

New York Coalition



For Open Government, Inc.

Secret Meetings

Make The Open Meetings Law A Sham

January 26, 2023

New York Coalition For Open Government

About:

The New York Coalition For Open Government is a nonpartisan non-profit charitable organization comprised of journalists, activists, attorneys, educators, news media organizations, and other concerned citizens who value open government and freedom of information.

Mission Statement:

Through education and civic engagement, the New York Coalition For Open Government advocates for open, transparent government and defends citizens' right to access information from public institutions at the city, county, and state levels.

Statement of Purpose:

We believe that, if government is of the people, by the people and for the people, then it should also be open *to* the people. Government exists to serve its citizens. Access to public information should be simple. Freedom of Information Laws and the New York Open Meetings Law make access to public records a right.

When government operates openly and honestly, we, the people, can hold our elected officials accountable, fulfilling our duties as an informed citizenry. The New York Coalition For Open Government works to ensure that all people have full access to government records and proceedings on the city, county, and state levels. Such access fosters responsive, accountable government, stimulates civic involvement, and builds trust in government.

The New York Coalition For Open Government

Board of Directors

Paul Wolf	President
Michelle Allen	Vice President
Janet Vito	Treasurer
Alberta Roman	Secretary
Larry Vito	Director
Sonia Dusza	Director
Maria Tisby	Director
Steven Lyle	Director
Suzanne Kelly	Director
Mary Lou Kling	Director
Patricia Irving	Director
Axel Ebermann	Director
Amil Virani	Director

The following members also contributed to the completion of this report: **Casey Jones, Susan Kims, Susan Laurailiard.**

Board President Paul Wolf, Esq. can be contacted at (716) 435-4976, or by email at paulwolf2@gmail.com. Our website is www.nyopengov.org and you can also follow our Facebook page.

Introduction

There are secret local government meetings occurring all across New York State, where public business is being discussed. No notice is provided for these meetings, there are no meeting minutes, the public and news media are not allowed to attend.

Due to a law passed by the state legislature in 1985, these secret meetings are legal and not a violation of the Open Meetings Law. Elected members of the same political party are allowed to hold a private political caucus meeting, where they can discuss political party business and public business. The political party in control of a public body can hold a private meeting, bring in staff and department heads, run through the night's public meeting agenda and work everything out before the public meeting occurs.

These secret meetings, make the public meeting a sham as the real discussion has already occurred in private.

The whole point of the Open Meetings Law is that public business be performed in an open manner so that citizens can observe the performance of elected officials by being able to attend and listen to the deliberations and decisions that result in public policy.

There is an interesting history of what caused the state legislature to allow for such secret meetings, which is explained in this report. The time has come to eliminate the ability to hold such secret meetings.

The History Of The Open Meetings Law

“It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy.

The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it.”

The above quote is how New York's Open Meetings Law begins. The first state to pass an open meetings law was Alabama in 1915. New York was the last state in the country to pass an open meetings law in 1976.

The Open Meetings Law is found in Article 7 of the Public Officers Law and consists of eleven sections from 100 to 111. The law presumes that every meeting of a public body shall be open to the general public. There are exceptions in the law that allow a public body to address certain topics in private. Section 105, delineates the limited reasons for which a public body can hold a closed executive session. These include protecting public safety, criminal investigations, collective bargaining negotiations, employment matters and property transactions.

Section 108, carves out three exemptions to the "open meeting" presumption. The Open Meetings Law does not apply to judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning boards of appeals; deliberations of political committees, conferences and caucuses; and any matter made confidential by federal or state law.

Although both sections 105 and 108 permit closed meetings, they apply to different types of meetings. An executive session may occur only upon a motion made in an open meeting, identifying with particularity the subject matter to be discussed. Upon the termination of such discussion, the public body is required to reconvene in open session.

In contrast, the meetings covered by section 108 are not "meetings" at all under the Open Meetings Law and are not limited to particular subjects. Public notice provisions do not apply and records or minutes are not required be kept. If a meeting falls into one of the three stated categories, the Open Meetings Law does not apply.

As originally enacted in 1976, section 108 provided that the Open Meetings Law would not apply to "deliberations of political committees, conferences and caucuses." The terms "political committees", "conferences" and "caucuses" were not defined.

