

FORMAL OPINIONS
OF THE
ATTORNEY GENERAL
OF
NEW JERSEY
1974-1977

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Exhibit H

February 13, 1974

HONORABLE BRENDAN T. BYRNE
Governor of New Jersey
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 1-1974

Dear Governor Byrne:

Chapter 357 of the Laws of 1973, approved December 28, 1973, established the Governor's salary at \$65,000, whereas Chapter 194 of the Laws of 1969 had established the salary at \$50,000. You have asked us to consider the legal propriety of your proposal to take the \$15,000 salary increase in increments of \$5,000 over a period of three years rather than to take the entire increase immediately as provided by the statute. We have concluded based upon our review of State law and precedents and the ruling of the Federal Cost of Living Council attached hereto that it would be proper for you to take the \$15,000 salary increase provided by Chapter 357 of the Laws of 1973 in increments of \$5,000.

An analysis of your proposal must begin with a consideration of the New Jersey Constitution which provides that:

"The Governor shall receive for his services a salary, which shall be neither increased nor diminished during the period for which he shall have been elected." Art. V, § 1, par. 10.

There does not appear to be any discussion of this provision in any proceedings of constitutional conventions. The provision appeared first in the 1844 Constitution, and there are no New Jersey cases construing it. Nonetheless, the same type of provision appears in the United States Constitution and in many other state constitutions regarding chief executive officers, legislators and judges.

The leading case construing such constitutional language is *O'Donoghue v. United States*, 289 U.S. 516, 53 S. Ct. 740, 77 L. Ed. 1356 (1932), which involved the provisions of Article 3, Section 1 of the United States Constitution. The Court in *O'Donoghue* stated that "the great underlying purpose which the framers of the Constitution had in mind" when they adopted this provision of the federal constitution was to prevent the commingling in the same hands of the essentially different powers belonging to distinct and separate branches of government. 289 U.S. at 529-530. The Court said:

"[E]ach department should be kept completely independent of the others—
...in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments." 289 U.S. at 530.

The Court added that the provision denying the power to diminish the compensation of federal judges was made explicit:

"[I]n order, *inter alia*, that their judgment or action might never be swayed

ATTORNEYS-GENERAL

1704, Alexander Griffith; 1714, Thomas Gordon; 1719, Jeremiah Basse; 1723, James Alexander; 1728, Lawrence Smith; 1733, Joseph Warrel; 1754, Cortlandt Skinner; 1776, William Paterson; 1783, Joseph Bloomfield; 1792, Aaron D. Woodruff; 1811, Andrew S. Hunter; 1817, Theodore Frelinghuysen; 1829, Samuel L. Southard; 1833, John Moore White; 1838, Richard S. Field; 1841, George P. Molleson; 1844, Richard P. Thompson; 1845, Abraham Browning; 1850, Lucius Q.C. Elmer; 1852, Richard P. Thompson; 1857, William L. Dayton; 1861, F.T. Frelinghuysen; 1867, George M. Robeson; 1870, Robert Gilchrist; 1875, Joel Parker; 1875, Jacob Vanatta; 1877, John P. Stockton; 1897, Samuel H. Grey; 1902, Thomas N. McCarter; 1903, Robert H. McCarter; 1908, Edmund Wilson; 1914, John W. Wescott; 1919, Thomas F. McCran; 1924, Edward L. Katzenbach; 1929, William A. Stevens; 1934, David T. Wilentz; 1944, Walter D. Van Riper; 1949, Theodore D. Parsons; 1954, Grover C. Richman, Jr.; 1958, David D. Furman; 1962, Arthur J. Sills; 1970, George F. Kugler, Jr.; 1974, William F. Hyland.

light of the traditional rule of statutory construction that statutes should be construed to substantially conform to the Legislature's intent and to avoid unreasonable results. *County of Monmouth v. Wissel*, 68 N.J. 35, 42 (1975). A construction of the Act which would draw dual State employment within the parameters of its general proscriptions would simply not be consistent with its primary purpose, i.e., to regulate and control the narrow area of private business and commercial relationships with the State by legislators, State officers and employees. Moreover, the consequences of such an interpretation would produce substantial hardships for many State employees in situations which are far removed from the Act's essential objectives. Surely, it cannot be suggested that the Legislature intended, for example, the harsh result of prohibiting a maintenance worker for the Department of Transportation earning \$6500 a year from also being employed on a different shift as a maintenance worker in the Department of Environmental Protection earning a similar salary. Yet, this is precisely the type of dual State employment which would be prohibited under a contrary interpretation of the Conflicts of Interest Act.

