



DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 27, 1985

MEMORANDUM

To: Jim Lytle, Assistant Counsel to the Governor
From: Bob Freeman, Executive Director *BF*
Subject: Political Caucuses

In conjunction with our conversation of Tuesday regarding the recent amendment to the Open Meetings Law, I would like to offer the following observations and suggestions.

First, your concern and sensitivity are much appreciated. As we discussed, although both houses of the Legislature passed the bill by overwhelming margins, the Governor has borne the brunt of the criticism. From my perspective, the issue has not yet become highly significant in terms of the actual operation of government. However, I believe that it has become important in terms of philosophy and image. I am sure that you know that, as both Secretary of State and Lieutenant Governor, Governor Cuomo was a vocal supporter of the Open Meetings Law and gained a well deserved reputation as a champion of open government. Perhaps one of the reasons for the criticism involves the apparent inconsistency with positions taken in the past.

Second, despite the reaction to the legislation, there have been few reports indicating that closed political caucuses have indeed been held. Having spoken with a variety of municipal officials, I have the sense that they feel somewhat uncomfortable about the legislation. Many have publicly expressed opposition to it; others have told me privately that they think the amendment goes too far.

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The reaction of the news media was, in my opinion, predictable. Since the courts' determinations concerning political caucuses expanded rights of access in accordance with the stated intent of the Law (see section 100), any constriction of rights would be viewed with disfavor. Understandably the amendment has to be treated seriously by the media, especially local newspapers, for its potential effect involves a diminution of the media's capacity to get the news. In short, if a caucus is held in private and without any notice, it may be an event that nobody knows about. Moreover, at an ensuing open meeting, there may be only a vote without discussion. As such, the deliberative process, the heart of the Open Meetings Law, may be outside of any public scrutiny.

Notwithstanding what appears to be minimal use or reliance upon the exemption to date, the possibility remains that caucuses will be held to close meetings that would otherwise be open. Moreover, I would conjecture that closed caucuses will be held to consider issues that are most important to the public. For example, enclosed is a copy of a recent article concerning a controversy involving two municipalities in Rensselaer County. It is obvious that one of the public bodies wants to discuss the issue in private. If no basis for entry into executive session can be justified, the alternative, the legal loophole in the Law, may be a political caucus.

In my opinion, the amendment simply makes it too easy for a public body (or a majority of its members) to exclude the public from its most significant deliberations. Further, even though reports of political caucuses have been few, it is difficult, if not impossible, to know when closed caucuses occur, for they are "exempt" from the Law. The procedural requirements otherwise applicable to meetings (i.e., notice, motions prior to entry into executive sessions, minute taking) are completely absent if and when political caucuses are conducted.

Third, viewing the issue in terms of amending the Open Meetings Law, distinctions can be made between the State Legislature and other bodies with similar functions at the local government level. Perhaps most significant is the fact that the State Legislature is bicameral. Any legislation, before it is passed, must be made public and reviewed by both houses of the Legislature. Further, the two houses of the Legislature often engage in a "debate" regarding an issue, either on the floor or elsewhere. As such, the public has an opportunity to know that an issue has come before the State Legislature.

Moreover, the activities of the State Legislature are followed by dozens of members of the news media who have the capacity to learn about legislation and report to the public. In addition, the public can express its views to the Governor prior to his action. Therefore, there are at least three opportunities and often more (due to action taken in committee before a bill reaches the floor) to express concern before legislation is enacted. At the local level, there may be none before action is taken.

In terms of the closed caucuses of the State Legislature, a rationale for closing them might be based upon the bicameral aspect of the Legislature. In short, it has been contended that an open caucus of either house might telegraph the strategy of one house to the other. The impact of that type of disclosure is particularly significant since the two houses of the Legislature are led by opposing political parties.

At the local government level, all legislative bodies are unicameral. The same opportunity for debate or public knowledge of the issues does not exist, for a local legislative body might deal with an issue only once, and it need not disclose the substance of its proposed action prior to the taking of action.

The amendment enables a majority of members of local legislative bodies to discuss virtually all issues that come before them in private before any public disclosure of information regarding the issues. Thereafter, its public response to an issue might involve only a rubber stamping of a consensus reached during a closed caucus. Further, as suggested earlier, since the caucuses are completely exempt from the Law, there would be no requirement that notice be given or minutes be taken. Therefore, deliberations leading to decisions could be conducted in private in their entirety.

Assuming that the preceding rationale justifies treatment of the State Legislature different from that of local legislative bodies, the most obvious method of changing the law would involve an amendment that limits the applicability of the exemption to caucuses of the State Legislature. Even if the Law is silent with respect to political caucuses relative to local legislative bodies, I believe that they could nonetheless caucus in private to discuss political party business. It is noted that the term "meeting" is defined to mean "the official convening of a public body for the purpose of conducting public

business". Therefore, if, for example, a majority of members of a public body met to discuss purely political party business, rather than business associated with its public duties, the Open Meetings Law would not likely apply, and the effect of the exemption, as it pertains to political party business, would be preserved.

