PUBLIC MEETING

before

SENATE SPECIAL NEW JERSEY HIGHWAY AUTHORITY INVESTIGATION COMMITTEE

Concerning information about the proposed toll increase of the New Jersey Highway Authority and the Authority's compliance with the Open Public Meetings Act

February 16, 1988
Room 424
State House Annex
Trenton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Senator Gabriel M. Ambrosio, Chairman
Senator Christopher J. Jackman, Vice Chairman
Senator John A. Lynch
Senator Henry P. McNamara

ALSO PRESENT:

E. Joan Oliver
Office of Legislative Services
Aide, Senate Special New Jersey Highway
Authority Investigation Committee

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Meeting Recorded and Transcribed by
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Hearing Unit
State House Annex
CN 068
Trenton, New Jersey 08625

New Jersey State Legislature

SENATE SPECIAL NEW JERSEY HIGHWAY AUTHORITY
INVESTIGATION COMMITTEE

State House Annex, CN-068
Trenton, New Jersey 08625
Telephone: (609) 984-7381

MEMORANDUM

February 9, 1988

TO: MEMBERS OF THE SENATE SPECIAL NEW JERSEY HIGHWAY AUTHORITY INVESTIGATION COMMITTEE

FROM: SENATOR GABRIEL M. AMBROSIO, CHAIRMAN

SUBJECT: COMMITTEE MEETING

(Address comments and questions to E. Joan Oliver, Committee Aide, (609) 984-7381.)

The Senate Special New Jersey Highway Authority Investigation Committee will meet on February 16, 1988, at 11:30 a.m., in Room 424 of the State House Annex, in Trenton, New Jersey.

The Public Advocate and the Attorney General have been requested to testify at this meeting concerning any information they may have about the proposed toll increase of the New Jersey Highway Authority and the authority's compliance with the Open Public Meetings Act. In addition, the committee will consider the need to subpoena certain of the authority's documents that are relevant to the committee's investigation.

SENATOR GABRIEL M. AMBROSIO (Chairman): If I may call this meeting to order, I would like the record to reflect the attendance of the following Senators at the meeting today: Senator John Lynch, Senator Chris Jackman, Senator Henry McNamara, and myself. I am Gabe Ambrosio, and I am Chairman of this Committee.

Just a few brief announcements: We had planned to have two witnesses this morning, the Public Advocate and the Attorney General. The Public Advocate is here, and has agreed to testify before the Committee. The Attorney General has sent a letter indicating that he will not appear today. I will make the letter available for those who wish to see it, and it will be made a part of the record. He has indicated, in brief, that there is an ongoing investigation, and he is holding off any commitment to get involved in these Committee meetings until that investigation is completed. I will let the letter speak for itself.

At this time, I would ask one of the Senators to move that we authorize the issuance of subpoenas to the Highway Authority, requesting the various documents, a list of which has been supplied to us by staff -- the procedural documents, the operational documents, the financial documents, and other miscellaneous documents and correspondence that staff has recommended. Would someone please make that motion?

SENATOR LYNCH: So moved.

SENATOR AMBROSIO: Seconded?

SENATOR McNAMARA: Seconded.

SENATOR AMBROSIO: All in favor? (unanimous aye) Okay.

At this point, I would now recommend that we call the Public Advocate, who I understand has a statement to make, and who will then make himself available for questions.

SENATOR LYNCH: While he is coming forward, may I also make a motion that the Chair inquire of the Attorney General

further as to the contents of his letter, which is somewhat ambiguous, to try to clarify the issue of whether or not that letter intimates, or says that the Attorney General will not conclude his investigation, or is looking to this Committee for some factual findings before concluding his own investigation? To some extent, it even might intimate that he is not going to investigate until this Committee has concluded its work.

SENATOR AMBROSIO: Senator Lynch, I agree with you 100%. I will respond to the Attorney General's letter in a way that asks him to clarify his position more fully.

SENATOR McNAMARA: Not being an attorney, and since both of you attorneys read the letter in a different light, for the record, I read the letter-- I am not taking a position defending the Attorney General, but to me, you run the comparison of, if he is the ultimate prosecutor. I really and truthfully do not think it is proper that he should appear before this Committee, myself. But again, I am not an attorney.

SENATOR AMBROSIO: Senator, I think what Senator Lynch has alluded to in his comments has to do with the fact that the Attorney General's letter indicates that, in addition to his refusal, or his declining our invitation to testify because he has not completed an investigation, nor prepared a report on the matter-- I don't really have any problem with that. What I think I have a problem with is that he is awaiting the results of our Committee's investigation before he completes his investigation. That is the part of the letter that I think is confusing.

The other part is, he seems to indicate that, for all practical purposes, what has happened so far has mooted the question of the violation of the Open Public Meetings Act, and I don't understand what he means by that.

So, I think the letter needs clarification. I think simply corresponding with the Attorney General and asking him to clarify his position is appropriate at this time.

SENATOR McNAMARA: Fair enough. I think, quite frankly, the fact that we are going to subpoena, and witnesses are going to testify under oath, may be a legitimate observation that he is making. I don't know what he is thinking. It is just proper to get further clarification.

SENATOR AMBROSIO: Thank you. Mr. Slocum, thank you for appearing today. As has been decided by the Committee, all witnesses who appear before the Committee are going to be asked to give sworn testimony. So, if I may, I would ask you to stand to be sworn. (Mr. Slocum complies)

Just raise your right hand. Do you swear that the testimony you will give to this Special Committee of the Senate will be the truth, and nothing but the truth?

A L F R E D A. S L O C U M: I do.

SENATOR AMBROSIO: Thank you. Mr. Slocum, before you testify, we would just like to thank you for appearing before our Committee. We all have a copy of the report you have submitted, which is very comprehensive. The purpose of asking you to testify is to see whether or not you can elaborate on that report in any way, and answer some of the questions that have been raised by staff and other Senators with regard to some of the issues that have been raised in that report.

I understand you have a statement you would like to read, so please go ahead and read it.

MR. SLOCUM: Good morning, Mr. Chairman and members of the Senate Special New Jersey Highway Authority Investigation Committee. I welcome this opportunity to share with you the results of my Department's recent report on whether the New Jersey Highway Authority violated the Sunshine Act when it proposed a toll increase on the Garden State Parkway.

We launched this investigation in November, 1987 in response to a request from the Deputy Mayor of Middle Township, and to widespread public concern about the manner in which the Authority discussed the toll hike. The Highway Authority's

decision to propose a doubling of the tolls on the Garden State Parkway was probably the most significant decision the Authority has made in its 35-year history. It was certainly its most controversial. I decided that the public interest would be served by an inquiry into whether the Highway Authority's processes and deliberations on the proposed toll increase fully protected the public's rights under the Sunshine Act.

In preparing our report, my staff reviewed numerous documents and interviewed a variety of people familiar with the Authority's deliberations on the toll increase. We thoroughly reviewed all the minutes of the open and closed meetings that the Authority held from August, 1986, through November, 1987, all the resolutions relating to these closed sessions, and all relevant correspondence, memoranda, revenue bonds, and credit agreements. We also reviewed the Authority's briefing book on the toll increase, and the transcripts of the Assembly and Senate committee hearings on the Highway Authority proposal. In addition, we interviewed Highway Authority Commissioners and spoke to the Authority's in-house and outside counsel to clarify the factual circumstances surrounding the toll increase discussions. Finally, we researched relevant case law under the Open Public Meetings Act and its legislative history.

In this testimony, I will discuss our findings and conclusions from this investigation. I would like to turn first to the Authority's closed meetings. The relevant facts are now clear. From August, 1986, through November, 1987, the New Jersey Highway Authority met in 10 separate closed meetings to discuss a proposal to increase tolls on the Garden State Parkway. The Authority claimed that each closed session was justified because the toll increase matter was either: 1) Part of "contract negotiations"; or 2) excluded under the "public safety" exception.

Insofar as "contract negotiations" is concerned, the record is quite clear that the Authority's discussions on the toll increase did not involve the negotiation of any contract. The "contract negotiation" exception, by its very terms, only applies to a contract "in which the public body is or may become a party." No such contract arising out of the discussions of toll increases existed.

Moreover, the Authority has attempted to blur two very different matters and employed the "contract negotiation" exception in a manner which swallowed up the entire Open Public Meetings Law. The analysis is flawed, however, because it fails to distinguish between discussions relating to the use of revenue from a toll increase to meet obligations under present contracts and discussions involving actual contract negotiations. The Sunshine Act very clearly exempts only the latter from public disclosure.

Similarly treated by the Highway Authority is the "public safety" exception. The Highway Authority stretches the limits of imagination by making the argument that since a toll increase was necessary to ensure that the Authority could make payments under its bonds "in a safe and efficient manner ... a premature disclosure on the eve of an election" would cause people "to jump on the toll increase, instead of looking at the merits of the campaign."

The Open Public Meetings Act contains a very narrowly drawn "public safety" exception to the general mandate of open, public meetings. This exception refers to discussions of public safety tactics and techniques where disclosure could impair the protection of the public. The Legislature intended this section to prevent disclosure of law enforcement measures where disclosure would harm public safety or property.

At the heart of the Authority's position lies a claim that proposed toll increases were so controversial that the "public safety" might have been endangered by a premature

disclosure. It appears that it was not the public's safety that was at issue, but rather the safety of those making the decision to remain secure in their respective positions. While the Highway Authority Commissioners do serve as "public employees," it was not the public's safety which was at risk.

Furthermore, such tortured interpretation of the Sunshine Act flies in the face of legislative intent to ensure that public bodies conduct important governmental discussions publicly and do not hide away from the sunlight into the shadows of back rooms beyond public scrutiny when the issues to be addressed are controversial.

In short, the New Jersey Highway Authority's 10 closed sessions on the toll increase were not authorized by any of the exceptions in the Sunshine Act, and represent clear violations of the Act.

The Highway Authority also violated the Act in another significant respect. The Sunshine Act clearly requires that before a public body retires into closed session, it must first adopt a formal resolution at a public meeting that states the general nature of the subject to be discussed in closed session and states, as precisely as possible, the time when the public will learn the substance of the body's private discussions. The legislative history and the case law emphasize that these rules are mandatory.

The Highway Authority adopted general resolutions regarding the closed sessions, but these resolutions bore no resemblance to those required by the Act. The Authority's resolutions fail to state the "general nature of the subject(s) to be discussed" in private session. They do not even cite, let alone explain, the exception invoked to authorize a closed meeting. Nor do any of the resolutions provide the public with any specific knowledge of when a particular subject will be disclosed.

Although our report concludes that the Highway Authority violated the Sunshine Act in several ways, we determined that the January, 1987 session between the Governor and four of the Highway Authority Commissioners did not violate the Sunshine Act. Both the legislative findings of the Sunshine Act and its legislative history, indicate that the Governor does not come within the scope of the Act. Also, we recognized that the Sunshine Law was not designed to prevent the Governor from meeting privately with advisers to exchange ideas. Indeed, to require that the Governor conduct such discussions in public meetings would hamper the Governor's ability to seek the advice and counsel of other public officials or agencies. Finally, to constitute a "meeting" under the Act, a gathering must be open to all the members of a public body. However, only the officers of the Authority met with the Governor, and the record reflects that this meeting was not open to the rest of the Commissioners. Therefore, the Governor's meeting did not violate the Sunshine Act.

The final issue we considered was whether the Highway Authority cured its Sunshine Act violations. The focus of our inquiry was on the manner in which the Authority conducted its public meeting on November 30, 1987. Unfortunately, neither the Sunshine Act nor the case law supply any precise definition or adequate explanation of what is required to constitute a de novo curative action. Our task was further complicated by the lack of a verbatim record of what transpired in the closed sessions. The minutes merely provide summaries of the issues the Highway Authority considered. It is unclear whether these minutes fully reflect what the Authority discussed. For example, the minutes do not state that the Authority ever discussed in private session a full range of alternatives to the toll increase. However, Commissioner Robinson testified before the Legislature that the Authority did, in fact, discuss alternatives at the closed meetings. Moreover, some of the

Commissioners have recently stated that the minutes do not correctly reflect what occurred at several closed meetings. In light of these difficulties, we found it impossible to rely on the Authority's minutes to determine what was actually considered in private.

In the final analysis, we entertained serious doubts about whether the November 30 meeting was the type of de novo proceeding the Legislature contemplated when it enacted the Sunshine Act. The Commissioners never engaged in any discussions among themselves regarding the information that their consultants provided on the toll increase. Nor did the Commissioners explore any alternatives to a toll increase. And what was the end result? The Commissioners merely proposed the identical toll increase that they discussed in private session. As we stated in our report, it appeared as though the November 30 meeting was simply a ritualistic exercise directed to a preordained result, and was not the reconsideration of the entire issue required by the Sunshine Act.

What did we learn from our investigation? First, we think that the Legislature should take another careful look at the remedies under the Act. Along these lines, we suggest that the Sunshine Act include a precise definition and clear guidance on what is necessary to cure a Sunshine Law violation. Additionally, we recommend that the Legislature consider incorporating into the Sunshine Act an effective remedy to address the inherent problems surrounding closed meetings that are held to delay the public disclosure of a controversial decision. The present de novo requirement simply allows a public body to reconsider its decision at a later date. This is obviously ineffective to deter a public body from meeting in closed session to delay the release of information to the public.

With respect to the New Jersey Highway Authority, we recommended that the Authority fully reconsider, in public

meetings, all relevant aspects of the toll increase. It was felt that a full public airing of this issue is the only course of action that would begin to restore public confidence and avoid any appearance of impropriety arising from the private toll discussions. However, recently I observed in the newspapers that the Governor has interceded in these matters and determined that the barrier toll increases discussed in the closed sessions are not to be placed into effect and that only ramp tolls may be adjusted. Such executive decision-making may render moot, for these purposes, questions surrounding the efficacy of the purported November 30 de novo meeting. But I submit that it does not render moot the responsibility of the State Legislature to give greater clarity and definition to the standards set for such a de novo meeting, so that other public agencies can benefit from such guidance.

In closing, I must emphasize that the Sunshine Law should be strictly followed, not just because it is the law, but because it makes good sense. I am persuaded that an informed citizenry is a vital ally, not an enemy, in the formulation of critical public policy decisions. The Highway Authority obviously discussed matters of public importance in the shadowy depths of private sessions. Our democratic principles are better served and our policy discussions are only more enlightened, if the Authority and other public bodies reach their decisions under the full illumination of the Sunshine Act.

Thank you.

SENATOR AMBROSIO: Thank you, Mr. Slocum. I would like to pursue, if I might, a line of questioning that would attempt not to rehash the report you did, which was rather thorough, but I want to focus on some of the areas in the report that I have some questions about. If possible, I would like you to expand on them. All right?

As I understand it, your investigation began as a result of a complaint filed by a Deputy Mayor in November, 1987. Is that right?

MR. SLOCUM: That is correct.

SENATOR AMBROSIO: You received no notice prior to that of any of these meetings that the Highway Authority was having -- these private meetings?

MR. SLOCUM: No, we did not.

SENATOR AMBROSIO: You received no other requests, other than the one from that Deputy Mayor?

MR. SLOCUM: Well, in terms of a specific request to conduct an investigation, we received such a request from the Deputy Mayor, as indicated in my testimony. We had other calls where individuals -- private citizens -- made inquiry as to "What is going on?" but in terms of a specific request to conduct the investigation that was conducted, that came singularly from the Deputy Mayor of Middle Township, and from no other.

SENATOR AMBROSIO: In conducting your investigation-- I note in your large report, not your statement, that you say you obtained certain documents and you had conversations with various individuals. Did you take any written statements from any witnesses?

MR. SLOCUM: I don't believe we took written statements. We conducted interviews; specifically, we conducted interviews of two Commissioners, for example. Notes were taken as a consequence of the interviews, but we did not take statements from those whom we questioned about the ongoing machinations of the Highway Authority vis-a-vis the toll increases.

SENATOR AMBROSIO: And obviously, none of those statements were under oath or by affidavit. Is that right?

MR. SLOCUM: No, they were not.

SENATOR AMBROSIO: Okay. Were there any limitations imposed on your investigation, either self-imposed or by others?

