

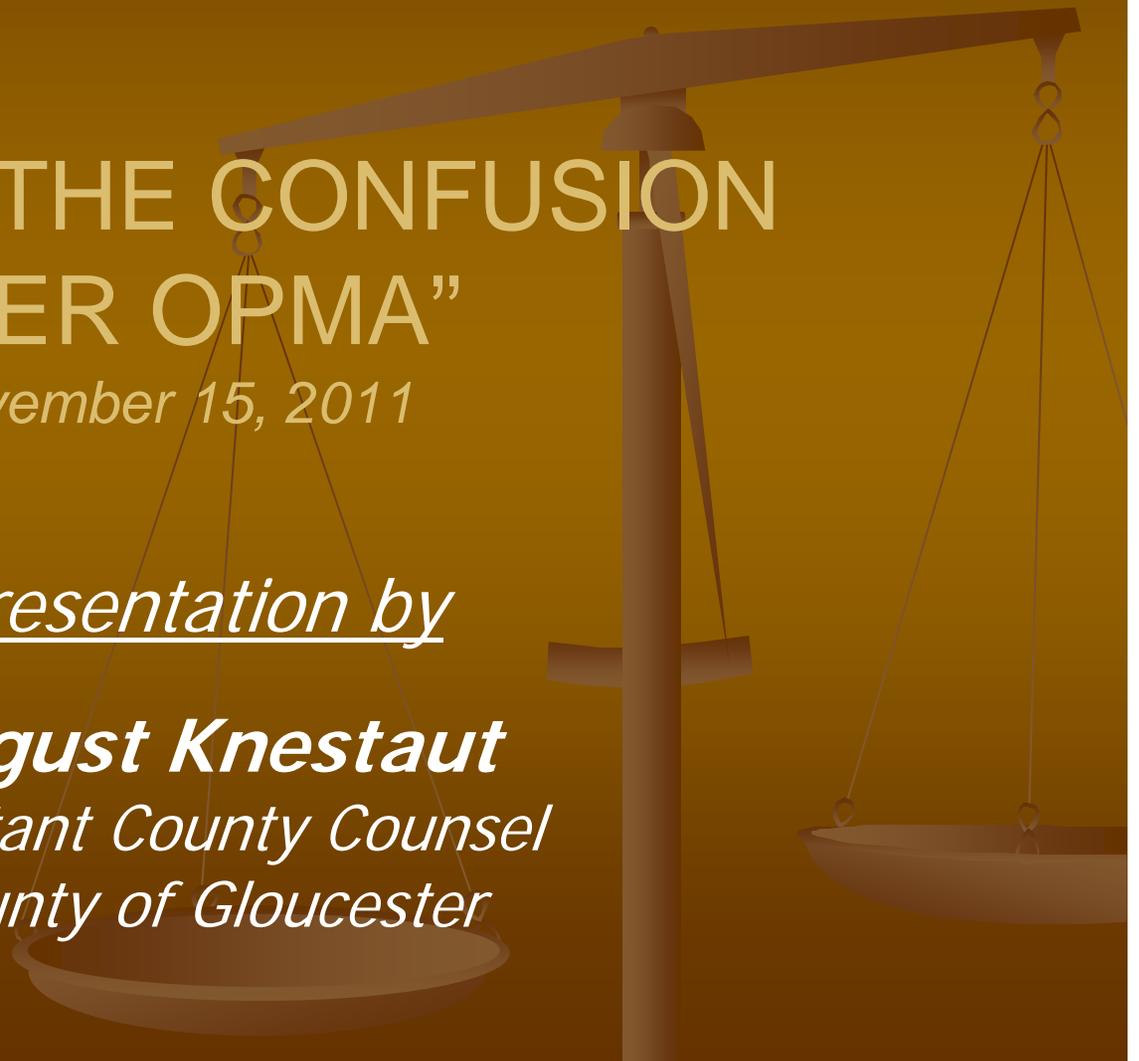
NEW JERSEY STATE LEAGUE OF MUNICIPALITIES

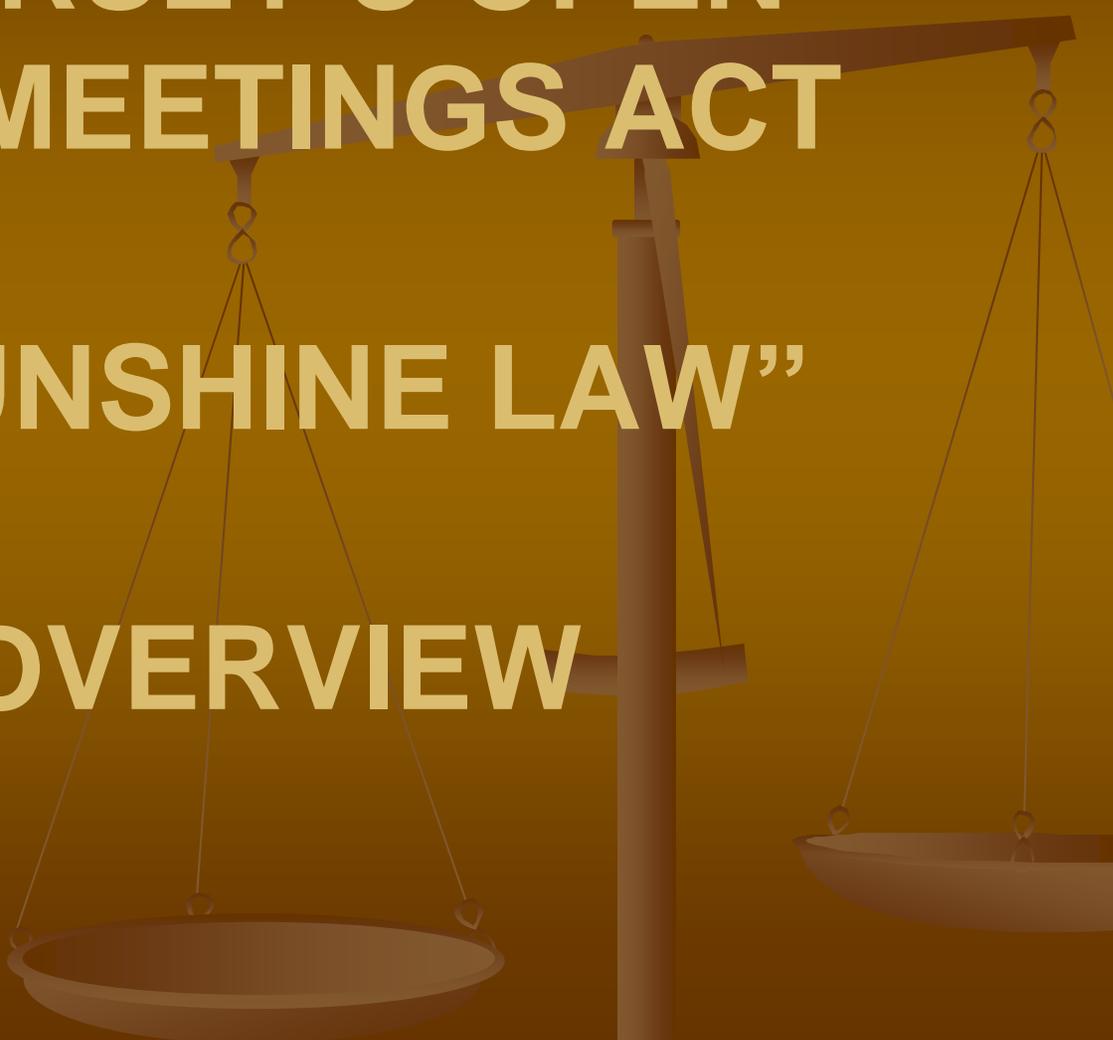
“WHAT IS THE CONFUSION OVER OPMA”

