communications system in informing citizens about public affairs (specialized publications, newsletters, public libraries, new communications technologies such as cable television, etc.)?

- What is the role of government in expanding public understanding, participation and acceptance of its actions and decisions? What, for example, is the role and performance of the growing public information function of government?

- What is the role of the Minnesota Press Council, journalism reviews, journalism schools and the press itself in monitoring and reporting on the performance of the media in coverage of public affairs?

- Are journalistic ethics adequate for coverage of sensitive personnel and other matters, when such matters are discussed in open meetings?

- What is the role and performance of the media in coverage of issues such as the open meeting controversy in which the media has a potential conflict of interest?

DISCUSSION OF RECOMMENDATIONS

How would a state or local body draft and adopt an open meeting policy?

Much of what would go into such a policy statement is already a part of the operating procedures of a number of public bodies. The experience of these bodies needs to be assembled, organized, and distributed so that they can be used by individual public bodies in drafting their own "open meeting policies."

Perhaps one way to begin this process would be for the organizations of local officials (League of Minnesota Cities, Association of Minnesota Counties, Minnesota School Board Association, etc.) to prepare a "model open meeting policy" based on procedures for notice, minutes and conduct of meetings which are being used by their members. A similar document could be prepared and distributed at some central contact point for state and regional public bodies. Such central contact points might be the State Department of Administration and Metropolitan Council.

Once such a resource document has been prepared, individual public bodies could add, delete, or change policies and procedures based on their own particular situations.

We hope members of public bodies would actively participate in preparation of their "open meeting policy," and not delegate its development entirely to staff. We also hope each public body would involve local citizens and media representatives in the preparation and review of the policy statement prior to the required public hearing. And, finally, we would encourage local citizen and media groups to carefully monitor both the preparation and implementation of each public body's "open meeting policy."

What voluntary openness procedures should be adopted by private organizations which receive substantial amounts of public funding?

Basically, the standards for openness should be those which we expect of government. At a minimum, we would like to see all such bodies adopt a statement of policy which:

- Establishes a general principal of open meetings, with guidelines for the use of closed meetings for any exceptions.
- Provides written notice and an agenda of all meetings in the organization's publication and by mail to persons who request receipt of notices and agendas.
- Includes within the general policy all committees of the organization including the executive committee, if one exists.
- Provides that meetings shall be held at times and in locations which the public may attend. Insofar as possible, meetings should be held throughout the jurisdiction covered by the particular organization or agency.

- Ensures that informative minutes of the governing body will be kept and made available to the public on request.

What if the committee's proposal to add the Legislature and University regents to coverage of the open meeting law is declared unconstitutional?

We recognize that such a judicial determination in either case is quite possible. We felt that such a determination belongs with the courts, however, and not with this committee or the Legislature. Therefore, we preferred to state our position on the policy that we feel should apply to these two important public bodies, even if the means by which that policy would be established may not be clear.

If either of these proposals were adopted by the Legislature and declared unconstitutional by the State Supreme Court, a constitutional amendment could then be one vehicle used to apply the open meeting law to the Legislature or University Board of Regents. Another might be to try a different statutory approach to meet the specific objection of the court. Whether the time, effort, and expense needed to pass a constitutional amendment would be justified would be a matter which would have to be determined at that time, by the Legislature and by the voters of the state.

Why was the committee so general in its conclusions and recommendations on the role of citizens and public affairs information in increasing awareness and openness in government?

These subjects did intrigue us and we held several meetings to take general testimony on them. Because of their central role in determining the openness and accountability of government, we felt a responsibility to at least identify that role and some of the issues which need addressing.

We felt, however, the citizen involvement and the role of public affairs information extended considerably beyond our charge from the Citizens League Board of Directors. We were also aware that the League Board has programmed specific studies in these two subject areas to be undertaken following adoption of this report. We would hope that these two study committees would address those issues which we have identified as part of their own work.

