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FILE NO. 82-041

MEETINGS:
Closed Preliminary Hearings and
Telephone Conference Calls

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J. Phil Gilbert, Chairman
State Board of Elections
1020 South Spring Street
Springfield, Illinois 62708

Dear Mr. Gilbert:

I have your letter wherein you ask two questions regarding the application of the Open Meetings Act (Ill. Rev. Stat. 1981, ch. 102, par. 41 et seq.) to the State Board of Elections. You first inquire whether the Open Meetings Act in any way prohibits the State Board of Elections from conducting a closed preliminary hearing pursuant to section 9-21 of The Election Code (Ill. Rev. Stat. 1981, ch. 46, par. 9-21). For

reasons hereafter stated, it is my opinion that the Open Meetings Act does not prohibit the holding of a closed preliminary hearing pursuant to section 9-21 of The Election Code.

Article 9 of The Election Code (Ill. Rev. Stat. 1981, ch. 46, par. 9-1 et seq.) sets forth requirements for the disclosure of political campaign contributions and expenditures and provides for the administrative enforcement of these requirements. The State Board of Elections is charged with investigating and rendering judgment upon complaints filed pursuant to article 9 of the Code. (Ill. Rev. Stat. 1981, ch. 46, pars. 9-20, 9-21.) Section 9-21 provides in pertinent part as follows:

> "Upon receipt of such complaint, the Board shall hold a closed preliminary hearing to determine whether or not the complaint appears to have been filed on justifiable grounds. Such closed preliminary hearing shall be conducted as soon as practicable after affording reasonable notice, a copy of the complaint, and an opportunity to testify at such hearing to both the person making the complaint and the person against whom the complaint is directed. If the Board determines that the complaint has not been filed on justifiable grounds, it shall dismiss the complaint without further hearing.
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> (Emphasis added.)

Section 2 of the Open Meetings Act requires, with certain exceptions, that "[a]ll meetings of public bodies shall be public meetings". (Ill. Rev. Stat. 1981, ch. 102, par. 42.) There is no question that the State Board of Elections is a

"public body" within the meaning of the Open Meetings Act. (Ill. Rev. Stat. 1981, ch. 102, par. 41.02.) Further, there is no question that a preliminary hearing held pursuant to section 9-21 of The Election Code must be considered a "meeting" under the Act. (Ill. Rev. Stat. 1981, ch. 102, par. 41.02.) None of the exceptions contained in section 2 of the Open Meetings Act (Ill. Rev. Stat. 1981, ch. 102, par. 42) apply to preliminary hearings conducted pursuant to section 9-21.

Thus, there appears to be a conflict between the two statutes: the Open Meetings Act mandates that all meetings of public bodies shall be open to the public yet section 9-21 of The Election Code expressly provides that the State Board of Elections shall hold a closed preliminary hearing in the discharge of its statutory duties under that section of the Code.

It is a well-established rule of statutory construction that, where there is an inconsistency between two statutes, one of which expresses a general statutory policy and the other of which is specific and relates to only one subject, the specific provision must prevail and must be treated as an exception to the general provision. (Sierra Club v. Kenney (1981), 88 Ill. 2d 110, 126.) In this case, the Open Meetings Act is clearly an expression of a general public policy that the deliberations of government be conducted openly and the actions of government be taken openly. (Ill. Rev. Stat. 1981,

ch. 102, par. 41.) In contrast, section 9-21 of The Election Code contains a particular provision which requires a specific public body to hold a closed hearing for an expressly limited purpose. The specificity of this provision is evident by the immediately subsequent provision in section 9-21 which requires the Board to make its final judgment on complaints found to be justifiable "after affording due notice and an opportunity for a public hearing". (Ill. Rev. Stat. 1981, ch. 46, par. 9-21.) Thus, the provision of section 9-21 at issue is plainly a specific statutory expression of policy on one limited type of governmental action. Therefore, under the above rule of statutory construction, the specific provision of section 9-21 of The Election Code must be considered an exception to the general mandate of the Open Meetings Act.

