

*Winter 1980*

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#### Recommended Citation

Jon Dilts, *The "Open Door" Laws: An Appraisal of Open Meeting Legislation in Indiana*, 14 Val. U. L. Rev. 295 (1980).

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# NOTES

## THE "OPEN DOOR" LAWS: AN APPRAISAL OF OPEN MEETING LEGISLATION IN INDIANA

### INTRODUCTION

An increasingly assertive conviction that the public's business should be conducted in public has produced a legion of state legislation attempting to establish the public's right to attend government meetings.<sup>1</sup> In an early draft of Indiana's Open Door Law, proponents for open meetings expressed that conviction with unusual force:

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating

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1. Every state now has some form of open meeting legislation. ALA. CODE § 13-5-1 (1975); ALASKA STAT. §§ 44.62.310-312 (Supp. 1975); ARIZ. REV. STAT. ANN. §§ 38-341 to -431.09 (Supp. 1979); ARK. STAT. ANN. §§ 12-2801 to -2807 (1979 Replacement Vol.); CAL. GOV'T CODE §§ 11120-31 (Supp. 1979) and §§ 54950-61 (Supp. 1979); COLO. REV. STAT. ANN. §§ 29-9-101 (Supp. 1978); CONN. GEN. STAT. REV. §§ 1-21 to -21A (Supp. 1979); DEL. CODE ANN. tit. 29, § 10001 to 10005 (Supp. 1977); FLA. STAT. ANN. § 286.011 (Supp. 1979); GA. CODE ANN. §§ 40-3301 to -3303 (Supp. 1979); HAWAII REV. STAT. §§ 92-1 to -13 (1976 Replacement Vol.); IDAHO CODE §§ 67-2340 to -2347 (Supp. 1979); ILL. ANN. STAT. ch. 102, §§ 41-46 (Smith-Hurd Supp. 1979); IND. CODE §§ 5-14-1.5-1 to -7 (Supp. 1979); IOWA CODE ANN. § 28A.1 to 28A.8 (Supp. 1979); KAN. STAT. ANN. §§ 75-4317 to -4320 (1977 and Supp. 1978); KY. REV. STAT. ANN. §§ 61.805-991 (1975); LA. REV. STAT. § 42.5 to .8 (Supp. 1979); ME. REV. STAT. ANN. tit. 1 §§ 402-06 (1964), *as amended*, (Supp. 1979); MD. ANN. CODE art. 41, § 14 (1978 Replacement Vol.); MASS. ANN. LAWS ch. 30A, § 11A (1979); MICH. COMP. LAWS ANN. §§ 15.261-273 (Supp. 1979); MINN. STAT. ANN. § 471.705 (1977); MISS. CODE §§ 25-41-1 to -15 (Supp. 1978); MO. ANN. STAT. §§ 610.010-.030 (1979); MONT. REV. CODE ANN. §§ 82-3401 to -3406 (Supp. 1977); NEB. REV. STAT. §§ 84-1408 to -1414 (1976 Reissue Vol.); NEV. REV. STAT. §§ 241.010 to .040 (1973); N.H. STAT. ANN. §§ 91A:1 to A:8 (Supp. 1977); N.J. STAT. ANN. §§ 10:4-7 to -21 (1976); N.M. STAT. ANN. § 10-15-1 to -4 (Supp. 1979); N.Y. PUBLIC OFFICERS LAW §§ 95 to 106 (Supp. 1979); N.C. GEN. STAT. §§ 143-318.1 to 318.7 (1978 Replacement Vol.); N.D. CENT. CODE § 44-04-19 (1960); OHIO REV. § 121.22 (1978); OKLA. STAT. ANN. tit. 25, §§ 301-14 (Supp. 1979); GEN. LAWS R.I. § 42-46-1 to -10 (1977 Reenactment Vol.), *as amended* (Supp. 1978); S.C. CODE ANN. §§ 1-20 to -20.4 (Supp. 1975); S.D. COMP. LAWS ANN. §§ 1-25-1 to -5 (1974); TENN. CODE ANN. §§ 8-4402 to -4406 (Supp. 1979); TEX. REV. CIV. STAT. art. 6252-17 (Supp. 1978); UTAH CODE ANN. §§ 52-4-1 to -9 (Supp. 1979); VT. STAT. ANN. tit. 1 §§ 312-14 (Supp. 1979); VA. CODE ANN. §§ 2.1-340 to -346.1 (1979 Replacement Vol.); WASH. REV. CODE §§ 42.30.010-.920 (1974) *as amended* (Supp. 1979); W. VA. CODE §§ 6-9A-1 to -7 (1979 Replacement Vol.); WIS. STAT. ANN. §§ 19.81 to .98 (Supp. 1979); WYO. STAT. ANN. §§ 9-11-101 to -107 (1977). Open records acts, another branch of right-to-know legislation, are excluded from the scope of this note.

authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining fully informed so that they may retain control over the public agencies they have created to serve them.<sup>2</sup>

Since 1953, with the pioneering passage of Indiana's Hughes Anti-Secrecy Act and California's Brown Act, all states have adopted some form of open meeting requirements.<sup>3</sup> Much of the early legislation, however, produced enough ambiguous verbiage, evasive lip service and confusion to require a second stage of remedial legislation during the past decade.<sup>4</sup>

In 1977 and again in 1979, Indiana rewrote and greatly expanded its 1953 anti-secrecy act to require open meetings.<sup>5</sup> The changes brought the state in line with progressive patterns and principles developed since the 1950s in California, Florida, Michigan, Tennessee and Washington.<sup>6</sup> The new "Open Door" legislation<sup>7</sup> was

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2. H. 1237, 99th Gen. Assembly, Reg. Sess. (1976). Nearly identical language appears in the Washington statute, WASH. REV. CODE § 42.30.010 (1974).

3. See Comment, *Open Meeting Laws: An Analysis and Proposal*, 45 MISS. L.J. 1151, 1158 (1974). In 1959 there were 20 states with open meeting laws. In 1962 there were 28. By 1974, there were 46. Today there are 50. The code sections are cited at note 1 *supra*. The four states passing open meeting laws since 1974 are New York, Rhode Island, Mississippi and West Virginia.

4. See Murtha, *Most 'Open Meeting' Laws Found to be Ineffective*, Editor and Publisher, Aug. 24, 1974, at 11. Dr. John Adams of the University of North Carolina noted in a report published by the University of Missouri and noted in Editor and Publisher that in 1974 the status of state law in this area was blurred by an impressive amount of activity in legislatures, resulting in frequent and extensive change. That process of amendment and modification has continued through the end of the decade.

5. IND. CODE §§ 5-14-1.5-1 to -7 (1977). The pre-1977 act was IND. CODE §§ 5-14-1-4 and 5-14-1-5 (1953):

Except as may now or hereafter be otherwise specifically provided by law, all public proceedings shall be open to any citizen of this state, and every citizen shall, insofar as physical facilities permit, be permitted to observe such proceedings. Nothing in this act contained shall be construed to modify or repeal any existing law with regard to public records which, by law, are declared to be confidential. Nor shall anything in this act be construed to modify or repeal any existing law, rule or regulation, with regard to the holding of executive sessions by any administrative body or agency. Provided, however, that no administrative body or agency shall, under the guise of holding an executive session, conduct public proceedings in such a manner as to defeat the declared policy of this act as set forth in section 1 hereof.

6. Cited at note 1 *supra*. Indiana's legislative drafters based the statute largely on statutes enacted in California and Washington. Interview with Richard

heavily debated and amended in an effort to strike a practical balance among such nebulous factors as the public's right to know, the individual's expectation of privacy, governmental efficiency and the role of the press in a democracy.<sup>8</sup>

Because the press and organized citizens' groups are ever urging greater public access to governmental meetings, it is likely that local government, state courts and the legislature will continue to be confronted by aggressive efforts to enforce and liberally construe the open meetings law.<sup>9</sup> Consequently, it is worthwhile to consider Indiana's approach to open meetings and to explore the statutory policy decisions made to accommodate the conflicting considerations.

### THE OPEN MEETING PRINCIPLE

Abraham Lincoln's call at Gettysburg for a government by the people was a call flavored more by hopeful prophecy and rhetoric than by reality. Lincoln knew, as any competent common-law lawyer would know, that the folks back home in the Midwest not only did not govern directly, but lacked even a common-law right to attend government meetings.<sup>10</sup> America's heritage of English law does not include open government.

The English Parliament debated in private. Members of the House of Commons claimed a right to secrecy as a safeguard from

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Cardwell, General Counsel for The Hoosier State Press Association, in Indianapolis (Sept. 24, 1979) [hereinafter cited as Cardwell Interview, Sept. 24, 1979]. Cardwell prepared the model statute used by Indiana.

7. Indiana legislators voted to call the act "The Open Door Law." JOURNAL OF THE SENATE, 100th Gen. Assembly, Reg. Sess. (1977) at 118. Other states have used popular names like Florida's "Sunshine Law."

8. The act was amended at every opportunity except one during the 1977 session of the Indiana General Assembly. JOURNAL OF THE SENATE, 100th Gen. Assembly, Reg. Sess. (1977) at 1, 106 and 118; JOURNAL OF THE HOUSE, 100th Gen. Assembly, Reg. Sess. (1977) at 682, 720, 721 and 744.

9. More than a dozen lawsuits have been filed in Indiana since the act was passed, about half of the cases in 1979. The first violation of the act resulting in a hearing occurred the morning the act became effective on Sept. 1, 1977, when an Alcoholic Beverage Board conducted an executive session without notice. Interview with Richard Cardwell, General Counsel for The Hoosier State Press Association, in Indianapolis (Oct. 25, 1979) [hereinafter cited as Cardwell Interview, Oct. 25, 1979].