New York's Open Meetings Law became effective on January 1, 1977. It took only three days for a meeting to become the subject of litigation. On January 3, 1977, the Newburgh City Council held a closed work session as they typically did to discuss public business. According to the Times Herald newspaper, members of the Newburgh City Council typically met informally in the City Manager's office prior to each council meeting to discuss items of interest. No votes were taken during the meetings, which the members referred to as "work sessions". Council members took the position that since no voting occurred, public business was not transacted and the work sessions were not meetings as defined by the Open Meetings Law. The Appellate Division disagreed with the position taken by the Council members and the New York Court of Appeals affirmed the decision.

This early court decision was important as it confirmed that the public and press were permitted to attend work sessions, agenda sessions, or any similar gatherings of local government officials, regardless of whether voting occurred.

The next court battle addressed the meaning of the phrase "public body."

In 1977, the Daily Gazette Newspaper sued the North Colonie Board of Education, when a reporter was denied the ability to attend school board committee meetings. The nine member board had several committees consisting of four school board members. The Court ruled in 1978, that since the committees did not have any authority to make final decisions on any matters and could only make recommendations to the entire board, they were not transacting public business and as such their meetings were not subject to the Open Meetings Law.

In response to the Daily Gazette decision, the New York State Legislature in 1979 amended the definitions of "public body" and "meeting." The legislature redefined "meeting" as the "official convening of a public body for the purpose of conducting public business. By removing the term "officially transacting public business" from the law and substituting "conducting public business," the legislature made it clear that whether a "meeting" was held did not depend on whether a vote was taken.

The definition of a public body was amended to be "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body.

A committee consisting of two or more members of a public body through the amendment became subject to the Open Meetings Law.

The amendments enacted in 1979, strengthened the public's right to observe government.

The History Of The Caucus Exemption

In 1980, the nine member Rochester City Council consisted of eight Democrats and one Republican. On Thursday afternoons, the eight Democrats typically met with the Mayor in a closed door meeting at the Mayor's office. Staff members, the City Clerk and the City Manager also attended the meetings in the Mayor's office. The sole Republican member, the public and news media were not allowed to attend the meetings.

On separate occasions in May 1980, Anthony Sciolino, the Republican member and news reporters attempted to attend the meeting and were denied entry. Sciolino and the Gannett news company filed a lawsuit complaining that public business was being discussed

behind closed doors in violation of the Open Meetings Law.

The Democratic council members argued that their meetings were a political caucus and that such meetings were exempt from the requirements of the Open Meetings Law. The Democrats pointed out that the term "political caucuses" was not defined by the statute and that the phrase "political caucus" should be interpreted to apply to a political majority of a legislative body regardless of what it discusses.

The Appellate Division Fourth Dept. ruled:

“An expansive definition of a political caucus, as urged by respondents, would defeat the purpose of the Open Meetings Law that public business be performed in an open and public manner (Public Officers Law, § 95), for such a definition could apply to exempt regular meetings of the Council from the statute. To assure that the purpose of the statute is realized, the exemption for political caucuses should be narrowly, not expansively, construed. The entire exemption is for the "deliberations of political committees, conferences and caucuses" (Public Officers Law, § 103, subd 2), indicating that it was meant to prevent the statute from extending to the private matters of a political party, as opposed to matters which are public business yet discussed by political party members. To allow the majority party members of a public body to exclude minority members, and thereafter conduct public business in closed sessions under the guise of a political caucus, would be violative of the statute...”

The Sciolino decision which addressed a local government caucus meeting, did not seem to concern the state legislature, which regularly held caucus meetings of their own. Sciolino applied a narrow judicial interpretation to the exemption. Following the Sciolino decision, the Committee on Open Government issued an opinion in 1985 that caucus meetings of the New York State Assembly and Senate when attended by a quorum of either house, held to discuss public business, as opposed to political party affairs, the Open Meetings Law, would apply.

On April 2, 1985, New York Post reporter Fred Dicker, sought and was denied access to the majority party caucus meetings in both the Senate and Assembly. The New York Post notified the majority parties in both houses that it intended to sue them for violating the Open Meetings Law based upon the Committee on Open Government's advisory opinion. While the New York State Legislature did not react to Sciolino or to other political caucus court decisions, it reacted quickly to the opinion of the Committee on Open Government. On May 23, 1985, a bill to amend the Open Meetings Law regarding caucus meetings was introduced in the Senate and the Assembly. The amendment contained a legislative declaration stating that political caucuses must be able to deliberate in private.