It is thus apparent that the literal terms of the Conflicts of Interest Act and its underlying policy are not indicative of a legislative purpose to deal substantially with dual State officeholding or employment situations and to alter the general body of law on dual employment. However, consistent with that body of law the Act does recognize that, through departmental codes of ethics, State officers or employees should not act in their official capacity in any matter involving a direct or indirect financial interest which "might reasonably be expected to impair his objectivity or independence of judgment." N.J.S.A. 52:13D-23 (e) (5). Through this provision, dual officeholding or employment could be precluded where it tends to impair the objectivity of a particular officer or employee.

In light of the foregoing, it is our opinion that the Conflicts of Interest Act does not impose an absolute bar to dual State officeholding or employment. The departments of State government, however, are free to regulate dual officeholding in instances where it may be expected to impair the objectivity and independence of the State officer or employee in the exercise of his or her primary job responsibilities.

Very truly yours,

WILLIAM F. HYLAND
Attorney General

By: ERMINIE L. CONLEY
Deputy Attorney General

* N.J.S.A. 52:13D-19 provides in pertinent part:

"No member of the Legislature or State officer or employee shall . . . undertake or execute, in whole or in part, any contract, agreement, sale or purchase of the value of \$25.00 or more, made, entered into, awarded or granted by any State agency; provided however, that the provisions of this section shall not apply to (a) purchases, contracts, agreements or sales which (1) are made or let after public notice and competitive bidding or which (2), pursuant to . . . [law], may be made, negotiated or awarded without public advertising or bids, or (b) any contract of insurance entered into by the Director of the Division of Purchase and Property . . ."

June 22, 1976

HON. FRED G. BURKE, *Commissioner*
Department of Education
225 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 19 - 1976

Dear Commissioner Burke:

You have asked a series of questions involving the impact of the recently enacted Open Public Meetings Act upon various activities of the State Board of Education as well as those of local boards. These questions will be considered in the following sequence:

1. whether meetings of the Law Committee, Agenda Committee, other committees of the State Board of Education, and of committees of local boards of education, must be open to the public;
2. whether workshops or training sessions of the State Board and local boards of education must be open to the public;
3. what procedure must be followed regarding emergency meetings of the State Board of Education;
4. what is the scope of the term "agenda" as used in the Open Public Meetings Act?

The Legislature, in enacting the Open Public Meetings Law, specifically declared it to be the public policy of this State that with certain limited exceptions its citizens have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way. The law does allow, however, a public body to discuss certain enumerated subjects in closed session provided that the procedural requisites in the law are met. To avoid misunderstanding, the Legislature found, that to be subject to the provisions of the Act, a public body must be organized by law and be collectively empowered as a multi-member voting body to spend public funds or affect personal rights. The Act, therefore, does not extend to informal or purely advisory bodies with no effective authority, nor to groupings composed of an individual public official, such as a school superintendent and his subordinates or advisors, who are not collectively empowered to act by vote.* Furthermore, to be covered by the provisions of this Act, a meeting must be open to all the public body's members,** and the members present must intend to discuss or act on the public body's business.

To implement its legislative resolve, N.J.S.A. 10:4-9 mandates that "no public body shall hold a meeting unless adequate notice thereof has been provided to the public." N.J.S.A. 10:4-8 (a) defines a "public body" as:

"... a commission, authority, board, council, committee or any other group of two or more persons organized under the laws of this State, and collectively empowered as a voting body to perform a public governmental function affecting the rights, duties, obligations, privileges, benefits, or other legal relations of any person, or collectively authorized to spend public funds including the Legislature. . ."

In order to answer your various inquiries, it is necessary to first determine whether the State Board and each local board is a "public body" within the meaning of the Open Public Meetings Act. Necessary to this determination is a clear understanding of the composition and responsibilities of both the State Board and local boards of education.

The State Board of Education has general supervision and control over public education in this state and may also make and enforce, and may alter and repeal, rules for its own government and for implementing and carrying out the school laws of this State. N.J.S.A. 18A:4-1, 10, 15. The State Board also has jurisdiction to hear appeals from determinations of the Commissioner of Education involving controversies arising under the education laws. N.J.S.A. 18A:6-9, 27. Local boards of education supervise and have general responsibility for the schools within their districts. N.J.S.A. 18A:10-1. Each board may adopt rules for its own governance as well as for the local school system. N.J.S.A. 18A:11-1.

