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STATE CAPITOL
PHOENIX, ARIZONA

August 29, 1975

DEPARTMENT OF LAW OPINION NO. 75-8 (R-10) (R75-81)

REQUESTED BY: PAUL R. BOYKIN
Executive Director
Arizona State Board of Medical Examiners

- QUESTIONS:**
1. Does the Arizona Open Meeting Law apply to the 90-10 agencies of this state?
 2. If the answer to the first question is yes, does the Open Meeting Law apply to the following:
 - A. Investigational proceedings of the Board of Medical Examiners?
 - B. Informal interview provided for in A.R.S. § 32-1451.B?
 - C. The personal deliberations and review of evidence by members of the Board of Medical Examiners following the completion of a hearing provided for in A.R.S. § 32-1451?

- ANSWERS:**
1. Yes. See Department of Law Opinion No. 75-7, issued on August 19, 1975.
 2. See body of opinion.

Since the Arizona State Board of Medical Examiners is a "governing body" as defined in the Open Meeting Act and since there is no exception to the Act for contested case or quasi-judicial proceedings (see Opinion No. 75-7), the Board is subject to the Act in all the cases described in Question 2 to

the extent that it is taking "legal action".^{1/} "Legal action" is defined in the Act as follows:

"Legal action" means a collective decision, commitment or promise made by a majority of the members of a governing body consistent with the constitution, charter or bylaws of such body, and the laws of this state.

A.R.S. § 38-431.2.

It is the opinion of this office that the term "legal action", as defined in A.R.S. § 38-431.2 must be construed to extend beyond the mere formal act of voting. Discussions and deliberations by members of the governing body prior to the final decision are an integral and necessary part of any "decision, commitment or promise", and we believe are included within the definition of "legal action". See Times Publishing Company v. Williams, 222 So.2d 470 (Fla. 1969).

The declaration of policy as set forth in § 1, Ch. 138, Laws 1962, provides compelling authority for this conclusion.

It is the public policy of this state that proceedings in meetings of governing bodies of the state and political subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this act that their official deliberations and proceedings be conducted openly. (Emphasis added.)

This section indicates a legislative intent to expose to public view all "official deliberations and proceedings" of

^{1/} It makes no difference what descriptive label or formality is accorded to the assemblage of board members. It may be called a formal or informal meeting or a luncheon. If legal action is taken, the assemblage is subject to the Act. See Sacramento Newspaper Guild v. Sacramento Board of Supervisors, 263 C.A. 41, 69 Cal.Rptr. 480, 487 (1968).

governing bodies. Likewise, A.R.S. § 38-431.01, which is the main operative section of the Open Meeting Act, provides in part that:

A. All official meetings at which any legal action is taken by governing bodies shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings. . . . (Emphasis added.)

Although the Act does not define "deliberations", it does define the term "proceedings" as follows:

"Proceedings" means the transaction of any functions affecting citizens of the state by an administrative or legislative body of the state or any of its counties or municipalities or other political subdivisions.

A.R.S. § 38-431.3.

"Deliberation" is defined in Black's Law Dictionary, 4th ed., as follows:

The act or process of deliberating. The act of weighing and examining the reasons for and against the contemplated act or course of conduct or a choice of acts or means.

The California Court of Appeals in the case of Sacramento Newspaper Guild v. Sacramento Board of Supervisors, 263 C.A. 41, 69 Cal.Rptr. 480 (1968), described the process of "deliberation" as follows:

To "deliberate" is to examine, weigh and reflect upon the reasons for or against the choice. [Citation omitted.] Public choices are shaped by reasons of facts, reasons of policy or both. Any of the agency's functions may include or depend upon the ascertainment of facts. [Citation

omitted.] Deliberation thus connotes not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision.

69 Cal.Rptr. at 485.

Accordingly, it is clear that the words "deliberations" and "proceedings" encompass the entire decision-making process.

Not only does the language used by the Legislature compel a broad interpretation of "legal action", the case law in other states leaves little room for argument. The Florida Supreme Court probably best described the rationale for extending the scope of activities to be covered by an open meeting law in the case of Times Publishing Company v. Williams, supra, wherein it stated:

Every thought, as well as every affirmative act, of a public official as it relates to and is within the scope of his official duties, is a matter of public concern; and it is the entire decision-making process that the legislature intended to affect by the enactment of the statute before us. This act is a declaration of public policy, the frustration of which constitutes irreparable injury to the public interest. Every step in the decision-making process, including the decision itself, is a necessary preliminary to formal action. It follows that each such step constitutes an "official act", an indispensable requisite to "formal action", within the meaning of the act.