An alternative proposal might be based upon the fact that numerous local legislative bodies are represented by members of only one party or a substantial majority of members of one party. Perhaps language could be added to the legislation in an effort to ensure that the deliberative process should generally be open. For instance, to attempt to prevent a lopsided majority of a public body from routinely deliberating in a closed caucus and thereafter ratifying its decisions without public discussion, the following language or something like it might be added to the exemption regarding political caucuses:

"The foregoing shall not apply to a meeting of at least two-thirds of the voting membership of any unicameral legislative body held to discuss public business."

Under the proposal, political party business would remain exempt from the law; at the same time, public business discussed by a substantial majority of a local legislative body would be subject to the Open Meetings Law.

I realize that the establishment of a a dividing line of two-thirds could be viewed as somewhat arbitrary. However, any similar line of demarcation may be equally arbitrary. A rationale for two-thirds might be based upon a contention that an affirmative vote of two-thirds of the membership of a public body is the maximum necessary to take action (as in the case of bonding resolutions). Moreover, as a matter of common sense, I wonder whether it could be effectively argued that a gathering of at least two-thirds of the members of a public body to discuss public business is not, in actuality, a "meeting", irrespective of the party designation of the members.

Lastly, it has been stated that the amendment merely clarifies the original intent of the Legislature. If indeed it was intended that party members could discuss any topic at any time in private, including public business, I feel that such intent represents bad public policy. Taken to an extreme, the use of political caucuses could render the Open Meetings

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Law all but meaningless and make a sham of the legislative declaration appearing in section 100 of the Law. At the local government level in particular, the Open Meetings Law in my opinion should serve as a vehicle by which the public can know that principles of democracy and representative government are viable in New York.

I hope that I have been of some assistance and look forward to discussing the matter with you.

RJF:jm

White

State of New York
COMMITTEE ON OPEN GOVERNMENT
MEMORANDUM

TO: Jim Lytle
FROM: Bob Freeman *BF*
SUBJECT: Political Caucus Legislation

November 12, 1985

As promised, attached for your review and comment is a draft proposal concerning political caucuses that contains the elements raised in my memo to you of October 23.

The proposal follows section 105 concerning executive sessions and could be added as a new section 105-A. For purposes of consistency, some of the language is similar to existing provisions concerning entry into an executive session. Purely political party business would remain outside the scope of the Open Meetings Law, while purely public business would likely be brought back into the law. In the "hybrid" situation involving a discussion of political party strategy or position, like an executive session, a political caucus would be treated as a portion of an open meeting from which the public could be excluded, following a public vote to conduct a closed caucus carried by a majority of party members. Under the proposal, a closed caucus could be held under certain circumstances by local legislative bodies; yet the public would have a right to know when and why it is held. Further, in recognition of the manner in which the State Legislature functions, the procedural requirements imposed upon local legislative bodies would not apply to the Senate or the Assembly. In short, while the standard for conducting a closed caucus would apply equally to all legislative bodies, the Senate and Assembly could conduct their caucuses without having first convened an open meeting. Their practices, therefore, could remain as they are.

If the proposal is acceptable to the Governor and the leadership, the current language of section 108(2) could be repealed.

Lastly, tied to the proposal, and perhaps part of a "package", should be the equivalent of A.5856, the Governor's program legislation to strengthen the Open Meetings Law. As such, subdivision (6) of the proposal is intended to refer to a bill that is not yet part of the Law.

I would appreciate your comments.

RJF:ew

Section 105-A. Political Caucuses

1. When at least a majority of the total membership of a legislative body convenes, such a gathering is rebuttably presumed to be a meeting held for the purpose of conducting public business.

2. As used in this article, "political caucus" means a gathering of members of the Senate or Assembly of the state of New York, or of the legislative body of a county, city, town or village, who are members or adherents of one political party, as defined by sub-division three of section 1-104 of the Election Law, for the purpose of discussing political party strategy or political party position in relation to the responsibility, authority, powers or duties of such legislative body.

3. Upon a majority vote of the members of a political party who serve on a legislative body, taken in an open meeting pursuant to a motion identifying the general area of the subject to be considered, a political caucus may be held, during which the public and other members of the legislative body may be excluded. Following a political caucus, a meeting of the legislative body shall be resumed.

4. Nothing in this article shall be construed as extending to discussions of purely political party business, such as nomination of candidates, fund-raising activities of a political party, and similar partisan matters.

5. The provisions of subdivision three of this section shall not apply to the Senate or Assembly of the State of New York.

6. Any gathering of less than a majority of the total membership of a legislative body intentionally held to evade the purposes of this article shall be subject to the provisions of subdivision (2) of section 107 of this article.*

*The portion of A.5856 involving section 107(2) is reproduced below with a modification that I have twice underlined.

2. In any proceeding brought pursuant to this section, costs and reasonable [attorney] attorneys' fees may be awarded by the court, in its discretion, to the successful party. In addition, if the court finds that the public body or any of its members engaged in a pattern of violations or a flagrant disregard of this article, it may impose a fine of up to one hundred dollars payable by each member who knowingly or intentionally engages in such violation, notwithstanding any provision of law to the contrary regarding indemnification of such member.