MR. SLOCUM: Yes. We made a decision not to investigate, if you will, questions of motivation or specific intent as to the Highway Authority's decision to conduct the closed meetings. We did that specifically because it was felt that since we did not have the responsibility or jurisdiction to determine punishment, it would make no sense to engage in an investigation which looked at one-half of that process. If we weren't going to do the part that dealt with punitive measures, then there was certainly no purpose of our deciding what motivation lie beyond the decision-making that was engaged in.

SENATOR AMBROSIO: Was there any information not attained that you felt might have been necessary or helpful to the investigation? Or, did you receive all of the information you were looking for?

MR. SLOCUM: We were satisfied that we had a sufficient amount of data available to us to reach the findings we reached. Basically, it is important for us to understand that we do know to a certainty, we are satisfied to a certainty, that the Sunshine Act was violated insofar as the alleged exceptions to the Sunshine Law that were arguably utilized to justify the closed meetings. We think that conduct was wrongful. It is very clear to us that we had a sufficient amount of data to make that determination. Insofar as the meetings with the Governor are concerned, we are satisfied that we had a sufficient amount of insight into those matters to determine, as we stated, that those meetings were not covered by the Sunshine Act. Again, we are satisfied that our determination that adequate notice as to the closed sessions did not take place and was not forthcoming is a matter that violated the Sunshine Act, as well. Insofar as those three specific findings are concerned, I have every confidence that we had a sufficient amount of data made available to us to reach those determinations.

SENATOR AMBROSIO: Mr. Slocum, since you brought it out at this point, I am going to ask you: With regard to your conclusions concerning the meeting at the Governor's office, what information did you have upon which you based those conclusions? Did you talk to the Governor himself, or anyone from his staff?

MR. SLOCUM: No, we didn't talk to the Governor. We made the determination as to who was present. As indicated in our report, all of the Commissioners were not present. Therefore, it could not have constituted a meeting, in that they were not only not present, but they were not invited. They were not welcome to be participants in that discussion. Therefore, it could not be construed even as an ad hoc meeting of the Highway Authority. It was a meeting between the Governor and his advisers singularly, and we feel confident that it could not be characterized otherwise. Once we adopted that characterization, we were consistent with our understanding of the law that the Sunshine Act does not cover those kinds of meetings. Otherwise, it would be impossible for executive decision-making and leadership and guidance to take place, as we understand them.

SENATOR AMBROSIO: Let me just focus again on how you came to the conclusion that the others were not invited. Who did you talk to?

MR. SLOCUM: We talked to two Commissioners specifically. We tried to speak to a third Commissioner, but were not able to do so. We spoke to that particular Commissioner's counsel instead. But, we were satisfied, as a consequence of those interviews and a review of reams and reams of documents, that it was so.

SENATOR AMBROSIO: Okay. Is it your understanding that if the entire Highway Authority had a meeting with the Governor, that that would be exempt from the Sunshine Act?

MR. SLOCUM: Well, no. Our position is-- I don't want to decide until I have a specific set of facts in front of me, but if all members of the agency or entity are invited and are in attendance, there is certainly an argument that that constitutes a meeting.

SENATOR AMBROSIO: But you are not ready to make that decision now. Is that what you're saying?

MR. SLOCUM: No. I am prepared to say that that is so. But, I mean, you have to have a specific set of facts in front of you to decide whether or not such a meeting is lawful or unlawful, and I am not trying to decide that. I am merely saying that one of the things that was responsible for our decision that the Governor's meeting was not covered, was that all members were not invited. That is a mandate you have to have before you can say the Sunshine Act covers that activity.

SENATOR AMBROSIO: Let's just not apply it to the Governor's office. Let's talk about a local mayor and council. If one of the individual councilpeople decides to call a meeting and invites a quorum of that body together, but does not invite the entire body, is that a violation of the Sunshine Act?

MR. SLOCUM: I would doubt that that would be a lawfully constituted meeting and, therefore, I would have some doubts as to the applicability of the Sunshine Law. You see, how could you be doing business when you haven't invited all of the members of the body who are mandated to conduct the business?

SENATOR AMBROSIO: But my question is whether or not that would be a violation of the Sunshine Act, to have a closed meeting with--

MR. SLOCUM: My answer, sir, is no, simply because the Sunshine Act covers the doing of governmental business. My argument is, if all members who are mandated to conduct the business are not invited, then they can't be doing the business that they have a duty to witness.

SENATOR AMBROSIO: What is the effect of that meeting? Is any law violated?

MR. SLOCUM: I would doubt it, unless someone who feels there was an ex parte discussion, for whatever reason--

SENATOR JACKMAN: Someone who wasn't invited?

MR. SLOCUM: Yeah, I was going to say someone who wasn't invited and thought it was ex parte might feel left out, if you will, but other than that--

SENATOR AMBROSIO: Haven't you then just carved a hole out of the Sunshine Law which allows a local governing body to exclude, let's say, two members out of seven, and meet with five any time they want, with impunity? They could discuss governmental problems--

SENATOR JACKMAN: But they couldn't enact them.

SENATOR AMBROSIO: Whether they could enact them or not, you would have an effective majority of the council meeting privately, and then they could simply do what this Authority did, come to the next public meeting and announce their decision, when all of the discussions were held in private. Isn't that a violation of the Sunshine Law?

MR. SLOCUM: I have just been advised by a co-counsel that if, in fact, there was a specific intent to get around the Sunshine Law by recusing two members of the body, that that might constitute a violation of the Sunshine Act. I have no doubt as to the validity of that statement. I suppose, from a practical standpoint, if I thought I was one of the people who was not invited, there would be such a hue and cry from me, that whatever they thought they had done would be meaningless at any point. I suppose if you want to paint with too broad a brush, you can get yourself into difficulty. I don't believe you can do executive decision-making necessarily under the Sunshine Act. As a consequence, I don't think you want to box yourself into a hole so that no public official can conduct any meeting, can provide for data to be made available to him or

her; such that the minute you open your mouth, or the minute an idea is formulated, you have a duty to engage in public disclosure. I don't think that is something we want to do, and I think you have to be careful that you don't paint with too broad a brush.

However, when you are, in fact, doing the public's business, the public ought to have an opportunity to witness it being done. There is no reason I can think of why that ought not take place. So, the issue in my mind is, are you doing business or not? The point is, if, in fact, you want to do business, and you recuse a member or two simply to say, "Now it doesn't fall within the purview of the Sunshine Act," and you do, in fact, do business, and the only purpose in recusing the two members was to set up a set of circumstances so you could find a loophole in the Sunshine Act, then I believe wrongful intent makes your conduct wrongful.

SENATOR AMBROSIO: Do you think the intent is what is important here, or the effect of it? I'm asking you whether or not a meeting of a quorum of a governing body where they discuss town business is a violation of the Sunshine Law? Isn't that a classic violation? Whether they invite the entire council or not is irrelevant, if they have an effective majority.

MR. SLOCUM: I can't answer that question yes or no, because I don't believe there is a yes or no answer. It seems to me that every public official engages in any number of conversations with other public officials and members of other bodies periodically, just when they happen to meet. And I think it is appropriate for them to have those discussions. So you meet two or three people at the same time. Should that make a difference?

The issue has to be, when you are meeting your mandate as a public official to carry out the people's business, are the people entitled to know what you are doing? The answer,

unequivocally, is yes. But if you are meeting by happenstance, because you wanted to get some information, but you were not necessarily in the act of doing business, I don't think it is appropriate to invoke the Sunshine Act.

SENATOR AMBROSIO: I would just like to explore this a little longer.

MR. SLOCUM: Be my guest.

SENATOR AMBROSIO: Let's go back to the Governor's office. If the Governor were to attend a meeting of the Highway Authority, the fact that the Governor is there does not exempt the Authority--

MR. SLOCUM: It wouldn't change anything.

SENATOR AMBROSIO: Wouldn't change anything. If the Authority were to have a meeting at the Governor's office, the fact that they were having a meeting at the Governor's office wouldn't change anything?

MR. SLOCUM: Wouldn't change anything.

SENATOR AMBROSIO: My question is, if there is an effective majority of the Authority meeting at the Governor's office, where they discuss the public's business, like raising tolls, is that a violation of the Sunshine Law?

MR. SLOCUM: You see, Senator -- Mr. Chairman -- when you say to me that there is an effective majority, I don't know what that means.

SENATOR AMBROSIO: It means more than half.

MR. SLOCUM: The number of people present does not concern me. What concerns me is whether or not there have been sufficient invitations, such that you can make an argument that they are, in fact, doing business as a body. If, in fact, they are doing business as a body -- I am not concerned about logistics; I don't care whether it is in the Governor's office, whether it is in their back yard, whether it is in a rose garden; it doesn't make any difference -- they are doing what they are statutorily mandated to do and, therefore, they are covered by the Sunshine Act.

Now, just because more than half of the number of the body happen to be in attendance-- I don't in any way consider that, Senator, to be dispositive. It does not answer the question for me.

SENATOR AMBROSIO: All right. They would have to be doing business. If a majority is there -- an effective majority is there -- the next element you are putting in is that they would have to be doing the Authority's business.

MR. SLOCUM: Consistent with the mandate of that body. Whatever the mandate of that body is, if they were doing business in accordance with the mandate, then I would feel that the Sunshine Law was applicable, yes.

SENATOR AMBROSIO: Now, if a meeting was held at the Governor's office by an effective majority -- more than half of the Highway Authority Commissioners -- where they made a formal presentation to the Governor and recommended toll increases-- Isn't that doing the public's business?

MR. SLOCUM: I am not persuaded, Senator.

SENATOR AMBROSIO: You're not?

MR. SLOCUM: I'm not.

SENATOR AMBROSIO: You don't consider that a violation of the Sunshine Law?

MR. SLOCUM: Because I don't believe they were doing business consistent with their statutory mandate, nor were all their members invited.

SENATOR AMBROSIO: I am not concerned about whether the Governor is in violation, because I don't believe the Governor is in violation. I don't think the Sunshine Law applies to the Governor. But I do think it applies to the public agency. So, even though the meeting took place with the Governor, it could very well be that they violated the Sunshine Law, but not the Governor.

MR. SLOCUM: I disagree. I can't believe that any of the commentary that took place at that time was subject to public disclosure as a consequence to the Sunshine Act.

SENATOR AMBROSIO: Thank you.

SENATOR McNAMARA: I guess I am kind of caught between a rock and a hard place. Hearing what you're saying, and looking at the Act -- 10:4-11 -- I am inclined to agree with the Public Advocate, because it says: "No person or public body shall fail to invite a portion of its members to a meeting for the purpose of circumventing the provisions of this Act." My understanding of the meeting was, they were making a presentation. They weren't taking a vote on whether they were going to raise the tolls, or whatever the hell they were going to do. They were making a presentation to the Governor.

We all agree that the Governor is excluded by virtue of the Act itself, but I don't really see that they would be in violation, in reading this particular provision of the Act itself, where it says unless it is "for the purpose of circumventing the provisions of this Act." It is kind of clear that they had all decided what they were going to do at some other private meeting, and came forward to make their recommendations to the Governor, as the Executive.

SENATOR AMBROSIO: Senator, it might be that we are focusing on an area that has to be cleared up by the Legislature, because I see that as a clear violation of the Sunshine Law -- an absolutely crystal clear violation. The very fact that you don't is an indication that we might have to look at that legislation and clear it up. If the Public Advocate doesn't see it either, there is clearly some confusion here.

SENATOR McNAMARA: I think the problem is, some attorney most probably drafted the Act.

MR. SLOCUM: Not only do I not see it, Mr. Chairman, but I would submit to you that it would be a mistake to close the loophole you think you see, because I think it would deter executive decision-making at a level that is inconsistent with the public mandate of the Sunshine Act.

SENATOR AMBROSIO: Mr. Slocum, I read your words very carefully, and I agree with them. In your determination that the meeting at the Governor's office does not come within the scope of the Act, you characterize meetings of the Governor with his advisers and with his counsel and with his staff. Those are clearly not areas that I would ever suggest we make subject to the Open Public Meetings Act. But, we are not talking about meetings with his advisers, his staff, or his counselors. We are talking about meetings with a public body that has an effective majority that can speak on behalf of that public body.

I am suggesting that that is an area that the Senators and the full Legislature and the Governor might have to address. My feeling is that where there is an effective majority of a public body meeting at any time, they are subject to the Open Public Meetings Act, unless they fall within one of the exceptions, one of the chance meetings, and some of the areas that you point out. It is not an issue, obviously, that we are going to decide today, but I think it was important that we had this dialogue on it.

I do have a few other areas before I yield to any other Senator. Did you have any communication with the Attorney General's office concerning his role in this investigation?

MR. SLOCUM: Yes, I did.

SENATOR AMBROSIO: And, what was the outcome of those discussions?

MR. SLOCUM: We merely discussed the jurisdictional boundaries associated with punitive measures. We agreed that it fell singularly within his purview, and not in mine.

SENATOR AMBROSIO: Can you pinpoint a time as to when those discussions took place?

MR. SLOCUM: I really can't.

SENATOR AMBROSIO: Was it before your report was completed?

MR. SLOCUM: Oh, it was before the report was completed, yes.

SENATOR AMBROSIO: Mr. Slocum, as I read your report, you made certain findings which you think are firm and well-founded. Is it the next step, and the only next step, with regard to the enforcement of the Act, for the Attorney General to bring whatever proceedings are required under the Act for the penalties? What I am really asking is, is there an interim step that has to take place before the Attorney General acts?

MR. SLOCUM: As I understand the law, there is no particular chronological sequence that must be adhered to. The Attorney General has the responsibility to make the determination as to whether or not a violation occurred and the extent to which punishment ought to be meted out. If you look carefully at the legislation, you will see that three times the Public Advocate's name is mentioned in terms of his responsibility under the Act, and sometimes we have overlapping jurisdiction. The overlapping jurisdiction, in my judgment, does not constitute a conflict, in that where a possible conflict would arise would be if I determined culpability as well as punishment and the Attorney General did, as well. Suppose I said there was no culpability and the Attorney General said there was, that would cause a big problem. Even if only one body imposed a fine, the conflict wouldn't be the same as the question of culpability. That is specifically why we shied away from notions of specific intent and motivation, to avoid that conflict. Absent that conflict, the Attorney General, in my judgment, is free to speak earlier or later in the process, because he is unique in terms of the findings he is going to reach. Neither you nor myself have an opportunity to do precisely that, because we don't have the jurisdictional basis to do so.

SENATOR AMBROSIO: I would like to focus briefly on your conversation with the attorneys for the Highway Authority. Did you speak to them directly?

MR. SLOCUM: Not me personally. My staff spoke to them directly.

SENATOR AMBROSIO: Do you know which of the attorneys your staff spoke to?

MR. SLOCUM: Specifically by name?

SENATOR AMBROSIO: Yeah. I believe Fox and Fox represents the Authority, but there was someone else who was at the meetings taking the minutes, I think a Mr. Grossman. Do you know whether or not all of those individuals were spoken to?

MR. SLOCUM: I am advised that we spoke to three members of the legal staff. We spoke to Arthur Grossman, Martin Fox, of Fox and Fox, and Tom Critchley, who I understand is inside counsel.

SENATOR AMBROSIO: Did your investigation reveal the mechanism by which the invoking of the Open Public Meetings Act, Executive Session, was employed? By that I mean, did the attorneys act after they were asked by the Authority, or did the Authority begin to act and the attorneys say, "We recommend you going to private session?

MR. SLOCUM: Well, Senator, if there had only been one meeting, I could understand what it is you're asking. But it is clear to me that since they had 10 meetings over some 18 months, that it would be very difficult to discern at this point in time which came first, "the chicken or the egg," so to speak.

It is pretty clear to me that even if counsel, without any catalyst, addressed the body and said, "Look, this is what I think you ought to do: Since I understand from rumblings that you are going to discuss a toll increase, I think you ought to go into closed session, and I think you ought to argue some exception to the Sunshine Act when you do so." Or, it

doesn't matter to me whether the converse was true. If the body said, "Look, since I know this is what we are going to do, what I think we ought to do is tell counsel this is what we are going to do, and ask them to tell us how we can cover ourselves." It doesn't matter, in my view, and we said so in our report. Whether counsel should have been conversant with the mandate of the Sunshine Act, whether they had been asked to cover the closed meetings, or whether they looked at the Act, and said, "Since you are engaging in these discussions, this is what I think you ought to do," the advice that counsel gave the Highway Authority was incorrect. There were clear-cut violations of the Sunshine Act as a consequence of the way the closed meetings were conducted. Counsel either knew that or should have known that, and they should have given advice consistent with that. Since they failed to do that, you can recognize when you read our report that we place a great deal of the blame on those people who gave that advice, simply because they should have said, "No, no, you're doing a terrible thing," and they should have said that loud and clear.

