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COMMENTS

OPEN MEETINGS IN VIRGINIA: FORTIFYING THE VIRGINIA FREEDOM OF INFORMATION ACT

The past two decades have evidenced a growing criticism and intolerance of "closed sessions" or "secret meetings" in the operation of government. As a result of this increased disapproval,¹ most states enacted some form of "open meeting" legislation designed to give the public a legal right to attend meetings of state and local governing bodies.² The purpose of these statutes has been to maintain the faith of the public in governmental agencies by allowing citizen attendance and participation in all phases of

1. H. CROSS, *THE PEOPLE'S RIGHT TO KNOW XIV-XV* (1953) (hereinafter cited as H. CROSS). The press made the first real effort to combat interference with the people's right to know in 1950 when the American Society of Newspaper Editors created a Committee on Freedom of Information. The purpose of this Committee "was to strike down barriers to access to public records and proceedings." *Id.* at XIV. The news media has always considered one of its functions to be the protection of first amendment freedoms of which freedom of information is the very foundation. The role of the press was best expressed by Basil L. Walters's, Chairman of the Society's Committee on Freedom of World Information, statement: "I have noted a tendency of some officials in some of the smallest government units, as well as the largest, to forget that they are servants of the people and to act instead as though the taxpayers were their servants. Our duty as newspaper men, I believe, is to act always as the eyes of the American public and to keep an eternal spotlight of publicity on all servants of the people." *Id.* at XIV.

2. ALA. CODE tit. 14, §§ 393-94 (1959); ALAS. STAT. § 44.62.310 (Supp. 1970); ARIZ. REV. STAT. ANN. §§ 38-431.00-.06 (Supp. 1970); ARK. STAT. ANN. §§ 6-602 to -605 (Supp. 1969); CAL. GOV'T CODE §§ 54950-60 (West 1966); CONN. GEN. STAT. REV. § 1-21 (1969); DEL. CODE ANN. tit. 29, § 5109 (Supp. 1968); FLA. STAT. ANN. § 286.011 (Supp. 1972); GA. CODE ANN. §§ 23-802, 23-9912 (1971); HAWAII REV. LAWS §§ 92-1 to -6 (1968); IDAHO CODE ANN. § 59-1024 (Supp. 1969); ILL. ANN. STAT. ch. 102, §§ 41-44 (Smith-Hurd Supp. 1972); IND. ANN. STAT. §§ 57-601-09 (1961); IOWA CODE ANN. §§ 28A.1-.8 (Supp. 1970); KY. REV. STAT. ANN. § 89.550 (1969); LA. REV. STAT. ANN. §§ 42:5-8 (1965); ME. REV. STAT. ANN. tit. 1, §§ 401-06 (Supp. 1970); MD. ANN. CODE art. 23A, § 8; art. 25, § 5; art. 41, § 14 (1973); MASS. GEN. LAWS ANN. ch. 30A, § 11A; ch. 34, § 9; ch. 39, § 23A-C (1973); MICH. COMP. LAWS ANN. §§ 15.251-.253 (Supp. 1970); MINN. STAT. ANN. § 471.705 (Supp. 1970); NEB. REV. STAT. §§ 84-1401-05 (Supp. 1971); NEV. REV. STAT. §§ 241.010-.040, 244.080, 268.305, 386.335, 396.100 (1969); N.H. REV. STAT. ANN. §§ 91-A:1-7 (Supp. 1970); N.J. REV. STAT. §§ 10:4-1 to -5 (Supp. 1970); N.M. STAT. ANN. § 5-6-17 (1966); N.Y. TOWN LAW § 267(1) (McKinney 1965); N.D. CENT. CODE § 44-04-19 (1960); OHIO REV. CODE ANN. § 121.22 (1969); OKLA. STAT. ANN. tit. 25, § 201-02 (Supp. 1970); PA. STAT. ANN. tit. 65, §§ 251-54 (1959); S.D. CODE §§ 1-25-1 to -2 (1967); TEX. REV. CIV. STAT. ANN. art. 6252-17 (1970); UTAH CODE ANN. §§ 52-4-1 to -4 (1970); VT. STAT. ANN. tit. 1, §§ 311-14 (Supp. 1970); VA. CODE ANN. § 2.1-340 (Supp. 1973); WASH. REV. CODE ANN. §§ 42.32.010-.030 (1961); WIS. STAT. ANN. § 66.77 (Supp. 1970); WYO. STAT. ANN. § 15.1-5 (1957), § 21.1-39 (Supp. 1973).

the decision making process.³ Citizens must be able to go behind the decisions of government and hear discussion on the issues in order to obtain the background necessary to make intelligent decisions at election time.⁴