Clearly, the State Board of Education and each local board of education is a "public body" as defined in this Act. These boards are statutorily created and "collectively empowered as a multi-member voting body" to spend public funds or affect persons' rights. Boards of education are certainly not "informal or advisory boards with no effective authority" but have specific statutory authority to supervise and control the system of free public education in this State and to expend moneys necessary to maintain such system.

I

You initially ask whether meetings of (a) the Law Committee, (b) the Agenda Committee and (c) various other committees of the State Board and local boards of education must be open to the public.

The State Board organizes at its first regular meeting following June 30 of each year. N.J.S.A. 18A:4-8. With regard to committee structure, N.J.A.C. 6:1-4.1 provides:

"(a) The Board shall act as a committee of the whole. The following standing Committees shall be constituted:

1. Legal;
2. Liaison;
3. Nominating."

Pursuant to State Board regulation, the Legal Committee consists of at least three Board members whose training and experience make them particularly valuable for the review of all cases appealed from the Commissioner of Education to the Board. Notices of all hearings held by the Legal Committee are sent to all members of the Board. The Liaison Committee meanwhile consists of the President of the State Board of Education and two members of the Board appointed by her. The President of the State Board also appoints three Board members, in May of each year, to serve on a Nominating Committee. Finally, the President, may, at any time, appoint a special committee to consider or take action on any matter. It is assumed that the Agenda Committee was organized under this general grant of authority.

As noted *ante*, N.J.S.A. 10:4-12 requires that all meetings of public bodies be open to the public. To answer the present inquiry, it is therefore necessary to determine whether the above mentioned sub-committees of the State Board are "public

bodies" as the term is defined in the Open Public Meetings Law and, thus, subject to the provisions of this Law. A public body is one "collectively empowered as a voting body to perform a public governmental function affecting the rights . . . of any person, or collectively authorized to spend public funds." N.J.S.A. 10:4-8(a). Since the sub-committees of the State Board do not consist of an effective majority of the Board's members, the question of whether they are subject to the requirements of the Open Public Meetings Law depends upon the nature and extent of the authority delegated to them by that body.

The functions of the legal committee are set forth in N.J.A.C. 6:2-1.4. This regulation provides that the legal committee shall supervise the preparation of the record of the matter before the Commissioner and make it available to the entire Board. The committee also transmits to each member of the entire Board the basic documents involved in such appeals from the Commissioner's decisions. However, N.J.A.C. 6:2-1.5 specifically provides:

" . . . The *entire Board* shall make a final determination with respect to each controversy by resolution in open meeting." (Emphasis added)

The Legal Committee simply serves a preparatory function to the formal action of the State Board. The Legal Committee has no grant of power from the Board to take any definitive action affecting the rights of parties before it. Rather, by regulation, the determination of an appeal from a Commission's decision must be made by the entire State Board. Therefore, the Legal Committee is purely an advisory body with no authority to affect the rights, duties, privileges, benefits or legal relations of any person. Since the Open Public Meetings Law does not apply to advisory bodies with no effective authority, you are advised that the meetings of the Legal Committee, as it is now constituted, are not subject to its requirements.

With regard to the Agenda Committee, you indicate that it usually meets once each month on a day in advance of the regular State Board Meeting for the purpose of planning items to be included on the agenda for that meeting. If this group serves a purely administrative function, and merely determines which items are ready for Board discussion and action, it would have no effective authority and its meetings would not be governed by the Open Public Meetings Law. However, should this sub-committee discuss substantive issues and have effective authority to keep matters from coming before the board, it could be concluded that the State Board has delegated its agenda committee a grant of power. If this were the case, such committee would not be "purely advisory" and would, therefore, be subject to the requirements of N.J.S.A. 10:4-6. The operation and effective authority of this committee must be studied to determine whether it is advisory or not and, therefore, subject to the act.

You also pose the general question, as to whether other committees of the State Board as well as committees of local boards must be open to the public. As articulated above, it is essential in answering this question to determine whether the committee or sub-committee is composed of an effective majority of the members of the body and whether that body has delegated to the committee or sub-committee authority to affect personal rights or to expend public moneys. Such determination cannot be made in the abstract. The general principles expressed herein must be applied in a factual context to determine whether a committee is truly informal or advisory or whether it does have effective authority, in a legal or practical sense.

II

You also ask whether workshops or training sessions of the State Board and local boards must be open to the public. You give as examples a workshop conducted by a local board wherein guidance counsellors present a report of the year's activities in a comprehensive testing program, or one conducted by the State Board at which personnel from several Divisions report on activities of those Divisions for the previous year. In both instances you indicate board members would ask informational questions and receive answers from appropriate staff members.