The amendment also provided that the political caucus exception would now apply to discussions of public business even if a quorum of a legislative body were present. All such discussions would now be entirely exempt under the statute. This amendment was passed by the Assembly unanimously on May 30, 1985, one week after it was introduced. On the same day, it passed the Senate by a vote of forty nine to seven. Governor Mario Cuomo signed the bill into law the very next day. In a legislative body that typically moves very slow, the amendment to discuss public business in private through a political caucus meeting passed with lightning speed.

Shortly before the legislature introduced their political caucus amendment, the Oneonta Star filed a lawsuit against the Schoharie County Board of Supervisors. The Schoharie County Board consisted of sixteen members, with nine members constituting a quorum. In 1984, ten of the sixteen supervisors were Republicans. The Republican supervisors in their responding papers readily admitted that they met regularly in closed session to privately discuss public business. The county attorney, the clerk of the board, and other county officials often attended these closed door sessions. The case was argued before the Appellate Division on May 30, 1985, the same day the legislature amendment was passed. The court based its ruling on the legislature's new amendment and determined that the closed meetings of the Republican members of the board of supervisors did not violate the Open Meetings Law.

One critic of the amendment asserted that it "presages an end to New York's commitment to open meetings" and "vitiate[s] the public's right to open government." In particular, the critic noted the potential for abuse at local municipal levels, where governments controlled by one party could use the expanded coverage of the political caucus as a means for essentially conducting all public business in private, thereby excluding not only any minority party members but also the public "from observing any meaningful discussion of public business."

Although the 1985 amendment gave a green light for private political caucus meetings to discuss public business as well as political business, several court decisions have pushed back on that.

In *Humphrey v. Posluszny*, the Fourth Department in 1991, reversed a lower court opinion that had found that closed meetings between Independent Party members of the Lancaster Village Board, who constituted a quorum, and members of the Village Police Benevolent Association were protected by the political caucus exemption. On appeal, the Fourth Department reversed in a 3-2 decision. The appellate court referred to the legislative intent of the 1985 law, citing a portion of the Legislature's finding that "the public interest was promoted by a 'private, candid exchange of ideas and points of view among members of each political party concerning the public business to come before legislative bodies.'" According to the court, "[n]onetheless, what occurred at the meeting at issue went beyond

a candid discussion, permissible at an exempt caucus, and amounted to the conduct of public business, in violation" of section 103(a) of the Open Meetings Law. The decision does not state what was discussed in the caucus meeting.

In 1992, the entire Buffalo Common Council were Democrats. Eight of the members constituting a quorum met in a private meeting held at the Buffalo Hilton Hotel. On the same day as the meeting, Common Council member Eugene Fahey, stated that the purpose of the closed meetings was to adopt in private a proposed plan to address the budget deficit before "going public" to debate whether such a plan will be accepted.

The Buffalo News filed a lawsuit regarding the private meeting. The Councilmembers argued that the meeting was properly closed because all of the Council members were of the same political party and, therefore, the meeting was exempt under the law as a political caucus meeting. Erie County Supreme Court Judge Joseph Glowonia rejected the Council members argument, stating:

“A literal reading of Section 108... could effectively preclude the public from any participation whatsoever in a government which is entirely controlled by one political party. Every public meeting dealing with sensitive or controversial issues could be preceded by a "political caucus" which would have no public input, and the public meeting decisions on such issues would be a mere formality.”

Judge Glowonia stated further in his decision:

“...if the discussion, as Councilman Fahey indicated in his public statement, is to adopt a proposed plan on a public issue without reference to political party posturing then it remains within the over-all intent of article 7. Citizens must remain fully informed if they are to retain control of their public servants. They must be able to observe those servants and the performance of their duties.

In a divided Legislature where a meeting is restricted to the attendance of members of one political party, regardless of quorum and majority status, perhaps by that very restriction it would be fair to assume the meeting constitutes a political caucus. However, such a conclusion cannot be drawn if the entire Legislature is of one party and the stated purpose is to adopt a proposed plan to address the deficit before going public. In view of the over-all importance of article 7, any exemption must be narrowly construed so that it will not render section 100 meaningless.”

In 1992, Senator Nancy Lorraine Hoffman of Syracuse and twelve others, proposed a bill that would have limited political committees, caucuses and conferences to discussions of "partisan political matters" only. Under this bill, party meetings that discuss "public business" would be subject to the provisions of the Open Meetings Law. As the prime

sponsor's memorandum in support of the bill explicitly stated, the bill's intent was to "repeal the provision of the 1985 law permitting closed meetings and open the decision making process up to public scrutiny both at the state and local level."