November 15, 2011

Presentation by

August Knestaut
Assistant County Counsel
County of Gloucester

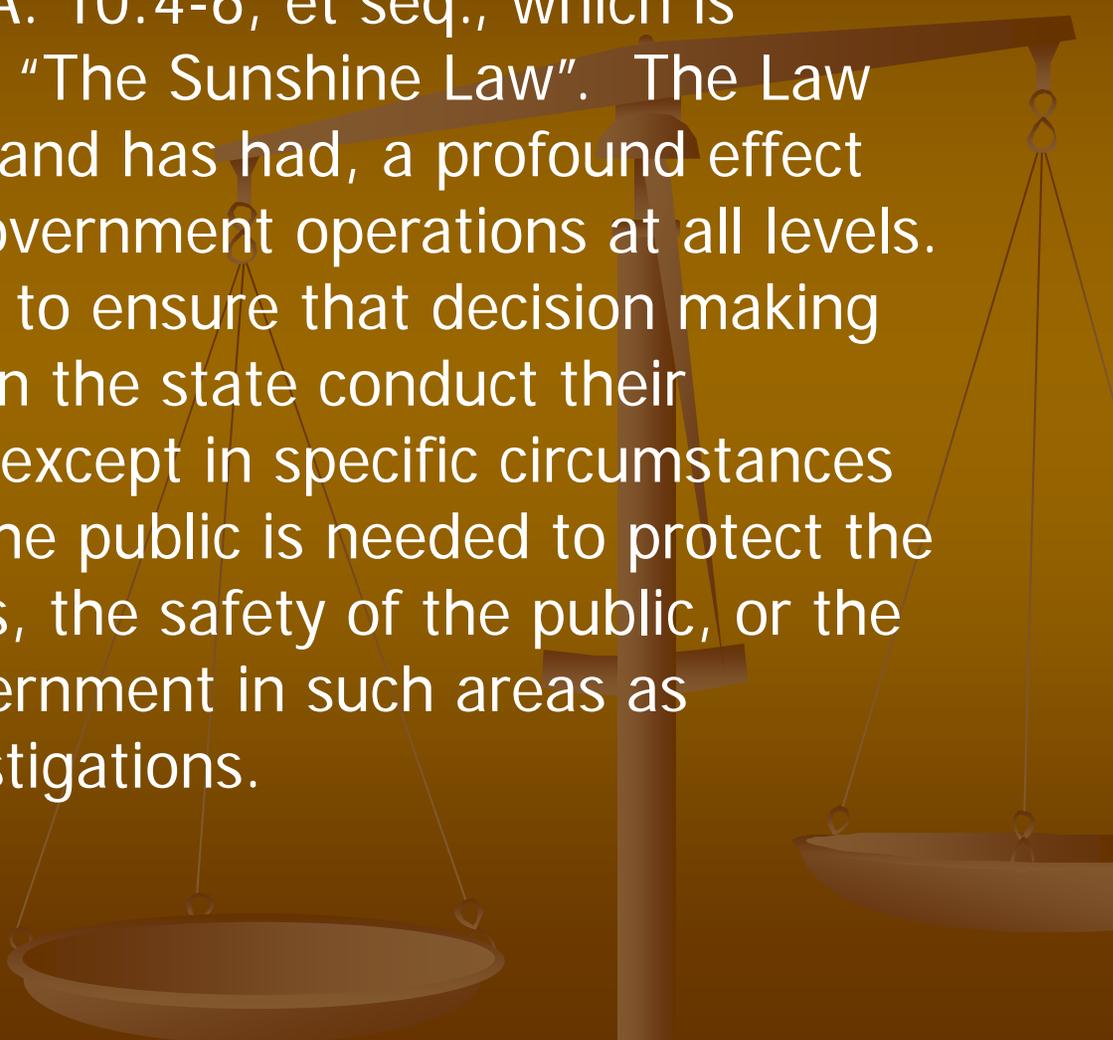




**NEW JERSEY'S OPEN
PUBLIC MEETINGS ACT**

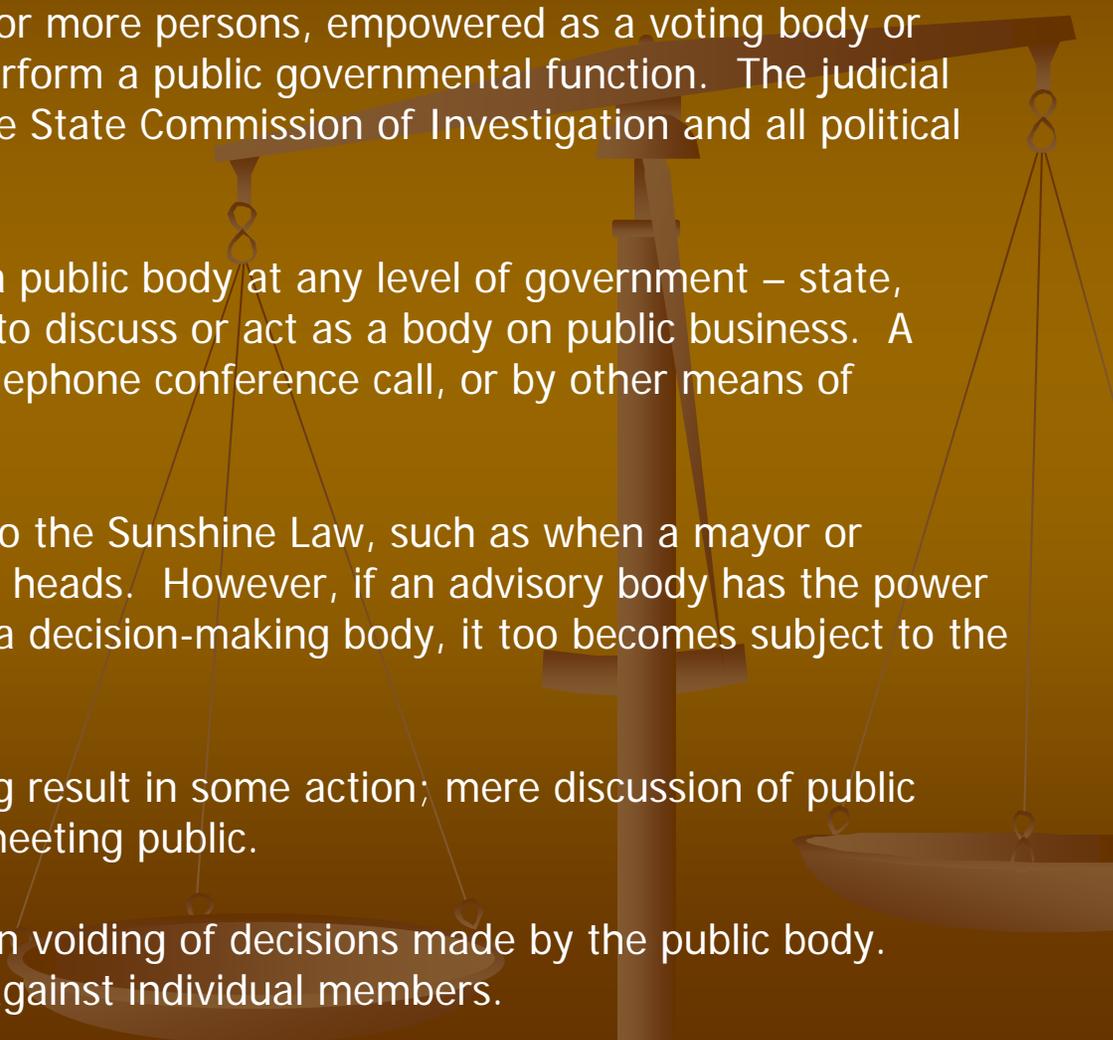
“THE SUNSHINE LAW”

AN OVERVIEW



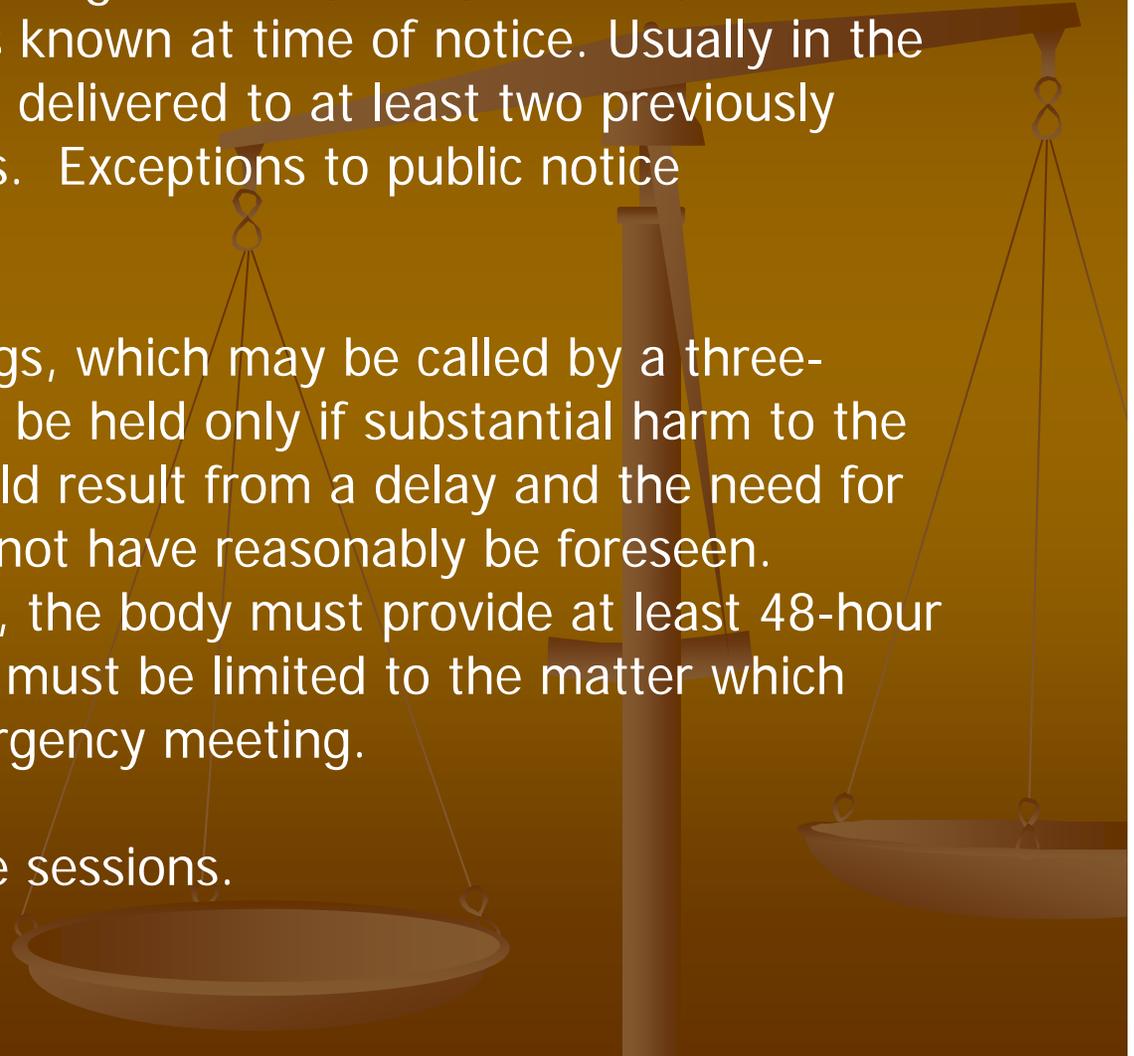
In 1975, the legislature enacted the Open Public Meetings Act, N.J.S.A. 10:4-6, et seq., which is commonly known as "The Sunshine Law". The Law was meant to have, and has had, a profound effect on the visibility of government operations at all levels. The Law is designed to ensure that decision making government bodies in the state conduct their businesses in public except in specific circumstances where exclusion of the public is needed to protect the privacy of individuals, the safety of the public, or the effectiveness of government in such areas as negotiations or investigations.