SENATOR AMBROSIO: Is it your understanding of the Act that if a public body or an individual member acts under advice of counsel and he violates the Act, that is a defense to the prosecution of it?

MR. SLOCUM: That is not my understanding.

SENATOR AMBROSIO: I note that in your report, and in the statement you read today, you make certain recommendations for changes to the Open Public Meetings Act, which I particularly appreciate. Do you have any specific recommendations? I know you make general recommendations that we tighten up the Act as it applies to correcting violations and remedial action, but-- Even if you don't have them today, I would appreciate any specific recommendations you might make.

MR. SLOCUM: Well, the most specific thing I can recall, Senator, that we asked for, was that you set out and

delineate clearly what has to be said specifically to carve out an exception under the Sunshine Act for an anticipated closed meeting. We were not satisfied that the alleged notice that was given was in any way consistent with what we understand the Sunshine Act to require. Therefore, we ask the State Legislature to look at the Act and make a determination as to whether they couldn't more clearly delineate the standard for what has to be expressed to invoke an exception and to conduct a closed meeting.

SENATOR AMBROSIO: Thank you, Mr. Slocum. Does anyone else have a question?

SENATOR McNAMARA: You know, since the question of the chicken or the egg, as to who, you know--

MR. SLOCUM: Did what to whom?

SENATOR McNAMARA: --did what to whom, would you also recommend that maybe penalties to counsel should be included in the Sunshine Act? If you are saying that a person cannot rely -- that it is not a defense to rely on counsel's opinion, I have a real problem when those people serving on boards -- whether they are planning boards or zoning boards or any other boards within this State -- ask their counsel, in good faith, whether they should be exempt, you know, "Can a meeting be held in private session," and counsel advises, "Yes, you can go ahead and discuss this in private," and that is not a defense for them. I don't like the idea of the attorney walking away scot-free. He is the only guy being paid.

MR. SLOCUM: Well, Senator, I am not certain in my own mind that they are walking away scot-free. There are several things that come into play. First of all, we have boards for professional responsibility. To the extent that a determination was made at the time that was egregious, I would think it would be appropriate for the board to review that conduct and, consistent with professional standards, make some determination as to what kind of criticism ought to be imposed against him.

Secondly, there has been a great deal of publicity associated with these matters. For those who seek counsel, they get to look at the performance of counsel vis-a-vis these matters, and people make an independent judgment as to whether that is the kind of advice and counsel they desire for themselves. So, I think it has a legitimate business impact on them, as well as the existence of professional boards which determine professional responsibility. I think it would probably be unwise to draft a Sunshine Act and to put into it sections that deal with the responsibility associated with legal counsel. I would guess that you could look at a whole host of regulatory measures that the State Legislature engages in, and they never do that. I think there is a reason why, because we have a system that says professional boards ought to determine professional responsibility. We think they can adequately clean their own houses and wash their own laundry, so to speak. When you do something different from that, you are saying no to that entire system.

SENATOR McNAMARA: In this particular case, the notoriety involved with it obviously can have an impact on that particular firm. But when you get down to just the average local board relying on the average local attorney, I have a real problem where you take someone who is not familiar with the law, who is serving as a volunteer, and, in fact, cannot even use as a defense the advice of the attorney who is paid to give him counsel.

MR. SLOCUM: Oh, you wouldn't want that, Senator. You wouldn't want that to be in the Sunshine Act, would you, that if a lawyer told you it was okay to do it, then you would be absolved of any responsibility?

SENATOR McNAMARA: No, no, no, no, no, no. I am not saying that.

MR. SLOCUM: Oh.

SENATOR McNAMARA: What I want in there is-- I want him to hang with the volunteer. I don't like the volunteer being put up for execution, and the guy who gave him the advice walking away scot-free.

MR. SLOCUM: Well, I can tell you, Senator, my response was off the top of my head. It is not that I am trying to back away from it. I still subscribe to everything I set out. But in my own mind, it is because I am a system person; I am a process person; and I do believe we have a system that adequately addresses professional responsibility. I do think the question you raised goes to how we can get a higher level of performance from professionals, and I would guess that if you do it this way, you're saying no to the existing system, and I would think a long time about that.

SENATOR McNAMARA: I would like you to think about it, though, because I have a high degree of respect for you. Your track record has impressed me in a number of areas, and I would like you to take a hard look at it -- and your staff -- to see if you couldn't make some recommendations. Just my gut reaction is, I don't like to see the hanging of the guy who innocently took the advice, and the other guy walking away scot-free.

MR. SLOCUM: I understand your concern, Senator. We will look at that.

SENATOR AMBROSIO: Senator Jackman?

SENATOR JACKMAN: Mr. Slocum, your reputation precedes you, of course, and you have done a marvelous job as a Public Advocate. Have you made recommendations to the Highway Authority, or to the Garden State Parkway Authority on the conduct of their prior meetings? Have you made recommendations to them to correct those so-called violations?

MR. SLOCUM: Senator, we sent them copies of our report, which demonstrated our findings as a consequence of our investigation. I thought, quite frankly, that that was sufficient. I did nothing beyond that.

SENATOR JACKMAN: Nothing's wrong?

MR. SLOCUM: I didn't understand you, Senator.

SENATOR JACKMAN: I didn't get you.

MR. SLOCUM: I did nothing beyond that, other than to send them our report.

SENATOR JACKMAN: Your report.

MR. SLOCUM: We sent each Commissioner a copy of our report. We were hopeful that they would read it, and if they did read it, they would understand that we were critical of their performance.

SENATOR JACKMAN: Based upon your evaluation, you do agree that they violated the Sunshine Act?

MR. SLOCUM: That is correct, Senator.

SENATOR JACKMAN: And you made certain recommendations, I assume -- right? -- based upon your discussions with counsel, and what have you?

MR. SLOCUM: Yes, we did.

SENATOR JACKMAN: Fine. Okay, that's all. Thank you.

SENATOR AMBROSIO: Just in that same area, how many reports does your office issue in a year concerning violations of the Open Public Meetings Act?

MR. SLOCUM: We get, Senator, a host of concerns about the occurrence of specific events and whether or not the Sunshine Law was violated. We have sent out advisory opinions; we have sent our opinion letters; we have sent out informational packages to people who are in ongoing sets of circumstances. But we rarely conduct a full-scale investigation as to the occurrence of a particular event, because more often than not, the greatest impact of the Sunshine Act, as I understand it, is that it gives guidance to people who are interested in doing the right thing. So, much of what we do is informational, to assist those individuals who are engaged in that activity.

SENATOR AMBROSIO: Can you initiate a review on your own, or do you always react to complaints and inquiries?

MR. SLOCUM: It is my position that as a consequence of our mandate to protect the public interest, we can do precisely that, because I think that is consistent with the public interest.

SENATOR AMBROSIO: Are you satisfied with the current process that is in place right now for your office to review these complaints?

MR. SLOCUM: In terms of the process, I am satisfied, yes. I am satisfied. I think there is an effective system of controls built into the legislation so that most public agencies which are responsible for supervising the Sunshine Act have behaved responsibly in the past. I see no reason that they wouldn't in the future. I believe the number of concerned calls we get is probably lessening over time, because I think people are falling into line, so to speak, and recognize the legitimacy of such things as the Sunshine Act.

SENATOR AMBROSIO: Anyone else? Senator Lynch?

SENATOR LYNCH: Yes. Professor Slocum, Henry and Chris were saying all kinds of nice things about you. You and I recently had some altercations with regard to the Council on Affordable Housing. We are not going to get into the Fair Housing Act today.

MR. SLOCUM: Good.

SENATOR LYNCH: I have used some Murine and Visine, and hopefully have the redeye out, and hope you do, too.

The issue that was raised by Senator McNamara with regard to the responsibility of the attorneys here is a significant one, because clearly when it comes to an authority or a local board or any public agency in satisfying the Open Public Meetings Act, they rely heavily upon the advice of counsel. I think probably more often than not, most members proceed in accordance with what is on the agenda, fully hoping

that they understand that if it is going to move forward in that vein, counsel has already authorized it. The point that there should be some responsibility on the part of counsel is a good one.

I suspect, however -- correct me if I am wrong -- that counsel would be responsible to the authority or to the individual if there were losses sustained as a consequence of poor advice, if it were a violation of standard of profession.

MR. SLOCUM: As a consequence of negligence.

SENATOR LYNCH: Right.

MR. SLOCUM: Whether wilfully or inadvertently.

SENATOR LYNCH: Right. It seems, from the history here, that there-- I am not going to judge the facts, but it seems pretty clear that at the very least, there was negligence on the part of counsel in offering poor advice, or not advising on the issue at all. Have you formed any opinions on that through your investigation, or have the members of your staff?

MR. SLOCUM: Senator, I'm smiling because I can see the litigation you anticipate unfolding before my very eyes. I think it would be inappropriate for me, at this early stage in that process, to try and decide the outcome. I don't want to decide whether or not they were negligent to a point whereby they ought to be liable. I think it would be a very bad answer for me to give, regardless of what I could say.

I believe the boards of professional responsibility probably ought to take a look at it, and as I sit here, it would probably be a good idea if this august body were to ask members of that board to come and testify, to find out their feelings, whether they think that this kind of conduct is appropriate for their purview. If, in fact, they were to tell you that they think it is inappropriate, that would give me, if I sat on that side of the fence, some guidance as to what I ought to do, consistent with Senator McNamara's request.

SENATOR LYNCH: I suspect that that body, however, would give us the same answer the Attorney General gave us; that is, that they wouldn't prejudge the facts. If there was a likelihood that there would be some proceeding before them, they would have to judge that within their own forum.

MR. SLOCUM: Senator, what I meant was, I don't want them to discuss the merits before this body. What I want them to do is testify as to whether or not they believe such conduct is appropriate for their review, regardless of what they might find. If they made a determination-- If you were satisfied that they were serious about the concerns they might have, such that they could answer to your questioning that they thought it was appropriate for their review, that would give you some confidence that the matter, in all probability, would be looked at. But, if they refused to answer that question in the affirmative, that would send a warning light, it would seem to me, as to the necessity for some other approach to these matters.

SENATOR LYNCH: Forgetting for a moment the professional ethics boards that might be involved here, if there were-- Assuming these facts, if there were a violation of a standard of the profession in rendering poor advice or not advising at all when advice was appropriate, and if that violation of a standard subjected the Authority or members of the Authority to responsibility -- legal responsibility -- for damages, for instance, with bondholders, there is no question that there would be a cause of action against that attorney that could be rendered by the Authority or individual members who might be found responsible by way of indemnification. Is that correct?

MR. SLOCUM: Sounds good to me, Senator.

SENATOR LYNCH: You are an adviser to the Governor -- a member of the Cabinet?

MR. SLOCUM: I believe every member of his Cabinet is an adviser to the Governor, and I am a member of the Governor's Cabinet.

SENATOR LYNCH: Just like you viewed the members of the Authority -- members of the governing body of the Authority -- to be advisers to the Governor, when it comes to certain issues. Are you familiar with the fact that this law firm is coming up for reappointment in the near future, and that the Governor has the power to veto the minutes?

MR. SLOCUM: Well, I am now.

SENATOR LYNCH: Yeah. Did you make any recommendations to the Governor with regard to the rehiring of this counsel?

MR. SLOCUM: I have not had the opportunity, as yet, to speak to the Governor about these matters. Therefore, I have made no recommendations.

SENATOR LYNCH: With regard to the issue that was raised by Senator Ambrosio relating to the meeting of the four Commissioners with the Governor-- Again, I agree with Senator Ambrosio and you, that the Governor is not in any way the issue involved in this line of questioning that Senator Ambrosio raised. But in listening to it, I was putting myself in the position of Mayor in New Brunswick dealing with, say, a Parking Authority, whose members I appoint, and who might be coming to see me with regard to a proposed rate hike for all of the 4000 or 5000 parking spaces which are under their governance in the City of New Brunswick, seeking my input or advice as to whether or not that might be viable -- politically viable -- necessary, politically expedient, and so forth, knowing full well that if I was strongly opposed to it, they might have to go back and rethink their position.

Do you think that if I met with three of the five members of the Parking Authority under those circumstances, those three being the Chairman, the Vice Chairman, and the

Treasurer, that that meeting would not be subject to the Open Public Meetings Act?

MR. SLOCUM: In my judgment, I don't think it would be subject to it, unless the other two were specifically not invited so that the Sunshine Act would not apply.

SENATOR LYNCH: If the other two were not invited, you're saying it would not apply, or would apply?

MR. SLOCUM: No, I'm saying that if the other two were not invited, it would leave open-ended the question as to why they were not invited. If you could make a determination, somehow, that the two were not invited simply because they didn't want this conduct covered by the Sunshine Act, then it would be a violation. But if they weren't invited because it was deemed unnecessary, they weren't doing business that required the body en bloc to be present, then it would not, because three people can give advice as well as one, and it wouldn't bother me if it were four out of five. See, it's not a numbers game that I see. The question is whether or not you want those with executive responsibility to be able to engage in discourse with those who have arguably been called "advisers" to the executive.

I am of the view that you ought to take the view that the word "advisers" should be liberally construed.

SENATOR LYNCH: Regardless of whether or not those advisers constitute a quorum of whatever body it is they represent?

MR. SLOCUM: See, I don't think that is relevant. As I said, it is not a numbers game. The thing that bothers me is, you create these agencies to carry out a specific mandate. You want them to be able to do it, but then the question is, do you want those agencies to maintain contact with other entities in government? My guess is, it is probably a good thing. So, to the extent that you wrap that up, so to speak, in the Sunshine Act, you probably do a disservice to intra-agency

communication, which is probably not a good thing, because it is not decision-making.

SENATOR LYNCH: That may very well be true, and I don't really give a darn about the meeting between the Highway Authority and the Governor. I was getting some free advice from you on some upcoming meetings. (laughter)

MR. SLOCUM: I see. I forgot that you're a Mayor.

SENATOR McNAMARA: A good move, John.

MR. SLOCUM: I've got to advise you, Senator, free advice is usually worth exactly what you pay for it. (laughter)

SENATOR LYNCH: That's all I have.

SENATOR AMBROSIO: I would just like to pick up where you left off, Senator Lynch. As I understand what you're saying, it doesn't matter that you have an effective voting bloc of a--

MR. SLOCUM: Well, be careful, please, Mr. Chairman. For it to be an effective voting bloc, all members would have had to have been invited before the word quorum could ever even be utilized. The fact that you have a majority doesn't constitute a quorum, because it is not a legitimate meeting.

SENATOR AMBROSIO: If you have three out of five members or, as you say, four out of five members, at a closed-door meeting, with, whether it be a mayor or a governor, and you have an in-depth discussion as to whether to take a particular action, and the four people in that room vote to go ahead and do it, haven't you effectively gutted the Open Public Meetings Act?

MR. SLOCUM: If that scenario could, in fact, be played out, I would agree with you, but, see, Senator, I doubt--

SENATOR AMBROSIO: Well, how would you know? It's behind closed doors.

MR. SLOCUM: I doubt that it could be played out, simply because the people who didn't get invited-- What are they going to do when they find out that such a clandestine meeting took place?

SENATOR AMBROSIO: According to you, that isn't a clandestine meeting. They could do nothing because they weren't invited.

MR. SLOCUM: If, in fact, you are arguing, sir, that they, in fact, did business which is mandated by the statute that created the body, then if I were not invited and they were doing the business that I am supposed to be a participant in, why wouldn't I get upset?

SENATOR AMBROSIO: Is it a violation of the law?

MR. SLOCUM: Well, see, if you are doing the business, as I said earlier, that you are statutorily mandated to do, then it ought to be covered by the Sunshine Law, no matter who is present. If you are not doing that business, it ought not be covered. But, see, when you tell me as a consequence of the factual circumstance you put together that they are, in fact, doing business, and they are taking votes and the like, then it is clear to me that the Sunshine Law was intended to protect that kind of activity -- protect the citizens' rights in that kind of activity.

