STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

ATTORNEY GENERAL OPINION 08-3

To: The Honorable Kate Kelly
Idaho State Senator
P. O. Box 654
Boise, ID 83701

Per Request for Attorney General's Opinion

Dear Senator Kelly:

QUESTIONS PRESENTED

1. Should the executive session exceptions set forth in Idaho Code § 67-2345 be interpreted narrowly by governing boards and their attorneys?

2. What is the scope and appropriate interpretation of Idaho Code § 67-2345(1)(a)?

3. What is the appropriate method of taking corrective action, when the discussion in an executive session "drifts" from the session's stated purpose?

CONCLUSIONS

1. Yes, the executive session exceptions set forth in Idaho Code § 67-2345 should be interpreted narrowly in order to fulfill the broad public purpose of allowing citizens to observe their governments at work, as provided by the Idaho Open Meetings Act.

2. Consistent with the conclusion to Question 1, the appropriate interpretation of Idaho Code § 67-2345(1)(a) is narrow in scope. An executive session should only be entered into under § 67-2345(1)(a) to discuss specific hiring issues regarding a specific person or a specific position. Discussions should not be held on broad questions such as whether to generally fill vacancies or whether sufficient funds exist to fill a vacancy.

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3. Corrective action should be taken immediately upon recognition of the fact that an executive session has "drifted" from its stated purpose. Governing bodies should implement an oversight mechanism, such as having their attorney attend the executive session as an observer to assist in preventing and recognizing "drift."

ANALYSIS

A. The Idaho Open Meetings Act's Executive Session Exceptions Should Be Interpreted Narrowly

1. Broad Public Purpose of the OMA

In 1974 the Idaho Legislature adopted the current version of Idaho's Open Meetings Act ("OMA"). The OMA begins with a sweeping preamble:

> The people of the state of Idaho in creating the instruments of government that serve them do not yield their sovereignty to the agencies so created. Therefore, the legislature finds and declares that it is the policy of this state that the formation of public policy is public business and shall not be conducted in secret.[1]

This preamble indicates that all inferences regarding whether to open or close a meeting should be resolved in favor of openness.[2] It is fundamental that where a statute is designed to protect the public, the language must be construed in light of the legislative intent and purpose and is entitled to a broad interpretation so that its public purpose may be fully carried out.[3] More directly, statutes enacted for the public benefit must be interpreted favorably to the public.[4] To effectuate the OMA's remedial and protective purpose, "these enactments should be broadly construed and interpreted in the light most favorable to public access."[5]

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[1] Idaho Code § 67-2340.

[2] *See* 2007 Idaho Open Meeting Law Manual 14. The Idaho Attorney General publishes the Idaho Open Meeting Law Manual annually; the advice in the manual for both government and its attorneys is: "If in doubt, open the meeting."

[3] Johnson v. Killion, 283 P.2d 433 (Kan. 1955); *see also* Smith v. Marshall, 587 P.2d 320 (Kan. 1978).

[4] Bd. of Public Instruction of Broward County v. Doran, 224 So. 2d 693, 699 (Fla. 1969); *See also* Wolfson v. State, 344 So. 2d 611, 613 (Fla. Dist. Ct. App. 1977); Laman v. McCord, 432 S.W.2d 753 (Ark. 1968).

[5] Solas v. Emergency Hiring Council of the State, 774 A.2d 820, 824 (R.I. 2001).

2. The Public Records Act Provides Guidance for Interpreting the OMA

The most applicable statute to which the OMA can be compared for purposes of this analysis is the Idaho Public Records Act.[6] Under the Public Records Act, the presumption is that all public records are open to disclosure and all exemptions are narrowly construed.[7] Thus, pursuant to the Public Records Act, if a record is not obviously exempt from disclosure, then the court should hold that it is subject to disclosure.[8] The same analysis is appropriate within the open meetings context.[9] Both statutes share the same purpose—transparency and openness in government.[10] As outlined above, both the OMA and Public Records Act were enacted for the benefit of the public; thus, they should be interpreted to benefit the public.

3. The OMA Requires Flexibility With an Eye Toward Openness

This interpretation is necessarily flexible, as no specific guidelines or "magic words" can account for the range and assortment of meetings, votes, and actions covered under the OMA and the realities of local government, while also safeguarding the public's interest in knowing and observing the workings of governmental bodies.[11] In other words, courts should resist technical interpretations that serve to undermine the very purpose of the Open Meetings Act. Just as the courts should resist these interpretations, so too should governmental entities. Instead, government should strive to interpret the exceptions for executive sessions narrowly in order to give full purpose and effect to the OMA's goal of open and accessible government.