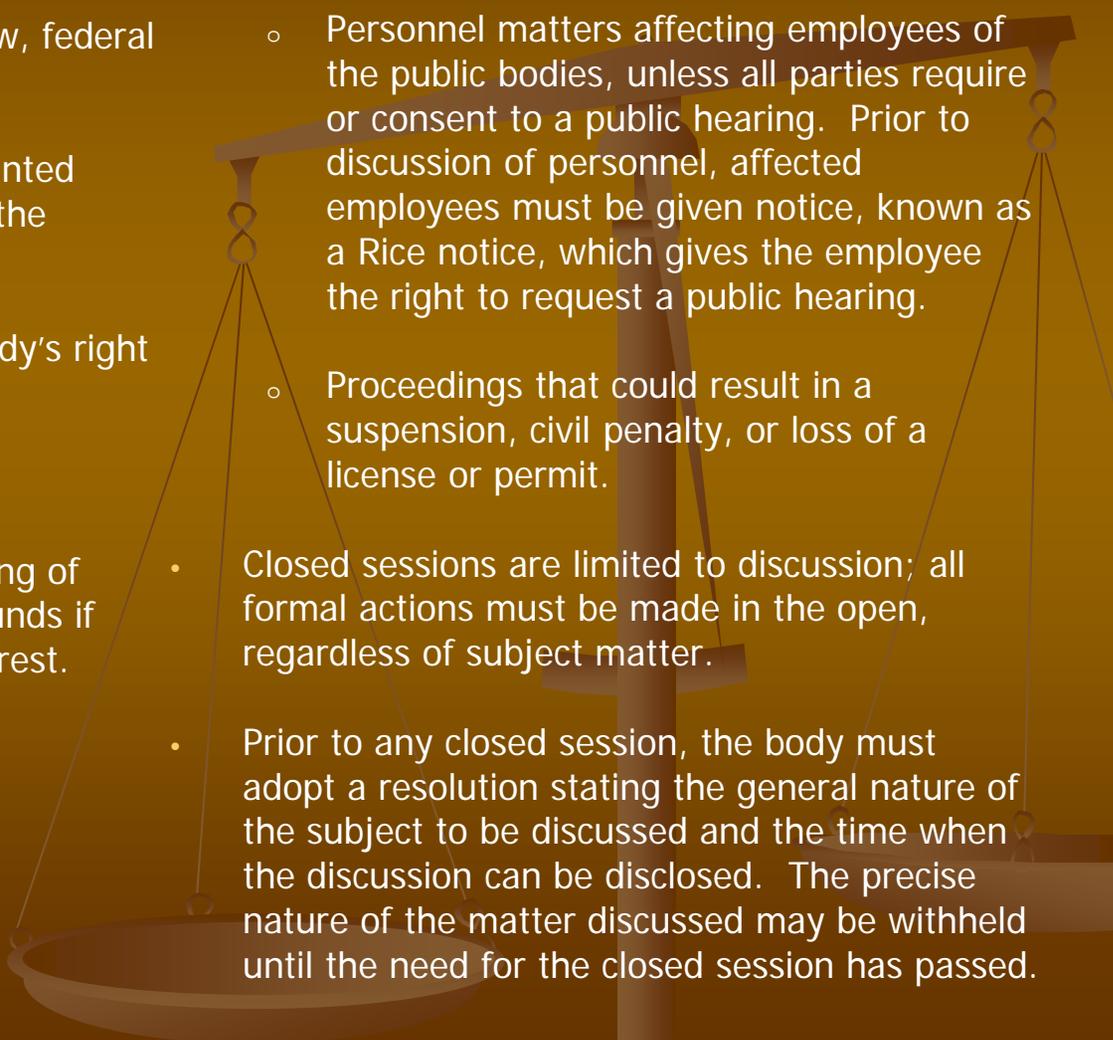
The main points of the Open Public Meetings Act, N.J.S.A. 10:4-6 are:

- All meetings of public bodies in New Jersey must be open to the public unless closure is specifically permitted by law. If a meeting by members of a public body is closed to the public, the reason given must be one specifically authorized under the Law.
 - A public body is a group of two or more persons, empowered as a voting body or public fund-spending body to perform a public governmental function. The judicial branch, the Parole Board and the State Commission of Investigation and all political parties are excluded.
 - A public meeting is one held by a public body at any level of government – state, county or local – with the intent to discuss or act as a body on public business. A meeting may be in person, by telephone conference call, or by other means of electronic communication.
 - Advisory bodies are not subject to the Sunshine Law, such as when a mayor or governor meets with department heads. However, if an advisory body has the power to eliminate options available to a decision-making body, it too becomes subject to the law.
 - It is not necessary that a meeting result in some action; mere discussion of public matters is enough to make it a meeting public.
 - Violations of the law may result in voiding of decisions made by the public body. Penalties may also be assessed against individual members.
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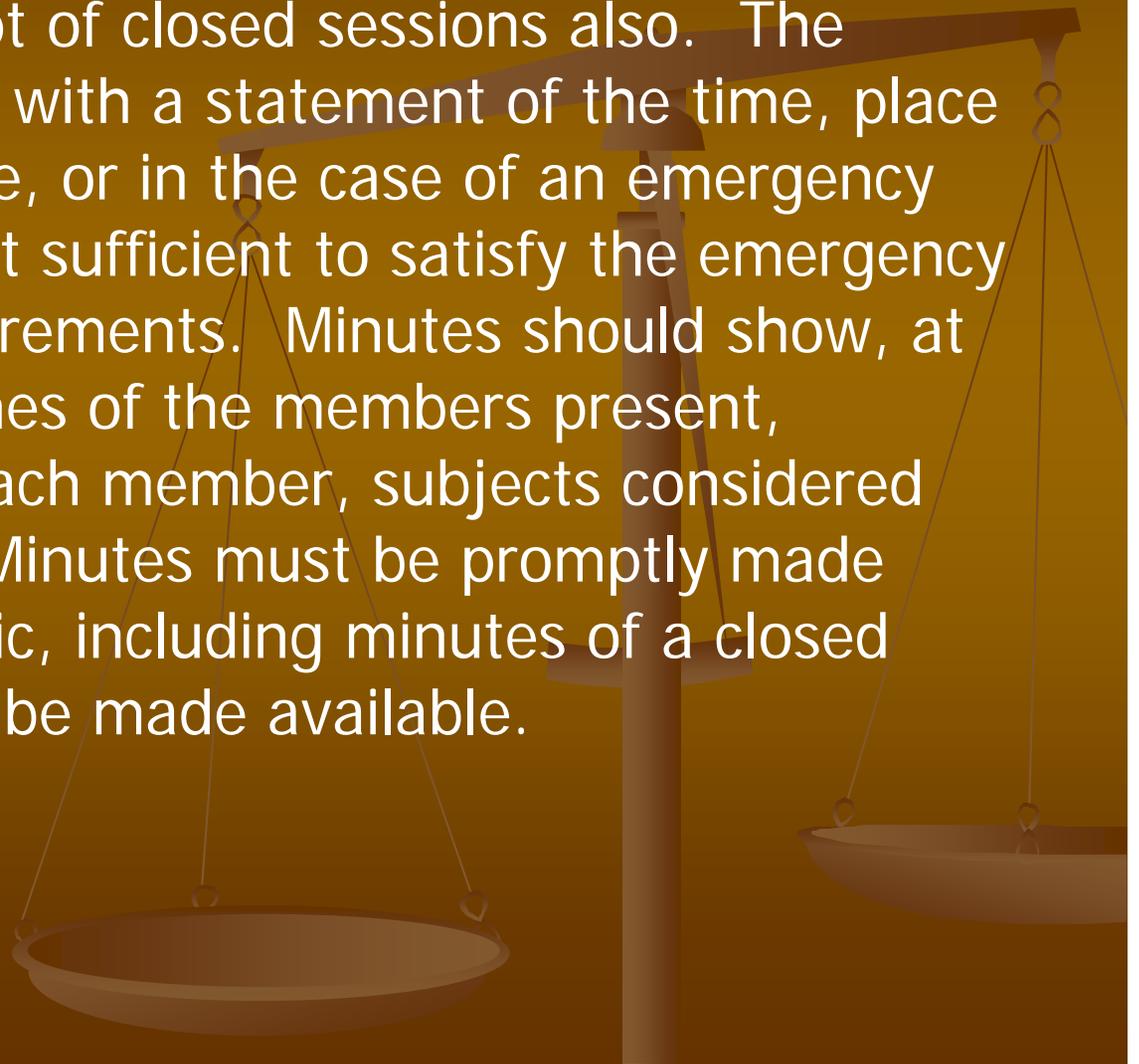
- **PUBLIC NOTICE**: Every public body must publish its meeting schedule by Jan. 10 or within seven days of its annual organization meeting, whichever is later. A 48-hour written notice must also be given for any regular, special, adjourned or unscheduled meeting giving the time, date, location, and as complete an agenda as known at time of notice. Usually in the municipal building, and delivered to at least two previously designated newspapers. Exceptions to public notice requirements are:

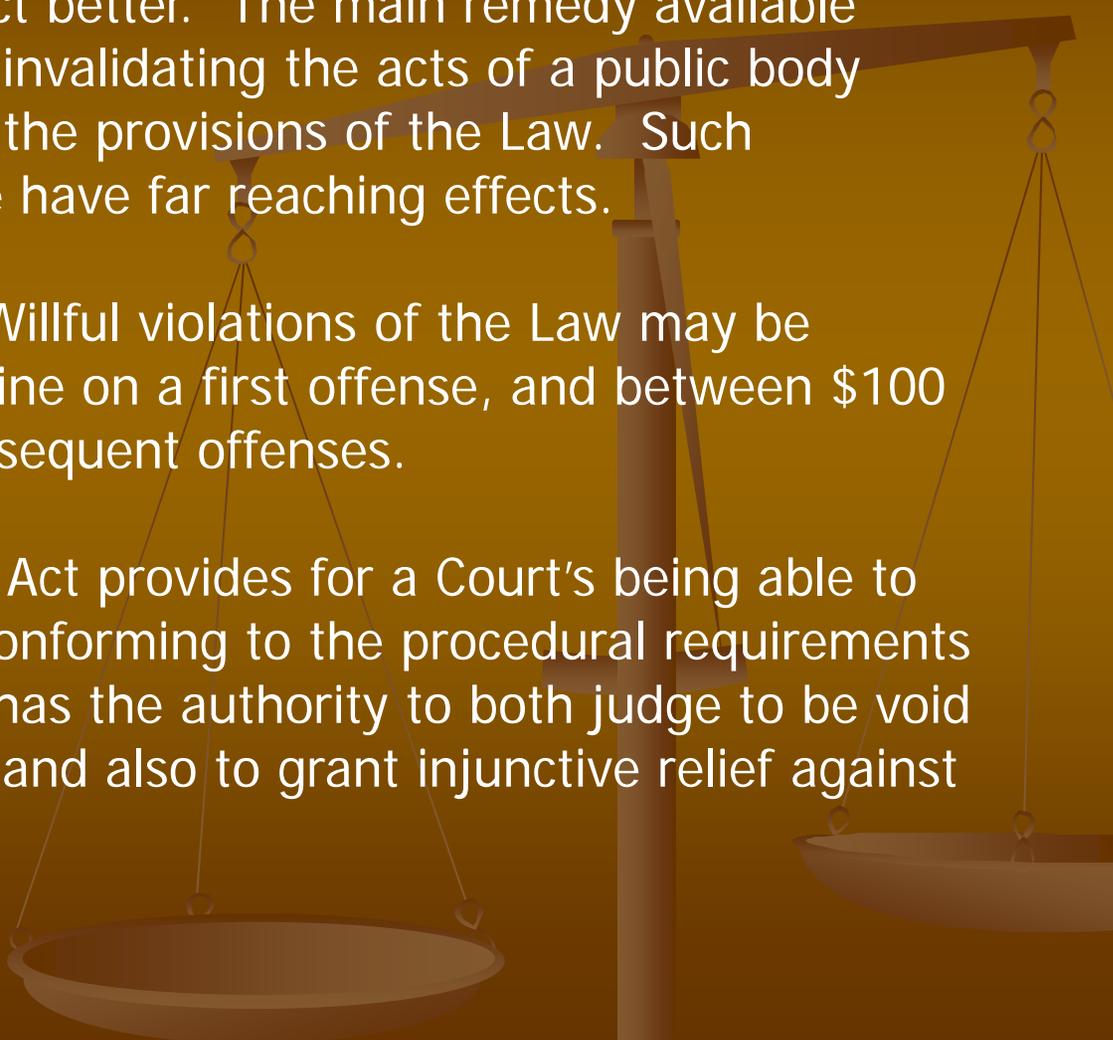
- Emergency meetings, which may be called by a three-quarters vote, may be held only if substantial harm to the public interest would result from a delay and the need for the meeting could not have reasonably be foreseen. Whenever possible, the body must provide at least 48-hour notice. Discussion must be limited to the matter which prompted the emergency meeting.
- Closed or executive sessions.



- **CLOSED SESSIONS**: Closed or “executive” sessions may be held without public notice, or during the course of a public meeting, provided that the subject matter is covered by one or more of the following legal exemptions:
 - Matters made confidential by state law, federal law, or rule by court.
 - Disclosure would result in an unwarranted invasion of individual privacy, unless the person affected consents in writing.
 - Disclosure would impair the public body’s right to receive federal or state funds.
 - Collective bargaining.
 - Lease or acquisition of property, setting of banking rates, investment of public funds if disclosure would harm the public interest.
 - Investigations into violations of law.
 - Strategies to protect public security.
 - Pending, ongoing or anticipated litigation or contract negotiation, including attorney-client privilege. The threat of litigation must be more than theoretical for this exemption to apply.
 - Personnel matters affecting employees of the public bodies, unless all parties require or consent to a public hearing. Prior to discussion of personnel, affected employees must be given notice, known as a Rice notice, which gives the employee the right to request a public hearing.
 - Proceedings that could result in a suspension, civil penalty, or loss of a license or permit.
 - Closed sessions are limited to discussion; all formal actions must be made in the open, regardless of subject matter.
 - Prior to any closed session, the body must adopt a resolution stating the general nature of the subject to be discussed and the time when the discussion can be disclosed. The precise nature of the matter discussed may be withheld until the need for the closed session has passed.
- 

- **MINUTES**: Each public body is required to keep reasonably comprehensible minutes of all its meetings. Minutes must be kept of closed sessions also. The minutes should start with a statement of the time, place and manner of notice, or in the case of an emergency meeting, a statement sufficient to satisfy the emergency meeting notice requirements. Minutes should show, at a minimum, the names of the members present, individual votes of each member, subjects considered and actions taken. Minutes must be promptly made available to the public, including minutes of a closed session, which must be made available.



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- **VIOLATIONS**: The Law sets forth two sets of remedies: Civil and criminal. The criminal remedies are not of a significant nature. They do, however, create a public sanction against officials who should both know and act better. The main remedy available under the Law is that of invalidating the acts of a public body which has acted outside the provisions of the Law. Such invalidation can of course have far reaching effects.
 - Criminal Penalties – Willful violations of the Law may be punished by a \$100 fine on a first offense, and between \$100 and \$500 on any subsequent offenses.
 - Civil Remedies – The Act provides for a Court's being able to void any action not conforming to the procedural requirements of the Law. A Court has the authority to both judge to be void the acts undertaken, and also to grant injunctive relief against violations.



