

## THE CHANGING WEATHER FORECAST: GOVERNMENT IN THE SUNSHINE IN THE 1990s—AN ANALYSIS OF STATE SUNSHINE LAWS

All fifty states and the District of Columbia have enacted open meeting statutes.<sup>1</sup> Open meeting laws mandate that all meetings of specified governmental bodies must be open to the public.<sup>2</sup> Although the requirements of open meeting statutes vary from state to state, the statutes' common purpose is to promote the democratic system of government by ensuring the free flow of information and encouraging confidence in elected officials.<sup>3</sup> However, despite the existence of these laws meetings of public officials are not always open to the public.<sup>4</sup> Open meeting statutes frequently are written poorly and contain numerous loopholes.<sup>5</sup> These inadequacies allow governmental bodies to meet privately within the confines of the law, even though private meetings violate the purpose and spirit of the law.

This Note evaluates the effectiveness of state open meeting statutes and analyzes recent reforms in open meeting legislation. Part I of this Note examines the history of open meetings and addresses the necessity for open meeting laws. Part II examines the structure of open meeting statutes. Part III evaluates whether open meeting statutes ensure open meetings and explores recent developments in open meeting laws. Part IV recommends fundamental changes in state open meeting laws.<sup>6</sup>

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1. Open meeting statutes also are referred to as the "Freedom of Information Act," the "Sunshine Law," or the "Right to Know Law." New York, the last state to pass such a law, enacted its open meeting statute in 1976. R. James Assaf, Note, *Mr. Smith Comes Home: The Constitutional Presumption of Openness in Local Legislative Meetings*, 40 CASE W. RES. L. REV. 227, 229 (1989). Congress passed a federal open meeting statute, the Freedom of Information Act in 1965. 5 U.S.C. § 552b (1988). The Freedom of Information Act requires federal governmental agencies to hold open meetings. *Id.*

2. The Massachusetts open meeting statute is a typical state statute. It states that "[a]ll meetings of a governmental body shall be open to the public and any person shall be permitted to attend any meeting except as otherwise provided by this section." MASS. ANN. LAWS ch. 30A, § 11A 1/2 (Law. Co-op. 1983 & Supp. 1993).

3. See *infra* notes 7-17 and accompanying text.

4. See *infra* notes 52-65 and accompanying text.

5. See *infra* notes 78-83 and accompanying text.

6. This Note discusses state open meeting laws and how they affect state governments and their political subdivisions, including counties and municipalities. For a discussion of the federal open meeting statute, see David A. Barrett, Note, *Facilitating Government Decision Making: Distinguishing Between Meetings and Nonmeetings Under the Federal Sunshine Act*, 66 TEX. L. REV. 1195 (1988);

## I. THE NECESSITY FOR OPENNESS IN PUBLIC AFFAIRS

The United States is a representative democracy.<sup>7</sup> The people must be informed to exercise effectively their right to self-government.<sup>8</sup> Open meeting statutes ensure the free flow of information to the electorate by requiring governmental bodies to hold public meetings.<sup>9</sup> Open meetings allow the public to observe how their elected officials vote on issues. This information allows members of the public to determine if public officials are truly acting in a representative capacity. Public meetings guard against corruption and deceit and promote public faith in government.<sup>10</sup> Requiring governmental bodies to transact public business in open meetings also allows taxpayers to monitor the expenditure of public funds.<sup>11</sup>

Despite the importance of open meetings, public bodies in the United States historically have not been required to hold open meetings. Although

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Susan T. Stephenson, Note, *Government in the Sunshine Act: Opening Federal Agency Meetings*, 26 AM. U. L. REV. 154 (1976).

7. Webster's Dictionary defines "democracy" as a "government in which the people hold the ruling power either directly or through elected representatives." WEBSTER'S NEW WORLD DICTIONARY 375 (2d College ed. 1986). The term "representative democracy" refers specifically to a democracy in which the citizens act through their elected representatives.

8. The principle that self-governance depends on an informed citizenry is widely accepted. Perhaps the most famous and frequently quoted expression of the principle appears in James Madison's letter to W.T. Barry. Madison wrote, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; And the people who mean to be their own Governors, must arm themselves with the power, which knowledge gives." Letter from James Madison to W.T. Barry (Aug. 4, 1822), in THE COMPLETE MADISON 337 (Padover ed. 1953).

9. This statement assumes that open meeting statutes are effectively opening meetings of governmental bodies to the public. See *infra* notes 78-134 and accompanying text for an analysis of the effectiveness of open meeting statutes.

10. Both the United States and Great Britain have a long history of closed government meetings and an equally long history of public opposition to and distrust of a government that operates behind closed doors. In the early 1700s, the press in both Great Britain and the colonies defied government bans on the reporting of votes and debates of governing bodies. 112 CONG. REC. 13643-44 (1966), reprinted in STAFF OF SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 50-51 (Comm. Print 1974).

11. In addition to these generally recognized arguments in favor of open meetings, a student commentary on public meeting laws lists additional arguments in favor of open meetings. The author argued that open meetings allow public officials to gauge public sentiment, thus encouraging public officials to be more responsive to their constituents; promote more accurate reporting of meetings; and allow the public to realize the difficult issues facing public officials. The student argued that one result of such knowledge is increased public acceptance of less than desirable outcomes. Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199, 1201 (1962) [hereinafter *Open Meeting Statutes*].

the Founding Fathers recognized the importance of public participation in the democratic process,<sup>12</sup> they closed the Constitutional Convention to the public.<sup>13</sup> Deliberations of the House of Representatives and the Senate were not opened to reporters until 1790 and 1792 respectively.<sup>14</sup>

At the local level, however, the United States traditionally has allowed public access to meetings of governmental bodies. Many towns and cities<sup>15</sup> have a long history of public participation through town meetings.<sup>16</sup> However, state and local governing bodies were not required to open their doors under state open meeting statutes until the 1950s and 1960s.<sup>17</sup> Today all fifty states and the District of Columbia have open meeting statutes governing state and local legislative bodies.<sup>18</sup>

## II. STATUTORY CONTENT OF OPEN MEETING LAWS

Although open meeting statutes vary from state to state, most statutes contain both procedural and substantive provisions.<sup>19</sup> Open meeting

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12. The Founding Fathers argued for open meetings as a means of informing the public. Thomas Jefferson advocated public admission to meetings as a limit on government's power because the public would ensure the propriety of government action and facilitate discussion. Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 892 (1986). James Madison wrote on the necessity of public access to information and stated the importance of knowledge to the democratic process. See *supra* note 8.

13. Some have suggested that the Federalist Papers were necessary to gain acceptance of the Constitution because the Convention was closed to the public. *Open Meeting Statutes*, *supra* note 11, at 1202 n.18. Thomas Jefferson regretted the closure of the Convention. He wrote, "Nothing can justify this example but the innocence of their intentions, and ignorance of the value of public discussions." Sunstein, *supra* note 12, at 896 n.29 (1986) (quoting letter from Thomas Jefferson to John Adams (Aug. 30, 1787), reprinted in 1 THE ADAMS-JEFFERSON LETTERS 194, 196 (L. Cappon ed., 1959)).

14. Assaf, *supra* note 1, at 242-43.

15. Most local governing bodies were not legally obligated to hold open meetings. Although many municipalities held open town meetings, a significant number of cities kept their doors closed. See, e.g., *Open Meeting Statutes*, *supra* note 11, at 1199.

16. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 62-70 (J.P. Mayor ed., 1969).

17. In 1952, only one state had an open meeting law applicable to both state and local governmental bodies. In 1962, twenty-six states had such statutes. *Open Meeting Statutes*, *supra* note 11, at 1199-1200.

18. The press spearheaded the movement for open meeting laws. In 1950, the Freedom of Information Committee of the American Society of Newspaper Editors began a crusade to open the governmental process to the press and the public. The crusade resulted in the enactment of numerous open meeting statutes. *Open Meeting Statutes*, *supra* note 11, at 1199. Today, thirty-four state constitutions require open meetings of legislative bodies. *Id.* at 1203.