B. The Scope of the OMA's Hiring Exception Is Narrow

Idaho Code § 67-2345(1)(a) ("the Hiring Exception") provides that "[a]n executive session may be held . . . to consider hiring a public officer, employee, staff member or individual agent. This paragraph does not apply to filling a vacancy in an

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[6] Idaho Code §§ 9-337 to 9-350.

[7] Cowles Pub. Co. v. Kootenai County Bd. of County Comm'rs, 144 Idaho 259, 264, 159 P.3d 896, 901 (2007), *citing* Federated Publ'ns, Inc. v. Boise City, 128 Idaho 459, 463, 915 P.2d 21, 25 (1996); *see also* Magic Valley Newspapers Inc. v. Magic Valley Reg'l Med. Ctr., 138 Idaho 143, 144, 59 P.3d 314, 315 (2002).

[8] *Id.*

[9] Acker v. Texas Water Comm'n, 790 S.W.2d 299, 300 (Tex. 1990), *citing* Cox Enters., Inc. v. Bd. of Trustees, 706 S.W.2d 956, 958 (Tex. 1986).

[10] *Compare* Idaho Code § 9-338(1) *and* Idaho Code § 67-2340.

[11] Tanner v. Town Council of Town of East Greenwich, 880 A.2d 784, 797 (R.I. 2005).

elective office."[12] A broad interpretation of the Hiring Exception could encompass general discussions such as the filling of staff vacancies or the sufficiency of funds for staffing issues. However, consistent with the general premise that the OMA should be interpreted narrowly and in favor of openness, as discussed above, the OMA's Hiring Exception should likewise be given a much more narrow interpretation.

The language of the Hiring Exception is consistent with a narrow interpretation of the provision, in that the Exception applies only to the consideration of the hiring of "a public officer, employee, staff member or individual agent."[13] Notably, the language refers to the hiring of a single individual, not the general filling of multiple staff vacancies or a general hiring need. Applying the principle that the OMA should be interpreted in favor of openness, the Exception should be interpreted to apply only to discussions of specific personnel issues regarding a specific person or position. Tangentially related considerations, such as funding issues related to hiring, have not been included in the language of the Hiring Exception and are topics more appropriately discussed in open sessions.[14]

Although Idaho case law is thus far silent on the issue of the proper interpretation of the Hiring Exception, other jurisdictions have interpreted executive session exceptions under their open meeting statutes in a narrow manner.[15] As a Florida court has articulated:

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[12] Idaho Code § 67-2345(1)(a).

[13] *Id.*

[14] *See* Common Council of City of Peru v. Peru Daily Tribune Inc., 440 N.E.2d 726, 729 (Ind. Ct. App. 1982) (noting, with respect to Indiana's open meetings statute: "[I]t is important to recognize what the statute does not say as well as what it does say. When certain items or words are specified or enumerated in the statute, then, by implication, other items or words not so specified are excluded.")

[15] *See, e.g.*, Miller v. City of Tacoma, 979 P.2d 429, 434 (Wash. 1999) (holding that Washington's executive session exception for the evaluation of applicants for public employment should be construed narrowly); Floyd County Bd. of Educ. v. Ratliff, 955 S.W.2d 921, 924 (Ky. 1997) (holding that "[t]he personnel exemption to the Open Meetings Act does not allow a general discussion concerning a school reorganization plan when it involves multiple employees"); San Diego Union v. City Council, 196 Cal. Rptr. 45, 49 (Cal. Ct. App. 1983) (refusing to interpret a personnel exception to an open meetings statute broadly, commenting: "[W]e must construe the 'personnel exception' narrowly and the 'sunshine law' liberally in favor of openness"); City of Prescott v. Town of Chino Valley, 803 P.2d 891, 893 (Ariz. 1990) (holding that the executive session exception for legal discussions should be interpreted narrowly, as "[g]enerally, executive sessions are permitted only when public discussion could harm the public's interest"); Illinois News Broadcasters Ass'n v. City of Springfield, 317 N.E.2d 288, 290 (Ill. App. Ct. 1974) ("[T]he exceptions allowing closed meetings are few and must be narrowly construed because they derogate the general policy of open meetings"); News & Observer Publishing Co. v. Interim Bd. of Educ. for Wake County, 223 S.E.2d 580 (N.C. Ct. App. 1976) (holding that "exceptions to our

> The [open meeting] statute should be construed so as to frustrate all evasive devices. . . . The principle to be followed is very simple: When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State.[16]

Idaho's Hiring Exception should be construed in a similar manner, in conformance with the OMA's general purpose of open government.

