

Opinion No. 67-119

October 20, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Clay Buchanan, Director New Mexico Legislative Council Legislative-Executive Building Santa Fe, New Mexico

QUESTION

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1. In your opinion are the duties of the Legislative Audit Commission such that (without being in violation of 5-6-17) some or all of its meetings could be considered as coming within the reasons given in Opinion of the Attorney General No. 59-105 for having non-public meetings?
2. If your answer to question 1 above is that some of the meetings should or could be non-public without violation of 5-6-17, what are the guidelines the commission should follow in determining which meetings should be open and which should be non-public?
3. Is it permissible under 5-6-17 to discuss personnel problems in a closed meeting, for example, to protect reputations of employees or prospective employees, and if so, are there any guidelines for determining when it is permissible?

CONCLUSIONS

1. Yes.
2. See Analysis.
3. See Analysis.

OPINION

{*179} ANALYSIS

This office has, on at least two occasions, discussed the public meeting law (Section 5-6-17, N.M.S.A., 1953 Compilation) as it applies generally to governmental bodies. The first such occasion was an opinion of the Attorney General, No. 59-105, dated August 14, 1959 wherein we discussed the act in an attempt to define generally the terms used therein. While this office has been involved in construing the Act as it applies to specific facts, subsequent to that opinion, the last opinion that again attempted to define the applicability and discuss procedures is Opinion No. 63-55, dated May 20, 1963. Copies of both of these opinions are attached. There are important distinctions and exceptions

contained in both of these opinions that in our view bear on the answers to your questions. In Opinion 59-105 we said as follows, at page 4:

"In view of this distinction, it is our opinion that public boards, commissions, or committees which have as their sole purpose the assembling and evaluation of facts for presentment to another authority for action are not included within the purview of the section in question. This decision is grounded in sound public policy as well as the legal distinction. In investigating public areas of government which require remedial action, situations can arise where if certain information confidential in its nature, was required to be released, great harm could be done to innocent individuals as well as the general public. The effectiveness of the investigation would in many instances be greatly hampered."

We have examined the duties and responsibilities of the Commission as well as the method of establishing the Commission and we are of the opinion that the Legislative Audit Commission is exempt from the provisions of Section 5-6-17 by virtue of the reassigning used above in Attorney General Opinion No. 59-105.

The provisions of Section 4-24-1, et seq., N.M.S.A., 1953 Compilation make it abundantly clear that the Commission is in essence a permanent interim committee of the legislature, as its members hold their position by virtue of being members of the legislature. The provisions for appointment of members (4-24-3) are not unlike provisions creating other interim legislative committees. Its duties and responsibilities are primarily and essentially **data gathering** and **fact finding** in nature. See Section 4-24-1, et seq., N.M.S.A., 1953 Compilation.

In essence it prepares audits and contracts for the preparation of audits on governmental agencies. It reveals its findings to executive agencies for appropriate action as well as reporting its findings to the Legislature at each session.

The Executive Branch of Government does not exercise any degree of control over the Commission. The Commission does not have any of the indicia found in executive branch bodies. Even the basic requirement of all executive agencies that of filing a budget with the Department of Finance and Administration -- is not required. Its employees are exempt from the Personnel Act, as we have previously ruled, as are other legislative employees.

In conclusion it is our opinion *{*180}* that the Legislative Audit Commission is exempt from the provisions of Section 5-6-17, supra; however, it is apparent that the Legislative Audit Commission operates in an area which, on occasion, can be of great public interest.

While, as we have indicated above, the Legislative Audit Commission need not comply with Section 5-6-17, we think that an orderly procedure should be followed which would allow the press and the public generally to witness the operations of the Commission to the extent consistent with the proper and efficient functions of the Commission.

Obviously certain activities of the Commission, like any body, executive or legislative, lend themselves to private discussion among members of the body -- such as confidential investigations in progress, personnel problems, etc., prior to arriving at an agreement. As we said in Opinion No. 63-55:

"Such a procedure can hardly be said to lend itself to partiality or arbitrary action since the highest courts of the land utilize this procedure."

In Opinion No. 63-55 we suggested a three-step procedure for executive bodies to follow in compliance with Section 5-6-17. While, as we have indicated, the Legislative Audit Commission is not an executive agency perhaps this procedure might be appropriate for it also since it lends itself to maximum public scrutiny.

We do not wish, however, to be understood as criticizing the methods and procedures used in connection with past actions of the Commission in recommending this procedure, but merely suggest it as a useful tool in the future.