APPENDIX

The Minnesota Open Meeting Law and its principal Supreme Court decisions and Attorney General's opinions

The Minnesota open meeting law (MS471.705), as last amended in 1973, now reads as follows:

471.705 MEETINGS OF GOVERNING BODIES: OPEN TO PUBLIC. Subdivision 1. Except as otherwise expressly provided by statute, all meetings, including executive sessions, of any state agency, board, commission or department when required or permitted by law to transact public business in a meeting, and the governing body of any school district however organized, unorganized territory, county, city, town, or other public body, and of any committee, subcommittee, board, department or commission thereof, shall be open to the public, except meetings of the board of pardons, the Minnesota corrections authority. The votes of the members of such state agency, board, commission or department or of such governing body, committee, subcommittee, board, department or commission on any action taken in a meeting herein required to be open to the public shall be recorded in a journal kept for that purpose, which journal shall be open to the public during all normal business hours where such records are kept. The vote of each member shall be recorded on each appropriation of money, except for payments of judgments, claims and amounts fixed by statute. This section shall not apply to any state agency, board, or commission when exercising quasi-judicial functions involving disciplinary proceedings.

Subdivision 2. Any person who violates subdivision 1 shall be subject to personal liability in the form of a civil penalty in an amount not to exceed $100 for a single occurrence. An action to enforce this penalty may be brought by any person in any court of competent jurisdiction where the administrative office of the governing body is located. Upon a third violation by the same person connected with the same governing body, such person shall forfeit any further right to serve on such governing body or in any other capacity with such public body for a period of time equal to the term of office such person was then serving. The court determining the merits of any action in connection with any alleged third violation shall receive competent, relevant evidence in connection therewith and, upon finding as to the occurrence of a separate third violation, unrelated to the previous violations issue its order declaring the position vacant and notify the appointing authority or clerk of the governing body. As soon as practicable thereafter the appointing authority or the governing body shall fill the position as in the case of any other vacancy.

Subdivision 3. This section may be cited as the "Minnesota Open Meeting Law."
[1957 c 773 s 1; 1967 c 462 s 1; 1973 c 123 art 5 s 7; 1973 c 654 s 15; 1973 c 680 s 1, 3]

The law has been interpreted a number of times by state courts and by the

State Attorney General. Following is a brief summary of the major opinions and decisions on the law which are currently in effect. The summary is drawn from a "School Law Bulletin" distributed to school board members and administrators. The bulletin was prepared by Peterson, Popovich, Knutson, and Flynn, counsel to the Minnesota School Boards Association. The committee is grateful to the Minnesota School Boards Association and its counsel for the use of this information.

- "Meetings" covered. Certainly the most controversial Attorney General's opinions were those issued in October 1974 to the Dakota and Richfield City Councils. The opinions held that a number of hypothetical situations involving meetings at which no official actions were taken were covered by the requirements of the open meeting law. The types of meetings covered by the opinions included: 1) gatherings of a quorum prior to a scheduled meeting in order to discuss agenda items; 2) impromptu or social gatherings of a quorum at which matters of city interest happened to be discussed; 3) gatherings of fewer than a quorum at which possible future agenda items are discussed; and 4) "political caucus" meetings to discuss municipal matters.

  The opinions held that deliberations as well as decision-making sessions of public bodies are covered by the law. In holding that meetings of fewer than a quorum of members could be required to meet the notice and other requirements of the open meeting law, the opinion argued:

  "To consider a deliberation involving two members of the five member council as significantly different from deliberation of a quorum would be to establish an artificial distinction. For example, since a quorum can usually conduct business, less than a quorum could adopt or defeat certain proposals. Similarly, less than a quorum could defeat proposals which require a two-thirds vote of the council.

  "In any event, the purposes of the law could be as effectively subverted by a gathering of two members as by a gathering of three, four or five of the members. For example, if two members privately deliberate on a municipal matter, the public might not have an opportunity to know their reasons for favoring rejection, selection or refinement of a course of action, and decisions might ultimately be reached without free, full and open discussion. In City of Miami Beach vs. Berns, the court stated that an 'informal conference or caucus of any two or more members permits crystallization of secret decisions to a point just short of ceremonial acceptance.'