10. For a general discussion of the history of public access to governmental meetings, see H. CROSS, THE PEOPLE'S RIGHT TO KNOW (1953); F. THAYER, LEGAL CONTROL OF THE PRESS (4th ed. 1962); A. WIGGINS, FREEDOM OR SECRECY (1956); Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199 (1962).

intimidation and on grounds of convenience and protection from the pressures of critical public opinion.<sup>11</sup> It was not until 1908 that England adopted an open meetings act.<sup>12</sup> That statute, enacted in response to an English court ruling that the press and public had no right to attend meetings of local authorities, was one of the first open meeting laws passed by any legislature.<sup>13</sup> The English common-law practice of private governmental meetings continued in the United States after the Revolution. The Constitutional Convention of 1787 conducted its sessions in secrecy, and debate during the early years of the Senate were in closed session.<sup>14</sup>

The tone, the spirit and the cadence of Lincoln's Gettysburg speech, however, are echoes of the Constitution, not of the dusty doctrines of common law. His government by the people is a constitutional government. Advocates of open meetings have often and hotly argued that the public's right to attend meetings is implicit in the first two articles of the Constitution as well as the First Amendment.<sup>15</sup> American courts, nevertheless, have never read the Constitution so expansively.<sup>16</sup> To the courts it is not obvious, as some have argued, that freedom of the press implies the right to gather news. No court has as yet been willing to extend constitutional guarantees to include a right of access despite arguments that government by the people means nothing unless the people have the opportunity to observe and participate.<sup>17</sup> And yet, Lincoln's ideal of

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11. Note, 75 HARV. L. REV., *supra* note 10, at 1203.

12. Local Authorities (Admission of the Press to Meetings) Act, 8 Edw. 7, c. 43 (1908).

13. Alabama has been credited with being the first state to pass an open meetings law. ALA. CODE tit. 14, §§ 393-94 (1959) (enacted 1915). Comment, 45 MISS. L.J., *supra* note 3, at 1154 (1974).

14. 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 xi, 15 (rev. ed. 1937).

15. Comment, 45 MISS. L.J., *supra* note 3, at 1159; Comment, *Ambiguities in Oregon's Open Meeting Legislation*, 53 ORE. L. REV. 339, 341 (1974). For arguments supporting a constitutional right of access, see Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1 (1957); Note, *Access to Official Information: A Neglected Constitutional Right*, 27 IND. L.J. 209 (1952).

16. *Branzburg v. Hayes*, 408 U.S. 665, 727-28 (1973); but see *Pell v. Procunier*, 417 U.S. 817, 839-41 (1974) (Douglas, J., dissenting).

17. One commentator, however, suggests that under some circumstances the secrecy of government meetings may in fact be protected by the constitutional rights of free speech and assembly. See Hollow, *Tennessee Sunshine*, 42 TENN. L. REV. 527, 542 (1975), citing *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), and *Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971).

popular government has not withered for lack of guardians among common law and constitutional law makers.

During the past decade, the states and the federal government have adopted or strengthened statutes aimed at making government more open and directly accountable to the people.<sup>18</sup> In Indiana, for example, legislators have drastically revised existing laws and in so doing have stirred the embers of old common-law debates about who should govern and how openly.<sup>19</sup> Indiana's open meetings law reflects a number of policy decisions by the legislature that touch sensitive areas of governmental decision making.<sup>20</sup> The debate for passage drew its strength from the national concern of the early 1970s about governmental abuse of power as well as from local citizens and newspapers disturbed by closed meetings and pre-meeting discussions, especially among school boards.<sup>21</sup>

Indiana's response was to reaffirm that the state and its political subdivisions exist only to aid the business of the state's citizens, and that deliberations and actions of public agencies are to be conducted openly in order that the citizens may be fully informed.<sup>22</sup> The legislation, rejected in 1976, amended and passed in 1977 and amended again in 1979, was modified at almost every opportunity.<sup>23</sup> Drafts of the bill involved heavy lobbying by organizations representing the press, schools, hospitals, and local government officials.<sup>24</sup> The final product resulted in a statute with wide ranging effects. It

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18. *E.g.*, Freedom of Information Act, 5 U.S.C. § 552(a) (1970); Legislative Reorganization Act, 2 U.S.C. § 190a(b) (1970). For a general discussion of federal efforts to open government meetings and information, see Hunter, *Statutory and Judicial Responses to the Problem of Access to Government Information*, 79 DET. COLL. L. REV. 51 (1979).

19. IND. CODE §§ 5-14-1.5-1 to -7 (Supp. 1979).

20. "It was one of the most amended laws in the history of Indiana because it involved an access policy for the state. People are fully in agreement with access as long as they are not affected." Cardwell Interview, Sept. 24, 1979.

21. Impetus for the Indiana legislation came largely as a result of efforts by Jack Howey and John Mitchell of Nixon Newspapers Inc. during the early 1970s. Howey, then editor of the Peru Tribune, and Mitchell, then publisher of the Frankfort Times and a former Indiana legislator, expressed frustration about their newspapers' inability to cover secret school board meetings. That frustration was translated into efforts by Cardwell and the state press association to draft legislation for the 1976 session of the General Assembly.

22. IND. CODE § 5-14-1.5-1 (1977).

23. *Supra* note 8.

24. The lobby organizations most actively involved in the law's drafting and adoption were the Hoosier State Press Association, the Indiana School Board Association and the Indiana Hospital Association.

severely restricts executive sessions,<sup>25</sup> forbids use of a secret ballot,<sup>26</sup> requires 48-hour notice to news media,<sup>27</sup> and provides citizen standing to seek injunctive relief<sup>28</sup> or have governmental decisions declared void for violations of the act.<sup>29</sup>

Since passage, the statute has spawned nearly a dozen court cases, one of them reaching the Indiana Court of Appeals during the summer of 1979.<sup>30</sup> Areas of conflict have sprung largely from questions of exemptions, the use of executive sessions, notice requirements and remedies. Because Indiana's legislative experience did not occur in a provincial vacuum, but was heavily influenced by the activities of other states and courts in this area of administrative law, this note examines in some detail these four principal areas of conflict in Indiana in light of legislative responses of the various states to the open government concept.

### COVERAGE

The Indiana Open Door Law applies to "all meetings of the governing bodies of public agencies."<sup>31</sup> Consequently, an analysis of coverage involves three distinct inquiries. First, it must be determined whether there is, in fact, a meeting as defined by the statute, that is, whether it is a "gathering of a majority . . . for the purpose of taking official action upon public business."<sup>32</sup> Second, if it is a meeting, then it must be determined whether the body conducting the meeting is the governing body of a public agency as defined by the statute. Finally, if it is a meeting of an appropriate governing body, then it must be determined whether any exceptions exist permitting the meeting to be closed.

### *Meetings*

Like California, Washington and a number of other states, Indiana's act carefully defines crucial terms in an effort to avoid as much ambiguity and confusion as possible.<sup>33</sup> The pivotal terms in the statute include "meeting," "public agency," "governing body," and

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25. IND. CODE § 5-14-1.5-6 (Supp. 1979).

26. IND. CODE § 5-14-1.5-3(a) (Supp. 1979).

27. IND. CODE § 5-14-1.5-5 (Supp. 1979).

28. IND. CODE § 5-14-1.5-7(a) (Supp. 1979).

29. IND. CODE § 5-14-1.5-7(b) (Supp. 1979).

30. *Blinn v. City of Marion*, \_\_\_ Ind. App. \_\_\_, 390 N.E.2d 1066 (1979).

31. IND. CODE § 5-14-1.5-3(a) (Supp. 1979).

32. IND. CODE § 5-14-1.5-2(c) (Supp. 1979).

33. CAL. GOV'T CODE §§ 11121-23 (Supp. 1979); WASH. REV. CODE § 42.30.020 (1974).

"official action." Each of these words are central to an understanding of the law's reach, and ordinary dictionary definitions are not much help. A meeting, under the act, means "a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business."<sup>34</sup> The act expressly excludes social or chance gatherings not intended to evade the statute, on-site inspections of public projects and programs, travel to and attendance at meetings of organizations devoted to improving government and attendance at political party caucuses "held for purposes of planning political strategy and holding discussions designed to prepare the members for taking official action."<sup>35</sup>

It is clear by that definition that Indiana makes no effort to prevent officials from conferring privately and informally among themselves in small groups of less than a majority. The legislature, in choosing the word "majority" as a functional test, rejected Florida and Colorado approaches which find a meeting whenever two or more are gathered together.<sup>36</sup> Indiana legislators, in drafting the majority requirement, followed the lead taken by most of the states. The basis for the decision was two-fold: 1) The public is never in danger until enough members of the body are present for taking official action, and 2) officials, like other human beings, need some opportunity to discuss public issues among themselves in an informal manner.<sup>37</sup> In short, they need room to breathe.

The legislative drafters also rejected the "quorum" concept used in a number of states and proposed by the Common Cause model statute.<sup>38</sup> Quorum, as defined by the model statute, is a simple majority. So defined, the practical effect of a choice between "quorum" and "majority" makes little difference from the standpoint of clarity. Where not so defined, however, the idea of a quorum introduces a potential loophole because officials comprising a majority but less

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34. IND. CODE § 5-14-1.5-2(c) (Supp. 1979).

35. *Id.*

36. COLO. REV. STAT. ANN. §§ 29-9-101 (1978); FLA. STAT. ANN. § 286.011 (Supp. 1979).

37. Most of the state statutes define it in terms of a majority or quorum. The theory is that if enough get together to take action then you are in danger. The legislators would argue that anything less than that stifles discussion. They wouldn't be able to even get together for coffee. We also provided for social and chance gatherings. It makes them feel more at ease.

Cardwell Interview, Oct. 25, 1979.

38. See Tacha, *The Kansas Open Meeting Act: Sunshine on the Sunflower State?* 25 KAN. L. REV. 169, 182 (1977).



than a quorum could convene a closed meeting, discuss the issues, reach a resolution and agree to vote accordingly at a subsequent open meeting.<sup>39</sup> Obviously, a pro forma public vote following closed deliberation is precisely what the open meetings acts are intended to discourage.