There is no common law right to attend public meetings.⁵ In fact, the United States Congress meets in public only through custom and actually conducts most of its business in committee meetings, one-third of which are usually closed to the public.⁶ Moreover, no state constitution protects freedom of access to public meetings except in a few instances with respect to the work of state legislatures.⁷ The Virginia Constitution is one of those silent on the right to attend sessions of the legislature. Thus without a statute, any right is a qualified one, resting solely on grace, custom, public opinion or common practice.⁸

Virginia joined the ranks of those states with open meeting legislation in 1968 when it enacted the Virginia Freedom of Information Act.⁹ The Act encompasses the right of access to official records¹⁰ as well as to public meetings. This comment will review the public meeting aspect of the Virginia Act, indicate some possible problem areas, and recommend certain changes. Since there is a scarcity of Virginia court decisions relative to the Act, an analysis can be made only by a comparison of Virginia's statute with those in other states and the court decisions pertaining thereto. The provisions of Virginia's Act are sufficiently similar to those in other states to afford a valid analysis in the Act's most important areas: coverage, executive meetings, notice, and enforcement.

I. COVERAGE

While Virginia's Freedom of Information Act appears to have a broad coverage, certain exceptions set out in Section 2.1-345 have a considerable narrowing effect.

The principal section calling for public meetings dictates that ". . . all meetings shall be public meetings."¹¹ The key to the Act's coverage, there-

3. Board of Pub. Instruction v. Doran, 224 So. 2d 693, 699 (Fla. 1969).

4. See Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199, 1200 (1962).

5. See H. CROSS, *supra* note 1, at 180-82.

6. *Id.*

7. Note, *Administrative Law—Freedom of Information—Texas Open Meetings Act Has Potentially Broad Coverage But Suffers From Inadequate Enforcement Provisions*, TEX. REV. CIV. STAT. ANN. art. 6252-17 (1970), 49 TEXAS L. REV. 764, 766 (1970).

8. See H. CROSS, *supra* note 1, at 183.

9. VA. CODE ANN. § 2.1-340 (Repl. Vol. 1973). This legislation did not come easily and was enacted only after several previous defeats.

10. VA. CODE ANN. § 2.1-342 (Repl. Vol. 1973).

11. VA. CODE ANN. § 2.1-343 (Repl. Vol. 1973).

fore, lies in the definition of "meetings," which Section 2.1-341 defines generally as a sitting body or informal assemblage of the membership of any authority or agency of the State or any political subdivision of the State as well as any organization supported wholly or principally by public funds.¹²

The definition is laudable for two reasons. First, the section specifically depicts the entities to which it applies, thereby providing guidelines for the judiciary; second, it includes the phrase ". . . and other organizations . . . supported wholly or principally by public funds." This public funds test is considered most desirable since it includes any organization that plays a substantial role in public affairs.¹³ The Supreme Court of New Mexico, for example, in reviewing a similar provision,¹⁴ found a corporation which operated a city owned electric utility system subject to its statute.¹⁵ If the same interpretation is given to Virginia's statute, agencies such as the State Highway Commission and the Greater Richmond Transit Authority would be included.

In addition to delineating a broad range of entities, Section 2.1-341 also appears to give the public the right to attend the deliberative and decision making process of the governing bodies. This conclusion is supported by the negative inference of the last sentence of the section,¹⁶ which implies that meetings should be subject to the statutory requirement if matters are discussed which relate to possible future official actions. The desirability and the necessity of openness at the decision making level is a fact that has come to be recognized by an increasing number of courts¹⁷ which have

12. . . . [M]eetings, when sitting as a body or entity, or as informal assemblage of the constituent membership, with or without minutes being taken, whether or not votes are cast, of any authority, board, bureau, commission, district or agency of the State or any political subdivision of the State, including cities, towns and counties; municipal councils, governing bodies of counties, school boards and planning commissions; and other organizations, corporations or agencies in the State, supported wholly or principally by public funds. Nothing in this chapter shall be construed as to define a meeting as a chance meeting of two or more members of a public body, or as an informal assemblage of the constituent membership at which matters relating to the exercise of official functions are not discussed. VA. CODE ANN. § 2.1-341 (Repl. Vol. 1973).

13. 75 HARV. L. REV., *supra* note 4, at 1205.

14. N.M. STAT. ANN. § 5-6-17 (1966). This statute includes ". . . all other governmental boards and commissions of the state or its subdivisions . . . supported by public funds"

15. *Raton Pub. Serv. Co. v. Hobbes*, 76 N.M. 535, 417 P.2d 32 (1966). The Court stated that "[C]orporate instrumentalities for accomplishing public ends, whether governmental or proprietary, have been considered to be governmental agencies." *Id.* at 539, 417 P.2d at 35.