Relative to this inquiry is N.J.S.A. 10:4-12 which provides that, with certain limited exceptions, "all public meetings of public bodies shall be open to the public at all times." A public meeting is defined as:

"... any gathering whether corporeal or by means of communication equipment, which is attended by, or open to, all of the members of a public body, held with the intent, on the part of the members of the body present, to discuss or act as a unit upon the specific public business of that body. Meeting does not mean or include any such gathering (1) attended by less than an effective majority of the members of a public body, or (2) attended by or open to all the members of three or more similar public bodies at a convention or similar gathering." N.J.S.A. 10:4-8(b)

By simply classifying a gathering as a training session or workshop does not exclude it from the statutory definition of a public "meeting". Under this definition if the training session or workshop is attended by, or open to, all members of the State Board of Education or of a local board of education, and is held with the intent to discuss or act as a unit on the "specific business of that agency" it is subject to the provisions of the Open Public Meetings Act.

In this regard, N.J.S.A. 10:4-8(c) defines "public business" as those "matters which relate, in any way, directly or indirectly, to the performance of the public body's functions or the conduct of its business." In connection with your inquiry, you indicate that a board might receive, at a "workshop" session, a report of the year's activities in a comprehensive testing program. Such report certainly goes to the very heart of the board's educational responsibilities and relates to the performance of its functions. Similarly, the report by various departmental personnel to the State Board of their activities in implementing the education laws concerns the Board's public responsibilities and likewise involves its ability to perform its public function. It is clear, therefore, that such meetings concern the "public business" of the State or local board.

These workshops or training sessions would not, however, be subject to the provisions of the Open Public Meetings Act:

- (a) if they were attended by less than an effective majority of the board;
- (b) if they were attended by, or open to, all the members of three or more local boards of education at a convention or similar gathering;

Furthermore, if the subject matter of such meetings falls within the exceptions enumerated in N.J.S.A. 10:4-12(b)*, that portion of the meeting dealing with such exceptions may be closed to the public consistent with the provisions of N.J.S.A. 10:4-13.** You are advised therefore that, except for the above situations, workshop and training sessions of the State Board and local boards of education are subject to the requirements of the Open Public Meetings Act.

III

Advice has also been requested as to what procedure should be followed regarding emergency meetings of the State Board of Education.

The Legislature recognized the possibility of emergency situations and provided therefore. N.J.S.A. 10:4-9(b) specifically states that a public body may hold a meeting without adequate public notice if three-quarters of its members approve such action and if certain conditions are met. To be consistent with N.J.S.A. 10:4-9(b), the meeting must involve a matter of such urgency that to delay it, so that "adequate notice" might be given, would likely "result in substantial harm to the public interest." The Act also requires that *if the meeting is called*, it must be strictly limited to the emergent matter which necessitated it. Notice of the meeting must also be provided as soon as possible after such meeting is called. Finally, it must be determined that either the public body could not have foreseen the need for such meeting at time when adequate notice could have been given or that the body could have foreseen the need for such meeting, but failed to do so. At the commencement of the emergency meeting, the presiding officer of the body must announce the adequate notice has not been given and specifically set forth the manner in which the above conditions have been met. N.J.S.A. 10:4-10(b).

Emergency meetings may be defined as meetings, other than those regularly scheduled, called by the State Board to consider a crisis or emergent situation within the educational system of the State. It may be that the need for such meeting is great but the emergency not of such nature to require an "immediate" meeting. In that situation, "adequate notice" should be given of such meeting. The Open Public Meetings Act defines "adequate notice" as:

"... written advance notice of at least 48 hours giving the time, date, location and, to the extent known, the agenda of any regular, special, or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken..." N.J.S.A. 10:4-8(d) (Emphasis added)

Such notice is to be distributed and published in the same manner as that of the schedule of regular meetings of the State Board. N.J.S.A. 10:4-8(d).

It is possible, however, that a crisis may arise in the educational system of such urgency that an "immediate" meeting must be held to deal with it. Such situation would not permit the giving of "adequate" or 48-hour notice to the general public. Before determining to call a meeting without adequate public notice, the above provisions should be carefully considered. The information required by these statutory sections should be fully articulated before the meeting is called to assure that the requirements of the statute will be met.

IV

Your final inquiry concerns the scope of the term "agenda" as used in the Open Public Meetings Act. You specifically ask whether the term may be construed to mean the several sheets of paper which enumerate the items for consideration by the Board, or whether the term must be defined to include all the pages of descriptive materials provided to members of the Board.