19. Courts have upheld open meeting statutes against attacks alleging that the statutes violate the United States Constitution, in particular the Fourteenth Amendment. Courts also have upheld open meeting statutes against claims that such statutes are too vague and, therefore, do not afford procedural due process for those who may be subject to their provisions. See, e.g., *State ex rel. Murray v.*

statutes commonly include a description of the governmental bodies required to hold open meetings,<sup>20</sup> a definition of the term "meeting,"<sup>21</sup> procedural requirements,<sup>22</sup> specific exemptions,<sup>23</sup> and remedies for violations of the statute.<sup>24</sup>

### A. *Applicability to Particular Public Bodies*

Open meeting statutes may apply to a wide range of governmental bodies.<sup>25</sup> State open meeting statutes specify which public bodies are required to hold open meetings. The public bodies compelled to hold open meetings differ depending upon the statute, but open meeting laws often embrace legislative, executive or administrative bodies.<sup>26</sup> Depending upon the statute, open meeting laws may apply to state or local public bodies, or

Palmgren, 646 P.2d 1091 (Kan. 1982), *appeal dismissed*, 459 U.S. 1081 (1982); Board of Pub. Instruction v. Doran, 224 So. 2d 693 (Fla. 1969); Raton Pub. Serv. Co. v. Hobbes, 417 P.2d 32 (N.M. 1966). An Illinois Appellate court upheld Illinois' open meeting statute against an equal protection challenge based on the statute's application to a city council but not to the state legislature. *People ex rel. Hopf v. Barger*, 332 N.E.2d 649 (Ill. App. Ct. 1979). Open meeting laws also have been upheld against allegations that such statutes violate the First Amendment's guarantees of free speech and free assembly. *See, e.g., People ex rel. Difanis v. Barr*, 397 N.E.2d 895 (Ill. App. Ct. 1975), *aff'd*, 414 N.E.2d 731 (Ill. 1980); *Dorrier v. Dark*, 537 S.W.2d 888 (Tenn. 1976) (finding that First Amendment protects expression of ideas and does not encompass a right to conduct public business in a closed meeting).

20. *See infra* notes 25-34 and accompanying text.

21. *See infra* notes 35-40 and accompanying text.

22. *See infra* notes 41-51 and accompanying text.

23. *See infra* notes 52-65 and accompanying text.

24. *See infra* notes 66-77 and accompanying text. These are general characteristics that vary depending on the individual state's open meeting statute. To determine the requirements of a particular state's open meeting law, consult the specific state's statute.

25. Courts have held that state open meeting statutes apply to a variety of governmental bodies including the legislative bodies of municipalities and counties, zoning boards of adjustment, housing authorities and university boards of regents. *See Laman v. McCord*, 432 S.W.2d 753 (Ark. 1968) (holding that open meeting statute applies to a municipality's governing body); *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 60 Cal. Rptr. 480 (Cal. Ct. App. 1968) (stating that Brown Act applies to legislative bodies of local agencies); *Wolf v. Zoning Bd. of Adjustment*, 192 A.2d 305 (N.J. Super. Ct. App. Div. 1963) (applying statute to Board of Adjustment); *Bogert v. Allentown Hous. Auth.*, 231 A.2d 147 (Pa. 1967) (applying statute to city housing authority); *Arkansas Gazette Co. v. Pickens*, 522 S.W.2d 350 (Ark. 1975) (applying open meeting statute to University Board of Trustees).

26. For example, the Indiana Open Door Law defines "public agency" as "[a]ny board, commission, department, agency, authority, or other entity, by whatever name designated, exercising a portion of the executive, administrative, or legislative power of the state. . . ." IND. CODE ANN. § 5-14-1.5-2 (Burns Supp. 1992).

both.<sup>27</sup> Statutes may specifically designate governing bodies which must hold open meetings.<sup>28</sup> Statutes also may require a governmental body to hold open meetings if it is supported by public funds or it disburses public funds.<sup>29</sup> In many instances, open meeting statutes include subordinate bodies or subagencies of covered bodies.<sup>30</sup>

Open meeting statutes commonly exclude several types of governmental bodies.<sup>31</sup> Almost all states exempt judicial proceedings.<sup>32</sup> Many states also exempt boards or entities engaged in quasi-judicial decision-making.<sup>33</sup> Statutes also commonly exempt advisory boards and committees that possess no authority and exist for the purpose of counselling other bodies even if these boards and committees were formed specifically to advise a public body which must comply with the law.<sup>34</sup>

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27. Many state statutes do not apply to the state legislature or state agencies. *See, e.g.*, DEL. CODE ANN. tit. 29, § 10002(a) (1974) ("Public body shall not include the General Assembly of the State, nor any caucus thereof, or committee, subcommittee, ad hoc committee, special committee or temporary committee."); ILL. ANN. STAT. ch. 102, para. 41.02 (Smith-Hurd 1987) ("Public body" includes all legislative, executive, administrative or advisory bodies of the state, counties, townships, cities, villages. . . . except the General Assembly and committees or commissions thereof."). The exemption of numerous governing bodies is a fundamental flaw in many state open meeting statutes. *See infra* notes 95-102 and accompanying text.

28. *See, e.g.*, ALA. CODE § 13A-14-2 (1982).

29. *See, e.g.*, ALASKA STAT. § 44.62.310(a) (1989) (including all bodies "supported in whole or in part by public money or authorized to spend public money").

30. *See, e.g.*, ALASKA STAT. § 44.62.310 (1989); CAL. GOV'T CODE §§ 54952.2-.3 (West 1983); KY. REV. STAT. ANN. § 61.805(2)(g) (Michie/Bobbs-Merrill Supp. 1982).

31. In addition to express exemptions for specific governmental bodies, open meeting statutes commonly exclude public bodies in two ways. Either the governmental body does not satisfy the definition of "public bodies" covered by the statute or the governmental body is subject to the open meeting law but exempt from its requirements because the meeting's subject matter falls within an enumerated exemption that allows a specific meeting to be closed. *See infra* notes 52-65 and accompanying text.

32. *See, e.g.*, HAW. REV. STAT. § 92-6(a)(1) (1985); MASS. ANN. LAWS ch. 30A, § 11A (Law. Co-op. 1983); KY. REV. STAT. ANN. § 61.810(j) (Michie/Bobbs-Merrill Supp. 1992).

33. In *Concerned Citizens v. Town of Guilderland*, 458 N.Y.S.2d 13 (N.Y. App. Div. 1982), the court held that when a zoning board met in a closed session to weigh evidence previously presented at an open meeting, the closed session was judicial in nature and was not required to be open for public inspection. *Id.* at 15-16. In addition, state statutes may specifically exempt meetings in which governmental bodies are performing quasi-judicial functions. *See* ALASKA STAT. § 44.62.310(d)(1) (1989); MD. CODE ANN., STATE GOV'T § 10-503(a)(1)(iii) (1993).

34. In *Goodson Todman Enters., Ltd. v. Town Bd. of Milan*, 542 N.Y.S.2d 373 (N.Y. App. Div.), *appeal denied*, 547 N.Y.S.2d 848 (N.Y. App. Div. 1989), the court held that the Zoning Revision Committee, which was created solely to recommend changes in the town zoning ordinance, was not legally required to hold open meetings. The court was persuaded by the facts that the committee members did not have fixed terms, the committee possessed no power to implement its recommendations, and the committee existed at the discretion of the town board. *Id.* at 374.

### *B. Actions Governed by Open Meeting Statutes*

Most open meeting statutes apply only to gatherings which meet the statutory definition of "meeting." To qualify as a "meeting," a quorum typically must be present.<sup>35</sup> In addition, the term "meeting" usually encompasses only gatherings at which deliberation or action on a public matter will occur.<sup>36</sup> Open meeting statutes normally extend not only to gatherings of public bodies for formal action,<sup>37</sup> but also to gatherings for purposes other than formal action.<sup>38</sup> Many statutes mandate that all deliberations and discussions on public issues be conducted at a meeting open to the public.<sup>39</sup> Most state statutes, however, exempt chance meetings and encounters or social gatherings.<sup>40</sup>

### *C. Procedural Requirements of Open Meeting Laws*

Open meeting laws frequently contain procedural requirements in addition to substantive requirements. In particular, virtually all open

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35. See, e.g., CAL. GOV'T CODE § 54952.6 (West 1983); N.Y. PUB. OFF. LAW § 102 (McKinney 1988); MICH. COMP. LAWS ANN. § 15.262(b) (West 1981).

36. See *supra* note 35.

37. This Note considers voting, enacting regulations and ordinances, and adjudicating individual rights as formal action of a public body. Formal action does not include discussion or deliberation.

38. See *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 69 Cal. Rptr. 480 (Cal. Ct. App. 1965) (overruling prior precedent holding open meeting statute applicable only to formal meetings and stating that legislative amendment to Brown Act opened all deliberations and final actions to public); *Board of Pub. Instruction v. Doran*, 224 So. 2d 693 (Fla. 1969) (finding that when public body deals with a matter which could foreseeably be the subject of formal action the gathering must be open to the public). But see *Schults v. Bd. of Educ.*, 205 A.2d 762 (N.J. Super. Ct. App. Div. 1964), *aff'd*, 210 A.2d 762 (N.J. 1965) (holding that closed conference did not violate open meeting statute when no official action was taken); *Beacon Journal Publishing Co. v. Akron*, 209 N.E.2d 399 (Ohio 1965) (holding that language not allowing any "resolution, rule, regulation or formal action" to be adopted at executive session limited public meeting statute to gatherings at which such actions were to be taken).