It is also helpful to analyze the specific purposes underlying various jurisdictions' personnel and hiring exceptions to their open meetings statutes. The primary stated purpose of such an exception is "to avoid undue publicity and embarrassment to the affected employee," or, in this case, to the job applicant whose credentials are being discussed.[17] A Pennsylvania court examining the purpose of this type of exception noted:

> Recognizing that certain areas such as discussions of personnel were against the public interest and/or personal privacy concerns outweighed those discussions being held in public, the General Assembly allowed those discussions to be held in private, but with the final decision being made in open session. In the case of hiring public officials, public policy allows that the selection process for public officials be conducted at executive session in order to attract the largest number of qualified candidates without compromising their professional reputations or standing at their current positions. As the Board points out, personnel matters are intended to be discussed and voted on in executive session so that it may openly and candidly discuss the strengths and weaknesses of candidates. To engage in the screening of applicants at a public meeting would undoubtedly interfere with that process because qualified applicants would be discouraged from applying and the pool of candidates would not necessarily be comprised of those best qualified for the position.[18]

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open meetings law should be strictly construed and [] those seeking to come within the exceptions should have the burden of justifying their actions").

[16] Town of Palm Beach v. Gradison, 296 So. 2d 473, 477 (Fla. 1974).

[17] Gillespie v. San Francisco Public Library Comm'n, 79 Cal. Rptr. 2d 649, 656 (Cal. Ct. App. 1998); *see also* Baker v. Town of Middlebury, 753 N.E.2d 67, 72-73 (Ind. Ct. App. 2001) (noting that discussions involving candidates for re-hire were appropriate in executive sessions in order to protect the privacy of the employees); City of Kenai v. Kenai Peninsula Newspapers, Inc., 642 P.2d 1316, 1326 (Alaska 1982) (noting that public discussion of job applicants' personal characteristics could damage the applicants' reputations).

[18] Morning Call, Inc. v. Bd. of Sch. Dirs. of S. Lehigh, 642 A.2d 619, 624, n.9 (Pa. 1994).

The above-stated purposes are completely inapplicable to general discussions regarding multiple staff vacancies or funding issues that do not relate to a specific job applicant. Accordingly, such broad discussions were not intended to be encompassed by the Hiring Exception.

In sum, Idaho's Hiring Exception should be construed to apply only to the narrow situation in which a specific candidate is being considered for a specific position.

C. Corrective Action Should be Taken Immediately

During an executive session in which a governmental body is discussing matters falling under the Hiring Exception, the discussion may drift to inappropriate tangential matters, such as the overall number of vacancies or revenue projections necessary to sustain positions. As outlined above, it is clear that these discussions were not intended to fall within this exception. A governmental body must be able to both recognize that these discussions are not appropriate within the executive session and to recognize that it must take immediate action to either return to the appropriate topic of discussion or to open the executive session to discuss in a public session those matters which are not the appropriate subject of the executive session.

Consistent with the broad public purpose of the OMA, it is apparent that corrective action should be encouraged by allowing governmental entities to recognize, learn from, and correct their mistakes. In fact, a governmental entity that is made aware of a violation which it refuses to address may be setting itself up to have a knowing violation proven against it. Analysis and enforcement of the OMA should be undertaken in a manner that will encourage compliance, by permitting corrective action.

The Idaho Supreme Court has tacitly endorsed this premise through its holdings with regard to executive sessions held in violation of the OMA. Where deliberations are conducted at a meeting that violates the Open Meetings Act, but no firm and final decision is rendered upon the questions discussed, the impropriety of that meeting will not taint final actions subsequently taken upon questions conscientiously considered at later meetings which do comply with the provisions of the Act.[19] Many other jurisdictions have reached a similar conclusion, holding that a later meeting held in

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[19] *See* State v. City of Hailey, 102 Idaho 511, 514, 633 P.2d 576, 579 (1981); *see also* Baker v. Indep. Sch. Dist. of Emmett, No. 221, 107 Idaho 608, 611, 691 P.2d 1223, 1226 (1984).

compliance with the applicable open meetings statute, and entailing a deliberation of the facts, will generally cure an earlier violation.[20]

