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DEPARTMENT OF STATE
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April 11, 1985

Mr. Frederic Dicker
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The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Dicker:

I have received your letter of April 2, in which you requested an advisory opinion under the Open Meetings Law.

On behalf of the New York Post, you have sought an opinion regarding "the legal status the state's Open Meeting Law of the majority 'conferences' or caucuses of the state Assembly and Senate, when attended by a majority of lawmakers from each respective legislative body." By means of example, you asked whether:

> "...if Assembly Democrats hold a 'conference' with more than 75 assemblymen present (a majority of the house,) should that conference be open to the press under the Open Meetings Law?
>
> "Should a Senate Republican Conference, with 31 senators present, be open to the press?"

In this regard, I would like to offer the following comments.

First, I am unaware of any judicial determination involving conferences or caucuses that you described that have been rendered with respect to either house of the State Legislature. As such, I know of no precedent that deals specifically with the gatherings that are the subject of your inquiry.

Second, in terms of background, the Open Meetings Law is applicable to meetings of public bodies. Section 102(2) defines "public body" to mean:

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

In view of numerous provisions of law, I believe that the Senate and the Assembly would each constitute a "public body" subject to the Open Meetings Law.

Third, the Open Meetings Law pertains to meetings of public bodies, and the term "meeting" has been expansively construed by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that the definition of "meeting" encompasses any situation in which a quorum of a public body convenes for the purpose of conducting public business, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. Further, the definition of "meeting" that appeared in the Open Meetings Law as originally enacted was amended in a manner consistent with the direction provided by the Court of Appeals as part of a series of amendments to the Law that became effective on October 1, 1979.

The determination of the Court of Appeals unanimously affirmed a decision of the Appellate Division in which the Court in its discussion of the term "meeting" found that:

> "Certain practices have been adopted whereby public bodies meet as a body in closed 'work sessions', 'agenda sessions', 'conferences', 'organizational meetings', and the like, during which public business is discussed, but without the taking of any action. Thus, the deliberative process which is at the core of the Open Meetings Law is not available for public scrutiny (see First Annual Report to the Legislature on the Open Meetings Law, Committee on Public Access to Records, Feb. 1, 1977).
>
> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (id. at 414, 415).

As such, based upon case law, I believe that a gathering of a majority of the membership of a public body for the purpose of conducting public business constitutes a meeting required to be held in accordance with the Open Meetings Law.

In addition, I believe that all meetings must be preceded by notice given pursuant to §104 of the Open Meetings Law and convened open to the public [see Open Meetings Law, §103(a)].

Fourth, §108(2) exempts from the provisions of the Open Meetings Law "deliberations of political committees, conferences and caucuses". The question, therefore, is whether the "conferences" or "caucuses" that you described are exempt from the Open Meetings Law.

Here I point out that five judicial determinations have been rendered that deal with the status of political caucuses or similar gatherings. In each determination, it was found that a gathering by a majority of the total membership of a public body for the purpose of discussing public business fell within the framework of the Open Meetings Law, even though those in attendance might represent a single political party.

The first and perhaps the most important determination on the subject is Sciolino v. Ryan. In its discussion of the issue, the Supreme Court decision in Sciolino held that:

> "A meeting of the majority members of the legislature to discuss purely political matters such as campaign finances to elect or re-elect members of the party to the legislature or to discuss party organization might be the type of 'political caucus' the legislature intended to exclude from the operation of the Open Meetings Law" [431 NYS 2d 664, 667].

The Court added that the holding in Orange County, supra, as well as the statute's legislative declaration required a finding that a discussion of public business during a so-called "politicial caucus" conducted by a majority of the membership of a public body is subject to the Law, stating that:

> "[T]he most decisive indication of the legislative intention is the legislative declaration contained in section 95 of the law. That

> section states: 'It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy.' (Emphasis added). Based primarily upon the legislative declaration, the courts held in Matter of Orange County Publications v. Council of the City of Newburgh, 60 A.D.2d 409, 401 N.Y.S.2d 84, affd. 45 N.Y.2d 947, 411 N.Y.S.2d 564, 383 N.E.2d 1157, that the words 'public meeting' within the meaning of the Open Meetings Law 'includes the gathering or meeting of a public body whenever a quorum is present for the purpose of transacting public business, whether or not a vote of the members of the public body is taken' (60 A.D.2d at pp. 412, 419, 401 N.Y.S.2d at p. 87); that it includes informal 'work sessions', 'agenda sessions' and 'conferences', 'during which public business is discussed, but without the taking of any action' (60 A.D.2d at p. 414, 401 N.Y.S.2d at p. 88); that 'the deliberative process' is 'at the core of the Open Meetings Law' (60 A.D.2d at p. 414, 401 N.Y.S.2d at p. 88); and that 'any private or secret meetings or assemblages of the Council * * * when a quorum of its members is present and when the topics for discussion and eventual decisions are such as would otherwise arise at a regular meeting, are a violation of the New York Open Meetings Law.' (60 A.D.2d at p. 418, 401 N.Y.S.2d at p. 91)" (id. at 667, 668).