39. See *Sacramento Newspaper Guild*, 69 Cal. Rptr. at 490 (finding that the term "meeting" extended to all sessions or conferences designed for the discussion of public business); *Doran*, 224 So. 2d at 693 (finding that "public meeting" was intended to cover any meeting at which the public body could discuss a matter that the body foreseeably may act on in the future); ARIZ REV. STAT. ANN. § 38-431 (1985) (defining a meeting to include deliberations with respect to contemplated legal action).

40. Almost all open meeting statutes exclude social gatherings and chance meetings. See, e.g., IOWA CODE ANN. § 21.2(2) (West 1989) ("Meetings shall not include a gathering of members of a governmental body for purely . . . social purposes. . ."); IND. CODE ANN. § 5-14-1.5-2(c)(1) (Burns Supp. 1992) (stating that "meeting" does not include "[a]ny social or chance gathering not intended to avoid this chapter").

meeting statutes include a notice provision.<sup>41</sup> Notice provisions require a governmental body to notify the public of a pending open session. Notice provisions specify the minimum number of hours or days that notice must be posted before a public meeting<sup>42</sup> and the location of the notice.<sup>43</sup> These provisions also may require the public body to post the meeting's agenda.<sup>44</sup> Notices must state the time, date and location of public meetings.<sup>45</sup>

Many state statutes require governmental bodies to record their proceedings or to take written minutes of open meetings.<sup>46</sup> Normally, written minutes must be available for public inspection following the meeting.<sup>47</sup> Although the required content of written minutes differs depending upon the statute, written minutes typically must contain a description of all actions taken or matters discussed, a list of members present and absent, and a list of how each individual member voted on proposals.<sup>48</sup>

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41. See, e.g., MICH. COMP. LAWS ANN. § 15.264 (West Supp. 1992); ARIZ. REV. STAT. ANN. § 38-431.02 (1985); ME. REV. STAT. ANN. tit. 1 § 406 (West 1989). In 1962, only six of the twenty-six states which had open meeting statutes had notice provisions. *Open Meeting Statutes, supra* note 11, at 1207.

42. See, e.g., ARIZ. REV. STAT. ANN. § 38-431.02(C) (1985) (requiring notice to be posted at least twenty-four hours in advance of a public meeting); MASS. ANN. LAWS ch. 30A, § 11A 1/2 (Law. Co-op. 1983) (requiring a minimum of forty-eight hours notice before a public meeting).

43. Typically open meeting statutes provide that the governmental body shall designate the location of posted notices. See, e.g., COLO. REV. STAT. ANN. § 24-6-402(2)(c) (West Supp. 1992). *But see* MASS. ANN. LAWS ch. 30A, § 11A 1/2 (Law. Co-op. 1983) (requiring notice to be posted in the office of the executive office of administration and finance); MD. CODE ANN., STATE GOV'T § 10-506(c) (1993) (allowing publication in the *Maryland Register* or delivery to a representative of the news media who regularly reports on sessions of the public body); MICH. COMP. LAWS ANN. § 15.264(b) (West Supp. 1992) (allowing notice to be posted in the principal office of the public body and any other appropriate location and to be broadcast on cable television).

44. See, e.g., ARIZ. REV. STAT. ANN. § 38-431.02(G) (1985); COLO. REV. STAT. ANN. § 24-6-402(c) (West Supp. 1992).

45. See, e.g., MASS. ANN. LAWS ch. 30A, § 11A 1/2 (Law. Co-op. 1983); MD. CODE ANN., STATE GOV'T, § 10-506(b)(2) (1984). Some statutes, in the case of an emergency, provide only for notice practicable under the circumstances. See, e.g., ARIZ. REV. STAT. § 38-431.02(D) (1985).

46. See, e.g., ARIZ. REV. STAT. ANN. § 38-431.01(B) (1985); MASS. ANN. LAWS ch. 30A, § 11A 1/2 (Law. Co-op. 1983); MD. CODE ANN., STATE GOV'T § 10-509 (1993); MICH. COMP. LAWS ANN. § 15.269(1) (West Supp. 1992).

47. See e.g., COLO. REV. STAT. ANN. § 24-6-402(d) (West Supp. 1992); MASS. ANN. LAWS ch. 30A, § 11A 1/2 (Law. Co-op. 1983); MD. CODE ANN., STATE GOV'T § 10-509 (1993); MICH. COMP. LAWS ANN. § 15.269(1) (West Supp. 1992).

48. See, e.g., MASS. ANN. LAWS ch. 30A, § 11A 1/2 (Law. Co-op. 1983) ("A governmental body shall maintain accurate records of its meetings, setting forth the date, time, place, members present or absent and action taken at each meeting, including executive sessions."); MICH. COMP. LAWS ANN. § 15.269(1) (West Supp. 1992) ("Each public body shall keep minutes of each meeting showing the date,

Open meeting statutes may contain several other types of procedural requirements. Some open meeting acts require that all officials of affected governmental bodies receive a copy of the act.<sup>49</sup> Some statutes allow recording, videotaping, photographing, or broadcasting of public meetings.<sup>50</sup> In addition, open meeting laws may prohibit governmental bodies from requiring individuals to register for admittance to meetings which under state law must be open to the public.<sup>51</sup>

#### *D. Statutory Exemptions to Open Meeting Requirements*<sup>52</sup>

All state open meeting laws contain exemptions allowing closed sessions in certain circumstances.<sup>53</sup> Common statutory exemptions include discussions of real estate transactions,<sup>54</sup> evaluations of personnel matters,<sup>55</sup> deliberations about the marketing of public securities,<sup>56</sup> discussions with legal counsel or staff about pending litigation,<sup>57</sup> conferences concerning matters of public security,<sup>58</sup> negotiations concerning collective bargaining,<sup>59</sup> and deliberations legally required to be confidential.<sup>60</sup>

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time, place, members present, members absent, [and] any decisions made at a meeting open to the public. . . . The minutes shall include all roll call votes taken at the meeting.”)

49. *See, e.g.*, MASS. ANN. LAWS ch. 30A, § 11A 1/2 (Law. Co-op. 1983). The provision’s purpose is to ensure that public officials of governing bodies subject to the open meeting statute are familiar with its requirements.

50. *See, e.g.*, MD. CODE ANN., STATE GOV’T § 10-507(b) (1993) (allowing governing body to adopt reasonable rules regarding recording, videotaping, broadcasting, and televising); MICH. COMP. LAWS ANN. § 15.263(1) (West Supp. 1992) (“The right of a person to attend a meeting of a public body includes the right to tape-record, to videotape, to broadcast live on radio, and to telecast live on television the proceedings of a public body at a public meeting.”).

51. *See, e.g.*, MICH. COMP. LAWS ANN. § 15.263(4) (West Supp. 1992).

52. Under statutory exceptions to open meeting laws, public bodies which must hold open meetings may close a session to discuss a topic which is specifically exempted from the open meeting requirement.

53. The Maryland statutory exemptions are typical of most open meeting statutes. MD. CODE ANN., STATE GOV’T § 10-508(a) (1993).

54. *See, e.g.*, MASS. ANN. LAWS ch. 30A, § 11A 1/2(6) (Law. Co-op. 1983); MD. CODE ANN., STATE GOV’T § 10-508(a)(3) (1993); MICH. COMP. LAWS ANN. § 15.268(d) (West Supp. 1992).

55. *See, e.g.*, MICH. COMP. LAWS ANN. § 15.268(a) (West Supp. 1992); MASS. ANN. LAWS ch. 30A, § 11A 1/2(2) (Law. Co-op. 1983); MD. CODE ANN., STATE GOV’T § 10-508(a)(1)(i) (1993).

56. *See, e.g.*, MD. CODE ANN., STATE GOV’T § 10-508(a)(6) (1993).

57. *See, e.g., id.* § 10-508(a)(7); MICH. COMP. LAWS ANN. § 15.268(e) (West Supp. 1992). Exceptions for discussing pending litigation codify the attorney-client privilege. Courts have stated that such exceptions are necessary because settlement, strategy discussions, and the avoidance of litigation are sensitive matters. Public discussion of litigation strategy would aid the adversary. *See, e.g., Sacramento Newspaper Guild*, 69 Cal. Rptr. at 481.

58. *See, e.g.*, MD. CODE ANN., STATE GOV’T § 10-508(a)(10) (1984).

59. *See, e.g.*, MICH. COMP. LAWS ANN. § 15.268(c) (West Supp. 1992).