The New York Public Interest Research Group ("NYPIRG"), a non-profit government watchdog group, issued a statement in support of Senator Hoffman's legislation. The group observed that caucuses are "where crucial decisions about the future of New York State are often made" and are "commonly used as a method to shut the public out of important, fast-breaking decisions. A 1992 editorial in The Buffalo News endorsed this bill, stating that

[w]hen lawmakers are discussing the policy their party bloc or their members will take on legislation, they are doing the public's business. Hiding behind the excuse that these are party discussions won't work... No matter how the Albany establishment resists this recommended change, it is scarcely a radical new idea.... Senator Hoffman's bill, which she would also apply to local government, merely responds to the ideals of a democratic society governed by elected representatives."

In his 1993 budget, Governor Mario Cuomo proposed legislation that would have added a new section 105-a to the Open Meetings Law. Cuomo's proposal was to limit caucus meetings at the local level but allow them to continue at the state level. The proposed legislation further provided that closed caucuses would only be allowed "for the purpose of discussing political party strategy or political party position with respect to the responsibility, authority, powers or duty of the legislature." Finally, the legislation would have required the party to announce publicly meeting times pursuant to section 104 of the Open Meetings Law.

While state legislation has not been passed to reform the caucus exemption, the City of Ithaca to their credit took action in 1985 to address the caucus issue at the local level. The Ithaca city council enacted an ordinance that if a caucus meeting is held public business cannot be discussed. According to a New York Times article on Long Island, one town, four villages and the Suffolk County legislature passed resolutions stating they would not discuss public business in private caucus meetings. It is unclear whether the resolutions passed in Long Island are still in effect but the ordinance passed by the Ithaca City Council is still in effect today. Other local governments passed similar local laws including the towns of Clarence (Erie County), Harrison (Westchester) and the Village of Harrison.

How Many Local Governments Are Holding Private Caucus Meetings?

Because private caucus meetings are exempt from the Open Meetings Law, there is no requirement to notify the public, no requirement to post meeting documents and no

requirement to post meeting minutes. As such, it is very hard to tell when caucus meetings occur and how often they occur.

In an effort to determine how many county legislatures are holding private caucus meetings, the New York Coalition For Open Government tried to contact every county legislature/board of supervisors (57 in all) by email. The email we sent asked the following questions:

Do the Legislators/Supervisors in your county hold private party caucus meetings?

If the answer to the question above is yes, how often do such caucus meetings occur?

Are county meeting agenda items discussed prior to the public meeting in caucus meetings?

Why do caucus meetings occur, what is the purpose for the meetings?

Getting a response to our email was not easy despite sending it multiple times to the clerk of the county legislature or the chairperson. We received a response from 14 counties (25%). Through information obtained from reporters and other research, we obtained information regarding 27 counties in total, which represents 47% of the 57 counties. Of the 27 counties that we obtained information for, 23 hold private caucus meetings and four do not. In other words, of the counties that we obtained information for, 85% hold caucus meetings.

The counties that hold caucus meetings in alphabetical order are:

Allegany
Cayuga
Chautauqua
Chenango
Chemung
Dutchess
Erie
Fulton
Greene
Jefferson
Livingston
Niagara
Orange

Otsego
Putnam
Schenectady
Seneca
Steuben
St. Lawrence
Ulster
Wayne
Warren
Wyoming

The 4 Counties that reported they do not holding caucus meetings are:

Essex, Madison, Ontario, Yates

As far as whether they discuss public business during their caucus meetings the following counties replied yes to our email or have publicly admitted to doing so.

Erie, Greene, Ostego, Seneca, Steuben

The Erie County Legislature states on their website “Preceding full legislative meetings, each party holds a caucus to review agenda items.” The Dutchess County Democrats state online that they hold their caucus meeting 30 minutes prior to the legislature’s public meeting.

The Problem With Holding Private Caucus Meetings

When the New York State Legislature amended the Open Meetings Law to allow public bodies to hold private political caucus meetings to discuss political and public business, newspapers across the state criticized the action as “a giant step backward”, “a blow to open government” and “a swipe at the public’s right to know.”

The original Open Meetings Law limited caucus meetings to the state level only, the legislature’s amendment added local governing bodies. Allowing local governments to conduct private caucus meetings is a huge problem, where a governing body may be dominated by one political party.