The Appellate Division, Fourth Department, affirmed the decision of the Supreme Court, holding that:

> "[T]he closed sessions of the Council's Democratic majority constitute meetings within the scope of the Open Meetings Law. A majority of the nine member Council constitutes a quorum (Rochester City Charter, §5-7), and it is undisputed that a quorum was present at the three closed sessions to which petitioners sought admission. The decisions of these sessions, the legislative future of items before the Council, although not binding, affect the public and directly relate to the possibility of a municipal matter becoming an official enactment. To keep the decision-making process of all but one of the members of the Council secret, simply because they term themselves 'majority' instead of a 'quorum', allows the public to be aware of only legislative results, not deliberations, violating the spirit of the Open Meetings Law and exaulting form over substance..." (81 AD 2d 475, 478).

Further, while it was contended that the phrase "political caucus" should be construed "to apply to a political majority of legislative body regardless of what it discusses" (id. at 479), it was determined that:

> "[A]n expansive definition of a political caucus, as urged by respondents, would defeat the purpose of the Open Meetings Law that public business be performed in an open and public manner (Public Officers Law, §95), for such a definition could apply to exempt regular meetings of the Council from the statute. To assure that the purpose of the statute is realized, the exemption for political caucuses should be narrowly, not expansively, construed. The entire exemption is for the 'deliberations of political committees, conferences and caucuses' (Public Officers Law,

> §103, subd 2), indicating that it was meant to prevent the statute from extending to the private matters of a political party, as opposed to matters which are public business yet discussed by political party members. To allow the majority party members of a public body to exclude minority members, and thereafter conduct public business in closed session under the guise of a political caucus, would be violative of the statute..." (id.).

Another decision dealt with "private weekend meetings" characterized as political caucuses, and were also found to be meetings subject to the Open Meetings Law (In Re Cooper, Sup. Ct., Westchester County, NYLJ, June 8, 1981). A third decision indicates that the exemption for political caucuses applies only to gatherings conducted for "purely political" matters and that a gathering of the members of a county legislature for the purpose of discussing public business was a "meeting" subject to the Open Meetings Law (Orange County Publications v. County of Orange, Sup. Ct., Orange Cty., July 30, 1981). A similar holding was reached in Oneonta Star v. County of Schoharie (Supreme Ct., Albany Cty., July 19, 1984). In the remaining decision, which involved the majority of the membership of the Troy City Council, the Court found that:

> "...the Respondents aver that prior to regular and special meetings of the Troy City Council the Democratic Majority meet with invited staff people to discuss legislation that is or may be on the Council agenda. The purpose of these discussions is to determine if the proposed legislation is consistent with the programs, goals and ideals of the Democratic Party and the impact and feed-back from constituents. The meetings are called by the Mayor, usually by a phone call to each member of the caucus. They (participating members of the Council) claim the meetings are not official ones and no vote is taken."

Nevertheless, in conclusion, the Court stated that:

> "[I]t is determined that the closed sessions or meetings of the Council's Democratic Majority constitutes meetings within the scope of the Open Meetings Law. A majority of the seven-member council constitutes a quorum. (Art. 2 Legislative Branch, City Council Local Law No. 31959 - Charter City of Troy), and it is undisputed that a quorum was present at the closed meeting. No formal decision was made at the closed meeting, no record was kept of the proceedings, however, proposed legislation was discussed and a fair inference may be drawn that such discussions affected future legislation. The holding of these preliminary meetings by the City Councils of this State have been historical and recognized as a valid exercise of political party representation in respect to matters to be considered by the Council as a whole. The State Legislature has now caused a discontinuance of this prearranged scheduling and predetermination of proposed legislation by enactment of the Open Meetings Law and the respondents closed meeting is a violation of that section of this law. (Public Officers Law Section 98). Further it is determined that such a meeting does not qualify as an exception under Public Officers Law Section 103" (Bulmer, Matter of v. Anthony, Sup. Ct., Rensselaer Cty., April 10, 1981).

There is no decision of which I am aware in which a conclusion different from those expressed in the cases cited in the preceding paragraphs was reached.

In sum, based upon judicial interpretations of the Open Meetings Law, it would appear that conferences or caucuses conducted by a majority of the members of either house of the Legislature for the purpose of conducting public business would constitute meetings subject to the Open Meetings Law. However, to the extent that political party business is discussed during the conferences or caucuses, such gatherings would in my view fall outside the scope of the Open Meetings Law.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Warren Anderson
Hon. Stanley Fink