Nevertheless, before meeting in a closed or executive session, most state statutes require the public body to conform to procedural safeguards. For example, open meeting statutes may require a majority of the body to vote for a closed meeting.<sup>61</sup> Often, the governmental body must state the purpose of the closed session or the specific exemption allowing a closed meeting.<sup>62</sup>

Open meeting statutes usually restrict discussion at closed meetings to subjects encompassed by the exemption under which the meeting was closed, although some statutes and courts allow discussion of collateral or auxiliary matters.<sup>63</sup> Statutes may require governmental bodies to keep written minutes giving a general description of the matters discussed at executive sessions.<sup>64</sup> Open meeting statutes also may prohibit a governmental body from taking any final legal action at a meeting closed pursuant to a statutory exemption.<sup>65</sup>

#### *E. Remedies for Violations of Open Meeting Statutes*

Open meeting statutes provide remedies for violations. Many open meeting statutes make actions which violate the statute void or voidable at the court's discretion.<sup>66</sup> In addition, open meeting statutes may award

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60. See, e.g., MASS. ANN. LAWS ch. 30A, § 11A 1/2(7) (Law. Co-op. 1983); MD. CODE ANN., STATE GOV'T § 10-508(a)(13) (1993); MICH. COMP. LAWS ANN. § 15.268(h) (West Supp. 1992).

61. See COLO. REV. STAT. ANN. § 24-6-402 (West Supp. 1992) (providing that an executive session may be held only upon a two-thirds affirmative vote of the governmental body); ALASKA STAT. § 44.62.310(b) (1989) ("If excepted subjects are to be discussed at a meeting, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss matters that come within the exceptions contained in (c) of this section shall be determined by a majority vote of the body."); MICH. COMP. LAWS ANN. § 15.267(1) (West 1981) (requiring two-thirds vote in order to hold executive session).

62. See, e.g., MASS. ANN. LAWS ch. 30A, § 11A 1/2 (Law. Co-op. 1983); MD. CODE ANN., STATE GOV'T § 10-508(d) (1993); MICH. COMP. LAWS ANN. § 15.267(1) (West 1981).

63. See, e.g., ALASKA STAT. § 44.62.310(c) (1989) (allowing discussion of subjects "auxiliary to the main question").

64. See, e.g., ARIZ. REV. STAT. ANN. § 38-431.01(C) (Supp. 1992); MICH. COMP. LAWS ANN. § 15.267(2) (West 1981).

65. See, e.g., ARIZ. REV. STAT. ANN. § 38-431.03(D) (Supp. 1992) ("No executive session may be held for the purpose of taking any legal action involving a final vote or decision."); COLO. REV. STAT. ANN. § 24-6-402(8) (West Supp. 1992) (invalidating any resolution, rule, regulation, ordinance, or formal action of a state or local public body unless enacted at a meeting open to the public).

66. See, e.g., IDAHO CODE § 67-2347(l) (Supp. 1993) (providing that action taken at a meeting which violates the statute is null and void); ALASKA STAT. § 44.62.310(f) (1989) (providing that action taken contrary to statute is void); ARIZ. REV. STAT. ANN. § 38-431.05(A) (1985) (same); MD. CODE ANN., STATE GOV'T § 10-501(d)(4) (1993) (providing that if the statute is willfully violated and another adequate remedy does not exist, a court may void action taken in violation of act); MICH. COMP. LAWS

court costs and attorneys' fees to a plaintiff who successfully proves a violation of the statute.<sup>67</sup> However, some statutes limit the available remedies by requiring an injured party to bring suit within a specified time period after the alleged violation.<sup>68</sup>

Many open meeting statutes levy criminal or civil penalties upon parties who violate the open meeting statute. Statutes which provide for criminal penalties normally classify violations as misdemeanors, entailing fines ranging from ten dollars to two thousand dollars.<sup>69</sup> In some instances, statutes impose jail terms<sup>70</sup> or provide for the removal of offenders from office.<sup>71</sup> Civil penalties against individual violators also may be awarded.<sup>72</sup>

Open meeting statutes commonly provide for equitable relief such as

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ANN. § 15.270(2) (West 1981). *Contra* Hargett v. Franklin County Bd. of Educ., 374 So. 2d 1352 (Ala. 1979) (finding that an action which violates Alabama's open meeting statute is not void); MASS. ANN. LAWS ch. 30A, § 11A 1/2 (Law. Co-op. 1983) (granting courts discretion to void actions taken in violation of the state open meeting statute).

67. *See, e.g.*, COLO. REV. STAT. § 24-6-402(9) (West Supp. 1992); MD. CODE ANN., STATE GOV'T § 10-510(d)(5)(i) (1993). Courts also have discretion to award attorneys' fees and costs to the prevailing governmental agency if the court determines that the suit was malicious or frivolous. *See, e.g.*, ILL. ANN. STAT. ch. 102, para. 43(d) (Smith-Hurd Supp. 1993); CAL. GOV'T CODE § 54960.5 (West Supp. 1993).

68. Depending upon the statute, time limitations may begin running at the time of the alleged violation or may be suspended until there is public notice of the alleged violation. *Compare* Kennedy v. Powell, 401 So. 2d 453 (La. Ct. App. 1981) (holding that a suit for violation of the open meeting statute must be brought within 60 days after the alleged violation occurred), *cert. denied*, 406 So. 2d 607 (La. 1981) *with* N.C. GEN. STAT. § 143-318.16A(b) (1990) (finding that action for violation of open meeting statute "must be commenced within 45 days following the initial disclosure of the action that the suit seeks to have declared null and void") (emphasis added). *See also* MICH. COMP. LAWS ANN. § 15.270(3)(a) (West 1981) (providing that a suit must be brought within 60 days after the meeting's minutes are made available to public).

69. *See, e.g.*, ALA. CODE § 13A-14-2(b) (1975) (establishing a fine between \$10 and \$500); ARK. CODE ANN. § 25-19-104 (Michie 1992) (establishing a fine of \$200); MICH. COMP. LAWS ANN. § 15.272 (West 1981) (establishing a fine of \$1,000).

70. *See, e.g.*, MICH. COMP. LAWS ANN. § 15.272(2) (West 1981) (providing that if an individual is convicted of intentionally violating open meeting act for second time, court may impose a jail term of up to one year); ARK. CODE ANN. § 25-19-104 (Michie 1992) (authorizing a court to impose a jail term of up to 30 days).

71. *See, e.g.*, HAW. REV. STAT. § 92-13 (1985); ARIZ. REV. STAT. ANN. § 38-431.07(A) (1985); IOWA CODE ANN. § 21.6(3)(d) (West 1989).

72. *See, e.g.*, ARIZ. REV. STAT. ANN. § 38-431.07(A) (1985) (authorizing courts to impose a civil penalty of up to a maximum of \$500.00 which shall be deposited in the general fund of the public body concerned); MD. CODE ANN., STATE GOV'T § 10-511 (1993) (providing that if a member of a public body wilfully participates in a meeting which she knows violates open meeting law, she may be subject to civil penalties of up to \$100); MICH. COMP. LAWS ANN. § 15.273 (West 1981) (allowing civil action for actual and exemplary damages of up to \$500 when an individual intentionally violates open meeting statute).

injunctive<sup>73</sup> and declaratory relief.<sup>74</sup> Open meeting statutes typically allow courts discretion in deciding equitable claims.<sup>75</sup> At least one court has held that injunctive relief is a proper remedy even when the statute does not provide for injunctive relief.<sup>76</sup> Statutes commonly allow courts to issue writs of mandamus requiring public bodies to open their meetings to the public.<sup>77</sup>

### III. HOW EFFECTIVE ARE STATE SUNSHINE LAWS?

Despite the obvious importance of open meeting laws, legislatures and courts have weakened the laws' impact.<sup>78</sup> A primary problem with open meeting statutes is that they are often vague or ambiguous.<sup>79</sup> In addition, open meeting statutes often exclude important public bodies from compliance.<sup>80</sup> In some instances, state legislatures failed to include certain entities because powerful interest groups lobbied against open meetings.<sup>81</sup>

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73. See, e.g., COLO. REV. STAT. ANN. § 24-6-402(9) (West Supp. 1992); MD. CODE ANN., STATE GOV'T § 10-510(d)(2) (1993); MICH. COMP. LAWS ANN. § 15.271 (West 1981).

74. See, e.g., IND. CODE ANN. § 5-14-1.5-7 (Burns Supp. 1992); DEL. CODE ANN. tit. 29, § 10005(d) (1991).

75. See, e.g., ILL. ANN. STAT. ch. 102, para. 43(c) (Smith-Hurd Supp. 1993) ("The court, having due regard for orderly administration and the public interest, as well as for the interests of the parties, may grant such relief as it deems appropriate. . . ."); GA. CODE ANN. § 50-14-5(a) (Supp. 1993) ("The superior courts of this state shall have jurisdiction to enforce compliance with the provisions of this chapter, including the power to grant injunctions or other equitable relief.").