Tennessee, a state which uses the word quorum, introduced an interesting ambiguity by making "quorum" not only a limitation but also a condition. Under the Tennessee Sunshine Law, a meeting is "the convening of a governing body . . . for which a quorum is required in order to make a decision . . . on any matter."<sup>40</sup> To be a meeting under the statute and thereby open to the public, the gathering must be of the type for which a quorum is *required*. That definition is considerably different from Indiana's. Tennessee apparently would permit closed gatherings of a majority whenever a quorum is not specifically required by law, whereas, in most instances, the mere presence of a majority in Indiana would trigger application of the statute. Moreover, in Tennessee, by simply voting to eliminate quorum requirements, officials could evade the act altogether.<sup>41</sup> Indiana's statute, drafted with the benefit of extensive commentary on the experience of other states, avoids this particular problem.

Indiana's decision to limit coverage of the act to majority gatherings clearly does nothing to prevent a minority with political and persuasive power from gathering to discuss public business.<sup>42</sup> The choice reflects the conviction, noted earlier, that the danger which arises from closed gatherings arises when the opportunity exists for public officials to make commitments as a voting majority.<sup>43</sup> Although language declaring that a meeting be open whenever two or more members are present may be more effective and inflexible,<sup>44</sup> the softer Indiana approach reflects an effort to balance the interests of public officials in informal conversation and the public's right to know what government is doing. In Indiana, moreover, it also reflects a realistic compromise. A stronger bill would have a difficult time getting through the General Assembly, but anything weaker would not be worth the effort.<sup>45</sup>

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39. See Comment, 45 MISS. L.J. 1151, *supra* note 3, at 1170.

40. TENN. CODE ANN. § 8-4402 (Supp. 1974).

41. For a general discussion of the problem, see Hollow, 42 TENN. L. REV. 527, *supra* note 17, at 540.

42. See Comment, 45 MISS. L.J. 1151, *supra* note 3, at 1170.

43. See text accompanying note 37 *supra*.

44. Comment, 45 MISS. L.J. 1151, *supra* note 3, at 1170.

45. Cardwell Interview, Oct. 25, 1979. See note 37 *supra*.

Closely related to this concern for permitting private breathing space for public officials is the statute's protection of officials' social lives. This kind of protection has become a standard item in open meeting laws and is based on the recognition that it is common for people who have daily contact at work to establish social relationships during nonworking hours. The reasoning is that an open meetings law so strong that its scope would be construed to cover discussions of public policy incidental to social encounters is unreasonably restrictive.<sup>46</sup> The act, therefore, protects social gatherings and unplanned, chance gatherings, even of a majority, so long as they are not intended to evade the statute.<sup>47</sup> Commentators concede the protection is fraught with danger of abuse.<sup>48</sup> Illegal meetings, under the guise of social or chance gatherings, are difficult to discover or to prove. Some social gatherings, however, such as pre-meeting dinners or weekly bridge games where a majority is frequently present should be suspect.

In addition to social or chance gatherings, the act protects on-site inspections of projects and programs, travel and attendance at meetings of organizations devoted to better government, and the political caucus.<sup>49</sup> Each of these are non-meetings in the sense that they are specifically not included in the definition of a meeting. An interesting question arises, however, when the officials at one of these non-meetings decide to take some official action. For example, officials inspecting a public works project might decide to order some changes in specifications and so direct the engineer at the job site.<sup>50</sup> It would be a simple matter to vote on those changes later at an open meeting, although the changes have already privately been ordered and the vote provides nothing more than an announcement. In exchange for this freedom to associate, to travel and to inspect, the public official clearly bears a burden of responsibility. The legislators have not seen fit to remove every opportunity for evasion, but to grant some expectation of trust.

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46. See Comment, 45 MISS. L.J. 1151, *supra* note 3, at 1170.

47. IND. CODE § 5-14-1.5-2(c)(i) (1977), *as amended*, (Supp. 1979).

48. Comment, 45 MISS. L.J. 1151, *supra* note 3, at 1170.

49. IND. CODE § 5-14-1.5-2(c)(iv) (Supp. 1979). A caucus is defined as "a gathering of members of a political party or coalition which is held for purposes of planning political strategy and holding discussions designed to prepare the members for taking official action." IND. CODE § 5-14-1.5-2(h) (Supp. 1979).

50. Concerned School Citizens of Garrett sued the Garrett-Keyser-Butler School District in DeKalb Circuit Court, alleging it had failed to give proper notice of a meeting of the board at Fort Wayne. The board had gone there to the office of an architect to review construction plans. The complaint alleges, also, that the meeting was not open and that final action was taken during it (deletion of \$500,000 worth of items from the proposal and a decision not to build an auxiliary gymnasium).

Under certain circumstances, even a majority of the members of a public body can be gathered together without the gathering being termed a meeting. The gathering of the majority must be "for the purpose of taking official action."<sup>51</sup> The legislature has broadly defined "official action" to include receiving information, discussing public business, making recommendations, establishing policy, making decisions on public business or voting.<sup>52</sup> Because of the manner in which these definitions intermesh, it is apparent that the legislature was aware that some form of "official action" is likely to occur at a social gathering of a majority of members of a public body. So long, however, as that gathering was not arranged *for the purpose* of taking official action, the activity is protected. It may be challenged on other grounds, but without some showing that the body intended to take official action, there seems little room to argue that what occurred was a meeting required to be open under the act. The loophole, however, is a small one compared to that created by the notion of caucus as a non-meeting.

The statute defines caucus as a gathering of the members of a political party or coalition which is held for the purposes of planning political strategy and holding discussions designed to prepare the members for taking official action.<sup>53</sup> The act also provides that a caucus is not a meeting covered under the law.<sup>54</sup> In the original version of the bill, caucuses were included as meetings and were listed among those which could be closed.<sup>55</sup> The House action in making a caucus a "non-meeting" rather than an executive session took the political strategy session completely out of the reach of the statute. As an executive session, the caucus would have been subject to requirements that public notice and identity of the subject matter be posted and provided to the news media. Moreover, the act forbids a body from ordinarily conducting an executive session during the meeting, but if a caucus is not a meeting at all, there is nothing to prevent a political faction or coalition of a board from meeting privately as a caucus without notice, at any time, even if that caucus constitutes a majority of the members on a board or commission. The caucus exemption is a major potential weakness in the act, and is virtually impossible to police. Planning political strategy and

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51. IND. CODE § 5-14-1.5-2(c) (Supp. 1979).

52. IND. CODE §§ 5-14-1.5-2(d)(1) to -2(d)(5) (Supp. 1979).

53. IND. CODE § 5-14-1.5-2(h) (Supp. 1979).

54. IND. CODE § 5-14-1.5-2(c) (Supp. 1979).

55. JOURNAL OF THE HOUSE, 100th Gen. Assembly, Reg. Sess. (1977), at 720.

preparing members to take official action, where "official action" includes voting, provides handy camouflage for action which the statute specifically intends to prevent.<sup>56</sup>

The caucus issue was, in fact, the most volatile issue threatening defeat of the open meetings act.<sup>57</sup> The state legislature in Indiana is included in the coverage of the act and the legislature uses the caucus traditionally and frequently. The caucus privilege is jealously guarded by the members of the General Assembly and practical politics makes it unlikely that any bill eliminating the private, political discussions could get enough support to pass.<sup>58</sup>

Under the caucus exemption, it is possible for a majority of a city council to meet privately for the purpose of taking official action upon public business, provided all members of the majority gathered belong to the same political party or coalition. The loophole is enormous and is far more significant than that posed by social or chance gatherings of a majority. A political group constituting a majority on a governing body can do precisely what the act directs not be done: intentionally meeting to take action on public business. Under these circumstances, then, it is curious to note that there have been few problems with the caucus at the local level and few complaints by the press.<sup>59</sup> This may be, of course, either because the caucus is not being abused or because it is being

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56. In enacting this chapter, the general assembly finds and declares that this state and its political subdivisions exist only to aid in the conduct of the business of the citizens of this state. It is the intent of this chapter that the deliberations and actions of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the citizens may be fully informed.

IND. CODE § 5-14-1.5-1 (Supp. 1979).

57. "This (the caucus) was the most volatile issue. The legislature is included in the act and the legislators caucus when somebody sneezes. They just didn't want any limitation on their ability to caucus." Cardwell Interview, Oct. 25, 1979.

58. In 1977, when the House took out the Senate's addition of "partisan political activities" from the executive sessions and deleted "caucus" from that section, some senators thought they were leaving the caucus unprotected. During the explanation to the Senate, it was said that they (the House) eliminated the caucus. We almost lost the whole thing on the caucus question.

*Id.*

59. There have been almost no complaints about the caucus at the local level. It does allow a lot, though. Terre Haute has seven Democrats and one Republican (on the city council). All the law has done there is to keep the Republican out of the closed caucus of the seven Democrats. They still get together to meet.

*Id.*

used discreetly enough to avoid criticism. Whatever the reason, the legislature has provided that political groups may caucus privately, the effect of which is a kind of escape valve from the pressure of open discussion. It is a recognition that if the law is to work to keep the formal processes open to the public, there must inevitably be some allowance for informal interaction.<sup>60</sup>

Problems, however, do arise when officials stray from the statutory definition of a caucus. In Indiana, the word "caucus" has been used to describe a political convention procedure whereby the party in power elects a replacement for a public official of that party who has resigned his office.<sup>61</sup> During the 1979 amendment procedure, an effort was made to amend the statute to require that form of local "caucus" be open to the public. The argument was made that the election procedure was not a true caucus as defined and that, moreover, that form of local political convention was of the type of thing intended to be covered.<sup>62</sup> The amendment was defeated in the Senate, leaving the issue unanswered.<sup>63</sup> The practical political lesson was that the concept of caucus remains an untouchable and highly sensitive issue for the legislature. The statutory privilege cannot be disturbed even to clarify that a county-level convention cannot be secret just because the county chairman likes to call it a caucus.<sup>64</sup>

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60. Access, to an extent, is a sham. No matter how you read the law, guys are going to talk together. The reason the open committee meetings (in the General Assembly) work is because it has not really inhibited their ability to meet. It has opened up the formal process. That is the reason it works. They can still go on their happy way pretty much. *Id.*

61. IND. CODE § 3-2-9-2 (1976), provides:

Vacancies in all elective county, township, city and town offices, except the offices of prosecuting attorney, clerk of the circuit court, and judge of any court, shall be filled for the unexpired term by a caucus as provided in this chapter, any other provisions of the law to the contrary notwithstanding.