Governmental entities should establish a procedure whereby they can both recognize and address open meeting violations. Using the executive session example discussed within this letter, an entity can take several steps to facilitate compliance by consulting the entity's attorney in the executive session. During the executive session, the entity's attorney can:

1. Monitor the discussion;

2. Identify inappropriate departures from the exception under which the entity went into executive session;

3. Advise the entity to keep the discussion within the parameters of the exception under a narrow interpretation of its scope; and

4. Advise and assist the entity in the proper procedure to employ corrective action immediately.

Using the entity's attorney preserves the confidence of the executive session, because the discussions therein are protected by the attorney/client privilege, but it also

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[20] Alaska Comty. Colleges' Federation of Teachers, Local No. 2404 v. Univ. of Alaska, 677 P.2d 886 (Alaska 1984) (holding that the appropriate remedy is a *de novo* meeting; where subsequent validating meeting took place, court must inquire whether substantial reconsideration occurred—if not, question is whether public injury from invalidation outweighs benefits derived from voiding decision); Cortese v. Sch. Bd. of Palm Beach County, 425 So. 2d 554 (Fla. Dist. Ct. App. 1982) (holding that failure to provide notice for workshop was cured by subsequent meetings where record indicated that ultimate decision was "bona fide"); Bd. of Educ. Sch. Dist. No. 67 v. Sikorski, 574 N.E.2d 736 (Ill. App. Ct. 1991) (holding that ratification at subsequent public meeting cured earlier violation and that the board was estopped from asserting its own violation of open meeting law to void a contract.); Szilagyi v. State ex rel. LaPorte Cmty. Sch. Corp., LaPorte County, 231 N.E.2d 221 (Ind. 1967); *contra* Bd. of County Comm'rs of St. Joseph County v. Tinkham, 491 N.E.2d 578 (Ind. Ct. App. 1986) (holding that award of bid at unlawful meeting was invalid); Delta Dev. Co., Inc. v. Plaquemines Parish Comm'n Council, 451 So. 2d 134 (La. Ct. App. 1984), *writ denied*, 456 So. 2d 172 (La. 1984) (holding that voidable action may be ratified in lawful session); Hawkins v. City of Fayette, 604 S.W.2d 716 (Mo. Ct. App. 1980); Fox v. City of Lakewood, 528 N.E.2d 1254 (Ohio 1988) (holding that adoption of a charter amendment concerning a matter discussed at an improper meeting cures the defect because of the public consideration attendant to its adoption); Bus. License Opposition Comm. v. Sumter County, 403 S.E.2d 638 (S.C. 1991); Olson v. Cass, 349 N.W.2d 435 (S.D. 1984) (holding that injunction against effectuating decision made at noncomplying meeting was unwarranted in light of previous opportunities for public discussion afforded at previous public meetings); Petition of Housing Auth. of City of Seattle, 383 P.2d 295 (Wash. 1963).

allows the entity an impartial observer to "referee" the discussion and to prevent "drift" from occurring within the session. Taking immediate action ensures that no more than a sentence or two of "drift" occurs, and thereby preserves the spirit of the exception for the executive session.

It is worth noting that even if corrective action is taken, an open meeting violation has still occurred. But in the example above, since the entity has the violation brought to its attention and moves immediately to correct the violation, it will be difficult to prove a "knowing" violation of the OMA.

This scenario raises certain concerns with regard to the "degree" of the open meeting violation at issue. It seems reasonable that the above example could be considered a "mild" violation of the OMA. But what if the violation were more egregious, such as scripted outcome on a zoning decision or an executive session that did not fall under any of the exceptions set forth in Idaho Code § 67-2345(a)? Under such circumstances, an entity will likely not be able to immediately cure the violation, but may need to address the OMA violation directly[21] and then take action, if possible, to cure the decision[22] that violated the OMA.

Violations of the OMA should be avoided whenever possible. If an entity is in doubt as to the propriety of an executive session, the doubt should be resolved in favor of openness. If a violation occurs, the entity should acknowledge the violation as soon as possible and take the appropriate steps to correct the violation, even if that means holding the entire meeting *de novo* and as if the prior improper meeting never occurred.

I hope that you find this letter helpful.

AUTHORITIES CONSIDERED

1. Idaho Code:

§§ 9-337 to 9-350.
§ 67-2340.

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[21] Likely a complaint will have been filed, which should be resolved prior to corrective action taking place.