**NEW JERSEY'S OPEN
PUBLIC MEETINGS ACT**

“THE SUNSHINE LAW”

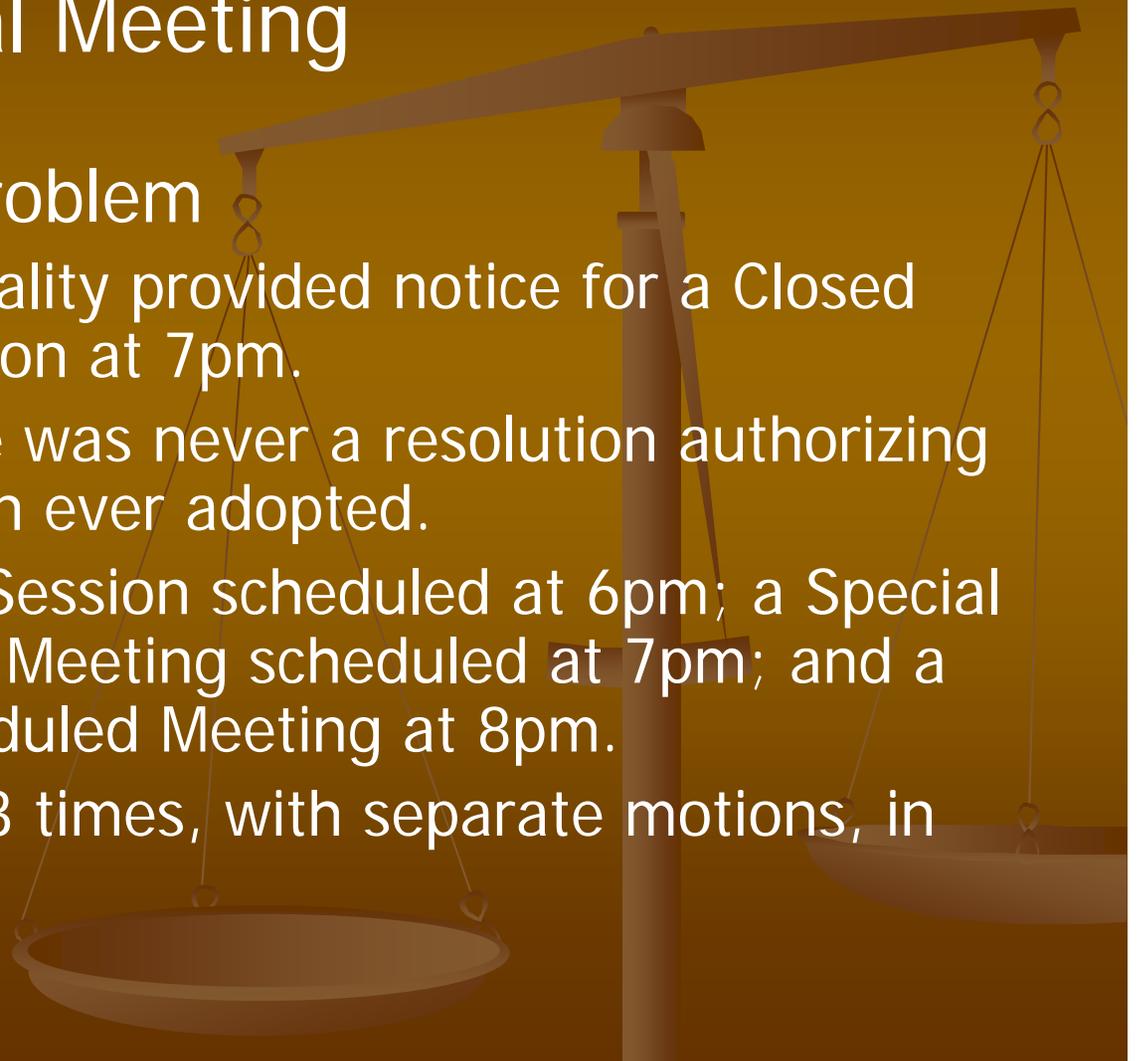
CASE STUDIES

Case Study #1

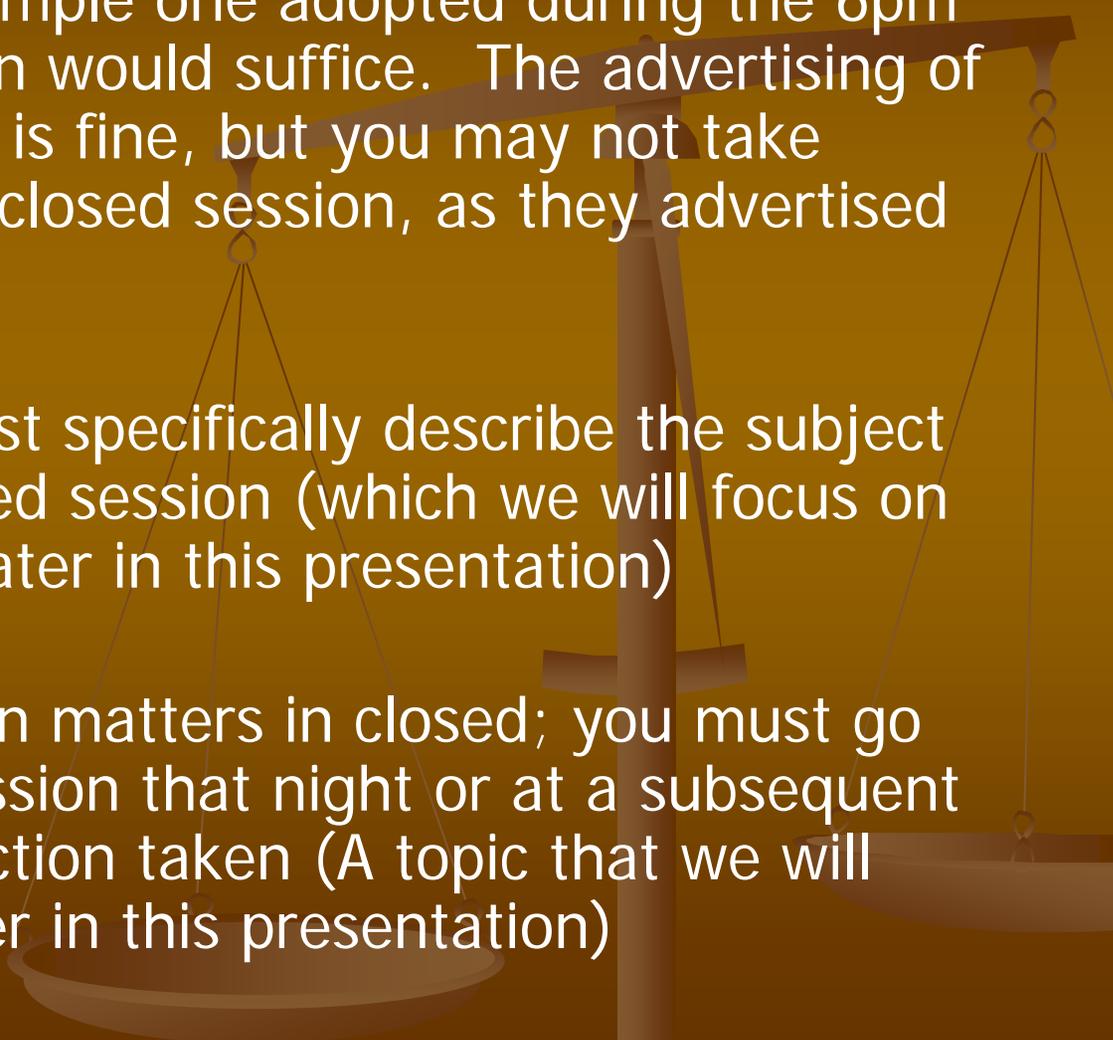
■ Notice of Special Meeting

■ Statement of Problem

- A local municipality provided notice for a Closed Executive Session at 7pm.
