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**Title:** Open Public Meetings in New Jersey: History and Current Issues\*

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**Abstract**

The New Jersey Open Public Meetings Act, passed in 1975, is the foremost law promoting transparent practices with regard to meetings in the State of New Jersey. Also called the Sunshine Law, it was passed during the administration of Governor Brendan T. Byrne, in line with his "Government Under Glass" initiative. Within this case study, a history is presented of open meetings in New Jersey. The New Jersey State legislature is currently considering revising the Sunshine Law. With this in mind, an assessment of current open meetings practices within the State and a list of areas to possibly revise are offered. While the spirit of the current law promotes open government, revision is necessary to adapt it to current information technology, to promote uniform application in all jurisdictions, and to eliminate gray areas and ambiguities. However, a new law is not enough. It is imperative to train public employees and elected officials concerning their obligations under the Sunshine Law. Key areas that need to be considered when revising the current Sunshine Law are: meeting minutes, closed sessions, notices and agendas, public comment provisions, the video and audio recording of meetings, electronic meetings regulations, and the recovery of attorney fees after successful litigation. A change in the Sunshine Law is a good first step, but a series of initiatives is necessary to open up public meetings. Three such steps are the training and education of elected officials and public employees on public meeting requirements, a plain-language guide to the Sunshine Law, and the consideration of different models of open meetings oversight.

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## **Introduction**

Open public meetings in the State of New Jersey are receiving a significant amount of attention recently. The New Jersey State legislature is currently considering revising the Open Public Meetings Act, also known as the Sunshine Law. This is a case study of open meetings in New Jersey which takes a historical and contemporary look at the issue. Also offered are an assessment of current open meetings practices within the State and a list of key policy areas to possibly revise. This case study results from a larger report addressing the central issues of the State's Sunshine Law today. The larger report seeks to demonstrate the need for change to both the law and culture within the state of New Jersey with regard to open meetings.

Since at least the 1940s in the United States, the proper level of openness of public meetings, particularly with regard to executive sessions, has been debated. Numerous cities had open meeting provisions in their charters by the 1950s (Cross, 1953). In the early 1950s, Harold Cross argued that right to attend public meetings was not as well established as the right to inspect public records: "[t]he right of access to legislative and administrative proceedings, to the extent to which it exists, is of strikingly modern origin, was denied and was of dubious legal validity both in England and the United States throughout the eighteenth century . . ." (Cross, 1953). The issues of efficacy and access are still the primary ones surrounding open public meetings. Public meetings are the most common avenue for citizen participation in the United States, but this goal of participation is often unfulfilled (Baker et al., 2005, McComas, 2001, Adams, 2004). Most of the literature surround public meetings has focused on them as avenues of participation not as conduits of transparency.

The role public meetings can play in improving public participation in government is prevalent in the public administration literature (King et al., 1998). William Baker and his colleagues found five critical factors that contributed to successful public hearings: "(1) a greater number of prehearing educational methods, (2) more media types and greater media frequency in the formal presentation, (3) more control over speakers' presentation time, (4) greater use of open follow-up meetings, and(5) more use of newspaper and direct mail to communicate posthearing decisions to the public" (Baker et al., 2005). Brian Adams found that while public meetings are not necessarily successful at giving the public an outlet to directly influence decision making, they are successful as means of sending information directly to elected officials and agenda setting (Adams, 2004). Successful processes for public meetings do not necessarily lead to successful meetings but there is some evidence that public officials see the two as linked (McComas, 2001). Many of the changes currently

being considered to the Open Public Meetings Act center around meeting processes and forms of participation.

The New Jersey Open Public Meetings Act, which promotes transparent practices with regard to meetings, was passed in 1975 during the Brendan T. Byrne Administration's "Government Under Glass" initiative. This initiative sought to open government and improve transparency in New Jersey state government. While the intention of the law is to promote open government, the law needs to be revised to adapt it to cover current information technology and to ensure that in practice, it is applied more uniformly across jurisdictions by removing unnecessary ambiguity and vagueness.