16. VA. CODE ANN. § 2.1-341 (Repl. Vol. 1973).

17. *See, e.g., Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971); Board of Pub. Instructiōn

broadly interpreted the term "meeting" to include the entire decision making process.

A Florida district court in construing its state's statute, which provides, "all meetings . . . at which official acts are to be taken are declared to be public meetings . . .,"¹⁸ held that the legislature must have intended "meeting" to include acts of deliberation, discussion and decision occurring prior to the affirmative "formal act."¹⁹ Similarly, the California Appellate Court has stated that deliberation and action are dual components of the decision making process and that the "meeting" concept cannot be confined to one component only.²⁰ Although a few states still give a restrictive interpretation of their statutes,²¹ it is clear that the trend is toward a broader interpretation.

The disappointing aspect of the Virginia Act is that its exceptions countermand much of the broad language in the "meeting" section. Section 2.1-345 states in part that the provisions of the statute are not applicable to study commissions or committees appointed by governing bodies unless the committees consist entirely of governing body members.²² This provision exempts from the statute's coverage any study committee or commission appointed by a governing body that contains one nongoverning body member. It takes little imagination to realize how this exception can defeat one of the major purposes of open meeting legislation, i.e. public access to discussion of governing bodies.²³

v. Doran, 224 So. 2d 693 (Fla. 1969); *Toyah Indep. School Dist. v. Pecos—Barstow Indep. School Dist.*, 466 S.W.2d 377 (Tex. Civ. App. Ct. 1971) (the Texas court declared that a meeting of the school board excluding all members of the public from the entire decision making process was in violation of the Texas Act); *Newspaper Local 92 v. Sacramento County Bd. of Supervisors*, 263 Cal. App. 2d 41, 69 Cal. Rptr. 480 (3d Dist. 1968). The California court also stated that its act included deliberation as well as voting.

18. FLA. STAT. ANN. § 286.011 (Supp. 1972).

19. *Times Publishing Co. v. Williams*, 222 So. 2d 470, 473-74 (Fla. Dist. Ct. App. 1969).

20. *Newspaper Local 92 v. Sacramento County Bd. of Supervisors*, 263 Cal. App. 2d 41, 69 Cal. Rptr. 480, 485 (3d Dist. 1968).

21. See *Waters v. City of Birmingham*, 282 Ala. 104, 209 So. 2d 388 (1968); *Selkove v. Bean*, 109 N.H. 247, 249 A.2d 35 (1968); *Housing Authority v. Superior Court*, 62 Wash. 2d 492, 383 P.2d 295 (1963).

22. The provisions of this chapter shall not be applicable to . . . study commissions or committees appointed by the governing bodies of counties, cities, and towns, provided that no committee or commission appointed by such governing bodies, the membership of which consist wholly of members of such governing body, shall be deemed to be study commissions or committees under the provisions of this section. VA. CODE ANN. § 2.1-345 (Repl. Vol. 1973).

23. Recently Virginia's Attorney General, Andrew Miller, issued an opinion prescribing limits on study commissions appointed by governing bodies. The opinion limits such committees to the consideration of specific issues. Additionally, the governing body must announce

The experience of other states is helpful in determining the best possible amendment for Virginia. Many of the states which have faced the problem of subordinate agencies and ad hoc advisory committees have included them within the provisions of their statutes.²⁴ In fact, both California²⁵ and Massachusetts²⁶ specifically amended their statutes to include such subcommittees after court rulings that these committees were not covered. One of the most convincing arguments for inclusion²⁷ recognizes that the essential question is not whether a quorum of a committee exists, but whether the agency or authority of the governing body deals with any matter on which foreseeable action may be taken by the body. The right of the public to participate should not be circumvented by secret meetings of various committees appointed by a governing body and vested with authority to make recommendations concerning matters about which foreseeable action may be taken.²⁸

It can be argued that since the committees only make recommendations to be considered for adoption at open meetings, there is no reason to include them within the coverage of the statutes.²⁹ However, where these recommendations are merely "rubber stamped" in the open meetings, the public is in fact deprived of participation in the actual decision making process.³⁰ To avoid this possibility the Virginia Act should be amended to

the purpose of the committee in advance and any final action taken on the committee's recommendation must be made in public. See *OP. VA. ATT'Y GEN.*, Sept. 6, 1973. Unfortunately, this limitation does not go far enough in opening discussion and deliberation to the public. Whenever a majority of a governing body meet in the form of a study commission, there is the likelihood that a collective agreement or decision will be made. A final public vote may be of little value in informing the public of the real issues involved in the matter.