62. "It is not really a caucus. It really is a convention. We could take the position that it falls under 2(a)(2)'s 'any entity'". Cardwell Interview, Oct. 25, 1979. The section referred to by Cardwell provides: "Public agency means: any county, township, school corporation, city, town, political subdivision, or other entity, by whatever name designated, exercising in a limited geographical area the executive, administrative, or legislative power of the state or a delegated local governmental power." IND. CODE § 5-14-1.5-2(a)(2) (Supp. 1979) (emphasis added).

63. At the present time, access to these conventions is at the discretion of the local party chairman. No court challenge has been made, but if it were to be made, it would likely focus on § 2(a)(2) rather than on the caucus definition. The vote defeating the caucus amendment in 1979 was 35 to 12. Cardwell Interview, Oct. 25, 1979.

64. "You just can't interfere with the caucus right and get a bill through the legislature. It is a very sensitive issue." Cardwell Interview, Oct. 25, 1979.

Indiana's definition of a meeting reflects the stress of political compromise and a balancing of political and public interests. While the definition clearly protects, for public scrutiny, all of the formal processes of decision making, it also allows considerable freedom for public officials to meet and discuss public issues informally. However, while allowing considerable leeway for the interests of public officials, the act stretches its net over nearly every aspect of public business except the judiciary.

### *Governing Bodies*

As critical as determining whether the gathering of officials is a "meeting" is the question of whether the body is one intended to be covered by the statute. The states generally have taken three approaches to determining the governmental agencies covered by their acts. Some simply list by type the government bodies whose meetings are open.<sup>65</sup> Others focus on the exercise of governmental power by an agency.<sup>66</sup> Still others define coverage in broad terms based on public funding.<sup>67</sup> However, the trend during the 1970s, a trend which Indiana followed, has been toward some combination of these devices to insure sufficient breadth of coverage.<sup>68</sup>

The governing body of a public agency in Indiana includes any board, commission, council or other body which takes official action upon public business and includes any committee appointed by the governing body or its presiding officer if the committee has been delegated authority to take official action on public business.<sup>69</sup> To determine what is and what is not a public agency, the act lists five sweeping definitions.<sup>70</sup> If an organization fits any one of the five, it

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65. *E.g.*, IOWA CODE ANN. § 28A.2 (Supp. 1979).

66. *E.g.*, ME. REV. STAT. tit. 1, § 402 (1964).

67. *E.g.*, OKLA. STAT. tit. 25, § 304 (Supp. 1979).

68. See Wickham, *Let the Sun Shine in! Open Meeting Legislation Can be Our Key to Closed Doors in State and Local Government*, 68 NW. U.L. REV. 480, 483 (1973).

69. IND. CODE § 5-14-1.5-2(b) (Supp. 1979).

70. Public agency means: (1) any board, commission, department, agency or authority, by whatever name designated, exercising a portion of the executive, administrative, or legislative power of the state; (2) any county, township, school corporation, city, town, political subdivision, or other entity, by whatever name designated, exercising in a limited geographical area the executive, administrative, or legislative power of the state or a delegated local governmental power; (3) any entity which is subject to either: (i) budget review by either the state board of tax commissioners or the governing body of a county, city, town, township, or school corporation; or (ii) audit by the state board of accounts; (4) any building corpora-

is a public agency, and its governing body must open its meetings to the public. To be a governing body, however, the group must be one that can take official action, and the act provides another five sweeping definitions of "official action."<sup>71</sup> The string of definitions are key elements in determining coverage of the act. They also reflect an attempt to avoid the ambiguity and confusion that has swirled about open meeting legislation in other states. For example, prior to 1977 Delaware provided merely that "boards and commissions" be open to the public,<sup>72</sup> the weakness being that such a vague description could be read to exclude such public bodies as city councils or public authorities from coverage. Other states use broad but more specific catch-all tests, such as whether the agency receives or uses public funds.<sup>73</sup> But that test, too, has problems. An unqualified public funds test could reach the administration of private colleges, for example, while missing public governmental commissions responsible for policy decisions but without a budget.<sup>74</sup> Indiana legislators rejected the "funds test" during early committee hearings and chose instead to use as one of the factors defining a public agency a consideration of whether that agency was subject to budget review by state or local government or to an audit by the state board of accounts. An agency using public money but not subject to such a review is outside the act.<sup>75</sup>

Another ambiguous test often applied has been the "official action" requirement. If not clearly defined by statute, the test could be as broad or as narrow as a court would be willing to accept.<sup>76</sup> In-

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tion of a political subdivision of the state of Indiana that issues bonds for the purpose of constructing public facilities; or (5) any advisory commission, committee, or body created by statute, ordinance, or executive order to advise the governing body of a public agency, except medical staffs or the committees of such staff.

IND. CODE §§ 5-14-1.5-2(a)(1) to -2(a)(5) (Supp. 1979).

71. "Official action means: (1) to receive information or to deliberate on public business; (2) to make recommendations pursuant to statute, ordinance, or executive order; (3) to establish policy; (4) to make decisions on public business; or (5) to take final action." IND. CODE §§ 5-14-1.5-2(d)(1) to -2(d)(5) (Supp. 1979).

72. DEL. CODE ANN. tit. 29 § 5109 (Supp. 1974).

73. See Comment, 45 MISS. L.J., *supra* note 3, at 1165.

74. A 1976 draft of the Indiana act provided a public funds test: "Public agency means: (7) any public institution, including public service industries, either directly owned by the state of Indiana or any of its political subdivisions, in whole or in part with other municipalities, or supported in whole or in part by contributions or levy of public funds." H. 1237, 99th Gen. Assembly, Reg. Sess. (1976).

75. IND. CODE § 5-14-1.5-2(a)(3) (Supp. 1979), *quoted at* note 70 *supra*.

76. See *Board of Public Instruction v. Doran*, 224 So.2d 693 (Fla. 1969) (holding the Florida law constitutional against an attack on grounds of vagueness).

diana's five-prong definitions of public agency and official action make it clear the legislature intended to include the governing bodies of every state and local governmental unit, including their advisory commissions and building corporations, which receive information, discuss public business, make recommendations, establish policy or make decisions. While it is a broad and far-reaching statute, it does not include every possible group having an effect on the public welfare. The act, significantly, does not include private organizations spending state money, nor does it touch the internal staff operations of public agencies. Moreover, the act allows some exceptions where interests of privacy and efficiency appear to demand them.<sup>77</sup>

### *Exemptions*

Besides the specified non-meetings as defined in the "not-include" clause of the meeting definition,<sup>78</sup> the Indiana act also provides that it is the intent of the legislature that the deliberations and actions of public agencies be conducted and taken openly *unless otherwise expressly provided by statute*.<sup>79</sup> It is an important limitation and, in light of the national history of open meeting legislation, there is significance in the word "statute." Some states, such as Kansas and Arkansas have included language making the act apply unless otherwise provided for by *law*,<sup>80</sup> an ambiguous term that at least theoretically gives those who would circumvent the law a powerful tool. "Law" can be construed to include any judicial decision, state or federal statute, administrative ruling or local ordinance. The exemption "by law" allows almost any governmental body to exempt itself from the open meetings requirement by merely passing its own law.<sup>81</sup>

Florida and Tennessee expressly require exceptions to the act to be based only on constitutional grounds.<sup>82</sup> Consequently, Tennessee provides only one exception to the open meeting statute, and

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77. Unresolved is whether the act covers an agency administering a federal program where the administrators of the federal funds are appointed by the county council. In the Delaware Superior Court (Muncie, Ind.), a CETA advisory board is accused of holding an executive session in violation of the Open Door Law. A motion to dismiss was denied on May 2, 1979. *Muncie Newspapers Inc. v. Board of Commissioners*, No. 2S-78/1165 (Delaware Superior Court, filed Dec. 13, 1978).

78. IND. CODE § 5-14-1.5-2(c) (Supp. 1979).

79. IND. CODE § 5-14-1.5-1 (Supp. 1979) (emphasis added).

80. ARK. STAT. ANN. § 12-2805 (1979); KAN. STAT. ANN. § 75-4318(a) (Supp. 1978).

81. See Tacha, 25 KAN. L. REV., *supra* note 38, at 183.

82. FLA. STAT. ANN. § 286.011(1) (1979); TENN. CODE ANN. § 8-4402 (Supp. 1979).



that relates to the General Assembly.<sup>83</sup> Beyond that constitutional exception, application of the Tennessee open meeting act necessarily depends on how the term "governing body" and "meeting" are defined. A statute exempting a governmental unit from the open meeting requirement would not suffice. Such a statute would be sufficient in Indiana, however. Between the severe limitations of a constitutional exception and the very broad concept of exception by law, is Indiana's provision for exception by statute. Like many of the provisions of the act, it reflects a middle-of-the-road approach. While acknowledging the possible need for exceptions to the act, it makes it necessary to subject proposed exceptions to the rigors of debate and compromise in the legislature. Since passage of the Open Door Law in 1977, only one statutory exemption has been enacted.<sup>84</sup>

Although statutes expressly exempting a governing body are possible, it is the language of the Open Door Law itself which provides for the most important exemptions. The act provides that meetings of judicial bodies are exempt from the requirements of the act.<sup>85</sup> Administrative bodies exercising quasi-judicial functions, however, are not specifically exempt. Some states, on the other hand, do exempt quasi-judicial bodies,<sup>86</sup> and the Supreme Court of Florida has held that quasi-judicial bodies are exempt from Florida's Sunshine Law even though no specific exemption is written into the act.<sup>87</sup> The Indiana act also provides an exemption for medical staffs and their committees, certainly an area where the public's right to know about what government is doing is less direct. A meeting of hospital administrators, however, clearly falls within the act, including a meeting to receive a report from a medical staff committee.