A change in the law is not sufficient enough to modify the current culture surrounding public meetings in New Jersey. Training and education should be required for both career government employees and elected officials of their obligations under the Sunshine Law. During the three decades since the law was passed, advancements in technology and communication have been rapid. Audio and video recordings can now be transmitted over the internet. The law should be revised taking into consideration new technology and how people are using them to conduct business. The use of electronic and digital governance tools is an international phenomenon with many municipalities outside of the United States taking the lead on these practices (Holzer and Kim, 2004).

In addition, the 30-year life of the Sunshine Law has proven that implementing open meeting legislation has some pitfalls. The requirement to take minutes of all meetings and then subsequently, to make them public is not always taken seriously by local governments, and the use of closed meetings is at times excessive and unjustified. There is a lack of uniformity throughout the State when it comes to implementing the Sunshine Law. The amount of time given to release minutes is interpreted differently by different municipalities and minutes are taken to different standards across the State. The nature and scope of public comment at meetings, which is determined by the municipality, is a useful tool for public participation and should be encouraged.

The Sunshine Law allows for citizens to bring action against a municipality that is found to violate the law. It does not, however, allow the recovery of attorney fees and other related costs. The cost of filing a suit is a deterrent for many individuals to challenge an open meeting violation. When a municipality is found in violation of the Sunshine Law, it can be fined, though; there have been very few fines imposed for violations. A court must find that the Sunshine Law was violated "knowingly," which has been difficult to prove.

This case study includes a brief history of the New Jersey Open Public Meetings Act, a description of the major problems with the law and its implementation, and suggestions on how to improve access to public meetings in the State. Not surprisingly, many issues present during the debate surround the passage of the 1975 law are still with us today.

## History

Open public meetings have a long history in the United States and many states instituted open meetings laws beginning in the 1950s (Pupillo, 1993). New Jersey was not far behind with its "Right to attend public meetings" law of 1960. This law was proposed each year between 1954 and 1960 (with the exception of 1956), but was not passed into law until 1960. The purpose of this proposed law was to "further freedom of information to the public of the transaction of governmental business by insuring to the citizens of the State the right to attend public meetings"(1963 (repealed 1973)).

With time however, residents of the State found problems and loopholes in the law. Attorney General George F. Kugler authored *New Jersey's Right to Know: A Report on Open Government* in 1974. The Report's purpose was to distinguish between the right to know about governmental business and the right to privacy. One of the main concerns about the 1960 law was its limitation of primarily focusing on open meetings where official action was taken. Kugler argued that the alienation of citizens by public bodies leads to apathy, and that as government expands, there is a greater need for checks and balances (Kugler Jr., 1974). Open meetings laws provide an avenue for citizens to become involved in government in addition to acting as an active checks mechanism. Shortly after Kugler's report, new open meetings legislation was proposed.

Today's Open Public Meetings Act (N.J.S.A. 10:4-6 to 4-2) was initially introduced on January 28, 1974 by Assemblyman Byron M. Baer (1976). It was a complement to then-Governor Brendan Byrne's "Government Under Glass" commitment. This commitment to transparent government came in the wake of the national Watergate scandal when there was perceived to be little public trust in government (Shure, 2006).

At the public hearing discussing this newly proposed law, the issue of meeting efficiency was raised as a concern. Some felt that wasted time would be common in open meetings. Baer countered that "our Founding Fathers never claimed that democratic means were always faster than undemocratic ones; it was sufficient that they were more just"

(Byron M. Baer in 1974a). Another perennial issue raised was the fact that public issues were often discussed behind closed doors. Baer, argued:

This bill will have a favorable impact on New Jersey Government for generations to come. It is in harmony with the Byrne Administration's commitment to 'government under glass.' . . . deception by those who govern has become a grave concern. It is now clear to many citizens that the withholding of crucial information has been part of a pattern of betrayal of the public interest by some public officials. In other cases, secrecy makes possible hiding official blunder, inefficiency, poor performance, injustice, arbitrariness or double dealing. The reality is that the public performance of some government bodies is pure theater; the decisions that will affect all of our lives are commonly being made behind closed doors. This often results in government dictated by special interests, carried out by the few to cater to the privileged.