  "While determining whether a gathering of less than a quorum constitutes a meeting is a more difficult question than that where a quorum is involved, we are compelled to conclude that each of the gatherings between two of the five members as described constitutes a meeting. These gatherings, as many others where less than a quorum of a public body meets, might well subvert the law's purposes just as effectively as a deliberation between a quorum or more, and there is no combination of factors which in our opinion would remove the gatherings from the mandate of the law."

- Training sessions. A February 1975 Attorney General's opinion held that a mayor and city council could participate in a private training session on staff and board communication sponsored by the League of Minnesota Cities so long as specific municipal matters were not discussed.

- Advisory bodies. A July 1975 Attorney General's opinion held that staff

appointed advisory committees which review and make recommendations to the State Arts Board are subject to the requirements of the open meeting law.

- Exceptions not allowed for collective bargaining strategy sessions. In February 1974, a Ramsey County District Court judge ruled that collective bargaining strategy sessions conducted by a school board were not exempt from the requirements of the open meeting law.

- Notice of meetings. In April 1974, the State Supreme Court ruled in Sullivan vs. Credit River Township that "adequate and timely notice" must be provided the public of the time and place of public meetings. The decision does not require specific notice to be given of regularly scheduled meetings, or of meetings which were adjourned-to from a regularly scheduled meeting. Notice must be provided for special meetings but not for emergency meetings "where the giving of such notice is impractical or impossible" or where "the situation calls for immediate action involving the protection of the public peace, health or safety."

- Exceptions allowed for litigation strategy discussions with attorney. The most recent Supreme Court decision was in the September 1976 suit by the Minneapolis Star and Tribune Company against the Minneapolis Housing and Redevelopment Authority. The court ruled that public bodies could hold private meetings with their attorneys to discuss "threatened or pending litigation." The court stated that its decision should not be interpreted to allow private meetings between public bodies and their attorneys to provide general legal advice or opinions. The decision did not specify procedures to be followed by public bodies in using this exception.

Open meeting laws in other states

Common Cause has prepared a report on the open meeting laws in effect in the fifty states as of December 1976. All states now have such a law or comparable provision in state constitutions or executive orders. The following are some of the highlights of an analysis which was prepared for the committee of the Common Cause findings. Limited numbers of copies of the analysis and the original Common Cause report are available from the Citizens League office.

- Open meeting laws in 34 states apply to the Legislatures of those states. Legislative committee meetings are open by statute in 28 states.

- Thirty-eight states open meeting law have requirements for notice; 34 have requirements for minutes.

- Open meeting laws in 26 states provide that actions taken at illegally held meetings are void or may be voided.

- Legal sanctions for convictions of violations of the open meeting law exist in 35 states; 15 states have no penalties.

- All state open meeting laws but one (Tennessee) contain one or more exceptions for specific types of discussions. There are about fifty different exceptions provided for, ranging from any discussion where the public body votes itself into executive session by a majority vote (West Virginia) to more narrow exceptions like discussion of land acquisition or collective bargaining strategy. Minnesota's law is one of the most tightly drawn in terms of exceptions. Some states have ten or more specific exceptions provided for. The most common exceptions to the state open meeting laws are:

- Real estate sale or purchase (27 states).
- Discussions with attorney/ litigation strategy (23 states).
- Discussions of an individual's character (20 states).
- Collective bargaining strategy or negotiations (18 states).
- Public health, safety, security (17 states).
- General exemption for personnel or employment related discussions (16 states).

Major sources

In addition to our verbal and written testimony from resource persons, the committee used as input to its study a number of resource materials and staff memoranda. They included three principal reports or memos. Where appropriate this input is reflected in the findings section of this report. Limited numbers of copies or summaries of these documents are available from the Citizens League office. They are:

- Gleeson survey. This report was issued in December of 1976. It was prepared by Professor Michael Gleeson of the University of Minnesota's School of Public Affairs and two of his graduate students, Mark Bernardson and Mary Schweiger.

The report analyzes a survey of local elected and appointed officials, newspaper editors and League of Women Voters chapter presidents throughout Minnesota. The purpose of the survey was to assess the impact of the Minnesota open meeting law since important changes in the law had taken effect in 1974. Particular emphasis was given in designing the survey questionnaire to "claims" that have been made by both critics and supporters of the law about its effects.