But, I am also suggesting to you that if it is done as you suggest, there would be other protective devices available; that is, the relief that would be available to the non-invited members.

SENATOR AMBROSIO: And what is that relief?

MR. SLOCUM: To null and void everything that took place.

SENATOR AMBROSIO: Under what law? We haven't violated the Sunshine Law. Under what law?

MR. SLOCUM: No, no, no, it's not that you violated a law. It's that you were not legally constituted. You were not a legally constituted body when you took the vote.

SENATOR AMBROSIO: But what will happen is-- That is not the legal action. They will have reached an agreement in the private, closed-door room, and will then go to the next

meeting and somebody will make a motion, and at a public meeting they will adopt a policy that was clearly cemented behind closed doors. Isn't that what the Highway Authority did here?

MR. SLOCUM: I don't think so, Senator. What you are suggesting to me is that there are five people involved in an operation -- whatever it is. Suppose I get on the phone -- I am the Chairman -- and I call up each person. I talk to them and I try to badger and cajole, to get them to adopt a specific point of view, and I am ultimately successful. When we go to the next public meeting and we vote, I know what the vote is going to be ahead of time, because I have done my homework, so to speak. Did I violate the Sunshine Act?

SENATOR AMBROSIO: No, you didn't.

MR. SLOCUM: No, because all of those discussions that predate the meeting--

SENATOR AMBROSIO: Because you didn't have a meeting where you had an effective majority.

MR. SLOCUM: See, I contend, Senator, that you didn't have a meeting either, because you can't have a legitimate meeting unless all members of the body are invited.

SENATOR AMBROSIO: Okay. Anyone else? (no response)

Again, I want to thank you for coming, Mr. Slocum. It has been very enlightening.

SENATOR McNAMARA: Mr. Slocum, may I ask one question before you leave?

MR. SLOCUM: If it is going to be a long question, I'll sit down.

SENATOR McNAMARA: No, no, it's not going to be a long question. To follow that through, if the intent is to circumvent, if you have two together out of five, they are in violation of the--

MR. SLOCUM: That is correct. It doesn't matter.

SENATOR McNAMARA: Okay. See, I think the intent is the key, because if you get two -- which in no way controls, it is not a quorum -- out of five-- If you got two people together to sit down to accomplish a goal, you are in violation of the Sunshine Act. (Mr. Slocum nods agreement)

SENATOR LYNCH: How do you ever prove that, if you don't have a standard to go by? I mean--

SENATOR McNAMARA: I was just asking his opinion if that, in fact, was what he was saying.

MR. SLOCUM: Well, theoretically, that is the correct answer, but you're right, Senator, that--

SENATOR LYNCH: But you're going into the mental machinations--

MR. SLOCUM: You're right.

SENATOR LYNCH: If you go into the mental machinations of the people, you are never going to get there, so that's--

MR. SLOCUM: You're right; you're right. What can I tell you?

SENATOR AMBROSIO: We don't need Mr. Slocum on this, but just so we know the law, it clearly says: "A meeting does not mean or include any gathering attended by less than an effective majority of the members of the public body." Therefore, that doesn't violate the Sunshine Law. It is clearly excluded, because it is less than an effective majority of the members of the public body. So, notwithstanding what the Public Advocate said, the law clearly says that if you have less than an effective majority, you can't violate the Sunshine Law, which implicitly would mean that if you have an effective majority, you violate the law.

Anyway, that is not an issue we are going to resolve today. Before we adjourn for the day, I would ask that the Senators consider giving a direction that we subpoena the following witnesses for the next meeting: the Executive Director, the Chairman, all the Commissioners. And, depending

upon the response we get concerning the waiver of the attorney-client privilege, the three attorneys who serve for the Authority.

SENATOR LYNCH: All in one day?

SENATOR AMBROSIO: We are going to try to put an all-day meeting together, if possible, sometime--

SENATOR LYNCH: That is a lot to bite off, though.

SENATOR AMBROSIO: --in mid-March.

SENATOR McNAMARA: That is a tremendous amount to bite off. All of those people in one day? You might spend half of that day just with the attorneys.

SENATOR AMBROSIO: I'll tell you what--

SENATOR JACKMAN: If you are going to bring in three lawyers, you'll be here for a week. (laughter)

SENATOR AMBROSIO: Let's start with the Executive Director, the Chairman, and the three attorneys. Do you think we can do those in a day?

SENATOR LYNCH: Well, the attorneys are used to waiting, so--

SENATOR AMBROSIO: And they may get paid for it, too.

SENATOR McNAMARA: Yeah, that's right. Their clock is running.

SENATOR AMBROSIO: Well, does someone want to make a motion that we invite the Executive Director, the Chairman, and the attorneys for the Authority to our next meeting?

SENATOR LYNCH: So moved.

SENATOR McNAMARA: Seconded.

SENATOR AMBROSIO: All in favor? (unanimous aye) Okay, anything else?

SENATOR JACKMAN: That's it.

SENATOR AMBROSIO: Okay, this meeting is adjourned.

(MEETING CONCLUDED)

APPENDIX

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
RICHARD J. HUGHES JUSTICE COMPLEX
CN 080
TRENTON, N.J. 08625
609 292 4919

W. CARY EDWARDS
ATTORNEY GENERAL

February 11, 1988

Honorable Gabriel M. Ambrosio, Chairman
Senate Special New Jersey Highway Authority
Investigation Committee
464 Valley Brook Avenue
Lyndhurst, New Jersey 07071

Dear Senator Ambrosio:

I have your February 5, 1988 letter requesting a report from me on the New Jersey Highway Authority's recent actions with respect to toll increases on the Garden State Parkway, as well as your February 9, 1988 letter asking that I bring any such report to a February 16, 1988 meeting of your committee. I must advise you that, at this time, I am unable to comply with your request because I have neither completed an investigation of, nor prepared a report on, the matter.

Furthermore, while my staff has provided me with an initial analysis of the law as it relates to certain minutes of Authority meetings, the fact that my inquiry into the matter is still pending prevents me from testifying before your committee. Indeed, I am awaiting the results of your committee's investigation so that I may be able to review that testimony, along with other evidence, in order to finalize my findings and be able to determine whether it would be appropriate to bring an action for civil penalties for knowing violations of the Open Public Meetings Act. Such an action could, under the statute, be brought by me or a county prosecutor or, if either of us determined to refer the matter, by the Public Advocate. As you know, the Public Advocate also has not yet investigated nor expressed an opinion on the appropriateness of seeking civil penalties.

I am sure you will agree that at this point in time, in view of the Public Advocate's findings, the release of minutes and other public disclosures by the Authority and the veto of the toll increase by the Governor which, for practical purposes, has mooted many of the Open Public Meetings Act issues which have received so much attention, it would be wasteful to duplicate further investigatory efforts which, I am confident, will be skillfully and professionally carried out by your committee. In that regard, I would appreciate receiving from you a copy of the record of your proceedings so that I may review same to determine whether further action is called for.

Sincerely,

W. CARY EDWARDS
Attorney General

THE NEW JERSEY HIGHWAY AUTHORITY'S PROPOSED TOLL INCREASE:

REPORT OF THE PUBLIC ADVOCATE

ON ALLEGED VIOLATIONS

OF THE OPEN PUBLIC MEETINGS ACT

Alfred A. Slocum
Public Advocate

Dated: January 27, 1988

By: Richard E. Shapiro
Director

Susan Remis Silver
Assistant Deputy Public Advocate

Susan R. Oxford
Assistant Deputy Public Advocate

Division of Public Interest
Advocacy
CN 850
Trenton, NJ 08625
(609) 292-1692

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I. Introduction

On November 23, 1987, the Public Advocate received a request from Charles M. Leusner, the Deputy Mayor of Middle Township, to investigate whether the New Jersey Highway Authority (Authority) violated the Open Public Meetings Act (also known as the "Sunshine Act" or "Sunshine Law"), N.J.S.A. 10:4-6 et seq., when the Authority adopted a proposal to increase the Garden State Parkway tolls.

After reviewing this complaint, the Public Advocate determined that it was in the public interest to investigate these allegations. N.J.S.A. 52:27E-1 et seq. Specifically, the Public Advocate concluded that the public interest would be best served by an inquiry into whether the public's rights under the Open Public Meetings Act were fully protected by the processes and deliberations of the Highway Authority relating to toll increases. N.J.S.A. 52:27E-30. See also, Delaney v. Penza, 151 N.J.Super. 455 (App. Div. 1977). Investigations of citizen complaints relating to administrative action or inaction is squarely within the jurisdiction of the Public Advocate. N.J.S.A. 52:27E-36. However, while the Public Advocate possesses the authority to assess whether a particular body or agency has satisfied the legal requirements of the Sunshine Act, he has no jurisdiction, in the absence of a referral from the Attorney General or county prosecutor, over penalty actions for violations of the Open Public Meetings Act. N.J.S.A. 10:4-17. Therefore, we have not investigated and express no opinion on the

appropriateness of the civil penalty provision to any of the violations of the Act discussed in this report.

In investigating this complaint, we reviewed the following documentation:

(1) the minutes of all the closed meetings and the open meetings that the New Jersey Highway Authority held from August 1986 through November 1987;

(2) the resolutions relating to closed meetings that the Authority adopted from July 1986 through November 1987;

(3) the relevant correspondence and memoranda relating to the Authority's proposal to increase the tolls;

(4) the Highway Authority's revenue bonds, 1986 series and 1984 series;

(5) the Authority's $80 million credit agreement with the Morgan Guaranty Trust Company of September 1, 1987;

(6) the briefing book that the New Jersey Highway Authority prepared on the proposed toll increase; and

(7) the transcripts of the hearings on December 7 and December 21, 1987, before the Assembly Independent and Regional Authorities Committee and the transcript of the December 9 and December 28, 1987, hearings before the Senate Independent Authorities Committee. (The Assembly hearings are cited in this report as A.H. I and A.H. II; the Senate hearings are referred to as S.H. I and S.H. II).).

As part of our investigation, an attorney in the Department of the Public Advocate attended a special meeting that the Highway Authority held on November 30th to consider "de novo a proposal to amend toll regulations governing use of the Garden State Parkway to increase tolls ... [and to] consider[] de novo re-adoption of all other actions taken by the Authority at its November 19, 1987 meeting." (Notice of Special Meeting of the New

Jersey Highway Authority, dated Nov. 24, 1987). We have also reviewed the minutes of this meeting.

In addition, we interviewed several officials of the Highway Authority over the telephone to clarify the factual circumstances under which the Highway Authority discussed toll increases in closed sessions. As part of this effort, we spoke to Martin Fox and Arthur Grossman of Fox & Fox, the outside counsel for the Highway Authority, Tom Critchley, the in-house counsel for the Highway Authority, Judith Stanley, the Chairman, and Julian Robinson, the Treasurer of the Authority.

Finally, we comprehensively researched the relevant case law under the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., the legislative history of the Act, pertinent law review articles, and other related materials.

In this report, we will examine the Highway Authority's open and closed meetings from August 1986 through November 1987 and will focus on those private sessions in which the Authority discussed toll increases. We will analyze the exceptions to the Open Public Meetings Act to determine if any exceptions properly applied to the particular discussion. We will also review the Authority's resolutions relating to closed meetings to determine if it complied with the requirements of the Open Public Meetings Act. Finally, we will examine the Highway Authority's November 30th public meeting to determine if the Authority cured any Open Public Meetings Act violations.

II. Summary of Findings and Recommendations

This report focuses exclusively on allegations that the Highway Authority violated the Open Public Meetings Act. We have not investigated, nor do we address, any issues relating to the merits of a toll increase. This report also does not consider assertions regarding the motivations of members of the Highway Authority or other governmental officials in discussing the matter in closed sessions. The Legislature is presently investigating these issues, and we consider questions of motivation irrelevant to either a determination of whether the Highway Authority complied with the Sunshine Act, Polillo v. Deane, 74 N.J. 562, 577 (1977), or whether the Sunshine Act's remedial provisions are effective.

Our principal findings and recommendations are as follows:

A. Findings

1. From August 1986 through November 1987, the New Jersey Highway Authority met in ten separate closed meetings to discuss a proposal to increase tolls on the Garden State Parkway.

2. None of the nine exceptions in the Open Public Meetings Act authorized the Highway Authority to meet in closed session to discuss the toll increase proposal. N.J.S.A. 10:4-12(b).

3. The Highway Authority, therefore, violated the Open Public Meetings Act at each of its ten closed sessions when it excluded the public from witnessing its deliberations on toll increases. N.J.S.A. 10:4-12(a).

4. The Highway Authority passed ten resolutions to authorize the closed sessions in which the Authority discussed

the proposed toll increase. However, these resolutions did not state the general nature of the toll discussions the Authority planned to discuss in closed session or the specific statutory exceptions invoked to justify the closed session. The resolutions did not state the time when or the circumstances under which the Authority would disclose to the public the substance of the private toll discussions. N.J.S.A. 10:4-13.

5. The Highway Authority, therefore, violated section 13 of the Open Public Meetings Act when it failed to adopt appropriate resolutions relating to each of the ten closed sessions in which the Authority discussed the proposed toll increase. N.J.S.A. 10:4-13.

6. The Highway Authority held a public meeting on November 30, 1987 in an attempt to cure any prior Open Public Meetings Act violations that related to its private toll increase discussions.

7. The abbreviated minutes of the private sessions fail to provide a full record of the discussions at these sessions and, therefore, are of minimal assistance in evaluating whether the November 30th meeting cured the Sunshine Law violations.

8. Although our analysis suggests that the November 30th meeting did not cure the prior violations of the Act, we are unable to reach a conclusive determination on this issue because (1) we lack clear or definitive legislative or judicial guidance on what is legally necessary for de novo consideration of a particular issue, and (2) there is no verbatim record of precisely what occurred at the closed sessions.

9. The spirit animating the Act and the public interest would best be served if the Highway Authority would fully reconsider all aspects of a toll increase, including all toll increase alternatives.

10. In January 1987, the four officers of the Highway Authority met with Governor Kean to inform him of the necessity for a toll increase.

11. The legislative findings, N.J.S.A. 10:4-7, and the history of the Open Public Meetings Act indicate that discussions with the Governor are not within the scope of the Act. Moreover, at least one New Jersey court has held that the intent of the Sunshine Law is to allow officials, like the Governor, to meet privately with their counselors and advisors to discuss policy and exchange ideas.

12. The Public Advocate concludes that the session between Governor Kean and four of the Highway Authority Commissioners was not a "meeting" within the meaning of the Open Public Meetings Act, and these discussions did not violate the Sunshine Law.

B. Recommendations

1. To restore public confidence and to avoid any appearance of impropriety arising from the private discussions of toll increases, the Public Advocate recommends that the Highway Authority reconsider all relevant aspects of the toll increase, including toll increase alternatives.

2. To correct the Highway Authority's inadequate resolutions relating to closed sessions, the Public Advocate recommends that the Authority begin each monthly meeting with an open, public meeting. If the Authority determines that a closed session is warranted, it should pass a resolution at this open session which (1) states the general nature of each subject it wishes to discuss in private and the exception invoked to justify the closed session; and (2) states, to the fullest extent possible, the time when the discussion will be disclosed to the public.

3. The Legislature should provide a precise definition or clear guidance on what is necessary to cure a Sunshine Law violation. The present de novo provision in the Act and the judicial decisions that interpret the Act provide unclear and ambiguous interpretations that offer little assistance in determining in a particular case what is necessary to constitute de novo reconsideration of a matter.

4. The Legislature should carefully reassess the effectiveness of the remedies presently available under the Sunshine Act. The present case raises the difficult problem of formulating an effective remedy to address closed meetings that are held to delay the public disclosure of a controversial decision. By the time the public learns that a public body met in private, the public body will usually have fulfilled its goal of delaying release of information to the public. In such a circumstance, a public body would have little concern about repeating its decision-making process in public since the primary

benefit of the closed sessions will have been fully accomplished. In this way, a public body can effectively thwart the goals of the Sunshine Act. Therefore, we think that the Legislature, as the primary policy-maker in this area, should consider whether the "de novo" requirement, which is the only realistic deterrent because of the difficulty in satisfying the requirements of the penalty provision, Woodcock v. Calabrese, 148 N.J.Super. 526, 537 (Cty. Ct. 1977), is an effective remedy in these circumstances or whether other remedial measures should be adopted.