(Byron M. Baer in 1974a)

In addition to the concerns of efficiency and the possibility of improperly closed sessions, the relationship between the public and the public officials was questioned. The sentiment at the time was that not only did citizens not trust public officials, but public officials did not trust the public. The legislative affairs chairman of Common Cause New Jersey thought that public officials "don't think the public has got the ability to sit in at some of these meetings or take an interest in what their government is doing" (Lewis S. Ripps in 1974a). However, "if people are to vote intelligently they must have access to as much information as possible about the actions of their public officials" (Byron M. Baer in 1974a).

Along with concerns directly voiced at the public hearing, many officials across the State wrote in support or opposition to the law. Large and small municipalities alike opposed the law. The mayor of the Borough of New Providence felt that municipalities should not be burdened by the law and that the bill would delay normal municipal operations. He also thought that the courts would have a backlog of cases and the cost of government would increase (Edward M. Bien in 1974a). The mayor of Trenton said that even though he was supporter of openness, he felt that the bill had major weaknesses. Such weaknesses he noted were the restriction of government bodies to do their business efficiently, the notification requirement creating a burden on municipalities, and government actions, such as entering into contracts, would be questioned (Arthur J. Holland in 1974a).

Taxpayer associations were among those who showed support for the bill. One such association member voiced that: "This bill will...help protect us from those who dare disenfranchise the public, the average citizen, from observing, investigating and participating more fully in government business" (Maywood Taxpayer's Association in 1974a). The Alert Parents for Good Schools organization also supported this bill. They expressed concern that at many emergency meetings, public business was discussed that was not originally on the agenda. In addition, they saw an agenda for the public to view prior to a meeting, as well as a yearly schedule of regular meetings as necessary, and had an interest in the ability to obtain minutes as a public record (Hancock and Paterson in 1974b).

On October 21, 1975, Governor Brendan T. Byrne signed the bill into law. In his statement, he pointed out that "public bodies exist for the public's convenience, not their own" (Governor Brendan T. Byrne's statement in 1976). The law gives citizens the right to be informed about governmental decisions, and possibly restores the trust between the two groups. Byrne suggested that the legislature act as a watchdog for open meetings, amending it when necessary. "This law ushers in a new era of openness for government at every level in New Jersey and demonstrates clearly the determination of the legislature and of this administration that the public's business can and will be conducted in public" (Governor Brendan T. Byrne's statement in 1976).

On June 12, 2006, the official name of the Sunshine Law was amended to recognize the pioneering work of Senator Baer "in promoting greater openness in government." Included in the bill to rename the law was a statement in support of governmental transparency: "It has long been recognized that openness in government promotes citizen participation in public affairs, increases public confidence in government, and makes public officials more accountable to the electorate" (2006). New Jersey P.L. 1975, C. 231 may now be cited as the Senator Byron M. Baer Open Public Meetings Act.

The New Jersey Open Public Meetings Act gives the public the right to attend meetings of public bodies. A public body under the law means a "commission, authority, board, council, committee or any other group of two or more persons organized under the laws of this State, and collectively empowered as a voting body acting on behalf of the public" (1976, N.J.S.A. 10:4-8). The law requires public bodies to give advance notice of meetings for the purpose of giving the public time to arrange to attend. In addition, it requires that minutes be kept as a public record; these minutes also serve to inform those who did not attend meetings. These minutes "shall be promptly available to the public" (1976, N.J.S.A. 10:4-14)

The Sunshine Law also gives citizens the right to bring civil action against a public body that is violating the law (1976, N.J.S.A. 10:4-15).