The questionnaire was distributed to some 1,370 persons in 180 randomly selected counties, cities and school districts. Some in-depth interviews were conducted to validate the questionnaire and to support the questionnaire's findings. Forty percent of the questionnaires were returned with usable responses. They were from 94 percent of the 180 jurisdictions surveyed.

The report of the survey analysis includes all responses as well as a tabulation of responses in which agreement existed between what the report called "insiders" (elected and appointed public officials) and "outsiders" (newspaper editors and League of Women Voters presidents).

- CL questionnaire. In order to provide factual findings on policies and procedures used by public bodies to provide notice, keep minutes and generally conduct meetings, a survey was undertaken of state and local public bodies in the Twin Cities area. The survey also asked questions on media and citizen attendance at public meetings. The survey was sent to 265 public bodies including 109 state boards and committees and all metropolitan, county and school boards in the seven county Twin Cities area. The questionnaire was also sent to the 89 cities in the Twin Cities area which have a population of 2,500 or more.

- Analysis of newspaper coverage of the open meeting controversy. In an effort to determine subjectively the nature of press coverage of the open meeting law issue, an informal analysis was done for the committee of 1974-77 clippings on this subject from Minnesota daily and weekly newspapers. The clipping files had been accumulated by the League of

Minnesota Cities, largely through their regular use of the Minnesota Newspaper Association's clipping service.

The analysis paid particular attention to the volume and nature of both editorial and news coverage of the open meeting issue. In addition, the frequency and type of violations of the open meeting law which were being reported was analyzed.

BACKGROUND ON PREPARATION OF CITIZENS LEAGUE REPORTS

Each year the Citizens League Board of Directors adopts a research program with about six study topics. The Board makes its selection following a recommendation from its Program Committee, a standing committee of the Board. The Program Committee spends about four months in trimming a list of possible projects, which may have as many as 200 possibilities at the outset.

Under the League process, the Board submits an assignment to a committee made up of members of the Citizens League who have been given the opportunity to participate through an announcement in the League's semi-monthly newsletter. The Board approves membership on all committees and appoints the chairman.

The committee then goes to work and, after a period of six months to a year submits a report with background, findings, conclusions and recommendations to the Board of Directors.

A period of time after the committee has began meeting, but before it has reached its conclusions and recommendations, the Board of Directors names about five persons from the Board to meet with the study committee chairman and committee members to review how the committee is progressing and to raise questions which might subsequently be raised at the Board level. A five-member group from the Board may meet with the chairman about three or four times. The five-member Board panel may submit a list of questions for consideration by the Board when the committee's report is submitted.

Under the League's constitution and by-laws, the Board approves all League reports and position papers before they become official League policy and are released to the public. The Board may take whatever action on the report it deems desirable, including approval, modification or rejection. Once a report is approved by the Board, it becomes the full responsibility of the Board as official policy of the Citizens League.

The study committee officially disbands when the report is acted on by the Board. The chairman and others from the committee frequently are asked to help explain the report to the community.

COMMITTEE ACTIVITY

The Citizens League Board of Directors, in June 1975, authorized creation of the study committee on public meetings. The committee's charge from the League Board was:

The state's open meeting law is producing a conflict in public rights. The public's right to know about the activities of their elected and appointed officials often conflicts with the need to protect the public interest in such matters as wage negotiations and personnel matters, which also could involve protecting the private rights of employees. To a large extent the mass media are in the forefront of the open meeting issue as representatives of the public. A related question may be a way in which the media carry out this function.

We will review the specific problems which are claimed to have been caused by the open meeting law and develop recommendations, necessary, to public officials and to the media.