Some states<sup>88</sup> exempt meetings of parole boards where the sole

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83. TENN. CONST. art. II, § 22 provides: "The doors of each House and the committees of the whole shall be kept open, unless when the business shall be such as ought to be kept secret."

84. IND. CODE § 31-5.5-3-15 (Supp. 1979) provides that meetings of Child Protection Teams are exempt from the Open Door Law. IND. CODE § 20-8.1-5-10 (1977), enacted before the Open Door Law, provides for procedure for closed discipline hearings in public schools.

85. The act addresses itself only to executive, administrative and legislative bodies. IND. CODE § 5-14-1.5-2 (Supp. 1979).

86. *E.g.*, ALASKA STAT. § 44.62.310 (1974); KAN. STAT. ANN. § 75-4318 (Supp. 1978).

87. *Cannon v. Board of Public Instruction*, 231 So.2d 34 (Fla. 1970).

88. *E.g.*, OHIO REV. CODE ANN. § 121.22(D) (1978); VA. CODE ANN. § 2.1-345 (1979).

purpose of the meeting is to pardon or parole an inmate. Indiana does not. Another exemption in several states are meetings between public bodies and their lawyers. The Indiana act does not specifically address this question, although it does provide that a body may go into executive session to discuss strategy with respect to initiation of litigation or litigation which is either pending or has been threatened specifically in writing.<sup>89</sup> Statutes elsewhere which have not specifically exempted the attorney-client relationship between a public body and its attorney have not been treated uniformly by the courts.<sup>90</sup> The Florida open meetings law has been held to constitute a waiver of the attorney-client privilege as between a public agency and its attorney. The court in that case did, however, protect the ethical obligations of the attorney by allowing him to demand confidentiality when he has reason to believe that an ethical obligation would be breached by disclosure.<sup>91</sup> In Indiana, the attorney-client privilege is deeply ingrained in the law and it is not likely that a serious challenge could be raised.

Some states also exempt law enforcement agencies,<sup>92</sup> military organizations,<sup>93</sup> public hospital staffs,<sup>94</sup> university boards of trustees,<sup>95</sup> pollution control boards,<sup>96</sup> juvenile correction agencies,<sup>97</sup> and prison commissions.<sup>98</sup> These wide-ranging, blanket exemptions frustrate the intent of legislation whose purpose is to permit the general public to observe government decision making and the deliberations which precede it. The usual argument for an exemp-

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89. IND. CODE § 5-14-1.5-6(a)(ii) (Supp. 1979). See text accompanying notes 113 to 116 *infra*.

90. *Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968) (holding that the client-attorney privilege could not be applied to consultation and discussions with the attorney outside of litigation); *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*, 263 Cal. App. 2d 41, 69 Cal. Rptr. 480 (1968) (holding that the open meeting law had not removed the attorney-client privilege, but that neither "the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest.")

91. *Times Publishing Co. v. Williams*, 222 So. 2d 470 (Fla. Ct. App. 1969).

92. *E.g.*, N.C. GEN. STAT. § 143-318.4 (1978 Replacement Vol.).

93. Prior to 1979, Iowa expressly exempted military organizations. IOWA CODE ANN. § 28A.6 (1978). Effective 1979, Iowa revised its open meetings statute along lines similar to Indiana's. IOWA CODE ANN. § 28A (Supp. 1979).

94. *E.g.*, ALASKA STAT. § 44.62.310(d)(4) (Supp. 1975).

95. In 1979, Virginia deleted subdivision (5) of VA. CODE ANN. § 2.1-345 which expressly exempted university trustees. VA. CODE ANN. § 2.1-345 (1979).

96. *E.g.*, CAL. GOV'T CODE ANN. § 11126 (Supp. 1979).

97. *E.g.*, MINN. STAT. ANN. § 471.705 (1977).

98. *E.g.*, ILL. ANN. STAT. ch. 102, § 42 (Smith-Hurd Supp. 1979).

tion is that because judgments made by the agencies are based on highly sensitive information, effectiveness depends on their ability to proceed in confidence.<sup>99</sup> Closely related are arguments that the agency deals with people whose reputations may be unnecessarily damaged. Likewise, in cases involving acquisition of real estate, forceful arguments can be made that for competitive reasons the agency should be exempt from the act. These broad, general exemptions, however, have not been the approach taken by Indiana or most other states concerned with a need to balance concerns of privacy and security with the public's right to know about government operations.

Exemptions of agencies which otherwise come within the definitions section of the Indiana statute are rare. Instead, Indiana has shown a preference to pull nearly all governing bodies within the range of the act and provide for specific kinds of closed meetings only when privacy, security or competitive advantage outweigh the need for openness. By keeping the agencies within the act, closed meetings can be monitored and controlled by notice requirements and subject-matter limitations.

### *Executive Sessions*

In Indiana, as in most states today, statutory access by the public to governmental meetings is the rule, and secrecy is the exception.<sup>100</sup> The exceptions stem from the idea that while government must be open to the voters if democracy is to succeed, sometimes it is necessary for government to work free of public scrutiny to be effective. At least three statutory methods exist for permitting closed meetings. The first, as discussed above, is to carefully define the kinds of activities and bodies covered so as to put those activities and bodies outside the reach of the statute. Indiana has done this by defining gatherings as meetings only when a majority is present and only when the body involved is one that exercises or shares executive, administrative or legislative power.<sup>101</sup> The second method, also discussed above, is to specifically name organizations as exceptions notwithstanding the language of the act. Indiana has used this method to exempt Child Protection Teams.<sup>102</sup> Finally, open meeting

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99. See *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963).

100. See *Papadoupoulos v. State Board of Higher Education*, 8 Ore. App. 445, 494 P.2d 260 (1972).

101. See text accompanying notes 36-77 *supra*.

102. See note 84 *supra*.

statutes may expressly grant public bodies the option of having closed sessions under certain circumstances even though the bodies themselves are not excluded from coverage of the act.<sup>103</sup>

As passed in 1977, the Indiana act provided for a few closely limited opportunities for executive sessions.<sup>104</sup> After establishing the parameters of coverage in the definition section,<sup>105</sup> the act provided that any government falling within those parameters could meet privately for only six reasons, all of which were based on preserving the rights and welfare of individuals as citizens and taxpayers. As might be expected, the executive session section of the act was an area of considerable discussion by the legislators. Both the House and the Senate members were concerned that political strategy meetings be kept closed. The Senate added "partisan political activities" to the list of executive sessions although such activities were arguably already covered by the "caucus" exception.<sup>106</sup> Both items were eventually dropped from the list of allowable executive sessions by the House which took the much stronger action of making the political caucus a non-meeting under the act, protecting it completely.<sup>107</sup>

In 1979, the executive session section was revised and the list of categories increased from six to eight.<sup>108</sup> The changes were an at-

103. For a general discussion of executive sessions, see Comment, 45 Miss. L.J., *supra* note 3, at 1172-76.

104. IND. CODE § 5-14-1.5-6 (1977) provided:

(a) Executive sessions may be held only in the following instances:

(i) where authorized by federal or state statute; (ii) for discussion of strategy with respect to: collective bargaining, pending or threatened litigation, the implementation of security systems, or the purchase of property, if for competitive or bargaining reasons such discussion is necessary; (iii) interviews with industrial or commercial prospects or their agents; (iv) interviews with prospective employees; (v) with respect to any individual over whom the governing body has jurisdiction: to receive information concerning the individual's alleged misconduct, or to discuss prior to any determination, the individual's employment or other status; (vi) for discussion of records classified as confidential by state or federal statute.

105. IND. CODE § 5-14-1.5-2 (1977).

106. JOURNAL OF THE SENATE, 100th Gen. Assembly, Reg. Sess. (1977) at 79.

107. JOURNAL OF THE HOUSE, 100th Gen. Assembly, Reg. Sess. (1977) at 682,

720. See text accompanying notes 53-60 *supra*.

108. IND. CODE § 5-14-1.5-6(a) (Supp. 1979) provides:

(a) Executive sessions may be held only in the following instances:

(i) where authorized by federal or state statute; (ii) for discussion of strategy with respect to: collective bargaining, initiation of litigation or litigation which is either pending or has been threatened specifically in

tempt to clarify ambiguities, close loopholes and protect official discussion about employee performance and student placement.<sup>109</sup> Specific parts of the section were given an extensive overhaul. Originally the act provided that executive sessions could be held for discussion of strategy with respect to a) collective bargaining, b) pending or threatened litigation, c) the implementation of security systems or, d) the purchase of property, "if for competitive or bargaining reasons such discussion is necessary."<sup>110</sup> In rewriting the subsection, the legislators changed items b and d and strengthened the wording of the conditional clause at the end. Item d now provides for discussions of strategy in respect to "*the purchase or lease of real property up to the time a contract or option to purchase or lease is executed by the parties.*"<sup>111</sup> Item b now provides executive session "for discussion of strategy with respect to . . . initiation of litigation or litigation which is either pending or has been threatened specifically in writing."<sup>112</sup> Under the amendment, it is clear that strategy planning can include discussion about who to sue as well as strategy concerning a threatened lawsuit against the governing body. Also, the amendment makes it clear that an oral threat of a lawsuit is not sufficient to close a meeting for purposes of a strategy discussion.