### **Ways to Improve Openness in Meetings**

Many of the issues that were relevant during the passage of the Open Public Meetings Act of 1974 are still salient today. Municipalities are still doing public business behind closed doors that should be open. There is no oversight body and distrust between citizens and public officials is perceived to be high. The current law needs to be revised and brought up-to-date with the information age. It should be more strongly enforced, as courts tend to give municipalities only a slap on the wrist when they are found to violate the law.

Paula Franzese, the Peter W. Rodino Professor of Law at Seton Hall University School of Law, and Daniel J. O'Hern, Sr, a retired Associate Justice of the New Jersey Supreme Court, wrote an article in the *Rutgers Law Review* titled "Restoring the Public Trust: An Agenda For Ethics Reform of State Government and a Proposed Model for New Jersey." While this article touches upon ethics violations in general, it offers some valuable advice that can be appropriately applied to open meetings.

Franzese and O'Hern suggest distribution of a plain-language ethics guide for employees and third-parties, such as those who do business with the government (Franzese and O'Hern Sr, 2005). A similar guide for the Sunshine Law would benefit those who come into contact with the law on a regular basis. This plain-language guide to open meetings should be initiated in conjunction with widespread education and training of government representatives and attorneys. Currently, school board members throughout the state are required to receive ethics training within the first year of their term (James-Beavers, 1999). This type of training could be used as a model and made mandatory for all members of public bodies. While the training would not have to be restricted to open meetings issues, they should be a primary focus. Revised laws alone will not change a culture of secrecy. Education and training are also necessary for individuals to fully understand their responsibilities as a public official with respect to open meetings.

Some form of open public meetings commission, ombudsman, or oversight office should be considered for the state. As it now stands, there is no central body to conduct training on open meetings and educate the public as to how to file an Open Public Meetings Act violation. There is also no central authority to log and track complaints concerning open meeting violations. In the United States, there are several models of open meetings

oversight. In practice, all of these oversight bodies operate differently and the models are quite complex. Some bodies can offer binding opinions while others can only write advisory and non-binding opinions.

The models include commissions, ombudsmen, commissions functioning largely like an ombudsman, offices with statutory involvement under the state's attorney general, and freestanding offices of information practices. Connecticut, Hawaii, Maryland, Minnesota, New York, and Virginia all have some sort of oversight body. Serious consideration needs to be given to what type of oversight model would work most effectively in the New Jersey context.

### **An Example of Openness**

Though there are constant violations of the current Sunshine Law, some municipalities embrace the spirit of the law. The purpose of this example is to show that even within the constraints of the current law some municipalities have instituted more open practices with regard to meetings. One such municipality is the Borough of Hightstown located in Mercer County, New Jersey. The small municipality with limited resources succeeds in catering to the public with respect to meetings, and has an inclusive website where meeting documents are posted. Candace Gallagher, the Borough Clerk and Administrator, stated that, "It has been my experience that, in any government project, the more open the process, the smoother things go. The public does not like to be excluded, and to do so suggests that bad things are happening behind closed doors, even if they are not" (Gallagher, 2006a). While other factors clearly also matter, having a town clerk with a commitment to openness seems to produce more progressive open meeting practices.

Hightstown has instituted a working model for open meeting practices. In order for the council members and the public to prepare for meetings, a meetings packet is posted online by Friday for the following Monday council meetings. This packet includes supplemental materials relating to the issues that will be discussed at the upcoming meeting. In addition, the previous meeting's draft minutes are in the packet for approval. This is noteworthy since many towns do not release minutes until after they have been formally approved. At the meeting, all council members receive this packet, and there are two copies circulated for the public to review.

At the beginning and the end of each meeting, the public is given a chance to comment. Each person may speak for up to three minutes during each designated public comment period. At one point in time, the second comment session had been removed from

the meetings, but was brought back upon request by citizens. During these comment sessions, citizens may address any issue.