A total of 19 members participated actively in the work of the committee. The chairman was John Rollwagen, president of Cray Research. On those occasions when the chairman could not be present, Randall Halvorson served as acting chairman. The other members of the committee were:

Kenneth J. Andersen
Elizabeth Ebbott
Iwan J. Fertig
James A. Fitzgerald
J. Edward Gerald
Jack Grace
Diane Greensweig
Robert C. Hentges
Ed Lamphere
J. Gregory Murphy
Peter S. Popovich
Rosemary Rockenbach
Janis Sarles
Kati Sasseville
James W. Scheu
Beverly Smerling
Jim Storm

The committee was assisted by Jon Schroeder and Paula Werner of the Citizens League staff.

The committee held a total of 23 meetings from November 18, 1976 to May 19, 1977, an average of one per week. For the convenience of committee members and resource persons, meetings were held in both Minneapolis and St. Paul.

The committee spent the first several months hearing from a wide range of resource persons including local elected officials, news media representatives, legislators, the State Attorney General, professional lobbyists and citizen observers of government.

The committee was fortunate to have made available to it the only comprehensive survey available on the effects of the Minnesota open meeting law. The survey and its subsequent report were prepared under the direction of Professor Michael Gleeson of the School of Public Affairs, University of Minnesota.

The committee also undertook a survey of its own covering policies and procedures of local and state public bodies on notice, minutes and the general conduct of public meetings. And, an informal analysis was prepared for the committee of newspaper coverage of the open meeting issue in Minnesota from 1974-77. The committee

is grateful to the League of Minnesota Cities for use of its clipping files in preparation of this analysis.

Detailed minutes were prepared of each meeting of the committee, with copies being made available to members who were not present and to a large mailing list of persons who were interested in the subject matter under study. A limited number of copies of the minutes are on file at the Citizens League office, as are copies of background articles, staff report and survey and other data.

After the initial orientation portion of the committee's work, several months of internal discussion resulted in a series of drafts of findings and of conclusions. Following general agreement of the findings and conclusions, the committee's discussion shifted to recommendations and, finally, to adoption of this report.

As is always the case with Citizens League reports, the work of this committee could not have been possible without the important participation of a number of resource persons. We offer our sincere thanks to the following persons who acted as resource persons for the public meetings committee:

Rodgers Adams, chairman, First Amendment Committee, Minneapolis Star and Minneapolis Tribune.
Salisbury Adams, attorney and former state representative.
Mark Bernardson, student, University of Minnesota Graduate School of Public Affairs.
Dana Brandt, president, New Brighton League of Women Voters.
Marlow Burt, executive director, St. Paul Arts and Science Center, and chairman of the board, Minnesota Public Radio.
John Carmichael, executive secretary, Twin Cities Newspaper Guild.
Dr. Rollin Dennistoun, president, Minnesota School Boards Association, and member, Rosemount School Board.
Michael Gleeson, professor of public affairs, University of Minnesota.
Diane Greensweig, lobbyist, Common Cause.
Mary Ellen Grika, Minneapolis neighborhood activist.
Meredith Hart, candidate for Hennepin County Board in 1976.
Viola Kanatz, deputy director, State Bureau of Mediation Services.
Tom Kigin, assistant to the president, Minneapolis Public Radio.
Tom Lewcock, city manager, New Brighton.
John Mason, chairman, Minneapolis Board of Education.
Bob Meyer, area director, American Federation of State County and Municipal Employees (AFSCME).
Maxine Nathanson, director, Minneapolis Citizens Committee on Public Education.
Bruce Nawrocki, immediate past president, League of Minnesota Cities, and Mayor, Columbia Heights.
State Representative Howard Neisen, author of 1975-76 proposed changes in the open meeting law.
Jim Nobles, House Research Department, Minnesota Legislature.
Judge C. Donald Peterson, associate justice, Minnesota Supreme Court and chairman, Minnesota Press Council.
Peter Popovich, attorney and former legislator, lobbyist for various media and public officials organizations.
Ken Raschke, assistant attorney general.
State Senator David Schaaf.
Mary Schweiger, student, University of Minnesota Graduate School of Public Affairs.
Robert Shaw, manager, Minnesota Newspaper Association.
State Representative Harry Sieben, chairman, House Governmental Operations Committee.
Cy Smythe, president, Labor Relations Associates and professor, Industrial Relations Center, School of Business Administration, University of Minnesota.
Attorney General Warren Spannaus.
Robert Sylvester, president, St. Paul City Council.
Tom Triplett, senate counsel.
Peter Vanderpoel, director, State Planning Agency, former reporter.
Henry Winkels, lobbyist, Minnesota Federation of Teachers.