The rule that the specific prevails over the general has been held to be especially applicable where the specific provision is enacted later in time than the general statute. (Bowes v. City of Chicago (1954), 3 Ill. 2d 175, 205, cert. denied, 348 U.S. 857, 75 S.Ct. 81, 99 L.Ed. 675 (1954); Ming Kow Hah v. Stackler (1978), 66 Ill. App. 3d 947, 953-54, 957.) In the instant case, "AN ACT in relation to meetings" was first enacted in 1957. (Laws of 1957, vol. II, p. 2892.) Section 9-21 of The Election Code was enacted in 1974 by Public Act 78-1183. Therefore, as the later and more specific statute,

section 9-21 must be construed as an exception to the Act's general prohibition against closed meetings.

For these reasons, it is my opinion that the Open Meetings Act does not prohibit the State Board of Elections from conducting closed preliminary hearings pursuant to section 9-21 of The Election Code.

Your second question arises in the following factual context. As noted above, the State Board of Elections is charged with investigating and ruling upon complaints filed pursuant to article 9 of The Election Code. Subparts 2 and 3 of Part 10 of the Board's regulations set forth the Board's procedures for implementing its statutory duties under section 9-21 of the Code. (1981 Illinois Register 12,117 et seq.) The general procedure outlined by these rules is as follows: upon the filing of a complaint, a hearing examiner is appointed to conduct a closed preliminary hearing on the allegations of the complaint. (Rule 206.) Upon the conclusion of this hearing, the hearing examiner submits to the Board a written report which summarizes all the testimony and makes a recommendation as to whether the complaint has been filed on justifiable grounds. (Rule 210.) After it receives the hearing examiner's report, the Board then determines whether the complaint was filed on justifiable grounds. (Rule 211.) If the Board determines there are justifiable grounds for the complaint, it must order a public hearing. (Rule 302(a).)

Subpart 3 of Part 10 of the rules governs the Board's procedure for "public adjudicative hearings". These procedures are roughly analogous to those followed under subpart 2 in that a hearing examiner may be appointed to conduct the hearing (Rule 302(c)), evidence is gathered, and a report is submitted to the Board which includes findings of fact, conclusions of law, and recommendations for ultimate disposition of the complaint. (Rule 401.) The Board reviews the report along with the other documents filed in the proceeding and it then issues its final order. (Rule 402.)

Section 9-21 of The Election Code imposes specific time constraints on the performance of these duties. In pertinent part, it provides that:

> " * * *
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> * * * The Board shall render its final judgment within 21 days of the date the complaint is filed; except that during the 60 days preceding the date of the election in reference to which the complaint is filed, the Board shall render its final judgment within 7 days of the date the complaint is filed, and during the 7 days preceding such election, the Board shall render such judgment before the date of such election, if possible." (Ill. Rev. Stat. 1981, ch. 46, par. 9-21.)

You note in your letter that in many instances the Board must conduct both a closed preliminary hearing and a public hearing within these time limitations.

Because of these time constraints, the Board has adopted, by rule and regulation, procedures by which it may

conduct a part of its business under section 9-21 of the Code by telephone conference call in lieu of an in-person meeting. As part of the closed preliminary hearing process, the Board has adopted Rule 211 which provides, in pertinent part, as follows:

> " * * *
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> The Board may consider and discuss the Hearing Examiner's Report through a conference telephone call in lieu of an in-person meeting, and such consideration and discussion shall be deemed part of the closed preliminary hearing process. Any action on the Hearing Examiner's Report must be taken in open session, or if taken as part of the telephonic conference call, that portion of the conference call shall be broadcast over a speaker phone or other similar device at both the permanent and branch offices of the Board and that portion of the broadcast shall be open to the media and public." (Rule 211(d).)

Rule 402 contains a similar provision for the public adjudicative hearing process. In pertinent part, it provides that:

> " * * *
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> The Board may consider, discuss and take final action on any order through a conference telephone call in lieu of an in-person meeting. Notice shall be given to the media in advance of such conference call. The call shall be broadcast over a speaker phone or other similar device at both the permanent and branch offices of the Board and such broadcast shall be open to the media and public. The entire conference shall also be recorded by a certified court reporter.
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> * * * "
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> (Rule 402(a)(2).)