At the outset it should be noted that agenda information need not be given where annual notice of regularly scheduled meetings, distributed in accordance with N.J.S.A. 10:4-18, includes the time, date and location of those meetings. The only

inclusion of the term "agenda" in the Open Public Meetings Act is within the definition of "adequate notice." As noted *ante*, N.J.S.A. 10:4-2(a) defines "adequate notice" as

"... written advance notice of at least 48 hours, giving the time, date, location and to the extent known, the *agenda* of any regular, special, or rescheduled meeting..." (Emphasis added)

The question of the scope of an agenda therefore is limited to the notice required to be given for those meetings whose time, date and location are not listed in the annual notice schedule.

There is no definition of "agenda" within the Public Meetings Law. Black's *Law Dictionary* (4th ed.), however, defines "agenda" as a memorandum of things to be done, as items of business or discussion to be brought at a meeting; a program consisting of such things. Webster's *Third New International Dictionary* (1965) defines agenda as a "memorandum book; a list or outline of things to be done, subjects to be discussed or business to be transacted." In common discourse, the work agenda clearly refers to the listing of items to be discussed by the Board and not to be supportive materials relative to such items. It is a cardinal rule of statutory construction that words and phrases:

"... shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language." N.J.S.A. 1:1-1.

The courts of this State have consistently held that words in a statute are to be given their ordinary and well understood meaning in the absence of an explicit indication of a special meaning. *Service Armament Co. v. Hyland*, 131 N.J. Super. 38 (App. Div. 1974); *Lopez v. Santiago*, 125 N.J. Super. 268 (App. Div. 1973). There is no indication within the instant statute that the word "agenda" is to be accorded any special meaning. It is, therefore, reasonable to conclude that the word agenda refers solely to the list of items to be discussed or acted upon at the meeting. The notice required by N.J.S.A. 10:4-8(d), therefore, need only contain a listing of the items which will be before the Board at the meeting and need not include the supportive or explanatory materials and reports relative to such items.

It should be noted, however, that if certain of these supportive or explanatory materials are "public records", as the term is defined in N.J.S.A. 47:1A-2, they are open to public inspection. Duplicates of such records may be purchased pursuant to the fee schedule set forth in this statutory provision.

CONCLUSION

Based upon the foregoing considerations, you are advised that:

1. The meetings of the Law Committee of the State Board of Education are not subject to the requirements of the Open Public Meetings Act since this sub-committee is not composed of an effective majority of Board membership and is a purely advisory body with no effective authority to affect personal rights or expend public moneys. It is impossible to determine whether sub-committees of the State Board or local boards of education are generally excluded from this Law since such determina-

tion is a factual one which turns upon the composition of such sub-committees and a full evaluation of their authority. With regard to the Agenda Committee of the State Board, its operation and function must be reviewed to determine whether it is an "advisory body" and thus exempt from the requirements of the Law.

2. Training and workshop sessions of both the State Board and local boards of education are generally subject to the provisions of the Open Public Meetings Law. Excepted from the application of the Law are conference-type meetings (open to three or more local boards of education) or sessions attended by less than an effective majority of the Board membership. Furthermore, if the subject matter of such meetings falls within the exceptions enumerated in N.J.S.A. 10:4-12(b), that portion of the workshop or training session dealing with such matter may be closed to the public if the procedures required by N.J.S.A. 10:4-13 are followed.

3. The State Board of Education can hold an "emergency meeting" without giving 48-hour notice where it complies with the specific requirements of N.J.S.A. 10:4-9(b). The information required by this statutory provision should be articulated before the emergency meeting is called to assure that the statutory requirements will be met.

4. Agenda information need not be given where annual notice of regularly scheduled meetings, distributed in accordance with N.J.S.A. 10:4-18, includes the time, date and location of those meetings. Where agenda information is required, the term "agenda" may be construed as referring to the list of items to be discussed or acted upon at a State Board meeting. If materials relative to agenda items are "public records" as defined in N.J.S.A. 47:1A-2, they are open to the public and duplicates may be purchased pursuant to the fee schedule set forth in such statute.

Very truly yours,

WILLIAM F. HYLAND
Attorney General

BY MARY ANN BURGESS
Deputy Attorney General

* However, if a superintendent were in attendance at a meeting of a local board of education, he would be a participant at a public meeting which meeting would be subject to the provisions of this Act.

** N.J.S.A. 10:4-11 provides:

"No person or public body shall fail to invite a portion of its members to a meeting for the purpose of circumventing the provisions of this act."