24. See, e.g., *CAL. GOV'T CODE* § 5495 (West 1966); *MASS. GEN. LAWS ANN.* ch. 39, § 23A (1973).

25. In *Adler v. City Council*, 184 Cal. App. 2d 763, 7 Cal. Rptr. 805 (2d Dist. 1960), the California Appellate Court ruled that their statute did not apply to subordinate agencies with a purely advisory function. Later, realizing that its statute was too strictly construed, the California legislature amended its statute to cover any group, including committees, supported by funds from the parent agency and on which officers serve in their official capacity. Official advisory groups were also specifically included. *CAL. GOV'T CODE* § 54952 (West 1966).

26. Massachusetts, which likewise took a restricted view of its statute at first, amended its statute to cover "every board, commission, committee and subcommittee, however elected, appointed or otherwise constituted of any district, city or town." *MASS. GEN. LAWS ANN.* ch. 39, § 23A (1973). Recommendations have also been made in the Texas and Florida legislatures to include advisory committees within their statutes. See 49 *TEXAS L. REV.*, *supra* note 8, at 767; Note, *Government in the Sunshine: Promise or Placebo?*, 23 *U. FLA. L. REV.* 361 (1971).

27. 262 So. 2d 425, 429 (Fla. 1972) (dissenting opinion).

28. *Id.* at 430.

29. See 75 *HARV. L. REV.*, *supra* note 4, at 1206.

30. *Id.*

include any meeting where a collective decision, commitment, or vote is made by a majority of the members of the body.³¹ The exception as to study commissions and committees should be eliminated except for situations where they can meet the requirements set out in Section 2.1-344 which allows closed meetings for specific purposes. The same reasoning further dictates the necessity for eliminating the exceptions as to the standing and other committees of the General Assembly, the legislative interim study commissions and committees and the boards of visitors or trustees of state supported institutions of higher education. Here the same possibility exists that the vote taken in public may be a mere formal recognition of a decision actually made in secret.

3

However, there is a reasonable basis for excluding parole boards, petit juries, grand juries, and the Virginia State Crime Commission, since the nature of their activity is often such that secrecy outweighs the public's right to know. Many states recognize an exception for juries and quasi-judicial bodies such as these.³²

II. EXECUTIVE MEETINGS

An executive meeting is one conducted behind closed doors without public access. There have been numerous complaints about the use of "executive meetings" as a device to circumvent the legal requirements that attach when regular sessions are held. This tactic is most often guised as informal meetings, pre-council sessions, caucuses, conferences, or under some other descriptive designation.³³

There is no argument that executive or closed meetings are necessary in certain situations, and any statute may accordingly make such exceptions as the legislature deems proper. There are two methods for controlling executive sessions: one allows a governmental body to meet in closed meetings anytime it desires so long as final voting on the matters under consideration is taken in public;³⁴ the other method narrowly defines those specific occasions where an executive session is permitted.³⁵ Virginia follows the latter method in Section 2.1-344 by providing that executive meetings may be held only for specific purposes. This approach is preferable since it reduces the opportunities to subvert the Act.³⁶

31. For proposed amendment see APPENDIX § 2.1-341.

32. See, e.g., ALAS. STAT. § 44.62.310 (Supp. 1970); MASS. GEN. LAWS ANN. ch. 30A, § 11A (1973); MINN. STAT. ANN. § 10.41 (1967); N.M. STAT. ANN. § 5-6-17 (1966); OHIO REV. CODE ANN. § 121.11 (Page 1972).

33. H. CROSS, *supra* note 1, at 184-86.

34. See, e.g., MD. ANN. CODE art. 23A, § 8; art. 25, § 5; art. 41, § 14 (1973); OHIO REV. CODE ANN. § 121.22 (1972).

35. See generally 75 HARV. L. REV., *supra* note 4, at 1208-11 & n.66.

36. *Id.* The first approach allows the officials to freely determine whether meetings will be

All of the occasions for closed meetings listed in Section 2.1-344 are reasonable. The first exception concerning personnel matters such as the hiring and firing of public officials is one of the most widely recognized exceptions.³⁷ Courts have had little difficulty in accepting the validity of this exception since it may prevent unjustified harm to an individual's reputation.³⁸ Furthermore, this exception is necessary if persons of high caliber are to apply for governmental positions. The same reasoning justifies this section's third exception which deals with personal matters not related to public business. However, in order to give full protection to the individual, it is recommended that the statute allow an individual to have an open meeting if he so requests.³⁹

