ETHICS IN GOVERNMENT ACT

The Ethics in Government Act ("the Act") establishes strong ethical standards concerning the conduct of public officials. The Act evidences a commitment to honesty and accountability and is intended to ensure that the public has confidence in those who govern.

Despite the reforms intended to be carried out as a result of the Act, the Committee once again recommends that certain aspects of the Act should be strengthened and clarified.

The Act includes the creation of several bodies -- ethics commissions and public advisory councils. Those bodies conduct meetings and hearings, and they maintain numerous records.

With respect to disclosure, unlike the Freedom of Information Law or the Open Meetings Law, both of which are based on a presumption of openness, the opposite presumption exists in the Act. Unquestionably, there are good and valid reasons for withholding records or closing meetings when issues arise concerning the conduct of public officers. As indicated in the following paragraphs, the Act specifies that rights granted by the Freedom of Information Law and the Open Meetings Law do not apply to records of and meetings conducted by the entities created by the Act. The Committee believes that those entities, which are intended to guarantee accountability, should themselves be more accountable. Some of the deficiencies in the Act concerning disclosure might be the result of oversight; others potentially restrict openness in a manner inconsistent with the principles of open government reflected in the Freedom of Information and Open Meetings Laws.

It is noted that, even if the Freedom of Information Law and the Open Meetings Law fully applied to the bodies created by the Act, they would likely have the capacity to restrict access to records or close meetings in a manner that provides those bodies, as well as the individuals who are the subjects of their inquiries, with the protection they need to carry out their duties effectively.

The Freedom of Information Law permits agencies to withhold records when disclosure would constitute an "unwarranted invasion of personal privacy" [§87(2)(b)]. Records compiled for law enforcement purposes may be withheld when disclosure would interfere with an investigation, deprive a person of a fair trial or impartial adjudication, or which if disclosed would identify a confidential source [§87(2)(e)]. Communications between agencies or within an agency that consist of advice, opinion or recommendation may be withheld [§87(2)(g)].

Similarly, although the Open Meetings Law generally requires that public bodies conduct their meetings open to the public, §105(1)(f) permits a public body to conduct a closed or "executive session" to discuss:

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

It is likely, therefore, that the business of the bodies created by the Act, insofar as it relates to a "particular" public officer, could legally be conducted during an executive session if the Open Meetings Law were to apply.

Further, hearings concerning possible action to be taken against individuals could likely be characterized as "quasi-judicial proceedings", which are exempt from the coverage of the Open Meetings Law [see §108(1)].

Access to Records

Specifically, with respect to access to records of the State Ethics Commission, §94(17)(a) of the Executive Law, states that:

> "Notwithstanding the provisions of article six of the public officers law, the only records of the commission which shall be available for public inspection are:
>
> (1) the information set forth in an annual statement of financial disclosure filed pursuant to section seventy-three-a of the public officers law except the categories of value or amount, which shall remain confidential, and any other item of information deleted pursuant to paragraph (h) of subdivision nine of this section;
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> (2) notices of delinquency sent under subdivision eleven of this section;
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> (3) notices of reasonable cause sent under paragraph (b) of subdivision twelve of this section; and
>
> (4) notices of civil assessments imposed under this section."

Nevertheless, §94(9), which deals with the functions, powers and duties of the Commission, requires that the Commission adopt rules to govern its procedures [§94(9)(c)], promulgate guidelines to assist agencies to determine which persons hold policy-making positions [§94(9)(d)], prepare forms for financial disclosure statements [§94(9)(e)], advise and assist agencies in establishing rules relating to possible conflicts of interests [§94(9)(k)], and prepare an annual report to the Governor and Legislature [§94(9)(1)]. While public rights of access to the materials described above

may be implicit, §94(17)(a), which describes and limits the records that must be made available, fails to include those materials within the scope of accessible records. Similarly, §94(15) enables any person subject to the requirements of the Act to request an opinion from the Commission. While a request for an opinion is confidential, "the commission may publish such opinions provided that the name of the requesting person and other identifying details shall not be included in the publications". So long as the opinions do not include identifying details they should be made available.

Similar or duplicative provisions are contained in the Act with respect to the commissions other than the State Commission.

The Committee recommends that the kinds of records described above -- rules, guidelines distributed to agencies, forms, advice given to agencies concerning rules regarding conflicts of interest, annual reports and opinions having precedential value should clearly be available under the Act. In addition, as suggested earlier, the Act refers only to public "inspection"; it should ensure that accessible records are available for inspection and copying.

Meetings

The Act also provides that the Open Meetings Law does not apply to the commissions or the public advisory councils.

With respect to the State Ethics Commission, for example, §94(17)(b) states that:

> "Notwithstanding the provisions of article seven of the public officers law, no meeting or proceeding, including any such proceeding contemplated under paragraph (h) or (i) of subdivision nine of this section, of the commission shall be open to the public, except if expressly provided otherwise by the commission."

Similarly, with regard to the public advisory council, §94(18)(j) states that:

> "Notwithstanding the provisions of article seven of the public officers law, no meeting or proceeding, including any such proceeding contemplated under paragraph (h) or (i) of subdivision nine of this section, of the commission shall be open to the public, except if expressly provided otherwise by the public advisory council."