76. See *Miglionico v. Birmingham News Co.*, 378 So. 2d 677 (Ala. 1979).

77. See, e.g., ARIZ. REV. STAT. ANN. § 38-431.04 (1985); MICH. COMP. LAWS ANN. § 15.270 (West 1981).

78. Assaf recognizes that state open meeting laws are statutorily inadequate or eviscerated by court interpretations. Assaf, *supra* note 1. He then argues that access to meetings of public bodies should be a First Amendment right. *Id.* Constitutional protection, however, is not needed because more states have begun to strengthen their open meeting statutes.

79. The vagueness of some open meeting statutes has led to constitutional challenges alleging that such statutes do not afford procedural due process. See *supra* note 19. In *Doran*, 244 So. 2d at 693, the Board argued that the statutory phrase "all meetings" did not clearly state which meetings had to be open to the public. *Id.* at 697-98. In addition, the Board argued that the statute did not include adequate standards. *Id.* at 698-700. The court rejected both arguments. *Id.* In *Raton Pub. Serv. Co. v. Hobbes*, 417 P.2d 32 (N.M. 1966), the plaintiff argued that the New Mexico open meeting statute was unconstitutional because it was uncertain as to the meetings covered and in its application. *Id.* at 34-35. The court also upheld the statute's constitutionality.

80. See *infra* notes 95-98 and accompanying text.

81. California and Idaho did not include state governmental organizations because outraged interest groups threatened the viability of the whole statute. *Open Meeting Statutes, supra* note 11, at 1207. When California sought to close loopholes in the state open meeting statute, the amendment was opposed by cities and municipalities, water agencies, school districts, and the Wilson Administration's Department of Finance. Opponents of the bill argued that some issues must be discussed in closed meetings to avoid making plans public which may result in lost money. Carl Ingram, *Senate Approves*

The general population, on the other hand, seems indifferent to the existence of open meeting statutes.<sup>82</sup> Politicians often do not like the statutes because of the pressures from the public and press which may result from open meetings.<sup>83</sup>

Despite statutory provisions<sup>84</sup> and judicial pronouncements<sup>85</sup> that open meeting statutes should be construed liberally, courts have been reluctant to give open meeting statutes full effect.<sup>86</sup> Their reluctance to enforce such statutes may reflect a general ambivalence or even aversion to open meeting statutes in the state legislature. In addition, because statutes often are poorly or imprecisely worded, courts may misconstrue legislative intent when interpreting specific provisions of state statutes.<sup>87</sup>

The press and local interest groups have been the primary forces ensuring that public agencies conform to the dictates of open meeting acts.<sup>88</sup> As the media and public interest groups have realized that open meeting statutes are not accomplishing their intended purpose, they have

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*Overhaul of State Open Meetings Act*, L.A. TIMES, June 5, 1992, at 41.

82. In researching this Note, the author was frequently asked "What are open meeting laws?". In the face of public indifference, the press has been the motivating force behind the enactment of open meeting statutes. See *infra* notes 88-89 and accompanying text.

83. *Open Meeting Statutes*, *supra* note 11, at 1207.

84. See, e.g., ARIZ. REV. STAT. ANN. § 38-431.09 (1985) ("[A]ny person or entity charged with the interpretations of this article shall take into account the policy of this article and shall construe any provision of this article in favor of open and public meetings."); IND. CODE ANN. § 5-14-1.5-1 (Burns Supp. 1992) ("The purposes of this chapter are remedial, and its provisions are to be liberally construed with the view of carrying out its policy.").

85. See, e.g., *Laman v. McCord* 432 S.W.2d 753 (Ark. 1968) (holding that the Arkansas Freedom of Information Act was passed in the public interest and was to be liberally construed in order to achieve its purpose); *Doran*, 224 So. 2d at 699 (finding that statutes enacted for the public benefit are to be interpreted in a manner most favorable to the public).

86. See, e.g., *Gosnell v. Hogan*, 534 N.E.2d 434, 442 (Ill. App. Ct. 1989) (holding that a public body need only "substantially comply" with the statute).

87. For example, the Arizona Supreme Court initially interpreted the state open meeting statute as exempting public bodies engaged in quasi-judicial functions. See *Arizona Press Club, Inc. v. Arizona Bd. of Tax Appeals*, 558 P.2d 697 (Ariz. 1976). In response to this interpretation, the Arizona legislature amended the state statute to exclude only "judicial proceeding[s] of any court". ARIZ. REV. STAT. ANN. § 38-431.08(A)(1) (1992)(emphasis added). At the time of the *Arizona Press Club* case, ARIZ. REV. STAT. ANN. § 38-431.08 provided that: "[t]he provisions of this article shall not apply to any judicial proceeding. . . ."

88. The press adamantly has demanded that public agencies hold open meetings pursuant to state law. See, *Open Meeting Statutes*, *supra* note 11, at 1199. Interest groups also monitor governmental bodies for compliance with state open meeting statutes. For example, the California League of Women Voters assigns members to observe local government meetings to determine if local governmental bodies are obeying the state open meeting act. When the League discovers a violation, it urges officials to remedy infractions. Myrna Oliver, *Brown Act Keeps Sun Shining on Government*, L.A. TIMES, July 16, 1987, at 3.

lobbied state legislatures to amend state open meeting statutes.<sup>89</sup> In addition, as court rulings have tended to diminish the effectiveness of open meeting laws, legislatures have reacted by amending state statutes.<sup>90</sup>

State legislatures have responded to criticism by taking steps to bring back the presumption that governmental meetings are accessible to the public. State legislatures have focused on three main areas in attempting to strengthen state open meeting statutes.<sup>91</sup> First, state legislators have struggled to broaden the applicability of open meeting laws to encompass more public bodies and a wider array of agency actions and deliberations.<sup>92</sup> Second, legislators have attempted to narrow the statutory exceptions to open meeting laws and to eliminate certain exceptions entirely.<sup>93</sup> Third, legislators have added stiffer penalty provisions and provided broader remedies for violations of open meeting statutes.<sup>94</sup>

In the past, certain public bodies have avoided the dictates of the open meeting law completely because the state statutes have not covered all state

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89. For example, the media and public interest groups have been the driving force behind a proposed amendment to the Texas open meeting statute. The proposed amendment would require agencies to take minutes during executive meetings. The amendment was pushed before the Texas legislature for the sixth time in 1987. *States Consider Records, Meetings Law Amendments; Some Good, Others Bad*, THE NEWS MEDIA & THE LAW, Spring 1987, at 35.

90. See *supra* note 87. In 1992, the Florida legislature voted to put a referendum on the November ballot which would add an open meeting and records requirement to the Florida state constitution. The Florida Supreme Court's holding in *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992), that the public records law did not apply to offices created by the state's constitution prompted the referendum. *States Move to Open Access to Records*, THE NEWS MEDIA & THE LAW, Summer 1992, at 33.

91. Legislatures also have provided additional procedural requirements to ensure that open meeting statutes are effective. For instance, in 1968 only six of the twenty-six state open meeting statutes contained notice requirements. *Open Meeting Statutes*, *supra* note 11, at 1207. The lack of a notice requirement essentially allowed public bodies to side-step open meeting requirements. For instance, in *Harms v. Adams*, 232 S.E.2d 61 (Ga. 1977), an individual brought suit under Georgia's old open meeting statute against a planning commission alleging a failure to give notice of a meeting held in the mayor's office that technically was open to the public. *Id.* at 61-62. The court held that even if the body was required to hold open meetings under state law, the open meeting statute did not require the planning commission to give notice. *Id.*

California legislators also strengthened procedural requirements in the California open meeting statute. California allocated \$1 million in its 1992 budget to fund posting agendas in public places. Like many open meeting statutes, the California act required local public bodies to post public agendas of open meetings in advance. However, the agenda-posting requirement was discontinued after a 1990 initiative suspended state-mandated procedures which do not receive state funding. *States Consider, Pass Open Meetings, Records Measures*, THE NEWS MEDIA & THE LAW, Summer 1991, at 36.

92. See *infra* notes 99-106 and accompanying text.

93. See *infra* notes 114-21 and accompanying text.

94. See *infra* notes 122-34 and accompanying text.

and local government agencies uniformly. For example, until June 1, 1991, the Colorado Sunshine Law covered only state government bodies and excluded all county and municipal agencies.<sup>95</sup> At the opposite end of the spectrum, some state open meeting statutes cover only local agencies and exclude state agencies or the state legislature.<sup>96</sup> Also, statutes frequently exempt subordinate agencies and commissions which act independently of the governing body.<sup>97</sup> Courts have compounded the problem by narrowly construing the agencies and bodies governed by open meeting statutes.<sup>98</sup> The exclusion of public bodies from state open meeting laws allows some governing bodies to operate behind closed doors and denies the public access to the decision-making process.