Your question is whether the Open Meetings Act or any other State law prohibits the Board from conducting its official business by means of an interconnecting telephone

conference call held pursuant to procedures prescribed in the above regulations, provided that a statutory quorum is present and all other requirements of the Open Meetings Act are met. For the reasons stated below, it is my opinion that the use of telephone conference calls for the transaction of public business is not prohibited under the circumstances which you have described.

Once again, your question calls for an interpretation of the principal mandate of the Open Meetings Act that "[a]ll meetings of public bodies shall be public meetings". (Ill. Rev. Stat. 1981, ch. 102, par. 42.) As before, there is no question that the State Board of Elections is a public body within the meaning of the Act. There is, however, a threshold question of whether a telephone conference call is a "meeting" under the Open Meetings Act. If not, the Act would not apply and the openness of the Board's telephone conference calls would not be in issue.

Section 1.02 of the Act (Ill. Rev. Stat. 1981, ch. 102, par. 41.02) defines meeting as follows:

> " * * *
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> 'Meeting' means any gathering of a majority of a quorum of the members of a public body held for the purpose of discussing public business.
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> * * * "

Assuming that (1) a majority of a quorum of the Board is present and (2) the conference call is held for the purpose of

discussing public business, the question arises whether a telephone conference call is a "gathering" within the meaning of section 1.02 of the Act.

Initially, one may conceive of a gathering as a physical coming together of persons in a group. (See Webster's Third New International Dictionary 940 (1981 ed.).) However, it is also evident that, with the technology presently available, a group of persons may come together by non-corporal means as well. One would have to ignore the common practices of modern government to exclude the telephone conference call as a means by which public officials "gather" to conduct public business. See, e.g., Giordano v. Freedom of Information Commission (Super. Ct. 1979), 36 Conn. Supp. 117, 413 A.2d 493.

Furtherance of the goals of the Open Meetings Act requires the inclusion of telephone conference calls in the definition of meeting under the Act. To do otherwise would allow public officials to circumvent the Act merely because the forum for their discussion of public business is telephonic. Such a result would do violence to both the spirit and intent of the Open Meetings Act. For these reasons, it is my opinion that a telephone conference call involving a majority of a quorum of a public body held for the purpose of discussing public business must be considered a meeting under the Open Meetings Act.

Given then that telephone conference calls are "meetings" for purposes of the Open Meetings Act, the question at issue is whether such meetings satisfy the Act's principal mandate that "[a]ll meetings of public bodies shall be public meetings". (Emphasis added.) (Ill. Rev. Stat. 1981, ch. 102, par. 42.) This question brings the essential constituents of a "public" meeting into focus.

The term "public meeting" is not defined in the Open Meetings Act. In the absence of a statutory definition indicating a contrary legislative intent, words in a statute are to be given their plain and ordinary meaning. (Illinois Power Co. v. Mahin (1978), 72 Ill. 2d 189, 194.) Webster's Third New International Dictionary at page 1836 (1981 ed.) defines "public" as follows:

> "* * *accessible to or shared by all members of the community * * * ."

Thus, it is clear that a "public meeting" is a meeting accessible to the public or, in common parlance, an open meeting.

Applying this definition to the instant situation, I conclude that telephone conference calls held in accordance with the procedures outlined in the Board's regulations comply with the Open Meetings Act's "public" meetings mandate. Under Rule 402(a)(2), when the Board meets by use of a telephone conference call, the call is broadcast over a speaker phone or

other similar device at both the permanent and branch offices of the Board. The broadcast is open to the media representatives and the public in general. Thus, the procedure certainly makes the meeting "accessible to all members of the community" who desire to attend. In fact, the procedure in question may actually increase public access to the Board's meetings because they are broadcast not only at the Board's permanent office but also at branch offices. Thus, the meetings are accessible in more than one location, a feature otherwise not present when the Board meets in person.