Section 2.1-344 also excepts those common situations in which premature disclosure of certain matters would give speculators a chance to profit at the public's expense.⁴⁰ This appears to be the reasoning behind the exceptions concerning acquisition or use of land, prospective businesses and, the investment of public funds. These exceptions seem entirely justified. The exception involving legal consultation is also legitimate as long as it is not abused by inflating the confidentiality aspect for the purpose of avoiding the spirit of the statute.⁴¹ An additional safeguard of Section 2.1-344 is the requirement that all executive sessions be preceded by a motion stating for which of the specifically listed purposes the meeting is being held, and by requiring that all decisions be voted on publicly before they become effective. While the potency of this section is forced to rely on the good faith of the public officers, the Virginia approach seems to be the best legislative effort which can be reasonably made.

open. This is an invitation to frustrate the purpose of the law because a body can give full consideration to courses of action behind closed doors and then merely take a formal public vote on the decision already made. The second method reduces the opportunity to subvert the act because it limits the executive session to specific areas.

37. *E.g.*, ARK. STAT. ANN. § 6-602 (Supp. 1969); TEX. REV. CIV. STAT. ANN. art. 6252-17, § 2 (a)(1) (1970).

38. *See* Lucas v. Board of Trustees of Armijo Joint C.H.S. Dist., 18 Cal. App. 3d 988, 96 Cal. Rptr. 431 (1st Dist. 1971); 49 TEXAS L. REV., *supra* note 8, at 771 & n.42.

39. *See* APPENDIX § 2.1-344.

40. *See, e.g.*, N.J. REV. STAT. § 10:4-4 (Supp. 1970); TEX. REV. CIV. STAT. ANN. art. 6252-17, § 2 (s)(1) (1970); WIS. STAT. ANN. § 66.77 (Supp. 1970).

41. Newspaper Local 92 v. Sacramento County Bd. of Supervisors, 263 Cal. App. 2d 41, 69 Cal. Rptr. 480 (3d Dist. 1968). The open meeting statutes are not intended to destroy the assurance of private legal consultation stemming from the attorney-client privilege. This privilege can operate concurrently with the statutes as long as it is "not overblown beyond its true dimension. . . . [N]either the attorney's presence nor the happenstance of some kind of lawsuit might serve as the pretext for secret consultation whose recitation would not injure the public interest." *Id.* at 492. *But see* Laman v. McCord, 245 Ark. 401, 432 S.W.2d 753 (1968); Times Publishing Co. v. Williams, 222 So. 2d 470 (Fla. Dist. Ct. App. 1969).

III. NOTICE

An open meeting statute can be no better than its notice requirement since unannounced meetings are of little value to the public. Surprisingly, most earlier statutes did not provide for any notice requirements.⁴² A majority of the more recent statutes, however, do contain procedures for giving notice.⁴³ Virginia's Act requires that, "[i]nformation as to the time and place of each meeting shall be furnished to any citizen of this State who requests such information." While the purpose of this provision is laudable in that it requires that the press (or anyone requesting the information) be furnished with a schedule of the regular meetings, it lacks real effectiveness since it does not require notice for emergency or special meetings. Notice of such meetings is necessary in order to prevent scheduling of meetings on "trumped up" emergencies for the purpose of avoiding the notice requirement and circumventing the spirit of the statute.⁴⁴

In states with notice requirements, the methods for giving notice of emergency meetings vary. A common provision requires a twenty-four hour notice⁴⁵ prior to any special meeting. However, this may not be possible in all cases. Texas provides only that notice be posted prior to any emergency meeting.⁴⁶ Kentucky requires that written notice of emergency meetings be delivered at least three hours prior to the time specified for the proposed meeting.⁴⁷ Probably the best notice provision for special meetings is found in the Arkansas statute, which, like Virginia's statute, requires that information be given to anyone who requests it. The Arkansas statute, however, provides additionally that emergency meetings may be held only after a two hour advance notice is given to the press.⁴⁸ This provision is perhaps the best approach to follow in drafting an amendment to Virginia's statute.⁴⁹

IV. ENFORCEMENT

There are three enforcement procedures commonly used in open meeting

42. See 75 HARV. L. REV., *supra* note 4, at 1207.

43. See, e.g., ARK. STAT. ANN. § 12-2805 (1968); FLA. STAT. ANN. § 286.011 (Supp. 1970); KY. REV. STAT. ANN. § 88.040 (Supp. 1969); TEX. REV. CIV. STAT. ANN. art. 6252-17, § 3A (1970).