Realizing that open meeting statutes do not include many public bodies, state legislators have broadened the applicability of state laws. For example, Arizona amended its open meeting statute to require quasi-judicial bodies to hold open meetings.<sup>99</sup> Colorado changed its open meeting

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95. *States Consider, Pass Open Meetings, Records Measures*, *supra* note 91, at 36. *See also* James v. Bd. of Comm'rs of Denver Urban Renewal Auth., 595 P.2d 262 (Colo. Ct. App. 1978) (holding that Colorado's Sunshine Law applied only to state agencies and adopting narrow view of state agencies by holding that Denver Urban Renewal Authority, although created by state law, was not a state agency because its purpose is to serve municipalities and its members are appointed by municipalities), *aff'd*, 611 P.2d 976 (Colo. 1980); Bagby v. School Dist. No. 1, Denver, 528 P.2d 1299 (Colo. 1974) (en banc) (holding that although school boards are political subdivisions of the state, the Sunshine Act does not apply to political subdivisions of the state and that the Sunshine Act applies only to state agencies, authorities, and the state legislature).

96. *See supra* note 27.

97. *See* McLarty v. Bd. of Regents, 200 S.E.2d 117 (Ga. 1973) (finding that the open meeting act did not apply to a committee made up of faculty and students whose sole purpose was to review allocations of the student activity fund); *People ex rel* Cooper v. Carlson, 328 N.E.2d 675 (Ill. App. Ct. 1975) (holding that a subcommittee of the board of supervisors that advised the whole board on zoning and land planning development was not required to hold public meetings under state law); Sanders v. Benton, 579 P.2d 815 (Okla. 1978) (finding that Oklahoma's open meeting law did not apply to a citizens' advisory committee which assisted in making recommendations to board of corrections on proposed locations for a community treatment center because the advisory committee was a subordinate entity of a government entity governed by the law).

98. *See, e.g.*, Adler v. City Council, 7 Cal. Rptr. 805 (Cal. Ct. App. 1960) (superseded by statute) (finding that California's open meeting law did not apply to subordinate agencies independent of governing body and acting under authority of city charter); Beacon Journal Publishing Co. v. Akron, 209 N.E.2d 399 (Ohio 1965) (finding that Ohio's open meeting law does not apply to bodies created by executive order of mayor or chief administrator); Student Bar Assoc. Bd. of Governors v. Byrd, 239 S.E.2d 415 (N.C. 1977) (finding that the open meeting statute did not apply to faculty meetings of state supported law school).

99. *See supra* note 87.

statute to include all state and local government agencies.<sup>100</sup> State legislatures increasingly are amending state open meeting laws to require state legislatures to hold open meetings.<sup>101</sup> In addition, state legislatures are requiring private organizations which receive or spend public funds to hold open meetings.<sup>102</sup>

Excluding the deliberations of government bodies from open meeting laws weakens state statutes.<sup>103</sup> In the past, many statutes required only formal governmental actions, such as voting or enacting policies, rules, laws or ordinances to occur at an open meeting.<sup>104</sup> Legislatures and courts have undercut the purpose of open meeting statutes by allowing deliberations to be held in closed meetings. When the public is only allowed to witness the final outcome of deliberations, the public is denied access to governmental decision-making because the reasoning behind the final outcome is not disclosed. State legislatures have alleviated this problem by specifically requiring deliberations to occur in open meet-

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100. See *supra* note 95 and accompanying text. The Colorado Sunshine Law now extends to "state public bodies." "State public bodies" are defined as "any board, committee, commission, or other advisory, policy-making, rule-making, decision-making, or formally constituted body of any state agency, state authority, or the general assembly." COLO. REV. STAT. ANN. § 24-6-402(1)(d) (West Supp. 1992).

101. For example, a bill was proposed in New Mexico which included the legislature as a public body within the meaning of the open meeting statute. Although the proposed law would require the legislature to hold open meetings, the legislature would be exempt from notice and minutes requirements. *States Consider Records, Meetings Law Amendments; Some Good, Others Bad, supra* note 89, at 36. Colorado's open meeting law was amended in 1991 to include the state legislature. See *supra* note 100.

102. See CAL. GOV'T CODE §§ 54951.1, 51.7 (West 1983). The Washington State Senate considered a bill requiring nonprofit organizations using public funds to hold open meetings under state law when discussing the "expenditure and administration" of public money. *States Consider Records, Meetings Law Amendments; Some Good, Others Bad, supra* note 91, at 36. In 1992, Kentucky broadened the definition of "agency" in its open meeting statute to include "private contractors which conduct public business." *States Move to Open Access to Records, supra* note 90, at 33.

103. See *Marion County Sheriff's Merit Bd. v. Peoples Broadcasting Corp.*, 547 N.E.2d 235 (Ind. 1989) (holding in an investigation for police misconduct that the due process rights of those under investigation required deliberation on evidence to be done in private); *Hudspeth v. Bd. of County Comm'rs*, 667 P.2d 775 (Colo. Ct. App. 1983) (holding that the board of commissions may deliberate in a closed meeting, so long as they reach a final decision in an open meeting).

104. See *e.g.*, *Schults v. Board of Educ. of Township of Teaneck, Bergen County*, 205 A.2d 762, 772 (N.J. Super. Ct. App. Div. 1964) (holding that members of public body could hold closed meeting if no official action would be taken because the statute only required official action be taken at an open meeting), *aff'd*, 210 A.2d 762 (N.J. 1965); *Beacon Journal*, 209 N.E.2d at 404 (Ohio 1965) (finding that legislature intended to open to the public only those meetings in which any resolution, rule, regulation, or formal action of any kind may be adopted or passed).

ings.<sup>105</sup> In addition, some states are changing the definition of "meeting" to include gatherings of members which do not constitute a quorum.<sup>106</sup> Including those gatherings in the definition of "meeting" expands the reach of state open meeting statutes to ensure complete access to the decision-making process.

Another major flaw in state open meeting statutes is the large number of statutory exemptions. Even when the statute requires a public body to hold open meetings, statutory exemptions often provide a loophole for governmental bodies eager to avoid the rigors of public meetings. Courts have exacerbated the problem by construing statutory exceptions broadly. In *Gosnell v. Hogan*,<sup>107</sup> an Illinois appellate court held that statutory exemptions should be construed liberally.<sup>108</sup> The court stated that statutory exemptions allowing public bodies to meet in closed sessions included discussion of matters collateral to and matters related to exempted subjects.<sup>109</sup>

Realistically, some limits must be placed on the information available to the public. At the federal level, Congress, by creating specific exemptions to the federal open meeting law, recognized that information concerning military matters<sup>110</sup> or relations with foreign governments<sup>111</sup> may endanger national security if released to the public.<sup>112</sup> State and local governments need some closed meetings, but the need is not as extensive as at the federal level<sup>113</sup> or as broad as the present statutory exemptions allow.

In an attempt to strengthen open meeting laws, state legislators have

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105. See, e.g., IOWA CODE ANN. § 21.2(2) (1989) ("'Meeting' means a gathering . . . where there is deliberation or action upon any matter within the scope of the governmental body's policy-making duties."); HAW. REV. STAT. § 92-2(3) (1985) ("'Meeting' means the convening of a board . . . to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power.").

106. In most instances, open meeting statutes only apply to gatherings at which a quorum is present. See *supra* note 35 and accompanying text. In the spring of 1992, Kentucky changed its open meeting statute to require open meetings even when less than a quorum is present. *States Move to Open Access to Records*, *supra* note 90, at 33. See also COLO. REV. STAT. ANN. § 24-6-402(2) (West Supp. 1992) (requiring "all meetings of two or more members of any state public body" and "all meetings of a quorum or three or more members of any local public body" to be open to the public).

107. 534 N.E.2d 434 (Ill. App. Ct. 1989), *appeal denied*, 541 N.E.2d 1106 (Ill. 1989).

108. *Id.* at 440-44.

109. *Id.* at 440-42.

110. 5 U.S.C. § 552b(C)(1) (1992).