ACTION BY THE BOARD

The report occasioned perhaps as intense an internal debate as any ever considered by the Citizens League Board of Directors. The report finally was adopted by the Board on September 13, 1977, almost four months after it was approved by the committee. The Board devoted three full meetings and part of a fourth in considering the report.

Prior to the time the report was officially presented to the Board, an ad hoc committee of the Board, headed by Wayne G. Popham, was appointed to meet with the committee. Appointment of such an ad hoc group is routine in all League studies. The ad hoc Board committee met three times during April and May. Its questions were relayed back to the Public Meetings Committee.

When the report was presented to the Board in June 1977, several controversies were apparent, particularly over the questions of which exceptions to the open meeting law should be permitted and over the definition of a meeting. These questions had been raised in the ad hoc committee, too. Votes on some amendments indicated the Board was closely divided. Time ran out before the Board could complete action.

A new Board of Directors took office in June 1977, with many new members who had not been members before, which meant that the process of presenting the report and debate had to start again from the beginning. In the meantime, the Public Meetings Committee had reconvened and considered the issues raised at the first meeting of the Board. The Committee did not alter its position.

The new Board then met, and after two lengthy meetings, finally was able to complete action. Many of the controversies which had been present in the old Board resurfaced. As finally adopted, the Board adopted a few amendments to the committee report. These amendments, which have been incorporated into the body of this report, are:

- A recommendation that initial job screening for high administrative positions be exempted from the open meeting requirement.

- A conclusion that some kind of a public observer should be present at all legally closed meetings.

- A recommendation for two additional requirements for safeguards in the conduct of legally closed meetings: (1) a certificate would be filed stating that subject matter discussed was limited to that designated in the original vote to close the meeting, and (2) in any review of the legality of a closed meeting, the burden of proof would rest with the public body.

DISSENTING OPINION OF COMMITTEE MEMBERS

While we believe the Legislature should have statutory requirements for open meetings, we recognize that the Legislature may wish to adopt procedural requirements for itself which differ from those imposed by the Minnesota open meeting law.

The Legislature may, for example, want to define "meetings" covered by the law more narrowly for itself than the Attorney General has defined "meetings" for other public bodies. Such a provision would be in recognition of differences which exist between the Legislature and other public bodies. The Legislature is much larger than other public bodies, for example, normally making meetings between as few as two legislators less important than they would be in a smaller public body. While in session, legislators are also almost continually consulting with one another in informal "meetings" in their offices, in corridors, over lunch, and sometimes even in shared living quarters. It would be unrealistic to attempt to enforce notice and other requirements for all such meetings.

By Diane Greensweig and Kati Sasseville

ADDITIONAL STATEMENT BY MEMBER OF THE COMMITTEE

I agree in substantial part with the report of the committee but find it necessary to state, in addition, that the open meeting law is unclear and that, as a consequence, it is going to be rewritten by the courts, or by the Attorney General, unless the Legislature accepts its responsibility and acts promptly.

I do not agree, however, with Recommendation 1, (attached to Part Two: Public Bodies Covered by the Open Meeting Law) with particular respect to the Legislature. The Legislature has established a binding policy of openness by rule. The provision in the state (Article IV, Sec. 7) and federal (Article I, Sec. 5 [1]) constitutions allocating the power of self-regulation to the Legislature makes it unwise to consider surrender of ancient legislative independence to the courts.

The public's right to know is an idea, like liberty, fraternity and equality, which has power to move people and to change governments. For that reason, on the analogy of a river in flood, the passion for open meetings sometimes breaches its banks and flows into channels cut helter-skelter into urban and rural areas alike. In the hands of journalists, not only in Minnesota, but nationally, it is a volatile and explosive force that, in spite of its orientation to the public interest, is difficult for legislators and judges to deal with calmly and rationally, free of anxiety and pressure.