[22] One of the remedies under the Open Meetings Act is to void any decision that was reached through a violation. Idaho Code § 67-2347(1) and (4). It is not clear, however, how long an entity would be precluded from re-visiting a topic or decision point, the consideration of which was in violation of the Act. Presumably, the court order setting aside the decision would address this matter. For practicality purposes, when working on these issues, attorneys should consider this aspect within their proposed remedies to the reviewing entity.

§ 67-2345.
§ 67-2347.

2. Idaho Cases:

Baker v. Indep. Sch. Dist. of Emmett, No. 221, 107 Idaho 608, 691 P.2d 1223 (1984).

Cowles Pub. Co. v. Kootenai County Bd. of County Comm'rs, 144 Idaho 259, 159 P.3d 896 (2007).

Magic Valley Newspapers Inc. v. Magic Valley Reg'l Med. Ctr., 138 Idaho 143, 59 P.3d 314 (2002).

State v. City of Hailey, 102 Idaho 511, 633 P.2d 576 (1981).

3. Other Cases:

Acker v. Texas Water Comm'n, 790 S.W.2d 299 (Tex. 1990).

Alaska Comty. Colleges' Federation of Teachers, Local No. 2404 v. Univ. of Alaska, 677 P.2d 886 (Alaska 1984).

Baker v. Town of Middlebury, 753 N.E.2d 67 (Ind. Ct. App. 2001).

Bd. of County Comm'rs of St. Joseph County v. Tinkham, 491 N.E.2d 578 (Ind. Ct. App. 1986).

Bd. of Educ. Sch. Dist. No. 67 v. Sikorski, 574 N.E.2d 736 (Ill. App. Ct. 1991).

Bd. of Public Instruction of Broward County v. Doran, 224 So. 2d 693 (Fla. 1969).

Bus. License Opposition Comm. v. Sumter County, 403 S.E.2d 638 (S.C. 1991).

City of Kenai v. Kenai Peninsula Newspapers, Inc., 642 P.2d 1316 (Alaska 1982).

City of Prescott v. Town of Chino Valley, 803 P.2d 891 (Ariz. 1990).

Common Council of City of Peru v. Peru Daily Tribune Inc., 440 N.E.2d 726 (Ind. Ct. App. 1982).

Cortese v. Sch. Bd. of Palm Beach County, 425 So. 2d 554 (Fla. Dist. Ct. App. 1982).

Delta Dev. Co., Inc. v. Plaquemines Parish Comm'n Council, 451 So. 2d 134 (La. Ct. App. 1984).

Floyd County Bd. of Educ. v. Ratliff, 955 S.W.2d 921 (Ky. 1997).

Fox v. City of Lakewood, 528 N.E.2d 1254 (Ohio 1988).

Gillespie v. San Francisco Public Library Comm'n, 79 Cal. Rptr. 2d 649 (Cal. Ct. App. 1998).

Hawkins v. City of Fayette, 604 S.W.2d 716 (Mo. Ct. App. 1980).

Illinois News Broadcasters Ass'n v. City of Springfield, 317 N.E.2d 288 (Ill. App. Ct. 1974).

Johnson v. Killion, 283 P.2d 433 (Kan. 1955).

Laman v. McCord, 432 S.W.2d 753 (Ark. 1968).

Miller v. City of Tacoma, 979 P.2d 429 (Wash. 1999).

Morning Call, Inc. v. Bd. of Sch. Dirs. of S. Lehigh, 642 A.2d 619 (Pa. 1994).

News & Observer Publishing Co. v. Interim Bd. of Educ. for Wake County, 223 S.E.2d 580 (N.C. Ct. App. 1976).

Olson v. Cass, 349 N.W.2d 435 (S.D. 1984).

Petition of Housing Auth. of City of Seattle, 383 P.2d 295 (Wash. 1963).

San Diego Union v. City Council, 196 Cal. Rptr. 45 (Cal. Ct. App. 1983).

Smith v. Marshall, 587 P.2d 320 (Kan. 1978).

Solas v. Emergency Hiring Council of the State, 774 A.2d 820 (R.I. 2001).

Szilagyi v. State ex rel. LaPorte Cmty. Sch. Corp., LaPorte County, 231 N.E.2d 221 (Ind. 1967).

Tanner v. Town Council of Town of East Greenwich, 880 A.2d 784 (R.I. 2005).

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

Wolfson v. State, 344 So. 2d 611 (Fla. Dist. Ct. App. 1977).

DATED this 8th day of September, 2008.

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Analysis by:

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