111. *Id.*

112. *Id.*

113. For example, state and local governments typically do not address matters of military or national security. See Assaf, *supra* note 1, at 229.



reduced the number and narrowed the scope of statutory exemptions.<sup>114</sup> The Florida state legislature provided a model for other states when it implemented legislation drastically reducing the number of statutory exemptions and narrowly tailoring the remaining exemptions. The Florida legislature passed the Open Government Sunset Review Act (OGSRA) because the statutory exemptions had expanded so far that the state open meeting law was all but nullified.<sup>115</sup> OGSRA calls for the review of all statutory exemptions over a ten-year period.<sup>116</sup> Under OGSRA, the legislature may create or maintain an exemption only if the exemption's purpose outweighs the public's compelling interest in open meetings.<sup>117</sup>

To a lesser extent, other states have attempted to decrease the number of statutory exemptions. For example, in 1991, Maryland deleted a broadly worded exemption that allowed public bodies to hold executive sessions "for compelling reasons."<sup>118</sup> The 1991 Maryland amendment also

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114. See, e.g., FLA. STAT. ANN. § 119.14 (West Supp. 1993). Some states have attempted to increase the procedural safeguards necessary to meet in closed session in an effort to control the number of meetings closed pursuant to statutory exemptions. In 1987, the Texas legislature considered an amendment which would have required public bodies to take minutes or to allow tape recording of their closed meetings. The proposed amendment provided for judicial review of minutes or tapes from closed sessions when an individual challenged a closed meeting. *States Consider Records, Meetings Law Amendments; Some Good, Others Bad*, supra note 89, at 36. In the summer of 1992, the California Assembly considered several amendments to increase the procedural safeguards accompanying closed meetings. The proposed amendments would require closed sessions to be recorded and would establish stricter notice requirements for closed meetings. *States Move to Open Access to Records*, supra note 90, at 33.

115. FLA. STAT. ANN. § 119.14 (West Supp. 1993).

116. The Florida law creates a ten-year period beginning in 1986 and ending in 1995 for the review of exemptions to the open meeting statute. Specified exemptions are scheduled for repeal each year unless after reviewing the exemption the legislature determines that the exemption meets specified criteria. See *infra* note 117. The law requires the legislature to consider the following during the review process:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

Florida § 119.14(4)(a) (West Supp. 1993).

117. The Florida statute states specifically that "exemptions [to the open meeting statute] shall be created or maintained only if: (a) The exempted record or meeting is of a sensitive, personal nature concerning individuals; (b) The exemption is necessary for the effective and efficient administration of a governmental program; or (c) The exemption affects confidential information concerning an entity." FLA. STAT. ANN. § 119.14(2) (West Supp. 1993).

118. *States Consider, Pass Open Meetings, Records Measures*, supra note 91, at 37. In 1987, South Carolina introduced a similar bill prohibiting secret administrative meetings. The state open meeting law previously allowed secret administrative meetings upon a two-thirds vote of the body and "when

brought within the statute's scope meetings which previously had been exempt because officials were deliberating the granting of licenses or permits or considering various zoning matters.<sup>119</sup> In 1992, Georgia narrowed its exemption allowing personnel matters to be discussed at closed meetings by requiring certain personnel matters to be discussed at open meetings.<sup>120</sup> Many states narrowed exemptions for meetings between public bodies and their attorneys by limiting the exemption to discussions of imminent or pending litigation.<sup>121</sup>

State legislatures have also sought to increase the effectiveness of open meeting statutes by enacting broader remedies and stiffer penalties for violations. In the past, lax enforcement and lenient penalties decreased the effectiveness of open meeting statutes.<sup>122</sup> In addition, statutes often do not contain penalty provisions which effectively deter violations.<sup>123</sup>

Many statutes grant courts the discretionary power to void actions which

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required by exceptional reason so compelling as to override the general public policy of public meetings." *States Consider Records, Meetings Law Amendments; Some Good, Others Bad, supra* note 89, at 35.

119. *States Consider, Pass Open Meetings, Records Measures, supra* note 91, at 36-37. The state legislature also amended the Maryland Open Meeting Law to establish an independent compliance board which advises governmental entities on the legality of proposed closed meetings. *Id.* See MD. CODE ANN., STATE GOV'T § 10-502.1 (1993).

120. *States Move to Open Access to Records, supra* note 90, at 33. The present statute allows closed meetings "when discussing or deliberating upon the appointment, employment, compensation, hiring, disciplinary action or dismissal, or periodic evaluation or rating of a public officer or employee but not when receiving evidence or hearing argument on charges filed to determine disciplinary action or dismissal of a public officer or employee." GA. CODE ANN. § 50-14-3(6) (Michie 1993). The Georgia amendment also required public bodies to vote on personnel issues during open meetings.

121. See, e.g., IDAHO CODE § 67-2345(f) (Supp. 1993) (providing that a public body may meet in executive session "[t]o consider and advise its legal representative in pending litigation or where there is a general public awareness of probable litigation"); DEL. CODE ANN. tit. 29, § 10004(b)(4) (1991) (providing that a public body may call for executive session to obtain legal advice concerning pending or potential litigation, "but only when an open meeting would have an adverse effect on the . . . litigation position of the public body").

122. Cf. Assaf, *supra* note 1, at 230 (observing that many states do not enforce sunshine laws and that state courts and legislatures are creating broader exemptions). For example, the California open meeting statute has contained criminal provisions since its enactment but criminal charges are rarely filed and no one has ever been convicted under the act. Mryna Oliver, *Brown Act Keeps Sun Shining On Government*, L.A. TIMES, July 16, 1987, at 3. A Los Angeles County Deputy District Attorney has stated, "Practically speaking, it is very hard to prove a criminal violation under the Brown Act. You have to prove the action was taken in secret, and taken with the knowledge that the meeting was a violation of the Brown Act." *Id.* He stated however that civil actions for injunctions overturning actions taken in closed meetings and actions for injunctions seeking to prohibit closed meetings are more common enforcement methods. *Id.*

123. *Open Meeting Statutes, supra* note 11, at 1211.

violate the open meeting law.<sup>124</sup> However, courts often do not exercise this power. Courts frequently uphold actions taken at meetings which did not comply with the law's procedural requirements, such as notice requirements.<sup>125</sup> In many instances, courts sustain actions taken at meetings which violated the open meeting statute if the meeting was in "substantial compliance" with the law.<sup>126</sup> Courts have also sustained illegal actions under the theory that subsequent public meetings can "cure" the defect.<sup>127</sup> In addition, some state statutes allow the governmental body to ratify prohibited actions through specific corrective measures.<sup>128</sup>

Although states generally have strengthened open meeting statutes, legislators and courts have been reluctant to bolster provisions which void actions taken in meetings that do not comply with open meeting laws.<sup>129</sup> Courts have encouraged board and committee members to meet behind closed doors whenever the open meeting statute is not clearly applicable by allowing subsequent meetings to satisfy the open meeting requirement and by invalidating actions only when the meeting did not substantially comply with the statute. Even though the public may attend subsequent meetings,

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124. See, e.g., KAN. STAT. ANN. § 75-4320(a) (1989) ("[A]ny binding action which is taken at a meeting not in substantial compliance with the provisions of this act shall be voidable."); DEL. CODE ANN. tit. 29, § 10005(a) (1974) ("Any action taken at a meeting in violation of this chapter may be voidable by the Court of Chancery.").

125. See, e.g., *Arnold Transit Co. v. Mackinac Island*, 297 N.W.2d 904 (Mich. Ct. App. 1980) (upholding city ordinance passed by city council when the council failed to meet the statutory requirements of posting notice of the meeting forty-eight hours in advance and failed to record minutes of the meeting).

126. See, e.g., *Gosnell*, 534 N.E.2d at 442; *City of Flagstaff v. Bleeker*, 600 P.2d 49, 51 (Ariz. Ct. App. 1979).

127. See, e.g., *State v. City of Hailey*, 633 P.2d 576 (Idaho 1981) (finding that a meeting of city council, mayor, and city clerk at which the parties deliberated but did not reach a final decision violated open meeting law but did not invalidate actions taken at a subsequent public meeting).

128. See ARIZ. REV. STAT. ANN. § 38-431.05(B)(1985); MICH. COMP. LAWS ANN. § 15.270(5) (West 1981). The South Carolina statute, prior to amendment, even allowed secret votes if the public body subsequently ratified the decision at a public meeting. A 1987 amendment barred agencies from secret voting. *States Consider Records, Meetings Law Amendments; Some Good, Others Bad*, *supra* note 89, at 35.

129. Some states have attempted to strengthen invalidation provisions. For example, states have contemplated amendments allowing invalidation when the statute previously did not have such a provision. In 1987, the Texas legislature considered an amendment which would allow courts to void actions taken in illegally closed meetings. *States Consider Records, Meetings Law Amendments; Some Good, Others Bad*, *supra* note 89, at 35-36. The Ohio General Assembly considered a bill which would allow courts to invalidate actions taken at meetings at which the public was not given adequate notice. *States Move to Open Access to Records*, *supra* note 91, at 36. A 1987 amendment to the California open meeting act allows courts to overturn decisions made in violation of the open meeting act. CAL. GOV'T CODE § 54960.1 (West Supp. 1993).

the discussions and deliberations that occurred during closed meetings are not erased from the minds of decision makers.