III. An Overview of the Open Public Meetings Act

In order to place this report in a proper perspective, we must first briefly review the requirements of the Open Public Meetings Act. N.J.S.A. 10:4-6 et seq. Section 12 of the Act provides in relevant part:

> all meetings of public bodies[1] shall be open to the public at all times.

N.J.S.A. 10:4-7. In addition, the Legislature expressly declared that the Act's purpose is to insure the public's right:

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1. The Open Public Meetings Act broadly defines "public body" to mean "a commission, authority, board, council, committee or any other group of two or more persons organized under the laws of this State, and collectively empowered as a voting body to perform a public governmental function affecting the rights, duties, obligations, privileges, benefits or other legal relations of any person, or collectively authorized to spend public funds." N.J.S.A. 10:4-8(a) (emphasis addes). It is not disputed that the New Jersey Highway Authority falls within the scope of this definition and is bound by the requirements of the Open Public Meetings Act.

> 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.

N.J.S.A. 10:4-7. These rights are vital because "secrecy in government undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society." N.J.S.A. 10:4-7.

As Assemblyman Byron Baer, the chief draftsman and sponsor of the Act testified, "[t]he Open Public Meetings Act provides that degree of openness without which we cannot hope to restore the public's confidence in our form of government." (Testimony before the Assembly's Judiciary Committee on A-1030, March 14, 1974 at 105). The Act is necessary, Assemblyman Baer explained, to prevent "decisions that affect all of our lives [from] being made behind closed doors." Id. at 101.

The Open Public Meetings Act specifies nine circumstances under which the public may be excluded from the meetings of public bodies, N.J.S.A. 10:4-12, but the courts have narrowly construed these exceptions. Rice v. Union County Regional High School Board of Education, 155 N.J.Super. 64, 70 (App. Div. 1977); Gannett Satellite Info. Network v. Bd. of Educ. of Manville, 201 N.J.Super. 65,69 (Law Div. 1984); Accardo v. Mayor and Council of the City of North Wildwood, 145 N.J.Super. 532, 543 (Law Div. 1976).

Even if an exception does apply and a public body can properly discuss a matter in closed session, the Open Public Meetings Act requires that a public body first pass a resolution at a public meeting which states "the general nature of the

subject to be discussed ... [and] the time when and the circumstances under which the discussion conducted in closed session of the public body can be disclosed to the public." N.J.S.A. 10:4-13; Caldwell v. Lambrou, 161 N.J.Super. 284, 289 (Law Div. 1978); Cole v. Woodcliff Lake Board of Education, 155 N.J.Super. 398, 406 (Law Div. 1978). In sum, the Act requires that any closed meeting must (1) come within one of the nine permitted exceptions, and (2) an appropriate resolution must be passed. If a public body fails to strictly adhere to these requirements, the action the public body takes in closed session, if not cured by de novo action, is voidable. N.J.S.A. 10:4-15; Polillo v. Deane, 74 N.J. 562, 579 (1977); Hudanich v. Avalon, 183 N.J.Super. 244, 255 (Law Div. 1981).

With this statutory backdrop in mind, we will now review the factual circumstances surrounding the Highway Authority's discussions of a toll increase.

IV. Factual Background: The Highway Authority's Meetings on Toll Increases

The minutes of the New Jersey Highway Authority demonstrate that over the last sixteen months the Highway Authority met in ten separate closed sessions to discuss a proposal to increase tolls on the Garden State Parkway. At various points in time, the Authority claimed that its closed sessions were justified because the toll increase matter was part of "contract negotiations" and therefore exempt from public

disclosure under the Open Public Meetings Act. N.J.S.A. 10:4-12(b)(7).[2] At one closed meeting, the Authority claimed that the "public safety" exception of the Open Public Meetings Act justified its decision not to report toll increase discussions to the public. N.J.S.A. 10:4-12(b)(6).[3]

In this section of the report, we will examine the minutes of the Highway Authority's public and private meetings from August 1986 through November 1987. We will focus on the closed sessions in which the Authority discussed toll increases.

We must emphasize, at the outset, that after the minutes of the closed sessions, which are not verbatim records of the discussions, were released to the public, both the Governor and several officials of the Highway Authority indicated that portions of the minutes were inaccurate. In particular, they disputed certain references in the minutes to a purported decision to delay public disclosure of the toll increase until after the November 1987 election. Where appropriate, we have noted the portions of the minutes that are assertedly inaccurate. As mentioned above, questions relating to the motivations of the

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2. The "contract negotiation" exception provides that "[a] public body may exclude the public only from that portion of a meeting at which the public body discusses ... (7) [a]ny ... contract negotiation other than in subsection (b)(4) in which the public body is, or may become a party." N.J.S.A. 10:4-12(b)(7)..

3. The "public safety" exception provides that "[a] public body may exclude the public only from that portion of a meeting at which the public body discusses . . . (6) [a]ny tactics and techniques utilized in protecting the safety and property of the public provided that their disclosure could impair such protections." N.J.S.A. 10:4-12(b)(6).

members of the Highway Authority or to the timing of the decision are beyond the scope of our investigation.

A. The Authority's Meetings on August 28, 1986

1. The Closed Meeting on August, 28, 1986

The general practice of the Highway Authority is to begin each monthly meeting with a closed session. The Authority begins its monthly open meeting only after the business of the closed meeting is finished. In keeping with this practice, the Highway Authority met in closed session at 9:00 a.m. on August, 28, 1986. (Resolution 86-186, attached as A-1). This is, to our knowledge, the first closed session in which the Authority discussed a toll increase. (Minutes of the Exempt Meeting[4] of Aug. 28, 1986 at 1). The Highway Authority Commissioners agreed that ramp and barrier toll increases may be necessary to cover projected construction expenses beyond 1988 and to fulfill commitments made in their bond covenants. Id. at 1 and 2.

The minutes of the closed August 28th meeting also state that the Authority's proposed toll increase was sent to representatives of the Governor who were reviewing the proposal. Id. at 1. The Commissioners unanimously agreed to continue the dialogue on toll increases with the Governor's Office. Id. at 2.

The Commissioners decided not to report their toll increase discussion to the public since they believed it involved "contract negotiations" which were exempt from the public

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4. The Highway Authority refers to all of its closed meetings as "exempt meetings."

disclosure requirement of the Open Public Meeting Act. Id. at 4. "However, the Commissioners never adopted a resolution at a prior open meeting that stated (1) which exception covered private discussions on a toll increase; (2) the general nature of their toll increase discussion; or (3) when they would inform the public of the matters they discussed. The Authority merely adopted a resolution at the end of its public meeting in July 1986 that stated that "on Thursday, August 28, 1986, the New Jersey Highway Authority will hold a closed session ... [that] will consist exclusively of matters which may be discussed in the absence of the public." (See Resolution 86-186, dated 7-24-86). As far as informing the public of the time when the private discussions will be disclosed, the Authority's resolution simply stated that "[a]t the public hearing immediately following the meeting from which the public has been excluded, the discussion conducted in the closed session will be disclosed to the public as fully as possible consistent with the proper conduct of the Authority's business." (See Resolution 86-186)[5] .

2. The Public Meeting of August 28, 1986

Although the New Jersey Highway Authority discussed its proposal to increase tolls in closed session on the morning of August 28, 1986, the Authority did not provide the general public

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5. At the end of each month's public meeting, the Authority would pass the identical resolution to apply to the following month's closed meeting.

with any indication of the general nature of its private discussion. Rather, the minutes of the August 28th open meeting simply state the following:

> The Commissioners met with Staff representatives prior to this meeting and discussed only matters exempt under the Open Public Meetings Act. General Counsel advised that those matters were four (4) contract matters and two (2) legal matters which are not ready for the main Agenda.

(Minutes of the Public Meeting of August 28, 1986 at III). Other than this reference, the Highway Authority Commissioners made no mention of the toll increase discussions they held earlier in the day. The Authority did not pass a resolution or otherwise state when it would disclose the substance of the toll discussion.

B. The Highway Authority's Meetings on October 30, 1986

1. The Closed Meeting of October 30, 1986

On October 30, 1986, the Highway Authority held a second closed session in which it discussed toll increases. At this meeting, Executive Director George Ziiocchi reported that a toll increase would be necessary by 1988 or else the Authority might be in default of its bond obligations. (Minutes of the Exempt Meeting of October 30. 1986 at 1). Mr. Ziiocchi also stated that a toll increase would be necessary for the Authority to receive a favorable bond rating for the issuance of additional bonds. Id. In addition, the Authority's financial consultant, Chester Johnson of Government Finance Associates, Inc., made a presentation and submitted a report at the October 30th closed

session concerning the necessity of a toll increase by 1988. Id. The Commissioners agreed at this closed meeting to seek approval from the Governor for both ramp toll and barrier toll increases with the understanding that the implementation of the barrier toll increases would "not be immediate." Id.

The Commissioners did not state which exemption in the Open Public Meetings Act authorized them to discuss the toll increase matter in private. The Authority also failed to adopt a resolution at a prior public meeting that stated either the general nature of the toll increase discussion that would be considered in closed session or the time when the discussion would be disclosed to the public.

2. The Public Meeting of October 30, 1986

At the beginning of the open meeting on October 30, 1986, the Authority simply stated that "[t]he Commissioners met with Staff representatives prior to this meeting and discussed only matters exempt under the Open Public Meetings Act." (Minutes of the Public Meeting of October 30, 1986 at iii). The Authority did not state the general nature of the toll discussion it had in closed session. Nor did the Authority state when it would disclose the substance of that discussion.

During the October 30th open meeting, the Authority's attorney only stated that the items discussed in closed session included "one contract matter, two legal matters and one public safety matter which are not ripe for disclosure at the public meeting." Id. It is not possible to discern from this general statement which exemption the Authority considered applicable to

the proposed toll increase that the Authority discussed in closed session.

C. The Authority's Meetings on December 18, 1986

1. The Closed Meeting of December 18, 1986

The Highway Authority discussed toll increases for the third time at its closed meeting on December 18, 1986. (Minutes of the Exempt Meeting of December 18, 1986 at 3). As part of this discussion, Chairman Judith Stanley reported that the Governor's office favored a ramp toll increase but opposed a barrier toll increase in 1987. Id.

The Commissioners did not state which exemption in the Open Public Meetings Act justified their discussion of toll increases in a closed meeting. Nor did they pass an appropriate resolution concerning their private toll discussion at a prior open meeting.

2. The Public Meeting of December 18, 1986

Despite the fact that the New Jersey Highway Authority discussed toll increases at its closed meeting on December 18, 1986, the Authority made no reference to this discussion at its open meeting held later that day. The minutes from the December 18th open meeting merely state that "[t]he Commissioners met with Staff representatives prior to this meeting and discussed only matters exempt under the Open Public Meetings Act." (Minutes of the Public Meeting of December 18, 1986 at iii). The Authority's attorney advised that those matters included "contract

negotiations with regard to the State-owned sections." Id. The Authority did not state the general nature of the toll discussion. Nor did the Commissioners state when they would disclose the substance of their toll increase discussions to the public.

D. The Highway Authority's Meetings on January 22, 1987

1. The Closed Meeting of January 22, 1987

At the closed meeting of January 22, 1987, Chairman Judith Stanley reported that she, Lionel Levey, the Vice Chairman of the Authority, the Treasurer Julian Robinson, the Secretary Richard Sambol, and the Executive Director George Ziiocchi met with Governor Kean to discuss the Authority's proposed ramp and barrier toll increases. (Minutes of the Exempt Meeting of Jan. 22, 1987 at 1). The minutes state that Governor Kean authorized the Authority to proceed with its proposal to increase ramp tolls and indicated that the ramp toll increase could be implemented immediately. However, the Governor only approved the Authority's proposal for a barrier toll increase provided that the Authority "not proceed with or implement that increase until the end of 1987." Id. at 1.[6]

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6. When the minutes from this closed meeting became public, the Governor denied that he directed the Authority to delay a toll increase until after the November 1987 election. Governor Kean said he only told the Authority's Commissioners to delay a toll increase until "absolutely necessary." (Star-Ledger, Dec. 8, 1987 at 60; Bergen Record, Nov. 29, 1987; Star-Ledger, Nov. 24, 1987 at 15). Chairman Judith Stanley has indicated that the minutes are inaccurate and misconstrue the Governor's comments at their January 1987 meeting.(Star-Ledger, Dec. 8, 1987 at 60; Courier News, Dec. 2. 1987 at A-5; The Record, Dec. 1, 1987 at B-2). (Footnote continues on next page)

The Commissioners then discussed how to achieve a toll increase "consistent with the Governor's directives"[7]. Id. at 1. The Commissioners' discussion focused on the proper timing of a public disclosure of a toll increase proposal. The Commissioners did not want the general public to believe that the toll increase had any direct relationship to the construction of a proposed Arts Center. Id. at 1. Nor did the Commissioners want the public to link toll increases with the Authority's acquisition of the State-owned section of the Garden State Parkway. The Commissioners also wanted the Authority and the Governor to avoid receiving adverse publicity if they raised ramp tolls immediately and then raised barrier tolls at the end of the year. To resolve these difficulties, the Authority agreed to delay publicly proposing and implementing both ramp and barrier toll increases until "the end of 1987." Id. Chairman Stanley stated that she spoke directly with Governor Kean about proceeding with a ramp and barrier toll increase at the end of 1987, and the Governor approved of that course of action. Id. at 2.

(Footnote continued from previous page)
Moreover, Martin Fox, the Authority's counsel, informed this office that although the minutes state that the Governor "approved" the Authority's toll increse proposal, this does not mean that the Governor actually approved the proposal in the formal statutory sense since such approval must be in writing. See N.J.S.A. 27:12B-4.

7. Martin Fox, the Authority's counsel, informed this office in a telephone conversation that the word "directive" was a poor choice of words since the Governor does not have the authority to direct that tolls be increased.

The Commissioners felt that their toll increase discussions "involved contract considerations", and therefore, they believed that they did not have to disclose the substance of their discussion to the public. Id. at 2. The Commissioners did not pass a resolution at a prior open meeting that stated the general nature of their toll discussion or the time when they would disclose their discussion to the public.

2. The Public Meeting of January 22, 1987

At the beginning of the open meeting of January 22, 1987, the Chairman stated that "[t]he Commissioners met with Staff representatives prior to this meeting and discussed only matters exempt under the Open Public Meetings Act." (Minutes of the Public Meeting of January 22, 1987 at III).

The Authority's attorney then listed every item discussed in the closed session except the toll increase discussion. The only possible reference to the toll increase discussion made in private session was the attorney's statement that there was "one contract matter ... which [is] not ready for the main Agenda." Id. at 3. There was no reference to the general nature of this contract matter. Nor was there any indication of the time when this matter could be disclosed to the public.

E. The Authority's Meetings on February 26, 1987

1. The Closed Meeting of February 26, 1987

During the closed session of February 26, 1987, the Commissioners debated various financing arrangements and

expressed their concern that they choose a financing option that would not "generate too much visibility on the toll increase issue." (Minutes of the Exempt Meeting of Feb. 26, 1987 at 2). Chester Johnson, the Authority's consultant from Government Finances Inc., recommended that the Authority choose short-term financing through bond anticipation notes. He recommended this method since it would not involve a rating requirement, and "more importantly, would not likely involve any significant discussion on the issue of a potential toll increase." Id. at 1. Mr. Johnson cautioned that long-term financing would directly involve consideration of the potential toll increase. Id.

The Commissioners were unable to make a decision since the Authority's underwriter recommended long-term public financing. After further discussion, the Commissioners agreed that their financial consultant would meet with the Governor's Office and with the Authority's underwriter, and then their consultant would make his final recommendation. Id. at 2.

The Commissioners felt that their toll increase debate "involved contract considerations" and therefore need not be disclosed to the public. Id. The Authority did not pass a resolution at a prior open meeting that stated the general nature of the toll discussion or when the Authority would inform the public on this matter.