44. See generally *Hansen v. Kootenai County Bd. of County Comm'rs*, 93 Idaho 655, 471 P.2d 42 (1970); *Carlson v. Paradise Unified School Dist.*, 18 Cal. App. 3d 199, 95 Cal. Rptr. 650 (3d Dist. Ct. App. 1971).

45. See, e.g., PA. STAT. ANN. tit. 65, § 253 (1959). Most of these statutes are vague in that they do not state where notice is to be posted or to whom it is to be given.

46. TEX. REV. CIV. STAT. ANN. art. 6252-17, § 3A (1970).

47. KY. REV. STAT. ANN. § 88.040 (Supp. 1969).

48. ARK. STAT. ANN. § 12-2805 (1968).

49. See APPENDIX § 2.1-343.

statutes: (1) criminal penalties; (2) invalidation of illegally held meetings; (3) injunctions to prohibit future exclusion of the public.⁵⁰ Virginia has adopted the third procedure by providing that “[a]ny person denied the rights and privileges conferred by this chapter may proceed to enforce such rights and privileges by petition for mandamus or injunction. . . .” The aggrieved party must show “good cause”⁵¹ to support his petition. Presently, it is unclear as to what type of proof is needed. While two states which allow injunctions require proof of a prior violation before the order will issue,⁵² a Florida court has said that it is sufficient to clearly show that the statute has been or is about to be violated.⁵³ Whatever the case, it seems that it would be difficult to prove that the statute is about to be violated without showing a previous violation of some sort. Most likely the Virginia court will require some proof of prior violation.

Many statutes call for criminal penalties if their provisions are violated. Such sanctions range from small fines to imprisonment.⁵⁴ A problem with criminal penalties is that their enforcement depends on county and district attorneys who may feel reluctant to prosecute their fellow local government officials.⁵⁵ This reluctance may be reduced, however, and the sanctions more justified if they are limited to cases of knowing or wilful violators and kept within a realistic range commensurate to the crime.⁵⁶

A good case can be made for invalidation as a remedy even though earlier statutes did not rely on this procedure.⁵⁷ Where the statutes are silent as to enforcement, courts have generally held that any action taken at an illegal secret meeting may be invalidated.⁵⁸ Where, as in Virginia, the statute grants some remedies for its violation but is silent as to invalidation, courts are divided. A California case held that criminal and injunc-

50. See 75 HARV. L. REV., *supra* note 4, at 1211.

51. VA. CODE ANN. § 2.1-346 (Repl. Vol. 1973).

52. ILL. ANN. STAT. ch. 102, § 43 (Smith-Hurd Supp. 1972); MASS. GEN. LAWS ANN. ch. 39, § 23C (1973).

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

54. See 49 TEXAS L. REV., *supra* note 8, at 773.

55. *Id.*

56. See 75 HARV. L. REV., *supra* note 4, at 1211. Open meeting statutes often contain ambiguities in areas such as the extent of coverage, privilege of executive sessions or procedures for notification. It may be unfair to subject a public official to criminal proceedings in a test case brought to clarify the statute. If limited to knowing or willful violations, the use of criminal penalties would not have a degrading effect on the unwitting violator. See APPENDIX § 2.1-346.

57. The more recent statutes have included provisions for invalidation. See, e.g., ARK. STAT. ANN. § 12-2805 (1968); FLA. STAT. ANN. § 286.011 (Supp. 1973); IND. ANN. STAT. §§ 57-601 to 609 (1961).

58. See *Town of Paradise Valley v. Acker*, 100 Ariz. 62, 411 P.2d 168 (1966); *Green v. Beste*, 76 N.W.2d 165 (N.D. 1956).

tive remedies provided for in the statute were exclusive.⁵⁹ The Pennsylvania Supreme Court⁶⁰ and a Texas appellate court,⁶¹ on the other hand, have recently ruled that their statutory remedies were not exclusive. While the question of whether Virginia's injunction remedy is exclusively for the courts, it must be urged that a broader construction would be in keeping with the spirit of the Act and do much to solve the problem.

A noteworthy argument against invalidation is that it may overturn important measures because of a failure to give notice and, therefore, damage people who have relied on the earlier decisions.⁶² This problem can be reduced, however, by requiring that the suit be brought within a reasonable time after discovery of the illegal activity.⁶³ If used, invalidation would have to be applied only in situations where final action had been taken since it would be impractical to attempt to invalidate deliberation.⁶⁴ With these qualifications, invalidation could be an effective means of compelling open meetings and would be especially justified where the action taken affects a particular individual.⁶⁵

V. CONCLUSION

The Virginia Freedom of Information Act can be made an effective tool for assuring public scrutiny of the operations of local and state governing bodies. To insure its effectiveness amendments are necessary to clarify and strengthen those ambiguous and incomplete provisions which have caused problems.