In a December 29, 1985, New York Times article, Suffolk County Legislator James Morgo stated “The practical result of the amendment is that the dominant political party can conduct business in total secrecy and call it a political caucus.” In the same article, John Kutzer, executive director of the New York State Publishers Association

representing 50 daily newspapers said “The Legislature and the Governor made a mistake, they were afraid of a lawsuit giving the press access to party caucuses at the state level and did not see the ramifications on the local level.”

All across New York State, the majority party in control of a village board, town board, city council and county legislature are holding private closed door meetings, where everything is discussed and worked out prior to any public meeting.

In 2007, Oneida County legislators opened their Republican and Democratic caucuses after the Utica Observer-Dispatch newspaper reported that the meetings were closed and often took longer than regular board meetings.

In 2008, with pressure from the Utica Observer Dispatch and Evening Tribune newspapers, the Herkimer County Legislature Democratic Caucus opened their caucus meetings to the public. We do not know if this practice continues today. The Republican caucus refused to open their meetings.

The Mohawk Valley Chamber of Commerce passed resolutions calling for the Herkimer County Legislature and the Oneida County Legislature to open their caucus meetings to the public. The chamber stated in their resolution that they supports fair and open government and that:

“It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy”.

In response to the call for open caucus meetings Republican Majority Leader Patrick Russell stated “The New York State Legislature found that the public interest was promoted by private, candid exchange of ideas and points of view among members of each political party concerning the public business to come before legislative bodies,” the law states.

“Our members believe this to be true,” Russell said.

In a 2019 blog post, Christina Sonsire a Chemung County Legislator wrote about how caucus meetings occur there:

“The Chemung County Legislature’s Republican Caucus, comprised of 12 out of 15 sitting Legislators, has held six “political caucuses”, each lasting approximately one hour and held before and/or after meetings of the Legislature. During these gatherings numerous topics – including the 2020 Chemung County Budget, Elmira’s First Arena,

and Chemung County's relationship with the Library District – have been discussed at length. To the best of my knowledge the “caucuses” were held before the meetings on November 12th, November 13th, November 18th, before and after the meeting on November 25th, and after the meeting on December 2nd.

In other words, 12 of 15 Legislators have spent no less than six hours over the past month addressing public business behind closed doors where even elected members of the Legislature, including me, are unable to attend or even know what is being discussed.

Nothing could be less transparent.”

In February, 2021 Chip Rowe as Editor of the Highlands Current documented how the Putnam County Legislature holds a meeting before their public meeting. The Putnam County Legislature at the time consisted of 8 Republicans and 1 Democrat. According to the lone Democrat, right before the public meeting the 8 Republican legislators meet in a back room and “Everything is decided back there.” The public meetings are very well orchestrated with very little discussion. The private meetings include the legislative clerk and the county attorney, the Democratic legislator and the public are excluded.

Political caucus meetings may make sense for the state legislature, where the two political parties are discussing and debating state legislative policy issues. Accomplishing anything with 213 legislators, may be difficult without having party caucus meetings. The same is not true for a county legislature, City Council, Town Board, Village Board, consisting of a handful of members addressing local government matters. To allow the majority party of a local government to hold a private meeting where public business can be discussed completely guts and makes the Open Meetings Law meaningless. Public meetings become a sham when everything has been pre-determined in a private meeting held before the public meeting occurs.

Conclusion

We were able to obtain information regarding 27 counties in New York State, which represents 47% of the 57 counties. Of the 27 counties that we obtained information for, 23 hold private caucus meetings and four do not. In other words, of the counties that we obtained information for, 85% hold private caucus meetings where the public and news media are excluded.

Secret meetings where public business is discussed makes the Open Meetings Law a sham.

Recommendations

- 1) Amend the Open Meetings Law to eliminate caucus meetings at the local level.
- 2) Amend the Open Meetings Law so that at any gathering of at least 2/3 of the members of a public body, the Open Meetings Law applies unless they are discussing party business.
- 3) Local governments should take action and pass their own law preventing the discussion of public business during a caucus meeting.

Information Sources

The following law review articles were a tremendous source for the historical information cited in this report:

William A. Brewer, II & Alex Smith, Comment, New York Open Meetings Law: A Critical Evaluation, 41 ALB. L. REV. 329, 355 (1977).

Joseph Sluzar, New York Abandons a Commitment To Open Meetings, 50 ALB. L. REV. 613 (1986).

Timothy P. Whelan, New York's Open Meetings Law: Revision of the Political Caucus Exemption and Its Implications for Local Government, 60 Brook. L. Rev. 1483 (1995).