Several aspects of the duties of the Commission and the Public Advisory Council should be subject to the Open Meetings Law. As indicated earlier, even if the Open Meetings Law were applicable to all meetings of those bodies, it is likely that

any discussion focusing upon an individual officer or employee could be conducted during a proper executive session [see Open Meetings Law, §105(1)(f); further, hearings concerning possible action to be taken against individuals could likely be characterized as "quasi-judicial" and, therefore, exempt from the Open Meetings Law [§108(1)]. The Open Meetings Law, however, generally requires that matters of policy that do not focus upon a "particular person" must be conducted in public, for in those instances, it is rare that a basis for entry into an executive session may be asserted.

In the context of the Commission's administrative or quasi-legislative duties, there is no reason why the Open Meetings Law should not be applicable. For instance, the Open Meetings Law should apply to the Commission with regard to meetings that pertain to the adoption or amendment of its rules and regulations, as well as the development of general guidelines to determine the existence of policy-making positions within agencies. Like the Committee on Open Government, the Commission should meet in public to prepare and discuss its annual report.

The Commission may also determine to exempt classes of employees from the requirement that financial disclosure statements be filed. Section 94(9)(k) states in part that the Commission shall:

> "Permit any person who has not been determined by his or her appointing authority to hold a policy-making position but who is otherwise required to file a financial disclosure statement to request an exemption from such requirements in accordance with rules and regulations governing such exemptions. Such rules and regulations shall provide for exemptions to be granted either on the application of an individual or on behalf of persons who share the same job title or employment classification which the commission deems to be comparable for purposes of this section."

To the extent that the Commission's deliberations pertain to requests for exemptions sought by a class of employees, rather than a particular employee, the issue would involve questions of policy related to a position, not any particular employee. Consequently, the Open Meetings Law should be applicable to those discussions.

The major function of the Public Advisory Council involves the review of requests for exemptions from certain filing requirements. The Council may deal with individual requests for exemptions, and it may also consider exempting a class of employees. Section 94(18)(k) states that:

> "Where the council is of the opinion that a determination of a question common to a class or defined category of persons or items of information with respect to requests for deletion or exemption will prevent undue repetition of such

> requests for undue complication, the council may certify the question to the commission for resolution and disposition in accordance with paragraph (m) of subdivision nine of this section."

As in the case of the Commission, where the Council discusses an issue involving exemptions that pertain to a class of employees, its deliberations should be open.

In an area that relates to both records and meetings, the Freedom of Information Law, since its enactment in 1974, two years prior to the enactment of the Open Meetings Law, has contained an "open meetings" requirement involving the votes cast by members of public bodies. Section 87(3)(a) of the Freedom of Information Law requires that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

In essence, the provision quoted above prohibits members of public bodies from engaging in secret ballot voting and requires that a record be maintained and made available that indicates the manner in which members of public bodies cast their votes.

When the Commission or the Public Advisory Council votes on administrative or quasi-legislative issues, or when a vote is cast pertaining to a class of employees, a requirement similar to that found in §87(3)(a) of the Freedom of Information Law should apply.

In sum, the Act was passed to insure accountability and to increase public confidence in government. In the Committee's view, the bodies created by the Act should also guarantee at least a measure of accountability.

Privacy

Another potential problem in the Act involves the disclosure of financial disclosure statements submitted by persons required to file those statements. Section 94(9)(h) of the Act permits a person required to file a financial disclosure statement to request that portions of the statement be deleted and unavailable to the public. Such a deletion can be made if it is determined that "the information which would otherwise be required to be made available for public inspection will have no material bearing on the discharge of the reporting person's official duties."

The Committee, particularly in its role under the Personal Privacy Protection Law, is concerned not only with access to records, but personal privacy as well. The standard in the Act concerning deletions is, in the Committee's opinion, vague.

Generally, issues involving disclosure of records pertaining to named individuals focus upon whether disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. In some instances, the standard in the Act involving presence or absence of a "material bearing" on the performance of one's official duties might be inconsistent with the standard in the Freedom of Information Law and considerations of privacy. An aspect of a disclosure statement might, if disclosed, result in an unwarranted invasion of personal privacy, but it might have a "material bearing"; conversely, it might not have a material bearing, but perhaps it should be disclosed on the ground that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy.

Further, there is case law that suggests that privacy should be a consideration regarding financial disclosure by public employees. *Hunter v. City of New York* [58 AD 2d 136 (1977); aff'd with no opinion, 44 NY 2d 708 (1978)] dealt with a New York City local law requiring that certain employees prepare financial disclosure statements. It was determined that the provision in the law requiring that statements be disclosed without affording employees to present a claim of privacy was invalid. The Appellate Division in *Hunter* held that:

> "Accordingly, it is concluded that the local law's provision for disclosure of the financial statements without affording the employee the opportunity to present a claim for privacy, should be stricken, and that disclosure should not be made public absent the implementation of such safeguards as are consistent with due process" (58 AD 2d, at 142).

While the Act contains procedural safeguards concerning disclosure, no specific reference is made to the protection of privacy or the ability to assert claims of personal privacy.

Although the Committee offers no specific recommendation, it is suggested that the standard concerning deletions from financial disclosure statements be reviewed. Perhaps the standard could be altered in a manner that evidences a recognition of issues involving privacy. Such an alteration might be worthwhile, for numerous judicial decisions have been rendered under the Freedom of Information Law concerning the privacy of public employees. Moreover, those decisions might serve as useful precedent to the entities created by the Act.

RECOGNIZING TECHNOLOGICAL AND FISCAL REALITIES

FEES FOR COPIES AND REPRODUCTION OF ELECTRONIC INFORMATION IN THE COMPUTER AGE

The Freedom of Information Law currently provides that, unless prescribed by a different statute, an agency may charge up to twenty-five cents per photocopy or

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