Despite the effectiveness of invalidation as a remedy for open meeting violations, courts and legislators must act with care when overturning laws and ordinances passed by public bodies.<sup>130</sup> Wholesale invalidation may nullify or delay actions which are important and necessary to the public welfare. The harsh consequences that sometimes result from invalidation may outweigh any deterrent effect on policy makers.<sup>131</sup> In addition, a statute providing for the nullification of every rule, policy, action, ordinance or regulation passed in violation of the open meeting statute would create uncertainty in the legal community and the population as a whole.<sup>132</sup> Every rule or policy passed would face the possibility of invalidation, depending upon whether an individual chose to bring a suit alleging that the action was passed at a meeting which did not conform to the open meeting requirements.

Although legislatures generally have failed to strengthen invalidation provisions, states have made harsher penalties applicable to both the members of public bodies and the public bodies as a whole. State legislatures increasingly are providing criminal and civil remedies for individuals whose rights are impaired by violations of open meeting statutes.<sup>133</sup> In addition, state legislatures are including provisions awarding attorneys' fees and costs to the prevailing party.<sup>134</sup>

#### IV. PROPOSAL

Although some states have made a great deal of progress toward revising state open meeting laws, the commitment to reform has not been uniform. Some states remain indifferent to concerns that open meeting laws are ineffective and continue to allow statutes with few requirements to stand unamended.<sup>135</sup> In other instances, the state legislatures have met

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130. *Open Meeting Statutes*, *supra* note 11, at 1212-14.

131. *Id.* at 1214. This is especially true when legislation (or its nullification) does not affect policy-makers directly. Because invalidation does not punish the lawmaker, the deterrent effect is lost. *Id.*

132. *Id.*

133. *See supra* notes 69-72 and accompanying text.

134. *See supra* note 67 and accompanying text. The Texas legislature considered an amendment in 1987 allowing a plaintiff who successfully challenged an illegally closed meeting to recover attorneys fees. *States Consider Records, Meetings Law Amendments; Some Good, Others Bad*, *supra* note 89, at 35.

135. For example, the Alabama open meeting statute merely prohibits certain Alabama boards and commissions from holding secret sessions unless the "character or good name of a woman or man is

formidable resistance from political factions when they have attempted to revise the laws.<sup>136</sup> In order to help states achieve more effective open meeting laws, this Note recommends the following changes.

First, state legislatures should include a purpose provision in open meeting statutes. The purpose provision should state both the purpose and the construction of the law. A purpose provision will aid in interpreting the statute. The policy statement should declare that the statute's purpose is to ensure that governmental business is open to the public.<sup>137</sup> The policy statement should recognize that the people have not relinquished sovereignty to government agencies and that the people as sovereign need to be well-informed. In addition, purpose provisions should state that the open meeting statute must be construed strictly against closed meetings.<sup>138</sup> Such a purpose provision should deter courts from liberally construing an open meeting statute and failing to punish unsanctioned closed sessions.<sup>139</sup>

State legislatures also must broaden the open meeting statutes to reach all levels of state and local government and all types of public bodies. Open meeting laws should apply to all state and local governmental bodies and any subagencies or subordinate bodies of such bodies whether created by a state or local statute or ordinance, the state constitution, or state or local rules or regulations. The statutes also should encompass all bodies, public or private, that receive or spend state funds.<sup>140</sup> Such laws should pertain to all public bodies<sup>141</sup> regardless of whether the body performs a

involved." ALA. CODE § 13A-14-2 (1982).

136. For example, in 1991, the Illinois legislature failed to pass an amendment to its Open Meeting Act interpreting the Act more broadly to increase the number of meetings that must be open to the public. The bill also contained a controversial provision which allowed courts to impose a civil penalty of up to \$500 on individuals who met in closed meetings in violation of the law. *States Consider, Pass Open Meetings, Records Measures*, *supra* note 91, at 36-37.

137. See KAN. STAT. ANN. § 75-4317(a) (1989) (declaring statute's policy to open all meetings concerning governmental business and governmental affairs to public); IDAHO CODE § 67-2340 (1989) (same).

138. See, e.g., ALASKA STAT. § 44.62.312(b) (1989) (providing that open meeting statute "shall be construed narrowly in order to effectuate the policy stated in (a) of this section and avoid unnecessary executive sessions").

139. See *supra* notes 107-09 and accompanying text.

140. The California statute, for example, includes all private non-profit organizations that "receive public money to be expended for public purposes pursuant to the 'Economic Opportunity Act of 1964.'" CAL. GOV'T CODE § 54951.1 (West 1983).

141. Such laws should pertain to all public bodies except judicial proceedings in a court of law which are governed by the First Amendment. For an analysis of the First Amendment and judicial proceedings see Assaf, *supra* note 1.

judicial or quasi-judicial function or merely advises another governing body.<sup>142</sup>

State legislatures must restrict the number of statutory exemptions to state statutes to increase the effectiveness of open meeting statutes. State legislatures should follow Florida's example and implement a program to reduce the existing exemptions and a policy to limit the creation of new exemptions.<sup>143</sup> The retention or the creation of an exemption should be allowed only if it affects the non-public interests of individuals; the exemption is necessary for a governing entity's effective administration; or the exemption concerns confidential information.<sup>144</sup> Similar to the Maryland statute, state open meeting statutes should establish a commission to review the legality of proposed closed meetings.<sup>145</sup>

State legislatures must create harsher penalties to deter violations. First, the statute should authorize courts to void actions that violate open meeting statutes. The statute should require courts to weigh the prejudice of the violation against the harm to the governmental body and the public from nullification.<sup>146</sup> The balancing requirement would minimize the adverse effects that result from invalidating a statute while encouraging courts to apply the voiding provision adequately. The statute should provide that when a government body consistently has failed to comply with the open meeting laws, strict compliance, rather than substantial compliance, is required.<sup>147</sup> A strict compliance standard would prevent repeat offenders from taking advantage of the balancing test.

State legislatures also should enact civil and criminal penalty provisions enforceable against public bodies and their individual members in order to deter violations. Such civil and criminal liability provisions may be similar

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142. Open meeting statutes should apply to advisory bodies formed independently of state and local law, but which advise bodies subject to the open meeting statute. *See Spillis Candela & Partners, Inc. v. Centrust Sav. Bank*, 535 So. 2d 694 (Fla. Dist. Ct. App. 1988) (holding that Florida's open meeting law applies to an ad hoc advisory board which possesses no binding authority); *ARIZ. REV. STAT. ANN.* § 38-431.08 (1985) (limiting the exception for judicial proceedings to proceedings in a court of law). *See also supra* note 34 and accompanying text.

143. For a discussion of the Florida Open Government Sunset Review Act see *supra* notes 115-17 and accompanying text.

144. These criteria parallel the Florida statute's criteria. *FLA. STAT. ANN.* § 119.14(2)(a)-(c) (West Supp. 1993).

145. *See MD. CODE ANN., STATE GOV'T* § 10-502.1 (Supp. 1992).

146. *See supra* notes 130-32 and accompanying text.

147. *See Bells v. Greater Texoma Util. Auth.*, 744 S.W.2d 636 (Tex. Ct. App. 1987) (demanding that a special utilities district comply with the Act's literal terms when plaintiff alleged the district's repeated failure to comply with the notice requirements of the Texas Open Meeting Act).

to those already enacted by some states.<sup>148</sup> States also should enact provisions making removal from office an available sanction for willful or repeated violations.<sup>149</sup> Finally, state statutes must award costs and attorneys' fees to prevailing parties,<sup>150</sup> payable from the public body's treasury.

## V. CONCLUSION

Open meeting statutes have a vital function in a democratic society. Without information and knowledge concerning the issues faced by governing bodies and how the governing bodies handle these issues, the public cannot hold officials accountable for their actions. Open meeting statutes discourage corruption and deceit and promote faith in our government. All fifty states and the District of Columbia have recognized the importance of public access to government meetings and passed open meeting statutes.<sup>151</sup>

Despite the importance and prevalence of these statutes, they do not always ensure accessibility to government meetings. States have become aware that open meetings statutes are not fulfilling their stated aims. In recent years, state legislators have made a concerted effort to improve the effectiveness of these statutes. Although many states have not acted and others have not gone far enough, a definite trend toward open meetings exists. In order to increase the effectiveness of open meeting statutes, state legislatures must broaden the applicability of the laws, narrow statutory exceptions, and enact stricter penalty provisions. Society can achieve the democratic ideal only through the free flow of information.

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148. See *supra* notes 69-72 and accompanying text for an analysis of existing statutory provisions for criminal and civil liability.

149. See *supra* note 71 and accompanying text.

150. See *supra* notes 67, 134 and accompanying text.

151. Assaf, *supra* note 1, at 229.