Despite these changes, however, a basic problem of interpretation exists about what is and what is not a "strategy session." Does it include, for example, meetings between the governing body and the opposing litigant in an effort to reach an out-of-court settlement? That question has arisen in Indiana at least three times. In LaPorte an executive session between the county commissioners and the

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writing, the implementation of security systems, or the purchase or lease of real property up to the time a contract or option to purchase or lease is executed by the parties; however, all such strategy discussions must be necessary for competitive or bargaining reasons; (iii) interviews with industrial or commercial prospects or their agents; (iv) interviews with prospective employees; (v) with respect to any individual over whom the governing body has jurisdiction: to receive information concerning the individual's status as an employee, student, or independent contractor; (vi) for discussion of records classified as confidential by state or federal statute; (vii) to discuss before any placement decision an individual student's abilities, past performance, behavior, and needs; and (viii) to discuss a job performance evaluation of individual employees.

109. Cardwell Interview, Oct. 25, 1979. As with the drafting of the initial legislation, Cardwell was the chief lobbyist for the amendments.

110. IND. CODE § 5-14-1.5-6 (1977).

111. IND. CODE § 5-14-1.5-6(a)(iii) (Supp. 1979) (emphasis added).

112. *Id.*

NAACP to discuss settlement of a dispute about a proposed county affirmative action plan was opened to the public when the press complained.<sup>113</sup> However, in Fort Wayne a closed session was held at the urging of federal court judge for settlement of litigation filed against a school board by black citizens over desegregation plans, and in Valparaiso, a trial court judge refused to enjoin a closed meeting between the county council and the county welfare department to discuss settlement of a dispute over salaries.<sup>114</sup> Although there is no evidence that the precise parameters of "strategy" was ever discussed by the legislators, the structure of the statute itself indicates that strategy was not a concept intended to cover bargaining between adversary parties. The term, with its military history,<sup>115</sup> implies some kind of preparation for assault or compromise with the enemy, rather than the actual battle itself. The subsection, read in its entirety, would seem to support the view that a discussion about what to do and how to do it was intended to be a one-sided affair. For example, the subsection provides for discussion of strategy in respect to collective bargaining but not for collective bargaining itself; it provides strategy discussion about implementation of security systems because public discussion would, of course, make the systems vulnerable; it provides for closed strategy discussions about the purchase or lease of real property clearly because of the danger that open discussion would drive up prices excessively. In none of those instances would it be prudent or reasonable to invite the opposing side to the strategy session. The public isn't invited because the public includes precisely those criminals, property owners and labor organizations with whom the government is in conflict. It would seem, then, that the better view is that meetings between the governing body and a litigant are something other than strategy sessions and are not protected by Section 6 of the act. The litigant is precisely the person who should be excluded from the opposing side's strategy discussions, and if it is not a strategy discussion, the act requires that it be open to the public.<sup>116</sup>

A related problem is whether this section provides protection for a closed meeting between a majority of the governing body and the body's attorney. Certainly, if the body can meet privately to

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113. Cardwell Interview, Oct. 25, 1979.

114. *Id.*

115. *Strategia* is the Greek word meaning generalship.

116. "The rationale for the strategy exception is that if government is in an adversary relationship, it shouldn't be put at a disadvantage. Or if it is in litigation, same thing. The act shouldn't put government in a competitive disadvantage." Cardwell Interview, Oct. 25, 1979.

discuss strategy about pending litigation, it also can meet privately with its attorney for the same reason. In addition, the body might claim a recognized client-attorney privilege.<sup>117</sup> If a majority of the body meets with opposing counsel, however, the meeting does not appear to be protected since it is arguably not a strategy session. Because of these limitations, a proper solution to reaching an out-of-court settlement with a litigant would be for the governing body to consult and instruct its attorney and then permit the attorney to attempt a resolution of the differences. This is particularly true when the opposing litigant is another governing body. Each body might properly instruct its attorney to meet with opposing counsel to pursue a course of settlement discussed in a closed strategy session.<sup>118</sup> The only difficulty with such an arrangement, however, is that the attorney may be construed as acting as a committee of one representing the governing body.<sup>119</sup> If such a position would be adopted, he would fall under the reach of the act without protection under Section 6.<sup>120</sup> Under such a strained definition of the committee concept, the act would not provide any protection for secret, out-of-court negotiations between public bodies. That is not a policy position that the legislature clearly adopted, but it does conform to the general notion that secret deals are precisely what the statute was designed to eliminate. When public agencies are involved in a mutual litigious conflict, the public might well demand to know what is going on, why it has happened and what is being done about it.

The 1979 amendment also attempted to make it clear that even sessions that could be classified as strategy sessions may not always be protected as executive sessions. The legislators substituted the words "if for competitive or bargaining reasons such discussion is necessary" with the stronger "all such strategy discussions must be necessary for competitive or bargaining reasons."<sup>121</sup> If a strategy

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117. See text accompanying notes 89-91 *supra*.

118. As a practical matter, you can't separate strategy from the decision making. If you have a pending desegregation case, you have a right to discuss strategy. The attorney says, "I think we should hire this law firm, and here are five plans we can propose to the court in the hearing tomorrow." The committee then says our strategy is to hire the law firm and to present the five plans. It may be strategy, but they are making decisions.

Cardwell Interview, Oct. 25, 1979.

119. But even Cardwell would reject the notion of a committee of one. "At Valparaiso, the two attorneys could have met. A committee is more than one person." *Id.*

120. IND. CODE § 5-14-1.5-2(b) (Supp. 1979) provides in part: "Governing body . . . includes any committee appointed by the governing body or its presiding officer to which authority to take official action upon public business has been delegated."

121. IND. CODE § 5-14-1.5-6(a)(ii) (Supp. 1979).

session cannot be justified on such a basis, it is not protected by Section 6.

The other major changes in Section 6 were the personnel conduct provisions. Subsection v, which permitted the reception of information concerning an individual's alleged misconduct "or to discuss prior to any determination, the individual's employment or other status," was changed to read "and to discuss, prior to any determination, that individual's status as an employee, student, or independent contractor."<sup>122</sup> The language now makes it clear that the governing body is not limited to discussions only about employees. The change specifically protects the privacy of students and independent contractors. In addition to discussions about the individual's status as an employee, student or independent contractor, the act now also provides protection under subsection vii for discussions about a student's abilities, past performance, behavior and needs before any decision about placement is made. Subsection viii extends similar protection to discussion about job performance evaluation of individual employees.

It is apparent from these additions that the legislature is interested in protecting the legitimate privacy concerns of individuals not elected to office and whose private reputations may suffer unjustly because of a public inquiry. However, it should be noted that while the discussions themselves may be closed to the public, the governing body is required to take final action only at a meeting

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122. Cardwell, in a paper prepared for press association members, provided this explanation of the changes:

The original intent of the law was to create a limited allowance for discussion of alleged misconduct of an individual and for discussion of that individual's status. The "or other" was inserted because hospital boards wanted to be able to discuss recommendations of medical staffs about physicians, who are independent contractors, not employees; therefore, "or other" (status) was intended to modify "employee." This language was seized upon by agencies to call executive sessions any time there was a discussion about a "personnel" matter.

The legislature's amendment to Sec. 6(a)(v) is intended to clarify its original intent about the limited scope of allowable executive sessions and to make it a "straight-line" procedure for receipt of information about a specific individual's alleged misconduct and to discuss, prior to a determination, that specific individual's status. The legislature added "student" as a category (in addition to employees and independent contractors over whom there is jurisdiction) of individuals who might be subject to this allowance for discussion.

Internal paper by Richard Cardwell for the Hoosier State Press Association (Sept. 1, 1979).



open to the public,<sup>123</sup> and public notice of the executive sessions must be given before the meeting and must include notice of the purpose or subject matter.<sup>124</sup>

Indiana's allowance for and restrictions of executive sessions are consistent with the approaches taken by most states in this area of open meeting legislation, an area where there has been considerable experience and commentary.<sup>125</sup> Generally, the states have taken two approaches toward executive sessions, the subject-matter approach, which is the one used in Indiana, and the final-action approach. When subject matter is used as the criterion for determining when an executive session is permitted, the statutes simply list the permitted subjects. This is the approach taken by most states, and the lists reflect remarkable uniformity.<sup>126</sup> The final-action approach used by a minority of states, differs in that it permits governing bodies to meet in closed session at their discretion provided the final vote or decision takes place in public. The second approach does not significantly alter the pre-statutory situation since the approach fails to ensure the public an open meeting in which the officials conduct full discussions of the issues, resolve differences and come to conclusions.<sup>127</sup>

In those states which use the subject-matter listing as a guide to determining what kinds of meetings can be closed, common experience among the states has largely limited the list to five areas of concern: 1) personnel administration in the areas of hiring, firing, compensation and discipline of public employees, 2) matters that

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123. IND. CODE § 5-14-1.5-6(b) (Supp. 1979).

124. IND. CODE § 5-14-1.5-6(c) (Supp. 1979).

125. See Douglas, *New Hampshire Right to Know Law, An Analysis*, 16 N.H. B.J. 227 (1975); Guy & McDonald, *Government in the Sunshine: The Status of Open Meetings and Open Records Laws in North Dakota*, 53 N.D.L. REV. 51 (1976); Hollow, 42 TENN. L. REV., *supra* note 17; Little, Tompkins, *Open Government Laws: An Insider's View*, 53 N.C.L. REV. 451 (1975); Tacha, 25 KAN. L. REV., *supra* note 38; Wickham, 68 NW. U. L. REV., *supra* note 68; Note, *Public Access to Government Records and Meetings in Arizona*, 16 ARIZ. L. REV. 891 (1974); Note, *Pennsylvania Right to Know Statute: A Creature of the Legislature Shaped by the Judiciary*, 82 DICK. L. REV. 749 (1978); Note, 75 HAR. L. REV., *supra* note 10; Note, *Ohio Open Meeting Statute—School Boards*, 3 OHIO NORTH L. REV. 176 (1975); Comment, *Open Meeting Laws in Michigan*, 53 J. URBAN L. 532 (1976); Comment, 45 MISS. L.J., *supra* note 3; Comment, *Ambiguities in Oregon: Open Meeting Legislation*, 53 ORE. L. REV. 339 (1974); Comment, *Open Meetings in Virginia*, 8 U. RICHMOND L. REV. 261 (1974).