A law developed for the public interest, as this one is, deserves to be dedicated to the single purpose of improving democratic government. The report of the committee makes clear that the discussion so far has been dominated by contending political forces, journalists and some public officials, rather than by groups focusing directly on the improvement of governmental policies.

The political atmosphere of the country has been improved by the development of national and state sunshine laws. But a number of major assumptions about the effect of the law on local government remain to be tested. We don't yet know, for example, whether the law discourages leaders so that they turn apathetic or tend, in reaction, to allow policy making to devolve upon their staff subordinates. It may do the exact opposite, forcing the leadership to exercise its "final powers mandate" to override the staff bureaucracy and to take the consequences at the polls.

It is now suggested that the professional staff members must also hold their meetings of two or more persons in public, for otherwise policy will be made outside the public view. What is good for the elected official may also be good for the staff expert, and why not?

The purpose of setting up Legislatures, however, and establishing the mechanics

of representation, was to get rid of government by an unorganized mass of people who, because of their number, cannot communicate fast enough to reach a consensus before hell freezes over. Some rational and prudent principle of limitation must accompany the new drive to let the public supervise the details of government operations. Even the word "public" in this context needs to be defined.

Minnesota's open meeting law is in a critical stage of development. The statute, though it has admirable features, is far from clear, and its vague clutter will increase the difficulty of orderly interpretation as it is more widely applied.

Interpretations by the Attorney General, as a matter of common procedure, are without the benefit of notice and public hearing. There is no obligation to seek representative advice ahead of writing an opinion. Obviously, there must be more closed meetings in the Attorney General's office to interpret this statute even if the Legislature acts to clarify it. Without such clarification, we will have a public meetings policy almost completely fashioned by the Attorney General and the courts. Since the Minnesota statute offers them unclear guidance, they will turn to appellate decisions elsewhere to write the evolving Minnesota law.

A useful starting point for the Legislature, if it wishes to act, would be to define what constitutes a "meeting" for purposes of coverage by the statute. The Attorney General ruled in 1974 that the Minnesota statute does not define the term "meeting" and he took his definition from Webster's dictionary. He extended this non-legal meaning to hold that "each of the gatherings between two of the five members [of a public body]...constitutes a meeting."

Apparently the Attorney General was influenced here by the opinions of the Florida courts with respect to that state's somewhat different open meetings statute. At any rate, he reaches about the same result.

If we turn to another and perhaps more relevant source for a definiton of "meeting" we might come to a different interpretation. Robert's Rules of Order, Revised (Seventy-fifth anniversary edition), the standard parliamentary law guide, uses the word "meeting" to describe an assemblage of members for the transaction of business. Business cannot be conducted unless a quorum is present. In the absence of a quorum the only actions that can be taken are to "take measures to obtain a quorum, to fix the time to which to adjourn or to take a recess."

The context of the word "meeting" which Florida courts adopt, in the absence of notice converts any conversation about pending business by two members of a five-member body into an illegal meeting. The fact is, according to Robert's Rules, a quorum is required in order to meet at all. How can a statute apply to a non-meeting? Is it possible that the First Amendment rights of freedom of assembly and freedom of speech must be surrendered by those who take public office in Minnesota and Florida?

The statutes of many states, including the relatively new statute of Tennessee (1974), hailed by an expert or two as a model, stipulate that there can be no meeting subject to the sunshine law without a quorum. The Tennessee statute reads: "'Meeting' means the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter." (Chap. 44, Sec. 8-4402). But the statute goes further to provide that no chance

meetings, informal assemblages, or electronic communication shall be used to decide or deliberate public business in circumvention of the spirit or requirements of the law.

Technicalities must not be allowed to eviscerate sound public policy, but it would be better for the Legislature to write the rules. Looking at the statutes of other states, and at the journal articles produced mainly by law teachers, it is clear that many units of government, including appellate courts meeting at the conference stage on cases, are being told that they should be covered by the open meeting laws. In the long run, indications are that nearly every public body will be required to meet openly all the time and, for that reason, legislative fact-finding and determination are acutely needed to guide the process.