2. Public Meeting of February 26, 1987

At the open meeting on February 26, 1987, the Chairman announced that "[t]he Commissioners met with Staff

representatives prior to this meeting and discussed only matters exempt under the Open Public Meetings Act." (Minutes of the Public Meeting of February 26, 1987 at 111). The only presumed reference to the earlier toll increase discussion was the General Counsel's statement that the Authority discussed "two (2) legal matters and two (2) contract matters which are not ripe for disclosure at the public meeting." Id. The Authority did not reveal the general nature of its toll discussion, and did not state when it would disclose this matter to the public.

F. The Authority's Meetings on March 26, 1987

1. The Closed Meeting of March 26, 1987

During the closed meeting on March 26, 1987, Chester Johnson, the Authority's finance consultant, stated that the Authority received a reconfirmation from the Governor that he approved the barrier toll increase "provided that such toll increase was not made public until after the first week in November 1987[8]." (Minutes of the Exempt Meeting of March 26, 1987, at 1). Chester Johnson recommended that the Authority pursue short-term financing since there was no need to base such financing upon any anticipated barrier increase. Id.

The Commissioners did not state which exemption of the Open Public Meetings Act authorized them to meet on the toll

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8. Chester Johnson maintains that these minutes are inaccurate and states that it was he and not the Governor who recommended that the Authority delay its toll increase proposal until after the election. (Star-Ledger, Dec. 8, 1987 at 60; The Record, Dec. 1, 1987 at B-2).

increase question in private. Nor did the Commissioners adopt a resolution at a prior open meeting that stated the general nature of their toll discussion or the time when the discussion would be disclosed to the public.

2. Public Meeting of March 26, 1987

At the public meeting on March 26, 1987, the Highway Authority made no mention of the earlier toll increase discussion. The Chairman reported that "[t]he Commissioners met with Staff representatives prior to this meeting and discussed only matters exempt under the Open Public Meetings Act." (Minutes of the Public Meeting of March 26, 1987, at III). The only summary of the toll increase discussion was the General Counsel's statement that the closed session involved "a discussion with the Authority's Financial Consultant as to preliminary plans for possible short-term financing for the construction program." Id. This did not inform the public of the general nature of the toll increase discussion made at the earlier closed session. Nor did the Authority state when it would disclose its toll discussions to the public.

G. The Authority's Meetings on April 23, 1987

1. The Closed Meeting of April 23, 1987

During the closed meeting of April 23, 1987, Chester Johnson reported that he had contacted both Standard & Poor's Corporation and Moody's Investor Services Inc., and that neither rating service had concerns about the Authority's plans to

proceed immediately with short-term financing and then follow with long-term financing in approximately a year. However, Moody's raised a question "as to whether there was political readiness to put in a toll increase." (Minutes of the Exempt Meeting of April 23, 1987 at 3).

The Commissioners agreed that at the public meeting following their closed session, their attorney would state that their finance consultant gave a report on possible short-term financing for the capital improvement program. Id. at 4. The Authority did not cite which exemption of the Open Public Meetings Act authorized them to meet privately on the toll increase. Nor did the Authority pass an appropriate resolution at a prior open meeting concerning the toll discussion.

2. Public Meeting of April 23, 1987

At the public meeting on April 23, 1987, the Chairman stated that the Commissioners met in closed session prior to the public meeting and "discussed only matters exempt under the Open Public Meetings Act." (Minutes of the Public Meeting of April 23, 1987 at III). No direct reference was made to the Authority's discussion of the toll increase in closed session. The General Counsel merely stated that at the closed meeting, Chester Johnson of Government Finance presented a report "on the status of the studies on possible short-term financing with regard to the Parkway Construction Fund." Id. The Authority did not state which exemption of the Open Public Meetings Act authorized the closed session on the toll increase. Nor did the Authority state either

the general nature of its toll increase discussion or when the Authority would disclose its discussions to the public.

H. The Authority's Meetings on August 27, 1987

1. The Closed Meeting of August 27, 1987

During the closed meeting of August 27, 1987, Chester Johnson stated that he had met with both Moody's and Standard & Poor's with regard to the Authority's short-term financing plans. Mr. Johnson indicated that Standard and Poor's would like to meet with Authority representatives and the State later in the year with respect to the proposed increase in tolls. (Minutes of the Exempt Meeting of August 27, 1987 at 1). The Authority did not state which exemption of the Open Public Meetings Act authorized this toll increase discussion in a closed meeting. Nor did the Authority pass an appropriate resolution concerning the toll discussion at a prior open meeting.

2. The Public Meeting of August 27, 1987

In the open public meeting of August 27, 1987, the Highway Authority discussed their short-term financing plans at length. However, at no point in time did the Authority refer to Standard and Poor's request to meet with the Authority and the State with respect to proposed toll increases. (Minutes of the Public Meeting of August 27, 1987 at iv, v, and vi). The Authority did not tell the public which exemption of the Open Public Meetings Act authorized its private meeting on the toll increase proposal. The Authority did not reveal the general nature of its toll

discussion. Nor did it state when it would tell the public the substance of what was discussed.

I. The Authority's Meetings on October 22, 1987

1. The Closed Meeting of October 22, 1987

During the closed meeting of October 22, 1987, the Highway Authority discussed the rate schedule for the proposed toll increase. Jerry Nielsten, a traffic consultant with Volmer Associates, explained that each 25 cent toll will go to 50 cents with a 35 cent discount token available. Each 10 cent, 15 cent and 20 cent ramp toll will increase to 25 cents. The Commissioners agreed to increase the bus rate from $1.00 to $2.00 with a commuter bus rate of $1.00. The Commissioners also discussed where the new tokens should be sold. (Minutes of the Exempt Meeting of October 22, 1987 at 3). The minutes also state that Chester Johnson presented financial projections that demonstrated the need for the toll increase. Id.

The Commissioners agreed that the toll increase matter "would likely be presented for public presentation at the November 19 meeting." Id. In the meantime, the Commissioners agreed that "this matter involved matters utilized in protecting the safety and property of the public where disclosure could impair such protection as provided in the Open Public Meetings Act, N.J.S.A. 10:4-12(b)(6)." Id. Pursuant to the "public safety" exception, the Commissioners decided not to report their toll increase discussion at that month's public meeting. Id. However, the Authority never passed a resolution at a prior open meeting

that stated the general nature of its private toll discussion or when it would inform the public of what it said in closed session.

2. The Public Meeting of October 22, 1987

Although the Highway Authority had discussed in closed session both the need for a toll increase and the new toll schedule it wished to propose (Minutes of the Exempt Meeting of Oct. 22, 1987 at 3), the Commissioners made no mention of their toll increase conversation in the open meeting of October 22, 1987. The Chairman merely stated that the Authority discussed at the closed meeting "only matters exempt under the Open Public Meetings Act." (Minutes of the Public Meeting of October 22, 1987 at 3.) The General Counsel then explained that the Authority discussed in close session "two (2) matters involving protection of public safety and property which are not ripe for disclosure." Id. No other reference to the detailed toll increase discussion was made during the October 1987 public meeting. The Authority did not reveal the general nature of its toll discussions or state when it would disclose to the public the substance of its discussions.

J. The Authority's Meetings of November 19, 1987

1. The Closed Meeting of November 19, 1987

At the closed meeting of November 19, 1987, the Highway Authority had its last private discussion on the proposed toll increase. The Commissioners did not state which exemption of the

Open Public Meetings Act authorized this discussion on the toll increase in a closed session. Nor did the Authority pass an appropriate resolution at a prior open meeting to explain the general nature of its closed session discussions.

During the closed meeting on November 19, 1987, Jean Steifle of the Governor's Office, Independent Authorities Unit, delivered the Governor's "prior approval letter" to the Authority. This letter stated that the Governor and the State Treasurer approved the Authority's decision to propose a new schedule of tolls and authorized the Highway Authority to commence their process of seeking a toll increase. (Letter of Thomas H. Kean, Governor, and Feather O'Connor, Treasurer, to Judith H. Stanley, Chairman, New Jersey Highway Authority, dated Nov. 16, 1987). This letter was necessary since the Highway Authority's enabling act provides that the Authority may not adopt a resolution "for the fixing, revising or adjusting of tolls" unless they first obtain the prior approval in writing of the Governor and either the State Treasurer or the Comptroller of the Treasury. N.J.S.A. 27:12B-4.

Jean Steifle of the Governor's Office also delivered to the Authority the Governor's "waiver of veto" letter. This letter states that:

> I have reviewed the Minutes of the November 19, 1987 regular meeting of the New Jersey Highway Authority, relating to the RESOLUTION PROPOSING TOLL INCREASE AMENDMENTS TO REGULATIONS GOVERNING USE OF THE GARDEN STATE PARKWAY ... [and] I hereby approve the actions taken by the Commissioners at that meeting relating to the proposed toll increase...

(Letter of Thomas H. Kean, Governor to Judith H. Stanley, Chairman, New Jersey Highway Authority, dated Nov. 19, 1987). This "waiver of veto" letter was delivered to avoid the usual ten day waiting period that the Authority must observe before its actions have any effect. N.J.S.A. 27:12B-4.

The Authority's attorney reviewed the "prior approval" letter and the "waiver of veto" letter with the Commissioners and then explained the procedural requirements the Authority must take to ultimately adopt a toll increase. He informed the Commissioners that they must hold a public hearing, file the proposed toll increase with the Office of Administrative Law pursuant to the Administrative Procedure Act, make any adjustments to the toll schedule they determine necessary, and then receive prior written consent of the Governor and the State Treasurer before finally adopting a new schedule of tolls. Minutes of the Exempt Meeting of Nov. 19, 1987 at 2).

The Commissioners agreed to vote on a proposal to increase the Garden State Parkway tolls at the public meeting of November 19, 1987. Id.

2. Public Meeting of November 19, 1987

The New Jersey Highway Authority did not publicly disclose the proposed toll increase until its public meeting of November 19,1987.

At the public meeting on November 19th, the Authority's in-house counsel, Thomas Critchley, stated that the Authority's staff members and consultants have concluded that the Authority

lacks the necessary revenue to meet debt service and to fund the Authority's capital improvement program. Mr. Critchley then stated that "It is recommended that the Commissioners authorize the initiation of procedures to ... amend ...the toll schedule." (Minutes of the Public Meeting of November 19, 1987 at xvi-xvii). The Authority's in-house counsel said that the recommended toll increases provide for the following rate schedule:

> 1. The basic toll rates for cars at toll barriers will increase from $.25 to $.50.
>
> 2. Car tolls at ramps for the most part will increase from $.10 and $.15 to $.25 and from $.25 to $.50.
>
> 3. A $.35 car discount token will be available for use by cars at all $.50 exact change toll lanes.
>
> 4. Barrier tolls for heavy trucks, where allowed, will generally increase to a per-axle charge of $.50.
>
> 5. Tolls for buses will increase from $1.00 to $3.00 with provisions to permit regularly scheduled commuter buses to use discount bus tokens at a cost of $1.00. For toll purposes, school buses would be treated as and charged the rate for cars. Buses other than regularly scheduled commuter and school buses will be able to use discount bus tokens at a price of $2.00 each.

Id. at xvii.

Commissioner Julian Robinson made a motion for a resolution to adopt the proposed schedule of toll increases. Id. Commissioner Lionel Levey seconded the motion, and then all seven Commissioners unanimously adopted the resolution proposing toll increases without any further discussion. Id. at xviii.

V. Findings Relating to Allegations that the New Jersey Highway Authority Violated The Open Public Meetings Act

A. The Highway Authority Violated the Open Public Meetings Act When It Excluded the Public From Discussions on the Toll Increase from August 1986 through November 1987

1. None of the Authority's Ten Private Toll Increase Discussions Falls within an Exception to the Open Public Meetings Act.

The general mandate of the Open Public Meetings Act is clear: "all meetings of public bodies shall be open to the public at all times." N.J.S.A. 10:4-12. As noted by the New Jersey Supreme Court, the Open Public Meetings Act codifies this State's "strong tradition ... favoring public involvement in almost every aspect of government." Polillo v. Deane, 74 N.J. 562, 569 (1977).

In its statement of findings and declaration to the Open Public Meetings Act, the Legislature stressed the importance which it attached to the policies that the new law was to implement. The Legislature declared that the public had a "right ... 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." N.J.S.A. 10:4-7. The Legislature further found that such public involvement "is vital to the enhancement and proper functioning of the democratic process," N.J.S.A. 10:4-7, and determined "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,..." N.J.S.A. 10:4-7. Therefore, the Legislature determined that the citizens have a "right to attend all meetings of public bodies at which any business affecting the

public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion." N.J.S.A. 10:4-7.

The Act specifies that its provisions "shall be liberally construed in order to accomplish its purpose and the public policy of this State." N.J.S.A. 10:4-21. Moreover, courts have held that "strict adherence to the letter of the law is required in considering whether a violation of the act has occurred." Polillo v. Deane, 74 N.J. 562, 578 (1977); Rice v. Union County Regional High School Board of Education, 155 N.J.Super. 64, 70 (App. Div. 1977). It is also clear the "lack of wrongful intent cannot excuse noncompliance with the Act." Polillo v. Deane, supra, at 577.

The Act carves out nine exceptions to the general rule of public meetings. N.J.S.A. 10:4-12(b). However, courts have narrowly construed these exceptions in light of the Act's purposes and provisions. Rice v. Union County Regional High School Board of Education, supra, at 70; Accardi v. North Wildwood Mayor and Council, 145 N.J.Super. 532, 543 (Law Div. 1976).

The only exceptions to public disclosure that are relevant to this discussion are the exceptions that cover the acquisition of real property, N.J.S.A. 10:4-12(b)(5), protection of public safety and property, N.J.S.A. 10:4-12(b)(6), and pending litigation or contract negotiations, N.J.S.A. 10:4-12(b)(7). We

will discuss each of these exceptions in turn. Since none of these exceptions applies to the closed sessions on toll increases, we conclude that the New Jersey Highway Authority violated the Open Public Meetings Act when it excluded the public from the ten private sessions in which it discussed the increase of tolls on the Garden State Parkway.

a. Section 12(b)(6) - Protecting Public Safety and Property Exception

The New Jersey Highway Authority Commissioners stated at their October 22, 1987 meeting that their toll increase discussion "involved matters utilized in protecting the safety and property of the public where disclosure could impair such protection as provided in the Open Public Meetings Act, N.J.S.A. 10:4-12(b)(6)." (Minutes of the Exempt Meeting of Oct. 22, 1987 at 3). On this basis, the Commissioners agreed not to report on the toll increase discussion at their public meeting. Id.

Section 12(b)(6) of the Open Public Meetings Act provides:

> (b) A public body may exclude the public only from that portion of a meeting at which the public body discusses (6) Any tactics and techniques utilized in protecting the safety and property of the public provided that their disclosure could impair such protection.

N.J.S.A. 10:4-12(b)(6).

The legislative history indicates that the Legislature intended this section to prevent disclosure of law enforcement measures where disclosure would harm public safety or property.

In the legislative statement that accompanied Assembly Bill 1030, this section was described as permitting private deliberations that "concern investigation of violations or possible violations of the law, or techniques of protecting the safety and property of the public, where disclosure of such techniques could impair such protection." Statement to A-1030 at 3. For example, this exception would authorize private deliberations on a municipality's new undercover measures to reduce crime since disclosure could tip off potential criminals and thereby completely undermine the effectiveness of the proposed measures.

Additionally, in Woodcock v. Calabrese, 148 N.J.Super. 526 (Cty. Ct. 1977), the only decision to interpret N.J.S.A. 10:4-12(b)(6), the court made it clear that private discussions can occur under the "public safety" exception only when there is a clear connection between disclosure of the private debate and the safety of the public. The defendants in that case argued that the "public safety" exception covered private rent control discussions because disclosure of such a controversial and political matter would cause "widespread public concern or premature rumors of a rental increase." Id. at 532.

The court in Woodcock rejected this argument since there was no evidence that disclosure would actually impair the safety of the public or its property. Id. at 533. The court explained that the "public safety" exception applied only "in certain exigent police power situations, such as for police power

purposes, fire control, civil defense, health matters and riot-related activities, where disclosure of matters discussed could endanger public safety." Id.