126. See, e.g. MONT. REV. CODE ANN. § 82-3402 (Supp. 1977); OKLA. STAT. ANN. tit. 25 § 307 (Supp. 1979); ORE. REV. STAT. § 192.660(1) (Supp. 1973).

127. For a brief discussion of the problems raised by the approach, see Note, 75 HARV. L. REV., *supra* note 10, at 1210.

tend to prejudice the reputation and character of an individual, 3) real estate transactions, 4) public safety involving clear and imminent peril and 5) labor negotiations. The policy considerations behind these limited exceptions are considerations about rights of personal privacy and public interest concerns for keeping those who would damage the public's bargaining position or security from obtaining ammunition to do so.<sup>128</sup> A number of states also list such items as requests for anonymity made by a donor in a gift or bequest to the agency,<sup>129</sup> deliberations regarding the bestowing of honorary degrees,<sup>130</sup> examination materials in meetings of licensing and examining boards,<sup>131</sup> preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations.<sup>132</sup>

Indiana, while allowing for the most common concerns about personal privacy, public security and competitive position, has not gone much beyond what has been done elsewhere and in most instances has not gone as far. The Indiana act closely circumscribes the topics of bargaining and competition by limiting sessions to discussions of strategy. Even the purchase or lease of real property is protected only up to the time a contract or option to purchase or lease is executed by the parties.<sup>133</sup> Some states provide that labor negotiations with public employees be conducted in closed sessions. Arizona, for example, provides that "discussions or consultations with representatives of employee organizations regarding the salaries . . . in order to review its position and instruct its designated representatives" may be done in executive session.<sup>134</sup> No comparable provision exists in the Indiana Act.<sup>135</sup>

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128. For a general discussion of each of these major subjects permitted in executive sessions, see Tacha, 25 KAN. L. REV., *supra* note 38, at 195.

129. CAL. GOV'T CODE § 11126 (Supp. 1979).

130. *Id.*

131. *Id.*

132. ORE. REV. STAT. § 192.660(2)(c) (1978).

133. IND. CODE § 5-14-1.5-6(a)(iii) (Supp. 1979).

134. ARIZ. REV. STAT. ANN. § 38-431.03(A)(4) (Supp. 1979).

135. The question of collective bargaining is not directly answered in the Indiana act. The statute clearly provides strategy sessions with regard to collective bargaining, but an effort in 1979 to have collective bargaining itself specifically excluded from protection under section 6 failed. However, the legislature added a new section to the act providing that "any party may inform the public of the status of collective bargaining or discussion as it progresses by release of factual information and expression of opinion based upon factual information." It further provides that any report filed by a mediator is to be public record and any hearings held by a factfinder must be open to the public. IND. CODE § 5-14-1.5-6.5 (Supp. 1979).

The act doesn't answer whether collective bargaining sessions are supposed to be open or not. We could not get through the legislature a

## NOTICE

Declaring a meeting open to the public means little if the public is not informed that a meeting is scheduled. In 1962, however, only six open meeting statutes contained provisions requiring public notice: Arkansas, California, Louisiana, Massachusetts, Pennsylvania and Washington.<sup>136</sup> The consequence, of course, is the defeat of the statute by simple evasion. The governing body can merely meet at times and places unknown to the public. If challenged, the body can honestly respond that the meeting was open but that it is not the body's responsibility to send invitations.

Since 1962, most states, including Indiana, have enacted notice requirements.<sup>137</sup> Some of the statutes, however, require notice only for "regular meetings," or only to those who request it.<sup>138</sup> Some statutes expressly require notice but provide only that "adequate,"<sup>139</sup> or "reasonable,"<sup>140</sup> notice is necessary. Such language is vague and lends itself to varying application. A closely related problem is whether notice need be accompanied by an agenda. In a number of situations, notice of a meeting without some indication of the subject matter would be of little benefit to the public. Although the press might be interested in attending every meeting of a governing body, members of the public are likely to be more selective. If a statute is to truly serve the public's needs, some notice of agenda as well as time, place and date should be required.

Unlike the various state provisions for executive sessions, notice requirements vary widely. Some states require once-a-year notice for regular meetings,<sup>141</sup> while other states, like California, require that notice be given before every meeting.<sup>142</sup> For special or

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bill requiring open collective bargaining. As it stands now, if the school board itself does the bargaining then that has to be open. There are a couple of court things to the contrary, [and the feeling among some legislators is that the effect of making the boards bargain in public] is to drive the school board away from the bargaining.

Cardwell Interview, Oct. 25, 1979.

136. Note, 75 HARV. L. REV., *supra* note 10, at 1207.

137. By 1974, only six states did not have notice requirements: Alabama, Delaware, Georgia, North Dakota, Oklahoma and Utah.

138. See Tacha, 25 KAN. L. REV., *supra* note 38, at 190.

139. TENN. CODE ANN. § 8-4403 (Supp. 1979).

140. IOWA CODE ANN. § 28A.4 (Supp. 1979). In 1979, Iowa added to its statute a definition of reasonable notice which includes notification of requesting news media and posting of notice in a public place.

141. *E.g.*, ILL. ANN. STAT. ch. 102, § 42.02(a) (Smith-Hurd Supp. 1979); MICH. COMP. LAWS ANN. § 15.251(2) (Supp. 1979).

142. CAL. GOV'T CODE § 54954 (Supp. 1979).

emergency meetings, some states require 24-hour notice.<sup>143</sup> Arkansas and Texas require only two-hour notice.<sup>144</sup> The competing policy concerns involved in establishing how much time is needed for notice to be effective are clearly, on the one hand, the danger to public access caused by "instant" meetings and, on the other hand, the governmental interest in reacting quickly to an emergency or a deadline, for example, a city's need to act promptly in order to obtain approval for an expenditure by the state before the calendar year expires.<sup>145</sup>

Most state statutes also direct the manner in which the public is to be notified of a meeting. Arkansas requires notice of regular meetings only to those requesting it. In the case of special or emergency meetings, notice is given only to requesting news media in the county in which the meeting is scheduled.<sup>146</sup> Other states require posting and publishing of notices for the general public in addition to media notification.<sup>147</sup>

It was against this background that Indiana drafted its notice provisions for the Open Door Law. As in Illinois and Michigan, the act provides that notice of regular meetings need be given only once each year unless the date, time or place of the regular meeting is changed.<sup>148</sup> However, an executive session, for purposes of the act, is never considered a "regular" meeting and notice is required at each occasion.<sup>149</sup> In contrast with the Arkansas approach, which provides notice to any person requesting it, the Indiana act requires only posting at least 48 hours before the meeting a copy of the notice at the office of the public agency or at the building where the meeting is scheduled and delivery of a notice to news media which submit an annual written request for notification.<sup>150</sup> One apparent weakness with the Indiana procedure is that the act assumes the media will request notices and then will publish them. However, whether by oversight or intention, the media may do neither. The Arkansas approach at least allows interested citizens or citizen groups to request notification. Indiana's additional provision for posting notice at

143. *E.g.*, ILL. ANN. STAT. ch. 102, § 42.02 (Smith-Hurd Supp. 1979).

144. ARK. STAT. ANN. § 12-2805 (1979 Replacement Vol.); TEX. REV. CIV. STAT. art. 6252-17 s 3(A)(b) (Supp. 1978).

145. *See* *Blinn v. City of Marion*, \_\_\_ Ind. App. \_\_\_, 390 N.E.2d 1066 (1979).

146. ARK. STAT. ANN. § 12-2805 (1979 Replacement Vol.).

147. ILL. ANN. STAT. ch. 102, § 42.02 (Smith-Hurd Supp. 1979).

148. IND. CODE § 5-14-1.5-5(c) (Supp. 1979).

149. *Id.*

150. News media are defined as "all newspapers qualified to receive legal advertisements under IC 5-3-1, all wire services and all licensed commercial or public radio or television stations." IND. CODE § 5-14-1.5-2(j) (Supp. 1979).

the public agency's office or meeting place also is of little value to those members of the public with infrequent access to the office or meeting place. While no practical or inexpensive way exists to notify every citizen of an impending meeting, a better approach, and one more consistent with the burden on government to give notice, might be simply to notify the media—whether requested or not—of coming meetings, mail notices to citizens or citizen groups who have specifically requested notification, and to continue posting notice at the agency's office or meeting place.

When a meeting is called to deal with an emergency, Indiana simply requires that those news media who have requested notice of meetings must be given the same notice as is given to the members of the governing body and that notice be posted at the agency's office or meeting place.<sup>151</sup> The elimination of a specific time requirement prevents undue delay and is reasonable in a state where every county seat has either a daily newspaper or a radio station. Again, however, notice is limited to posting and to contacting news organizations requesting notice.

Notice requirements have provided grounds for most of the litigation in Indiana involving the Open Door Law. In the only case so far to reach the appellate level, the court held that whether notice was posted a full 48 hours in advance is an issue of material fact and that a Marion mayor's affidavit that he gave "notice as required" is insufficient to serve as a basis for summary judgment.<sup>152</sup> In Muncie, injunction and declaratory relief are being sought because an executive session was allegedly held without 48-hour notice.<sup>153</sup> Similarly, in Manchester, where a school board allegedly terminated a contract in executive session, patrons claim no notice was given of the meeting.<sup>154</sup> Finally, in Marion, county commissioners have been challenged for allegedly meeting privately without notice to discuss budget matters.<sup>155</sup>

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151. IND. CODE § 5-14-1.5-5(d)(1)(2) (Supp. 1979).

152. *Blinn v. City of Marion*, \_\_\_ Ind. App. \_\_\_, 390 N.E.2d 1066 (1979).