The first suggested amendment eliminates all the exceptions in the Act's coverage save for those involving parole boards, petit juries, grand juries, and the Virginia State Crime Commission. The need for secrecy in the meetings presently excepted is not justified when compared to the dangerous possibilities inherent in barring the public from important deliberations. The dominant interest of informing the public seems more than sufficient to justify the inclusion of such meetings within the Act's coverage. The definition of "meeting" in Section 2.1-341 must be amended to encompass any meeting where a collective decision, commitment, or vote is made by a majority of the members of the body.

59. *Adler v. City Council*, 184 Cal. App. 2d 763, 7 Cal. Rptr. 805 (2d Dist. 1960).

60. *Bogart v. Housing Authority*, 426 Pa. 151, 231 A.2d 147 (1967).

61. *Toyah Indep. School Dist. v. Pecos-Barstow Indep. School Dist.*, 466 S.W.2d 377 (Tex. Civ. App. Ct. 1971).

62. See 75 HARV. L. REV., *supra* note 4, at 1212.

63. See 49 TEXAS L. REV., *supra* note 8, at 776.

64. See *Schults v. Board of Educ.*, 86 N.J. Super. 29, 205 A.2d 762 (Super. Ct. App. Div. 1964); *Wolf v. Zoning Bd.*, 79 N.J. Super. 546, 192 A.2d 305 (Super. Ct. App. Div. 1963).

65. *Hamrick v. Town of Albertville*, 219 Ala. 465, 122 So. 448 (1929). See APPENDIX § 2.1-346.

The second recommendation adds a procedure for notification of emergency meetings or rescheduled regular meetings. The Arkansas approach of a two hour, advance notice to the press is the most effective method since it reduces the opportunity to circumvent the statute by the use of "trumped up" emergencies.

Finally, the enforcement provisions require amendment in order to fortify the Act and make it operative. The mandamus and injunctive procedures authorized by the current Act are desirable because they provide a gentle means of clarifying the statute while preventing future abuses. A possible weakness, however, is that these remedies will likely permit at least one violation without remedy before they will issue. The addition of provisions for criminal sanctions and invalidation will strengthen the enforcement section considerably because it will permit punishment of willful violators while allowing nullification of innocent violations that have a deleterious effect on particular persons.

The real strength of the Act depends, of course, on the good faith of the members of the governing bodies. Hopefully, the suggested amendments will help create a functional statute which, when combined with good faith compliance by public officials, will be an effective tool for maintaining an informed and participating public.

F.J.H.

APPENDIX

The Virginia Freedom of Information Act⁶⁶ with Proposed Revisions
(Section 2.1-342 concerning official records is omitted).

§ 2.1-340. **Short title**—This chapter may be cited as “The Virginia Freedom of Information Act.” (1968, ch. 479).

§ 2.1-341. **Definitions**—The following terms, whenever used or referred to in this chapter, shall have the following meanings, respectively, unless a different meaning clearly appears from the context:

(a) “Meeting or meetings” means the meetings, when sitting as a body or entity, or as an informal assemblage of the constituent membership, with or without minutes being taken, whether or not votes are cast, of any authority, board, bureau, commission, district or agency of the State or of any political subdivision of the State, including cities, towns and counties; municipal councils, governing bodies of counties, school boards and planning commissions; and other organizations, corporations or agencies in the State, supported wholly or principally by public funds. *Unless otherwise provided by law, any gathering at which there is a collective decision by a majority of the members of the body, or a collective commitment or promise by a majority of the members of the body to make a decision, shall be deemed a meeting under this definition.* Nothing in this chapter shall be construed as to define a meeting as a chance meeting of two or more members of a public body, or as an informal assemblage of the constituent membership at which matters relating to the exercise of official functions are not discussed.

(b) “Official records” means the records pertaining to completed actions or transactions which the groups, agencies or organizations, enumerated in subparagraph (a) of this section, are required by statute to keep and maintain, or reports paid for by public funds.

(c) “Executive meeting” or “closed meeting” means a meeting from which the public is excluded.

(d) “Open meeting” or “public meeting” means a meeting at which the public may be present.

(e) “Public body” means any of the groups, agencies, or organizations enumerated in subparagraph (a) of this section. (1968, ch. 479; 1970, ch. 456.)

66. Proposed additions are printed in italics; suggested omissions are included in brackets. The appendix includes the entire current statute with amendments except for section 2.1-342 pertaining to official records.