* * *

It is our conclusion, therefore, that with one narrow exception which we will discuss later, the legislature intended the provisions of Chapter 67-356 to be applicable to every assemblage of a board or commission governed by the act at which any discussion, deliberation, decision, or

formal action is to be had, made or taken relating to, or within the scope of, the official duties or affairs of such body.

222 So.2d at 473-474.

In a recent case, the Supreme Court of Florida restated its interpretation of Florida's Open Meeting Law as follows:

One purpose of the government in the sunshine law was to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance. Rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. The statute should be construed so as to frustrate all evasive devices. This can be accomplished only by embracing the collective inquiry and discussion stages within the terms of the statute, as long as such inquiry and discussion is conducted by any committee or other authority adopted and established by a governmental agency, and relates to any matter on which foreseeable action is taken.

Town of Palm Beach v.
Gradison, 296 So.2d
473 (Fla. 1974).

The fact that the Legislature amended the Act in 1974 to bring within the coverage of the Act committees and subcommittees of governing bodies, provides further support for a broad interpretation of "legal action". The California Court of Appeals considered this point in the case of Sacramento Newspaper Guild v. Sacramento Board of Supervisors, supra.

Without troubling the lexicographers, one recognizes a committee as a subordinate body charged with investigating, considering and reporting to the parent body upon

a particular subject. Normally, committees investigate, consider and report, leaving the parent body to act. By the specific inclusion of committees and their meetings, the Brown Act [California's Open Meeting Act] demonstrates its general application to collective investigatory and consideration activity stopping short of official action.

69 Cal.Rptr. at 486.

The court went on to state that:

An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate those evasive devices. [Footnote omitted.] As operative criteria, formality and informality are alien to the law's design, exposing it to the very evasions it was designed to prevent. Construed in the light of the Brown Act's objectives, the term "meeting" extends to informal sessions or conferences of the board members designed for the discussion of public business. The Elks Club luncheon, attended by the Sacramento County board of supervisors, was such a meeting.

69 Cal.Rptr. at 487.

It is also instructive to note that the Legislature in amending the Act in 1974 provided expressly for the use of executive sessions under five different circumstances. Specifically, A.R.S. § 38-431.03, added Laws 1974, provides for the use of executive sessions for the "discussion or consideration" of personnel matters (paragraph 1) and confidential records (paragraph 2) and for the "discussion or consultation" with attorneys for purposes of obtaining

legal advice (paragraph 3), with representatives of employee organizations (paragraph 4) and for purposes of international and interstate negotiations (paragraph 5). This section also prohibits the governing body from taking any "final action or making any final decision" in the executive session. Obviously the Legislature, in making an express exception to the open meeting requirement for certain types of "discussions, considerations and consultation", must have considered such conduct generally subject to the requirements of the Act. In other words, to construe "legal action" to include only the final decision of a body, to the exclusion of the deliberations leading up to the decision would render the executive session provisions found in A.R.S. § 38-431.03 idle and nugatory. Such a construction must be avoided. State v. Edwards, 103 Ariz. 487, 446 P.2d 1 (1968).

Not all "discussions, considerations and consultations", however, are required to be done in an open meeting. The definition of "legal action" contemplates actions by "a majority of the members of a governing body." Accordingly, it is our opinion that all discussions, deliberations, considerations or consultations among a majority of the members of a governing body regarding matters which may foreseeably require final action or a final decision of the governing body, constitute "legal action" and must be conducted in an open meeting, unless an executive session is authorized. It should be pointed out, however, that such discussions and deliberations between less than a majority of the members of a governing body, or other devices, when used to circumvent the purposes of the Act, would constitute a violation which would subject the governing body and the participating members to the several sanctions provided for in the Act. See Town of Palm Beach v. Gradison, supra.

In regard to your second question, it is our opinion that, to the extent a majority of the members of the Board consider matters in investigational proceedings and informal interviews which may foreseeably require the Board to take final action or make a final decision, the members must conduct those proceedings in an open meeting, unless an executive session is authorized.

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The final example given in Question 2 of the deliberations and review of evidence by members of the Board following an adjudicatory hearing is subject to the requirements of the Act and must be conducted in an open meeting.

Respectfully submitted,



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