153. *Muncie Newspapers Inc. v. Board of Commissioners*, No. 2S-78/1165 (Delaware Superior Court, filed Dec. 13, 1978). See note 79 *supra*.

154. *Dziabis v. Manchester Community School Corporation*, No. C-790224 (Kosciusko Circuit Court, filed May 22, 1979). Suit was brought by school patrons complaining that the school board met secretly on April 23, 1979, and voted 4-3 to combine the athletic director and assistant principal positions at Manchester High School. The effect of the action was the termination of the athletic director's contract.

155. *Federated Publications Inc. v. Grant County Council*, No. St-79-387 (Grant Superior Court, filed Sept. 12, 1979). Suit was brought by a newspaper complaining that the county council met on Sunday, Aug. 26, 1979, in a secret session at a motel to discuss the county budget.

The notice requirement is in one sense the heart of the Open Door Law. It is the clearest requirement, and the one that most strongly serves the watchdog role of the press. It provides that for whatever reasons governing bodies might choose to meet in executive sessions, they cannot avoid telling the public that they are meeting nor can they avoid a challenge if their reasons conflict with the law. The advance notice provision, which allows the news media to keep track of closed meetings, is one of the principal reasons Indiana editors cite as the reason for what they consider improved access by the public to government meetings since 1977.<sup>156</sup>

### REMEDIES

Not all states with open meeting laws provide penalties, but those that do have made use of several enforcement devices: 1) criminal penalties, 2) invalidation of decisions made at illegal, secret meetings, 3) injunctions against future violations of the open meeting law, 4) dismissal of violators from public office.<sup>157</sup> In addition, it has been noted that actions for assault and battery might be brought where there is forcible ejection and actions for false imprisonment if resistance leads to arrest.<sup>158</sup> Indiana's Anti-Secrecy Act of 1953 provided for criminal penalties of fine and imprisonment.<sup>159</sup> When the act was revised as the Open Door Law in 1977, the criminal sanctions were abandoned and replaced with a right to seek injunctions to prevent planned illegal meetings and/or invalidation of action taken during illegal meetings.<sup>160</sup>

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156. Survey of Indiana editors (Fall, 1978) (unpublished results on file at the offices of the Hoosier State Press Association, Indianapolis, Indiana).

157. The Arkansas statute formerly provided that public officials whose appointments must be confirmed by the senate are subject to dismissal for participating in an improperly closed meeting. Ark. Acts 1949, No. 75 § 2.

158. Note, 75 HARV. L. REV., *supra* note 10, at 1215.

159. The Anti-Secrecy Act provided:

Any public official of the state, or of any political subdivision thereof, who denies to any citizen the rights guaranteed to such citizen under the provisions of section 3 and 4 of this chapter, and any public official who, under the guise of participating in an executive session of the administrative body or agency of which he is a member, attempts to defeat the purposes of this chapter as set forth in section 1 hereof, shall be guilty of a misdemeanor, and shall, upon conviction thereof, be fined not less than fifty dollars (\$50) nor more than five hundred dollars (\$500) to which may be added imprisonment in the county jail for a term not to exceed thirty (30) days.

IND. CODE § 5-14-1-6(a) (1976).

160. IND. CODE § 5-14-1.5-7 (Supp. 1979).

Indiana's experience with criminal penalties under the old statute was typical of states using such a heavy club to force compliance. The club was just too big and heavy to lift off the ground so it was rarely, if ever, used. Even as late as 1975, one commentator observed that no case had been found in any state where a criminal penalty had been imposed.<sup>161</sup> The reason seems to be clear enough: Criminal enforcement depends on the action of prosecutors who may understandably be reluctant to seek such an extreme remedy for what might appear to be a minor violation of the law.<sup>162</sup> Moreover, aside from the fact that violators are simply not prosecuted, the criminal penalty does not necessarily accomplish the legislative purpose, namely, to force public officials to allow the public to view the decision-making process. The legislation should not be intended to criminalize the conduct of public officials.<sup>163</sup> With that kind of reasoning in mind, Indiana in 1977 switched to the use of injunctions and declarations of invalidation as remedies aimed at the meetings rather than the officials.

The new methods, too, have some defects, but they are at least reasonably related to the purpose of opening meetings to the public. The problem with invalidation is that it is available only when an illegal meeting results in the taking of some final action by the public officials. It provides no remedy for illegal meetings involving only discussion. Injunctions, since they operate prospectively, provide a more satisfactory manner of enforcement, and the threat of contempt proceedings is likely to be sufficient deterrent to future violations. However, a problem with the injunction in some states has been the requirement that before an injunction can issue, there must be a showing of prior illegal conduct.<sup>164</sup> Moreover, injunctions against a meeting are only effective when there is advance knowledge that an illegal meeting is about to be held. Without such a leak, the only prospective remedy is to seek an injunction to prevent the carrying out of any decisions made or to seek invalidation of the decisions. Nothing can be done about what was discussed.

Courts in many states have been reluctant to invalidate final acts of governmental bodies.<sup>165</sup> Often invalidation does nothing more

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161. See Note, *Legislation: Oklahoma's Open Meeting Law*, 29 OKLA. L. REV. 200 and n.105 (1976).

162. See Tacha, 25 KAN. L. REV., *supra* note 38, at 197.

163. *Id.* at 199.

164. See Comment, 53 J. URBAN L., *supra* note 125, at 542.

165. *E.g.* *Wilmington Federation of Teachers v. Howell*, 374 A.2d 832 (Del. 1977) (Invalidation of a public body's decision is a very serious sanction; absent specific statutory provisions, courts are generally wary of imposing such a penalty for violation

than to force a re-run public vote, especially where the secret vote was unanimous. In addition, invalidation can cause tremendous problems for government when money has been spent, bonds issued or contracts signed. The remedy might in some circumstances be far worse than the disease.<sup>166</sup>

Indiana has attempted to resolve these difficulties by providing that any citizen may seek an injunction or declaratory judgment but if such action would invalidate any warrants, notes, bonds or obligations of the governing body, it must be brought before the delivery of any of those warrants, notes, bonds or obligations.<sup>167</sup> Moreover, if relief is not sought within 30 days of the act or failure to act complained of, no action can be brought.<sup>168</sup> As in so many other instances, the act attempts to balance government's need to operate smoothly with the public's right to observe and attend meetings. Government cannot operate if its actions are clouded months or years later by suits for declarations of invalidity. The public, on the other hand, should not be able to use open meeting statutes to harass and confuse government. The solution has been an extremely short statute of limitations giving citizens a right to act, but only if they act quickly.<sup>169</sup> The approach is reasonable. The major problem, of course, is that it provides yet another method whereby a careful governmental agency with tight security and loyal members could evade the statute. Such evasion, however, seems more theoretical than real. Where the press and public remain vigorous and attentive, it would be rare that a clandestine meeting where official action was taken would go unnoticed for more than a month.

In 1979, Indiana added some extra teeth to the act by providing that the court may award reasonable attorney fees, court costs and other expenses of litigation to the prevailing party if the plaintiff prevails and the defendant's violation was knowing or intentional or if the defendant prevails and the court finds the action was frivolous and vexatious.<sup>170</sup> Criminal penalties have been abandoned in Indiana as harsh and unrealistic. In their place are civil actions

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of acts.); *Kane v. County Board of School Trustees*, 60 Ill. App. 3d 415, 376 N.E.2d 1054 (1978) (Act does not mandate invalidity of public actions allegedly taken during closed proceedings.); *Dobrovolsky v. Reinhart*, 173 N.W.2d 837 (Iowa 1970) (Statute could not be reasonably interpreted as providing that violations thereof rendered the actions of a public body void).

166. See Note, 75 HARV. L. REV., *supra* note 10, at 1213.

167. IND. CODE § 5-14-1.5-7(b) (Supp. 1979).

168. *Id.*

169. IND. CODE § 5-14-1.5-7(c) (Supp. 1979).

170. *Id.*



accessible to any citizen whereby a secret meeting falling within the scope of the act might be enjoined or illegal decisions declared void. As with any statute designed to open government, however, the value of the remedies and penalties is their effectiveness as an incentive for compliance rather than as an antidote to decisions made behind closed doors.

### CONCLUSION

Indiana's Open Door Law was drafted and passed in the wake of a general revival of interest in access to government. The legislators had the advantage of being able to compare a wide range of already enacted legislation and some commentary by legal scholars. In this uniquely advantageous position, the state legislature chose to tailor a statute that is at once a remarkably liberal departure from the informal past patterns of Hoosier government and a remarkably conservative preservation of Hoosier politics as usual.

The people of Indiana have been provided with an important right of access to the meetings of public bodies, a right not accorded by common law or apparently by the Constitution. For that reason the act is primarily effective as a policy directive to public officials and to private citizens seeking admission to governmental meetings. The statute clearly affirms Indiana's position supporting open government and describes the parameters of that position. The great advantage of the law is that it keeps the formal processes of government open and provides a means whereby citizens can challenge evasion quickly.

However, the right of access is rendered substantially less meaningful by the continued protection of the private political caucus with its attendant potential for abuse. While the caucus may have been a legitimate trade off to assure passage of the act and to preserve a long-standing tradition in the state legislature, it is certainly of less value at the local level where it provides a handy means for making decisions about public business under the cover of partisan political activity. This is particularly true where the only party members attending the caucus consist of a majority of the city council.

The act places the responsibility for openness on government officials and directs the courts to liberally construe its parameters. Nevertheless, abuse, evasion and overreaching are clearly possible, and open government will remain a distant goal until it becomes a part of the day-to-day policy of decision makers. No single act can

completely supplant the tradition of secret meetings or overcome the difficulty of detecting such meetings. Open government requires a fundamental change in the attitude of public officials regarding freedom of information. The real value of Indiana's act is its encouragement of openness. Whatever opportunities for secrecy that might still be available are of no consequence if officials believe in and practice open government. The Open Door Law is important because it reflects such an attitude by the state's most visible leadership.

*Jon Dilts*