§ 2.1-343. **Meetings to be public except as otherwise provided; minutes; information as to time and place**—Except as otherwise specifically provided by law and except as provided in §§ 2.1-344 and 2.1-345, all meetings shall be public meetings. Minutes shall be recorded at all public meetings. Information as to the time and place of each meeting shall be furnished to any citizen of this State who requests such information. *In case of emergencies requiring immediate action, a public body may hold an emergency meeting provided that a minimum of two hours advance notice of the time and place of such meeting is given to the press and to every local radio and television station.*

§ 2.1-344. **Executive or closed meetings**—Executive or closed meetings may be held only for the following purposes:

(1) Discussion or consideration of employment, assignment, appointment, promotion, demotion, salaries, disciplining or resignation of public officers, appointees or employees of any public body *unless such public officer, appointee or employee requests a public meeting.*

(2) Discussion or consideration of the condition, acquisition or use of real property for public purpose, or of the disposition of publicly held property.

(3) The protection of the privacy of individuals in personal matters not related to public business *unless the individuals involved request a public meeting.*

(4) Discussion concerning a prospective business or industry where no previous announcement has been made of the business' or industry's interest in locating in the community.

(5) The investing of public funds where competition or bargaining are involved, where if made public initially the financial interest of the governmental unit would be adversely affected.

(6) Consultation with legal counsel and briefings by staff members, consultants or attorneys, pertaining to pending litigation, or legal matters within the jurisdiction of the public body, including legal documents.

(a) No meeting shall become an executive or closed meeting unless there shall have been recorded an affirmative vote to that effect by the public body holding such meeting, which motion shall state specifically the purpose or purposes hereinabove set forth in this section which are to be the subject of such meeting.

(b) No resolution, ordinance, rule, contract, regulation or motion adopted, passed or agreed to in an executive or closed meeting shall become effective unless such public body, following such meeting, reconvenes in open meeting and takes a vote of the membership on such resolution, ordinance, rule, contract, regulation or motion.

(c) Nothing in this section shall be construed to prevent the holding of conferences between two or more public bodies, or their representatives, but these conferences shall be subject to the same regulations for holding executive or closed sessions as are applicable to any other public body.

§ 2.1-345. **Agencies to which chapter inapplicable**—The provisions of this chapter shall not be applicable to [deliberations of standing and other committees of the General Assembly, provided that when bills or other legislative measures are considered in executive or closed meetings of such committees, final votes thereon shall be taken in open meetings; unless such action is in conflict with the rules of the body of the General Assembly considering such bills or other legislative matters, under the provisions of Article IV, Section 7, of the Constitution of Virginia; legislative interim study commissions and committees, including the Virginia Code Commission; the Virginia Advisory Legislative Council and its committees; study committees or commissions appointed by the Governor; boards of visitors or trustees of state-supported institutions of higher education; provided, that announcements of the actions of the boards, except those actions excluded by § 2.1-344 of the Virginia Code are made available immediately following the meetings and that the official minutes of the board meetings, except those actions excluded by § 2.1-344 of the Virginia Code are made available to the public not more than three working days after such meetings;] parole boards; petit juries; grand juries; and the Virginia State Crime Commission [and study commissions or committees appointed by the governing bodies of counties, cities and towns; provided, that no committee or commission appointed by such governing bodies, the membership of which consists wholly of members of such governing body, shall be deemed to be study commissions or committees under the provisions of this section.]

§ 2.1-346. **Proceedings for enforcement of chapter**—

(a) *Any member of a governing body who wilfully participates in a closed meeting in violation of this Act, knowing that such meeting is prohibited by the Act, shall be guilty of a misdemeanor and fined no less than \$25 nor more than \$500.*

(b) *Any person adversely affected by action taken at a closed meeting prohibited by the Act, may commence proceedings for invalidation, if such proceedings are commenced within a reasonable time after discovery of the illegal action.*

(c) Any person denied the rights and privileges conferred by this chapter may proceed to enforce such rights and privileges by petition for mandamus or injunction, supported by an affidavit showing good cause, addressed to the court of record, having jurisdiction of such matters, of the county or city in which such rights and privileges were so denied. Any such

petition alleging such denial by a board, bureau, commission, authority, district or agency of the State government or by a standing or other committee of the General Assembly, shall be addressed to the Circuit Court of the City of Richmond. Such petition shall be heard within seven days of the date when the same is made; provided, if such petition is made outside of the regular terms of the circuit court of a county which is included in a judicial circuit with another county or counties, the hearing on such petition shall be given precedence on the docket of such court over all cases which are not otherwise given precedence by law.