

ATTORNEY GENERAL

October 28, 1976

HONORABLE RICHARD McGLYNN
Commissioner, Public Utilities Commission
1100 Raymond Boulevard
Newark, New Jersey 07102

FORMAL OPINION NO. 30—1976

Dear Commissioner McGlynn:

You have requested advice on whether the Public Utilities Commission may exclude the public, under the Open Public Meetings Act, N.J.S.A. 10:4-6, *et seq.*, from that portion of its meetings at which it discusses utility rate cases. More specifically, you ask whether these discussions of the Commission fall within the exceptions to the open meetings requirement pertaining to “the setting of banking rates,” “pending or anticipated litigation,” and “the attorney-client privilege.” For the following reasons, you are advised that the Public Utilities Commission may not exclude the public when it discusses utility rate cases pending before it.

Briefly stated, the facts surrounding your inquiry are as follows: After a utility company files an application for a rate change with the Commission, a hearing is held before a hearing officer appointed by the Commission. At this hearing, the utility company and other interested parties have the opportunity to present evidence in support of or in opposition to the application for rate change. Following the hearing, a report and recommendation is submitted to the Commission by its hearing officer. Thereafter, the Commission discusses this report and recommendation and the various aspects of the case to determine the final disposition of the application. It is this discussion of the Commission to which your inquiry pertains.

In declaring the policy underlying the Open Public Meeting Act, the Legislature found “the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies” to be “vital to the enhancement and proper functioning of the democratic process.” It found that secrecy in public affairs undermines “the faith of the public in government and the public’s effectiveness in fulfilling its role in a democratic society.” Therefore, it declared the public policy of this State to be that of insuring “the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon” except where otherwise clearly required by the public interest or by individual privacy. N.J.S.A. 10:4-7.

In accordance with this policy, the Open Public Meetings Act requires that “all meetings of public bodies shall be open to the public at all times.” N.J.S.A. 10:4-12. To this general rule, the Act only carves out nine exceptions. N.J.S.A. 10:4-12(b). When a particular item falls under one of these exceptions, a public body may exclude the public from its discussion on that item.

An exception to the open meeting requirement permits a public body to exclude the public from that portion of a meeting at which it “discusses . . . [a]ny pending or anticipated litigation . . . in which the public body is, or may become a party.” N.J.S.A. 10:4-12(b)(7). To invoke this exception, the public body must either be or expect to become a party to the litigation it wishes to discuss and the discussion must be limited to the pending or anticipated litigation. Assuming that a utility rate change proceeding before the Public Utilities Commission may be characterized as a form of “litigation,” the Public Utilities Commission clearly is not a party to such litigation.

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The "parties" to litigation are those persons directly involved in the litigation on both sides of the controversy, *i.e.*, the persons who institute the litigation, the persons against whom the litigation is instituted, and other persons who enter the litigation to support or oppose the claims being made. The person or agency that must decide the controversy, in this case the Public Utilities Commission, is not a "party" to the litigation but is instead the decision-maker in the controversy before whom the "parties" to the litigation are appearing.

The fact that the Public Utilities Commission may become a party to a judicial appeal if its decision on a utility rate application is appealed to the Appellate Division still does not permit it to utilize the exemption to conduct these deliberations in closed sessions. To invoke this exception, the subject under discussion must be the "pending or anticipated litigation" itself, *i.e.*, the public body must be discussing its strategy in the litigation, the position it will take, the strengths and weaknesses of that position with respect to the litigation, possible settlements of the litigation or some other facet of the litigation itself. Therefore, the mere fact that its decision on a utility rate application may become the subject of an appeal to the Appellate Division does not permit the Public Utilities Commission to conduct its deliberations on that application in closed session under the "pending or anticipated litigation" exception in the Act.

Another exception to the open meeting requirement permits a public body to exclude the public from that portion of a meeting at which it "discusses . . . [a]ny matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer." N.J.S.A. 10:4-12(b)(7). The attorney-client privilege is designed to protect those communications a client makes in confidence to an attorney for the purpose of obtaining legal assistance and the advice which the attorney, in return, gives to the client. *In re Richardson*, 31 N.J. 391, 396-97 (1960); *Russell v. Second National Bank of Paterson*, 136 N.J.L. 270, 278-79 (E. & A. 1947); *State v. Humphreys*, 89 N.J. Super. 322 (App. Div. 1965). The attorney-client exception in the Open Public Meetings Act is further qualified by making the exception applicable only "to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer." N.J.S.A. 10:4-12(b)(7).

It is manifest that this privilege cannot be used as *carte blanche* authority for the Public Utilities Commission to hold its deliberations on utility rate applications in closed session. These deliberations are not communications addressed to the Commission's attorney but are instead deliberations among the members of the Commission itself in order to reach a decision on the application before it. Simply because a public body's attorney is in attendance at a meeting does not enable it to invoke this exception. Although at times during the discussion, the Commission may seek to consult its attorney on some aspect of the case, it cannot be said that the Commission's entire deliberation on the application or even a major portion of it falls under the attorney-client privilege exception. *Cf. Sacramento Newspaper Guild v. Sacramento County Bd. of Super.* 69 Cal. Rptr. 480 (Cal. Ct. App. 1968); *Times Publishing Co. v. Williams*, 222 So. 2d 470 (Fla. Dist. Ct. App. 1969); *People ex rel. Hopf v. Barger*, 332 N.E. 2d 649 (Ill. App. Ct. 1975).

The Commission's deliberations on utility rate applications are also not permitted to be discussed in closed session under N.J.S.A. 10:4-12(b)(5). That section does not exclude all rate cases from the open meeting requirement but only excludes discussion on the "setting of banking rates." If the Legislature had intended to exclude all types of rate cases from the open meeting requirement, it would not have

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specifically limited this exception to "banking rates." Since the setting of utility rates does not constitute the setting of "banking rates," they may not be discussed in closed session under this exception.

In addition to the exceptions discussed above, there appears to be no other exception in the Act that would permit the Public Utilities Commission to conduct its deliberations on utility rate applications in closed session. There is also nothing to indicate a legislative intent to exempt these deliberations from public scrutiny. You are therefore advised that the Open Public Meetings Act requires the deliberations of the Public Utilities Commission on utility rate applications to be conducted in public session.

Very truly yours,

WILLIAM F. HYLAND
Attorney General

By: MICHAEL A. SANTANIELLO
Deputy Attorney General

January 19, 1977

HONORABLE RAYMOND H. BATEMAN
21 East High Street
Somerville, New Jersey 08876

FORMAL OPINION 1977 - No. 1

Dear Senator Bateman:

You have asked whether the procedures initiated by the New Jersey Education Association with various local boards of education for political action contributions are authorized under New Jersey law. This question has been generated by Bylaw 2 approved by the N.J.E.A. Delegate Assembly, effective September 1, 1976 in the following form:

*"Professional Payment—*Each Active Professional Member shall remit to the Association, through the same procedures by which the dues of such member are paid and under standards established by the Executive Committee, an annual total professional payment which shall include, in addition to the established dues for such member, a contribution, in the amount of two (\$2) dollars, for the NJEA Political Action Committee. Each fall when the Automatic Payroll Deduction members receive their membership cards, a letter explaining the Political Action Committee deduction, a form to request the return of the two (\$2) dollars, and a self-addressed envelope to NJEA will be included. Upon receipt of a request in writing from any member, the Association shall return the member's two (\$2) dollar contribution for the fiscal year during which the request was received. The Association shall transmit to the NJEA Political Action Committee those two (\$2) dollar contributions for which no refund request is received."