On the Borough of Hightstown's website (<http://www.hightstownborough.com/>), one can find a schedule of meetings, minutes, the aforementioned meeting packets, and much more information unrelated to open meetings. (Minutes are only kept online for 2005 and 2006 due to limited space.) The more the borough posts to its website the more open it is, which is thought to lead to greater trust with the public. The town also publishes a newsletter called the *Hightstown Crier* which includes meeting announcements. The Borough believes that since the website and newsletter have been used to publicize meetings, attendance has increased.

This example is particularly noteworthy since it shows open government practices can be implemented with even the most limited resources. Gallagher summed up her philosophy by stating: "I have found that the more information we provide to the public, the less critical they are. It is easy to criticize without having all of the information. To provide that broadens their point of view and lets them see things from the inside out, and the view is different" (Gallagher, 2006a).

While the Borough is largely open, there are limits to its open meeting practices; for example, it does not videotape meetings and some meetings have executive sessions. Nonetheless, Hightstown is at the forefront of open meetings practices in New Jersey. While the Hightstown examples show that progressive, open meeting practices are possible in the current environment, a series of changes would need to be instituted to affect real change.

## **Recommendations**

These recommendations for changes to open meetings practices in New Jersey are based off a report done by the authors for the New Jersey Foundation for Open Government (Piotrowski and Borry, 2007). Many towns around the State are doing a sufficient job of implementing the Sunshine Law. Unfortunately, others continue to get away with limiting access, either intentionally or through ignorance. If there was more uniformity in the application of the law throughout the State, the Sunshine Law would be more effective. When legislators look to revamp the Sunshine Law, they should pay particular attention to the following areas:

1. *Minutes* of meetings should be complete and accurately reflect what transpired at the

meeting. An explicit time limit is necessary to establish when minutes need to be released after a public meeting is held.

2. *Closed sessions* should not be used for routine matters. There should be more of a check on closed meetings so that topics which are not exempt under the law are discussed in open session.
3. *Notices and agendas* should be timely and complete. They should contain enough information so that anyone who wants to understand what will be discussed at a meeting is able to and whoever wants to attend a meeting can.
4. *Public comment* is crucial for a good working government. While limits may need to be imposed, the public should have a timely outlet for suggestions, questions, or concerns they might have during a public meeting.
5. *Video and audio recording* of all public meetings should be affirmed as a right of the public. Where feasible, municipalities should also consider taking it upon themselves to record meetings to keep as public records.
6. *Electronic meetings* must be addressed in the law to keep it up-to-date with the current information and technology era. The longer the State waits to address this issue, the more inadvertent violations of the law will occur.
7. *Attorney fees* should be recoverable, and where necessary, stricter *sanctions* need to be imposed.

A change in the Sunshine Law is a good first step, but there needs to be a series of initiatives to open up public meetings in State. We are recommending three such steps.

1. *Training and education* are necessary components to change culture. All individuals who serve on public bodies should be required to receive training on the key components of the Sunshine Law.
2. A *plain-language guide* on the Sunshine Law should be developed and distributed to government employees and elected officials throughout the State.
3. A model of *open meetings oversight* should be considered to train public employees and educate the public as to how to file an open meetings violation. Such a body could have the power to sanction and fine public bodies that do not comply with law, or solely offer advisory opinions.

Issues surrounding the processes of public meetings are not new or unique to New Jersey (Haight and Ginger, 2000, McComas, 2001) but have been gaining ground in the State recently. Given the State of New Jersey's renewed push for good governance and ethics reform (Franzese and O'Hern Sr., 2005), public meeting reform is likely to follow (Gallagher,

2006b). The New Jersey Sunshine law is an important component of democratic accountability and governmental transparency. It has great potential, but implementation and practice need to be better. With more enforcement, better training, more specific helpful guidelines public meetings in the can be more open.

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