The legislature might well look beyond the sunshine laws, at the same time, to review internal parliamentary rules for the conduct of public bodies. Such rules, when properly framed and applied, protect members of the minority, facilitate the dispatch of business, and safeguard the public interest. They will eliminate many inequities that an untrained eye will not see in a public meeting.

By J. Edward Gerald

DISSENTING OPINION BY BOARD MEMBER

Productive and thoughtful discussion of the open meeting law has been hampered by the simple premise that open meetings will always benefit the public good. Openness is in general a good policy. But the issue is more complex than that. And where the public interest lies is not always so clear. The Citizens League's report recognizes this fact, by recommending that certain subjects be excepted from the law.

The question not yet fully grappled with is not *whether* certain meetings will be in private and others in public, but *which* meetings shall or shall not fall under the law. This can be broken down to two specific questions:

Who is covered by the open meeting law?

The open meeting law clearly covers "meetings of governing bodies". The Attorney General's opinion has gone further to cover meetings of public officials, and to interpret the law as applying to a discussion between as few as two members of a governing body. This opinion does not rest on a finding about legislative intent.

It was not the intent of the law to open all the deliberations leading up to a decision of a governing body, or all the deliberations leading up to the vote of a particular member. A different test should be applied to a caucus discussing its strategy, than is applied to a public body making a decision. A minority caucus should have the opportunity to discuss among its own members how to handle an issue being raised by the majority. And the same principle applies even to a majority caucus, although here some additional safeguard probably needs to be employed.

What *subjects* are covered by the open meeting law?

The report recommends that strategy sessions of public bodies for collective bargaining with public employees be added as another exception from the law. This is a sound recommendation, in light of the heavy cost incurred by the public should the public body be disadvantaged in its bargaining. Another important factor is the requirement that an accommodation be reached. These considerations argue also for the addition of an exception for strategy sessions about negotiations for the purchase of land by public bodies. Since such meetings are usually not reported in any event, the public interest is unlikely to be affected by permitting the discussions to be closed. What is affected, principally, is the private interest of the "adverse parties", who would then not be privy to the strategy of the public negotiators. Such a change would be in the public interest, not contrary to it.

The chief concern with any meeting closed because of its subject matter is that the meeting discussion be limited to that subject. Safeguards are important to assure that the granting of exceptions is not abused. The Citizens League has suggested that the Legislature incorporate the public observer

concept into the law. I would go further to suggest specific procedures for implementation of the public observer concept. While not perfect, it can be made workable. It definitely should be installed as a safeguard for the meetings that will be closed.

Specifically, I urge that:

- At least one member of the public must be in attendance as a public observer. The public observer:
  - Cannot be an employee or appointee of the public body, and cannot have a conflict of interest with any party whose interests are adverse to the public body and the subject of the discussion.
  - Must attend the entire closed session;
  - Must be advised by the presiding officer of the responsibility to report any discussion of a subject not within the bounds of the notice and, on the other hand, not to disclose the content of the discussion in any other way than in the course of a judicial proceeding;
  - Must sign a certificate following the closed session that the entire session was attended and that the discussion was restricted to the subject specified. The certificate will be filed with the Secretary of State.
- Following a closed meeting or session, all members of the public body must execute a certificate to the effect that discussion was restricted to the subject specified. The certificate will be filed with the Secretary of State.
- A special summary proceeding for *in camera* judicial review and the content of a closed session will be provided in District Court. This review can be initiated in any of the following ways:
  - The public onserver is obliged to report a violation to the County Attorney, who will be required to file a petition in District Court for such a review;
  - Failure to file the required certificate within ten days will require the County Attorney to file a petition for mandatory review;
  - If no public observer was present at a closed meeting or session, any citizens shall have standing within thirty days to file a demand with the County Attorney for a mandatory review. In this situation the burden of proof will shift to the public body to establish that all discussion in the closed session was confined to legally permissible subjects.

By Wayne G. Popham

THE CITIZENS LEAGUE

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Volunteer research committees of the CITIZENS LEAGUE develop recommendations for solutions to public problems after months of intensive work.

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