An application of the above legal standards and reasoning to this case reveals the inapplicability of the "public safety" exception to the Authority's private toll increase discussions. Martin Fox of Fox & Fox, the general counsel for the Highway Authority, explained during our investigation that he and his associate Author Grossman advised the Authority that the "public safety" exception applied since a toll increase was necessary to insure that the Authority could make payments under its bonds "in a safe and efficient manner." He also said that "a premature disclosure on the eve of an election" would cause people "to jump on the toll increase" instead of looking at the merits of the campaign. Id.

This rationale does not satisfy the legal requirements of the "public safety" exception. We are unable to find any support in the Open Public Meetings Act for the assumption that the "safe and efficient" payment of bonds fits within the "public safety" exception to the Sunshine Law. Even if a toll increase is necessary to repay bond obligations, there is no basis in fact or law to assume that a disclosure of the proposed toll increase in an open public meeting would, in any way, endanger the public safety. Moreover, the "public safety" exception certainly cannot be used to determine what information the public receives during a political campaign. At the heart of the Authority's position is a claim that the proposed toll increase was so controversial that

the "public safety" may be endangered by a premature disclosure to the public. However, this rationale would allow a public body to exclude the public from discussions of virtually any controversial subject that affects the public. The court in Woodcock v. Calabrese clearly rejected such an overly broad interpretation of the "public safety" exemption.

Arthur Grossman, an associate of Martin Fox and general counsel for the Authority, presented a different argument in support of the "public safety" exception. He explained that if the Authority did not vote for a toll increase and the Authority defaulted on its bond commitments, the trustees for the bondholders could sue the Authority. If the trustees sued and won a judgment against the Authority, the Garden State Parkway might be forced to declare bankruptcy. If the Garden State Parkway was then forced to close, this could jeopardize the public safety of New Jersey residents and others who must use the Parkway.

We do not view such speculative and attenuated assertions as justifying a closed meeting under the "public safety" exception. No evidence suggests that a disclosure of the toll increase discussions would impair the safety or property of the public in any way. Nor does any evidence support the contention that disclosure of a proposed toll increase would mean that the Authority will have to close the Garden State Parkway. In fact, Mr. Grossman's entire position is based on the faulty assumption that public disclosure would somehow prevent the Authority from adopting toll increases. However, the Open Public Meetings Act

does not compel the Authority to take any specific course of action. It only mandates the Authority to conduct its discussions of such matters in public.

Since disclosure of the Authority's toll increase deliberations does not endanger the public safety or property, the plain language of section 12(b)(6) and judicial precedent compel the finding that the private toll conversations are not covered by the "public safety" exception. In fact, the Authority did disclose its toll increase proposal to the public on November 19, 1987 without any adverse effect on public safety or property.

Based on the above, we conclude that the "public safety" exception did not authorize the Authority to exclude the public from its toll increase deliberations.

b. Section 12(b)(7) - Pending or Anticipated Litigation or Contract Negotiation Exception

In a number of the Authority's closed sessions, the Commissioners stated their belief that their toll increase discussions were exempt from public disclosure under the contract negotiation exception of the Open Public Meetings Act[9]. (See

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9. At no point in time did the Authority maintain that the "pending or anticipated litigation" exception applies to its closed sessions on the toll increase. It is clear that the litigation exception could not cover the Authority's toll discussion since this exception only applies to the discussion of litigation strategy or the consequences of pending or anticipated litigation and does not authorize a public body to discuss in closed session the merits of a proposal that might be challenged in court in the future. Accardi v. Mayor and Council of North Wildwood, 145 N.J.Super. 532, 542-43 (Law Div. 1976).

Minutes of the Exempt Meetings of Aug. 28, 1986 at 2; Jan. 22, 1987 at 2; Feb. 26, 1987 at 2; see also minutes of the public meeting of Dec. 18, 1986 at 111).

According to the Authority's attorney, Arthur Grossman, this exception applies because the toll increase discussion occurred as part of a larger discussion on short and long term financing. Mr. Grossman explained that the Authority needs a toll increase in order to meets its financing obligations. Mr. Grossman advised our Department that since short-term and long-term financing both involve contract negotiations, the "contract negotiation" exception applies to toll discussions.

The Authority's attorney also argues that the toll increase was "contract negotiations" since the Authority sometimes discussed its toll increase proposal as part of its larger discussion on acquiring the thirteen mile stretch of the Garden State Parkway from the State, and the purchase agreement with the State was a contract.

Section 12(b)(7) provides:

> (b) A public body may exclude the public only from that portion of a meeting at which the public body discusses:
>
> (7) Any pending or anticipated litigation or contract negotiation other than in subsection (b)(4) in which the public body is, or may become a party.

N.J.S.A. 10:4-12(b)(7).

The "contract negotiation" exception does not cover the Authority's toll discussions for two reasons. First, section 12(b)(7), by its very terms, does not extend its coverage to all subjects related to a contract. Instead, the exception is

limited to the actual "negotiation" of a contract. N.J.S.A. 10:4-12(b)(7). The mere fact that the Authority is proposing a toll increase to provide a source of funding for either debt obligations or the acquisition of the State-owned section of the Parkway does not mean that the discussion of tolls themselves involve contract negotiations within the import of the Act.

In fact, in the Authority's closed sessions, the toll increase issue never arose in the context of negotiating either short-term or long-term financing contracts. Rather, the Authority mentioned tolls and financing in the same discussion either in the context of delaying public disclosure of the toll increase or to explain that additional revenue was needed to meet bond obligations. (Exempt Minutes of Oct. 30. 1986 at 1; Jan. 22, 1987 at 1; Feb. 26, 1987 at 1-2; March 26, 1987 at 1; Oct. 22, 1987 at 3). The Authority did not "negotiate" any financial contract during these portions of its closed sessions.

Moreover, the Highway Authority only mentioned a toll increase as part of a larger discussion on acquiring the State-owned section during two closed sessions. (Minutes of Exempt Meetings of Aug. 28, 1986 at 1; Dec. 18, 1986 at 3). In both of these meetings, the Authority did not discuss the toll increase in the context of actually negotiating the purchase agreement with the State. Instead, in both the August 1986 and the December 1986 closed sessions, the Authority first discussed the progress it made in acquiring the State-owned section, and then the Authority raised the toll increase question as an entirely distinct matter. The Commissioners explicitly recognized the fact

that the toll increase and the acquisition of the State-owned section were separate and distinct issues when they stated in their closed meeting on January 22, 1987, that they wanted "the Authority to take over the State owned section without that acquisition being directly tied to the toll increase." (Minutes of the Exempt Meeting of Jan. 22, 1987 at 1). In the closed meeting on February 26, 1987, the minutes state that "[t]here was also a discussion about keeping the acquisition of the State owned sections separate and removed from the toll increase issue." (Minutes of the Exempt Meeting of Feb. 26, 1987 at 2).

In addition, the Authority reported on the negotiation of this contract with the State in numerous closed sessions and made no mention of the proposed toll increase. (Minutes of Exempt Meetings of Sept. 25, 1986 at 1; Oct. 30, 1986 at 2; Nov. 20, 1986 at 1; Jan. 22, 1987 at 3; Feb. 26, 1987 at 4-5; March 26, 1987 at 2; April 23, 1987 at 2; May 28, 1987 at 2-3; and June 25, 1987 at 1). Therefore, there is no evidence that the toll increase discussions were actually part of negotiating a contract to acquire the State-owned section of the Parkway.

If one considers the nature of the subject the Authority discussed - the need to propose a toll increase - it is clear that this discussion does not involve the negotiation of any contract. The Authority has lumped together two very different matters. It has failed to distinguish between the use of revenue from a toll increase to meet obligations under present contracts or to enter into new contracts and those discussions involving

actual contract negotiations. Only the latter discussions are exempt from public disclosure.

Second, the "contract negotiations" exception only covers a contract "in which the public body is, or may become a party." N.J.S.A. 10:4-12(b)(7). Certainly, the Authority does not plan to enter into a financing contract with anyone to raise the tolls. In fact, the Authority lacks the power to enter into such a contract. Rather, the Authority sets the toll schedule by regulation, N.J.A.C. 19:8-3.1, and can only amend the toll schedule after proposing a rule pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-4, and holding a hearing pursuant to the Highway Authority's enabling Act. N.J.S.A. 27:12B-14.1.

For the above reasons, we conclude that the New Jersey Highway Authority cannot rely on the "contract negotiation" exception to justify its private toll increase deliberations.

c. Section 12(b)(5) - Acquisition of Real Property and Investment of Public Funds Exception

The New Jersey Highway Authority never expressly cited section 12(b)(5) of the Open Public Meetings Act to justify its closed session discussions on toll increases. However, it is appropriate to review this exception to public disclosure since in two instances, the Highway Authority discussed toll increases in the context of a larger discussion on acquiring a thirteen mile stretch of the Garden State Parkway from the State of New Jersey. (See Minutes of the Exempt Meetings of Aug. 28, 1986 at 1; and Dec. 18, 1986 at 3).

Section 12(b)(5) of the Open Public Meetings Act provides:

> (b) A public body may exclude the public only from that portion of a meeting at which the public discusses: (5) Any matter involving the purchase, lease or acquisition of real property with public funds, the setting of banking rates or investment of public funds, where it could adversely affect the public interest if discussion of such matters were disclosed.

N.J.S.A. 10:4-12(b)(5).

In Woodcock v. Calabrese, 148 N.J.Super. 526 (Cty. Ct. 1977), the only case that addresses this section, the court ruled that section 12(b)(5) was inapplicable to a proposed change in a rent control ordinance since the proposal at issue did not concern the specific items mentioned in the statutory exception. Id. at 532.

In this case, the toll increase debate clearly did not directly involve "the purchase, lease or acquisition of real property with public funds." N.J.S.A. 10:4-12(b)(5). The Authority never stated that raising tolls was necessary or directly related to the purchase of the thirteen mile stretch. Moreover, a fair reading of the minutes indicates that a toll increase and the acquisition of the State-owned portion were separate and distinct subject areas. In fact, the New Jersey Highway Authority went ahead and bought the thirteen mile stretch on July 1, 1987 independent of the discussion on raising tolls. (Minutes of the Exempt Meeting of June 25, 1987 at 1).

In addition, there is nothing in the meeting minutes or our investigation which suggests that disclosure of a toll

increase "could adversely affect the public interest," as required by section 12(b)(5).

The other two exceptions listed in N.J.S.A. 10:4-12(b)(5), are the setting of banking rates and the investment of public funds. There is no evidence that these matters were ever considered in relationship to the toll increase debate.

Therefore, we conclude that section 12(b)(5) of the Open Public Meetings Act, N.J.S.A. 10:4-12(b)(5), did not allow the New Jersey Highway Authority to discuss toll increases in closed sessions.

In sum, the New Jersey Highway Authority's ten closed sessions on the toll increase were not authorized by any of the exceptions in the Open Public Meetings Act. N.J.S.A. 10:4-12(b). Therefore, the Authority violated the Act at each of these closed meetings when it excluded the public from witnessing its deliberations on toll increases. N.J.S.A. 10:4-12(a).

B. The Highway Authority Violated The Open Public Meetings Act When It Failed to Adopt Appropriate Resolutions Relating to its Closed Sessions

Our review of the minutes from August 1986 through November 1987 reveals that the Highway Authority never passed an appropriate resolution prior to convening in closed session as required by N.J.S.A. 10:4-13. This section of the Open Public Meetings Act states the following:

> No public body shall exclude the public from any meeting to discuss any matter described in subsection 7.b. until the public body shall first adopt a resolution, at a meeting to which the public shall be admitted:

a. Stating the general nature of the subject to be discussed; and

b. Stating as precisely as possible, the time when and the circumstances under which the discussion conducted in closed session of the public body can be disclosed to the public.

N.J.S.A. 10:4-13.

In enacting this provision, the Legislature emphasized that passage of an appropriate resolution was mandatory:

> Section [13] requires that whenever a public body seeks to meet in private, it must first pass a resolution at a public meeting stating its intention to do so. The resolution must also state the general nature of the matters to be discussed and approximately when, if ever, the matters discussed can be made public.

(Statement attached to Assembly Bill 1030) (Emphasis added). See also Houman v. Mayor and Council of the Borough of Pompton Lakes, 155 N.J.Super. 129, 149 (Law Div. 1977).

As the court explained in Caldwell v. Lambrou, 161 N.J.Super. 284, 289 (Law Div. 1978), "the act requires that any attempt to retire into private session under one of the statutory exceptions must be preceded by the passage of a formal resolution explaining the exception under which the board deems itself empowered to retire." (Emphasis added). Moreover, in Houman v. Mayor and Council of the Borough of Pompton Lakes, supra, the court concluded that the defendants violated the mandatory requirements of N.J.S.A. 10:4-13 when the resolution failed to mention one of the items the Council intended to discuss in closed session. 155 N.J.Super. at 150.

A resolution relating to a closed meeting must also state "as precisely as possible, the time when and the circumstances under which the discussion ... can be disclosed to the public." N.J.S.A. 10:4-13(b). However, we recognize that it is not always possible for a public body to state with certainty when it can disclose closed session discussions to the public. Consequently, in Cole v. Woodcliff Lake Bd. Of Educ., 155 N.J.Super. 398 (Law Div. 1978), the court held it sufficient that the Board's resolution stated that personnel matters would be disclosed "as soon as such disclosure can be made without violation of the confidentiality of personnel." Id. at 407.

The Highway Authority's resolutions relating to its closed sessions fail to satisfy the above legal requirements. At the conclusion of each month's public meeting, the Highway Authority adopted a "boiler-plate" resolution that simply put the public on notice that the Highway Authority would have a closed meeting immediately before the next month's public meeting. Each month the Authority would merely pass the identical resolution with only the dates changed. This resolution stated the following:

> 1. At approximately 9:30 A.M. on Thursday, _____, 198__, the New Jersey Highway Authority will hold a closed session in accordance with the provisions of N.J.S.A. 10:4-13. The Agenda of this meeting will consist exclusively of matters which may be discussed in the absence of the public in accordance with the provisions of N.J.S.A. 104-12b. It is not possible to more precisely state the nature of the subjects to be discussed since discussion will be limited to matters arising between today's date and the date of the meeting.
>
> 2. At the public meeting immediately following the meeting from which the public

> has been excluded, the discussion conducted in the closed session will be disclosed to the public as fully as possible consistent with the proper conduct of the Authority's business in accordance with the Open Public Meetings Act.

This resolution fails to satisfy the Sunshine Law's explicit requirement that such a resolution state the "general nature of the subject[s] to be discussed" in private session. The Authority's resolutions do not even cite, let alone explain, the exception invoked to authorize a closed meeting. The Highway Authority's resolutions are even more defective than the one at issue in Houman since the Authority's resolutions fail to mention any items to be discussed in closed session.

The Authority's resolution also fails to state "as precisely as possible, the time when and the circumstances under which the discussion ... can be disclosed to the public." In fact, the general language of the Authority's resolution does not provide the public with any specific knowledge of when a particular subject will be disclosed.

Based on the above, we conclude that the Highway Authority violated the Open Public Meetings Act because each of the ten general resolutions that the Authority passed to justify its discussions of toll increases in private failed to meet the requirements of N.J.S.A. 10:4-13. Since the Highway Authority failed to adopt appropriate resolutions, the Open Public Meetings Act prohibited the Authority from excluding the public from its

discussions on toll increases. N.J.S.A. 10:4-13; Caldwell v. Lambrou, 161 N.J.Super. 284, 289 (Law Div. 1978).

In order to conform to the requirements of section 13, we recommend that the Highway Authority revise its practice of passing a resolution the month prior to a closed meeting. The problem with this procedure is that the Highway Authority presumably is not aware of what specific matters it will need to discuss in closed session the following month and, as a consequence, is unable to adopt a resolution with the specificity that section 13 requires. Instead, we recommend that the Authority begin each monthly meeting with an open, public meeting and, if the Authority needs to meet in closed session, it should pass a resolution at this open session which (1) states the general nature of each subject it wishes to discuss in private; (2) explains the exception or exceptions under which the Authority deems itself empowered to discuss the matter in closed session; and (3) states, to the fullest extent possible, the time when the discussion of each subject considered in closed session will be disclosed to the public. See N.J.S.A. 10:4-13. Since the Authority would be fully aware at this time of the matters to be discussed in closed session, it should have no difficulty meeting the specific requirements of section 13. Once such a resolution is passed, the Authority would then be free to discuss in closed session any matter that is properly exempt from public disclosure and can resume the public meeting when the closed session is finished.