A consideration of the competing policies underlying the Open Meetings Act supports this result. It is widely recognized that, in the formulation of a definition of "meeting", the public's need for access to information must be balanced against the need of public officials to act in an administratively feasible manner. (See 1974 Ill. Att'y Gen. Op. 123, 126; 1975 Cal. Att'y Gen. Op. I.L. 75-97.) In this case, the State Board of Elections is given a maximum time period of 21 days within which it must render a judgment after holding one, if not two, hearings at which the full panoply of due process rights are available: the right to be represented by an attorney (Rule 109), the right to present evidence, cross-examine witnesses (Rule 208), the right to discovery (Rule 305), etc. In some instances, the Board has only seven

days to complete the entire process. (Ill. Rev. Stat. 1981, ch. 46, par. 9-21.) In addition to these constraints, the Board's members are not centrally located.

On the other hand, the rights of the public are protected by the Board's rules. Under Rule 402, the Board's business conducted in the telephone conference call is limited to the consideration, discussion and taking of final action on its own orders made in public adjudicative hearings. Thus, the essential elements of open government, i.e., the open adjudication of adverse claims and public access to the final deliberations of the public body, are preserved under the Board's rules.

Similarly, the Board's procedures under subpart 2 of its rules for meeting by telephone conference call do not upset the required balance between the public's right of access and the officials' administrative needs. Section 9-21 of The Election Code makes clear that it is not until the Board determines that justifiable grounds exist for the complaint that the hearing process shall become open to the public. Thus, Rule 211 properly deems, as part of the closed preliminary hearing process, the Board's consideration and discussions leading up to that determination. Rule 211 permits only these discussions to be conducted by means of a telephone conference call. Once final action is contemplated, Rule 211 requires that the Board go into open session or broadcast the conference call to the

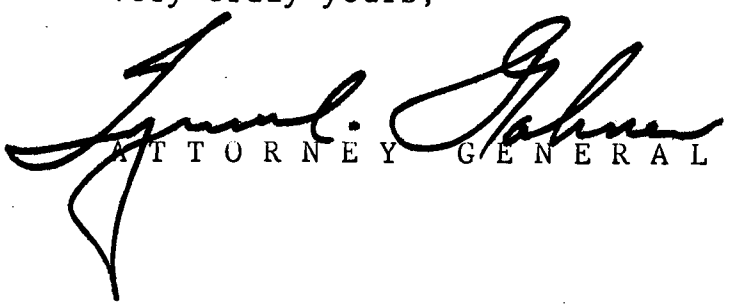
public at its permanent and branch offices. These procedures implement, to the fullest extent possible under section 9-21 of The Election Code, the mandate of the Open Meetings Act that the conduct of official business be open to the public.

Several other jurisdictions are in agreement that telephone conference calls may provide the requisite degree of openness under open meetings legislation. The laws of Montana, Utah, Connecticut and New Jersey expressly define "meeting" as including the convening of public officials corporally or by means of telephonic or other electronic communication. (See The National Association of Attorneys General, Open Meetings: Actions and Meetings Covered 38 (1979).) These open meetings laws thus contemplate that telephonic meetings may be lawfully held so long as they are accessible to the public and the other provisions of the applicable open meetings laws are met. In addition, the Attorneys General of Ohio and Florida have determined that telephone conference calls are not violations per se of their respective open meetings laws provided that the public may listen and that there is compliance with the laws' other requirements. Ohio Office of the Attorney General, An Analysis of R.C. 121.22 as Amended by AM.S.B.No. 74 (November 20, 1975), p. 4; 1975 Fla. Att'y Gen. Op. 75-59.

Therefore, it is my opinion that the Open Meetings Act does not prohibit the State Board of Elections from conducting

its official business by means of an interconnecting telephone conference call held pursuant to its adopted regulations so long as there is full compliance with all of the Act's requirements. Further, I am aware of no other provision or principle of law which would prohibit the Board from transacting its business in the manner contemplated.

Very truly yours,



ATTORNEY GENERAL