C. The January 1987 Session Between the Governor And Several Members of the Highway Authority Did Not Violate the Open Public Meetings Act

In January 1987, four of the seven Highway Authority Commissioners met with Governor Kean to inform him of the necessity for a toll increase. We conclude that this gathering was not a "meeting" within the meaning of the Open Public Meetings Act, and therefore, this discussion did not violate the Sunshine Law.

First, the legislative findings, N.J.S.A. 10:4-7, and the legislative history of the Open Public Meetings Act indicate that the Governor does not come within the scope of the Act. As Assemblyman Baer, the chief sponsor and draftsman of the Open Public Meetings Act stated, "[t]his bill does not involve the Governor's office and his various offices." (Testimony of Assemblyman Byron Baer before the Assembly Judiciary Committee on A-1030, dated March 14, 1974 at 205). Assemblyman Baer explained:

> there is an essential difference between the Governor or any of his department heads who may be meeting with persons who have a function of advising them, but no collective authority as a board and public bodies which do have authority as a board to make decisions collectively ... it's the latter that this bill seeks to cover; not to intrude between every executive officer and any adviser that he might have. Id. at 205-206.

Second, the intent of the Sunshine Law is "to allow officials to meet privately with counselors and advisors in order to discuss policy, formulate plans of action and generally to

have an exchange of ideas." Woodcock v. Calabrese, 148 N.J.Super. 526, 535 (Cty. Ct. 1977) (citing legislative findings in N.J.S.A. 10:4-7). This rationale applies to discussions between the Governor and subordinate officials in the State where the purpose of the meeting is to advise the Governor of a particular matter and to exchange views on the subject, not to "discuss or act as a unit upon the specific public business of that body." N.J.S.A. 10:4-8(b). Finally, to constitute a "meeting" under the Act, the gathering must be "attended by, or open to, all of the members of a public body." Id.

With these principles in mind, we have little trouble in concluding that the January 1987 discussion was not covered by the Sunshine Law. Initially, the discussions with the Governor were open to just the officers of the Authority and not to all of the Commissioners. (S.H. 37). Additionally, the meeting served to advise the Governor, who ultimately would have to review the toll increase, of the future need for such an increase and to exchange ideas on the subject. To hold that such discussions are covered by the Sunshine Law would seriously hamper the ability of the Governor to seek advice and counsel from other public officials or agencies. Although the Sunshine Law did not apply to these discussions, we have explained above that the Authority violated the Open Public Meetings Act when the Authority's officers subsequently reported in closed session on the substance of their discussions with the Governor. (Minutes of the Exempt Meeting of Jan. 22, 1987 at 1).

VI. The New Jersey Highway Authority Should Fully Reconsider Its Decision To Increase Tolls

The final aspect of our investigation is whether the Highway Authority cured the violations of the Open Public Meetings Act discussed in the preceding sections of this report. It has been suggested that the Highway Authority cured these violations in one of three ways (1) by conducting a "de novo" public meeting on the current toll increase proposal on November 30, 1987, (2) by disclosing the minutes of the closed sessions to the public, and (3) by holding public hearings on this proposal during the past several weeks.

At the outset, we reject any suggestions that disclosure of the minutes or the recent public hearings were sufficient to cure violations of the Open Public Meetings Act.

First, a public body has an independent obligation to "keep reasonably comprehensible minutes of all its meetings." N.J.S.A. 10:4-14, which is separate and apart from its general obligation to have "all meetings . . . open to the public at all times." N.J.S.A. 14:4-12(a). Moreover, the Legislature expressly declared in the Act that the public has a "right . . . 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." N.J.S.A. 10:4-7 (emphasis added). The Legislature further declared that it is "the public policy of this State to insure the right of its citizens . . . to attend all meetings of public bodies . . ." N.J.S.A. 10:4-7 (emphasis added).

This clear legislative policy would be thwarted if a public body could simply discuss subjects in closed session and then distribute copies of its minutes to the public. Indeed, the Act very specifically states that a public body may correct nonconforming meetings by "acting de novo at a public meeting held in conformity with this act." N.J.S.A. 10:4-15. It does not state that the public body can remedy past violations of the Act simply by making its minutes of improperly closed sessions available to the public. In devising a remedy, courts generally follow the legislative regulation of rights and will not change a remedy that is created and defined by statute. Dunkin' Donuts of America v. Middletown Donut Corp., 100 N.J. 166, 183 (1985).

Second, the Highway Authority's statutory obligation to conduct public hearings on a toll increase proposal, N.J.S.A. 27:12B-14.1 and 14.2, is similarly independent of its obligation, as a public body, to conduct open meetings in conformance with the requirements of the Sunshine Law. Furthermore, the public's rights to be present and to witness deliberations, N.J.S.A. 10:4-7, cannot be satisfied by merely allowing an opportunity for public comment on the final result of that process - the specific toll increase proposal.

Therefore, in order to assess whether the Highway Authority cured the Open Public Meetings Act violations, we must focus our analysis on the November 30th meeting.

On November 24, 1987, the New Jersey Highway Authority published a notice that it would hold a special meeting on November 30, 1987 to "consider[] de novo a proposal to amend toll

regulations governing use of the Garden State Parkway to increase tolls ... and [to] consider[] de novo re-adoption of all other actions taken by the Authority at its November 19, 1987 meeting." (Notice of Special Meeting, dated Nov. 24, 1987).

At the public meeting on November 30, 1987, the Authority revoked all of the actions it took at the November 19, 1987 hearing (Resolution 87-268) and unanimously proposed to increase tolls on the Garden State Highway. (Resolution 87-266). Before the Authority voted to propose a toll increase, the Commissioners heard the presentations of the Authority's Director of Finance, Frank Palombo (see Minutes of the Special Meeting of Nov. 30, 1987 at xvii-xx), its financial consultant, Chester Johnson (Id. at xx-xxvi), its traffic consultant, Gerald Nielsten (Id. at xxvii-xxx and xxxv-xxxvi), and its chief engineer, James Conlon (Id. at xxx-xxxiv). In addition, the Authority's Executive Director George Ziiocchi explained that the Authority planned to raise tolls based on three considerations: (1) the need to continue the Authority's capital improvement program; (2) the need to maintain and upgrade the Parkway to keep traffic moving quickly and safely; and (3) the need to meet the Authority's financial obligations. (Id. at xxxvi-xxxvii).

Section 15 of the Open Public Meetings Act provides that "[a]ny action taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable..." N.J.S.A. 10:4-15. However, the Act specifically allows a public body to "take corrective or remedial action by acting de novo at a public meeting held in conformity with this act..." N.J.S.A.

10:4-15. Thus, the Legislature provided a remedial procedure that allows a public body to correct earlier statutory violations by subsequent action. Houman v. Mayor & Council of Pompton Lakes, 155 N.J.Super. 129, 163 (Law Div. 1977).

While the Act does prescribe this curative remedy, the Legislature has, unfortunately, not supplied any precise definition or adequate explanation of what is required of a public body to constitute curative de novo action. The only reference to this provision in the Introductory Statement to the Assembly Bill states that a violation may be cured by "acting anew" without legislative amplification or elucidation of the criteria for evaluating whether a particular matter has been considered de novo.

Court decisions similarly construe the "de novo" language as requiring a public body to act anew in full in compliance with the Act. See, e.g., Polillo v. Deane, 72 N.J. 562, 580 (1977) (Section 15 requires that a public body "embark again upon its task" and arrive at the challenged decision in "strict conformity with the Open Public Meetings Act." Houman v. Mayor & Council of the Bor. of Pompton Lakes, 155 N.J.Super. 129, 164 (Law Div. 1977) (a public body "must reconsider its action completely anew, for a second time, in full compliance with all the requirements of the Open Public Meetings Act"); Oughton v. Bd. of Fire Commissioners, 178 N.J.Super. 633, 643 (Law Div. 1980), aff'd in relevant part, rev'd in part, 178 N.J.Super. 565 (App. Div. 1981)(a de novo action is "undertaken from the beginning as though nothing concerning the matter had happened before.").

However, our research has not disclosed any decision that provides a set of criteria or standards by which to assess whether a meeting is a de novo proceeding under the Sunshine Law. While the courts often speak in terms of what is sufficient to constitute a de novo meeting in a particular case, these decisions do not set forth with any specificity what is generally necessary for curative action.

A resolution of this uncharted legal area is further complicated by the difficulties in ascertaining from the Authority's minutes precisely what occurred at the closed meetings. The minutes provide summaries of the issues considered during these meetings, but are not verbatim accounts of the discussions (S.H. I at 56; A.H. II at 13, 32).[10] Although the minutes reflect that the Authority discussed or mentioned toll increase on numerous occasions, it is unclear whether the minutes provide a full rendition of the matters discussed or merely the end result of these discussions. For example, the minutes do not state that a full range of alternatives to the toll increase were discussed in any private sessions, but Commissioner Robinson

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10. We do not mean to suggest that the failure to take verbatim minutes constitutes a violation of the Sunshine Act, since the Legislature has expressly stated in the Introductory Statement to the Assembly Bill that "[m]inutes are not intended to be verbatim or even to include every comment made." See Caldwell, 161 N.J.Super. 284, 287 (Law Div. 1978). Rather, as we explain in the text, if de novo consideration requires a public body to redo in public the discussions that occurred in private, the lack of a verbatim record of the private meetings certainly confounds the effort to determine whether this has been accomplished.

testified before the Legislature that several alternatives were discussed at the meetings (A.H. II 65).

Moreover, the Commissioners never approved the minutes of the closed sessions[11] and concerns have been recently raised about whether the minutes correctly reflect what occurred at several closed meetings (A.H. I at 53, 105). The doubts about the accuracy of the minutes further reduce our confidence in relying on them to determine what was actually considered in private. Furthermore, given the length of time during which the Authority conducted the toll increase discussions in private, it is natural that recollections will differ or memories will fade as to the exact substance of these discussions. Consequently, in our view, it would not be productive at this point in time to reconstruct from the minutes or other sources the precise nature of the toll increase discussions at these private sessions.

Without clear legislative or judicial standards for determining what constitutes a de novo proceeding and in the absence of a verbatim record of the closed meetings, we recognize that reasonable people can reach very different conclusions about the November 30th meeting. On one hand, one could conclude that the Highway Authority cured the violations by considering the

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11. The Authority's General Counsel took notes at the closed meetings and prepared the minutes from these notes, usually on the same day as the closed meeting. Copies of these minutes were then sent to the Governor's Authorities Unit and to the Executive Director of the Highway Authority, but not to the Commissioners for their review and approval. (S.H. I 15-18, 56-57, 64; A.H. II 10-11).

reasons for a toll increase and the justifications for the proposed toll hike at a meeting conducted in conformance with the requirements of the Act. On the other hand, it is equally reasonable to conclude that the Highway Authority was obligated at this meeting to commence the entire process of considering a toll increase all over again. From this perspective, the Authority was required to question or discuss in public the necessity for the capital improvement program and the other financial assumptions driving the toll increase, as well as to consider other toll increase alternatives. Consequently, since these matters were not considered at the November 30th meeting, it was not a de novo proceeding under this view of the Act.

As mentioned above, both interpretations find some support in the purposes and objectives of the Act. The first interpretation is based on the view that the Sunshine Law is solely designed to compel open discussions by public bodies and not to prescribe the substantive manner in which a public body conducts its business or reaches a particular decision. Accordingly, as long as the Highway Authority reconsidered the propriety of a toll increase at a meeting held in conformance with the requirements of the Act, the mandate of the Sunshine Law has been satisfied and members of the public must look to other laws for relief from a decision they deem ill conceived or inadequately considered.

The latter interpretation derives support from the legislative intent that the public "witness in full detail all

phases of the deliberation, policy formulation, and decision-making of public bodies," N.J.S.A. 10:4-7. (Emphasis added). This interpretation of the de novo language would compel the Highway Authority, in order to cure prior violations of the Act and in the absence of a verbatim record suggesting that private discussions were more circumscribed, to reconsider all aspects of a toll increase decision.

After carefully evaluating the pertinent law and facts, we believe it is doubtful that the November 30th meeting was the type of de novo proceeding contemplated by the Legislature when the remedial provision was adopted, because this meeting merely provided a public airing of the reasons that support the toll increase decision reached in private without sharing with the public the background discussions leading up to this decision or the deliberations on toll increase alternatives. However, we must candidly acknowledge that, on the present record, we are simply unable to resolve this novel legal question with certainty because (1) we lack clear legislative or judicial guidance on the appropriate criteria for assessing curative actions by a public body; and (2) there is no verbatim record of what precisely occurred during the ten private discussions.

In the final analysis, however, it is our judgment that abstruse and technical legal debates over whether the November 30th meeting was or was not a de novo proceeding under the Act miss the point of the present public reaction to the Authority's proposed toll increase. The Authority may have called the November 30th meeting out of a sincere desire to assuage public

concerns about possible violations of the Sunshine Act. Nevertheless, to the public, the November 30th meeting possessed all of the indicia of a ritualistic exercise that was directed to a pre-ordained result -- reaffirmation of the toll increase decision reached in prior, private meetings. For example, while the Commissioners did question the consultants at several points about their reports during the November 30th meeting, the members of the Authority never engaged in any discussions or deliberations among themselves regarding the information provided by the consultants, the necessity for a toll increase, the feasibility of a smaller toll increase, or the existence of options in lieu of any toll increase. The brief and conclusory comments of the Commissioners -- some of which did not even address the merits of a toll increase -- at the end of the presentations were no substitute for a public discussion on the range of issues relevant to a toll increase.

It is our view that the primary goal of the Open Public Meetings Act - to restore public confidence in government decision-making by avoiding even the appearance of impropriety resulting from unlawful private sessions[12] -- is ill-served by the present state of uncertainty and widespread public distrust regarding the secret discussions of the toll increase proposal. Therefore, we have concluded that the spirit animating the Sunshine Law and the public interest would best be served if the

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12. See Introductory Statement to Assembly Bill and Caldwell v. Lambrou, 161 N.J.Super. at 288-89; Accardi v. Mayor and Council of No. Wildwood, 145 N.J.Super. at 549-50.

Authority would fully consider in public all the aspects of a toll increase. Cf. Polillo v. Deane, 74 N.J. at 580; South Harrison v. Bd. of Chosen Freeholders, 210 N.J.Super. at 378; Caldwell v. Lambrow, 161 N.J.Super. at 289-92; Oughton v. Bd. of Fire Commissioners, 178 N.J.Super. at 643. By adhering to a public process that explores the entire matter, including alternatives to a toll hike, and that does not merely present to the public the evidence assembled to justify a toll increase decision reached in private sessions, the Highway Authority should make significant strides in restoring the public confidence in government that has been seriously eroded in recent weeks.

VII. Conclusion

We conclude that the Highway Authority violated the Open Public Meetings Act by discussing toll increases in ten private sessions. The Sunshine Law does not prohibit a public body from delaying a decision on a matter, nor does it require public bodies to reach a decision on an issue by a particular time. However, the Act does require that a public body discuss these concerns in public unless the matter is covered by a particular statutory exemption.

Accordingly, we do not mean to suggest in this report that the Sunshine Law was violated when the Highway Authority did not adopt a toll increase proposal until November 1987. The Act, however, did compel the Authority to discuss this matter,

including the discussions relating to the deferral of its decision, openly and publicly.

The touchstone of our analysis in this report is the determination that the public interest is properly vindicated when the spirit of the Sunshine Law is the first and overriding guide to its application. Although New Jersey public officials now have had more than a decade of experience with the Act, the legislative observation "that secrecy in public affairs undermines the faith of the public in government" is as valid today as it was in 1975. It is often tempting to go behind closed doors when a matter is controversial. However, the short-term convenience of doing so is not worth the long-term consequences of citizen suspicion and distrust that result when our government operates behind closed doors. After all, an informed citizenry is a vital ally, not an enemy, of sound decision-making on matters that affect the public. The concerted efforts of all New Jersey public officials to keep "Government in the Sunshine" will further this salutary goal and will help preserve the public's confidence in government.