- However, there was never a resolution authorizing a closed session ever adopted.
- It had a Work Session scheduled at 6pm; a Special Closed Session Meeting scheduled at 7pm; and a Regularly Scheduled Meeting at 8pm.
- Voted at least 3 times, with separate motions, in closed session

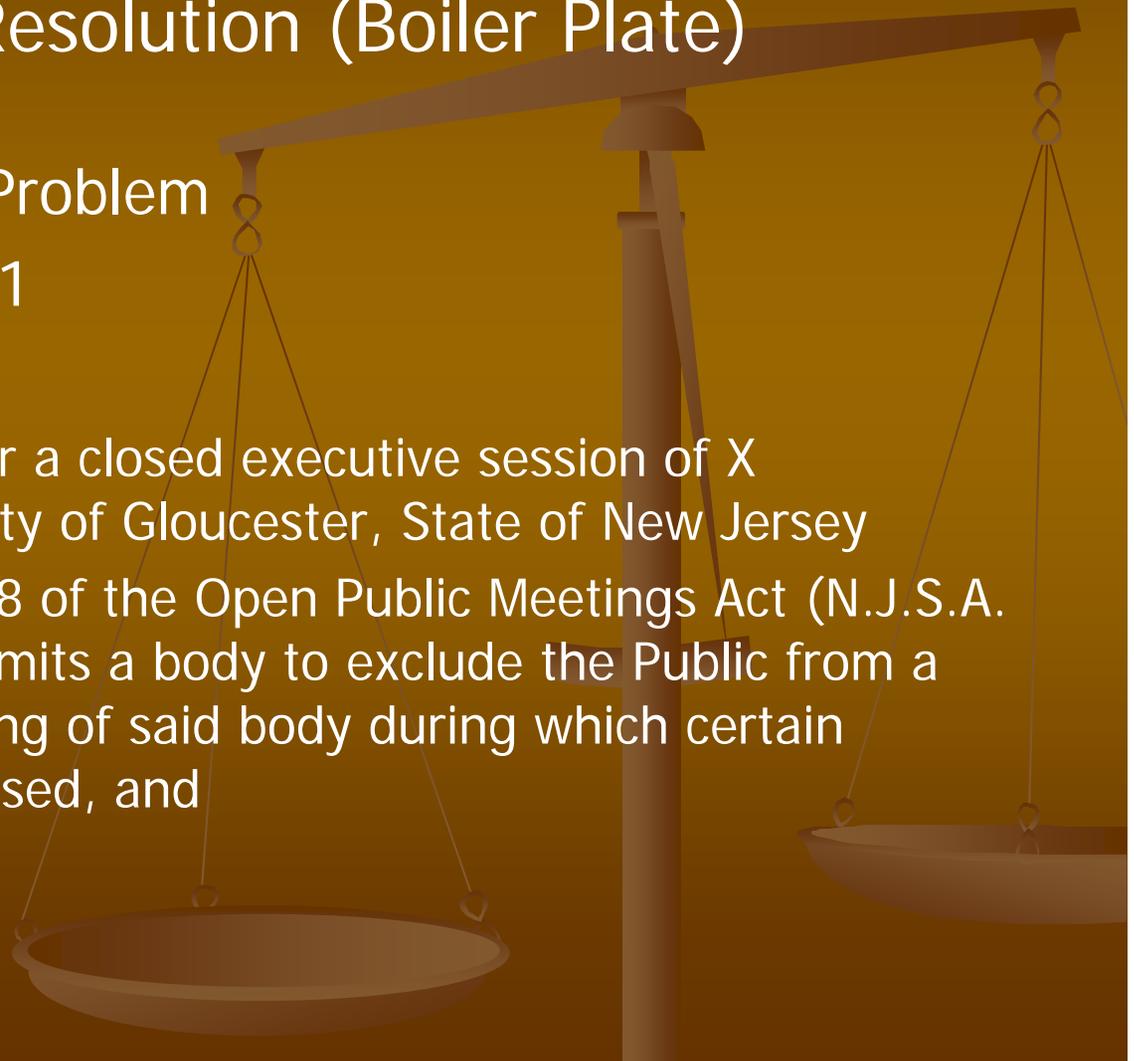


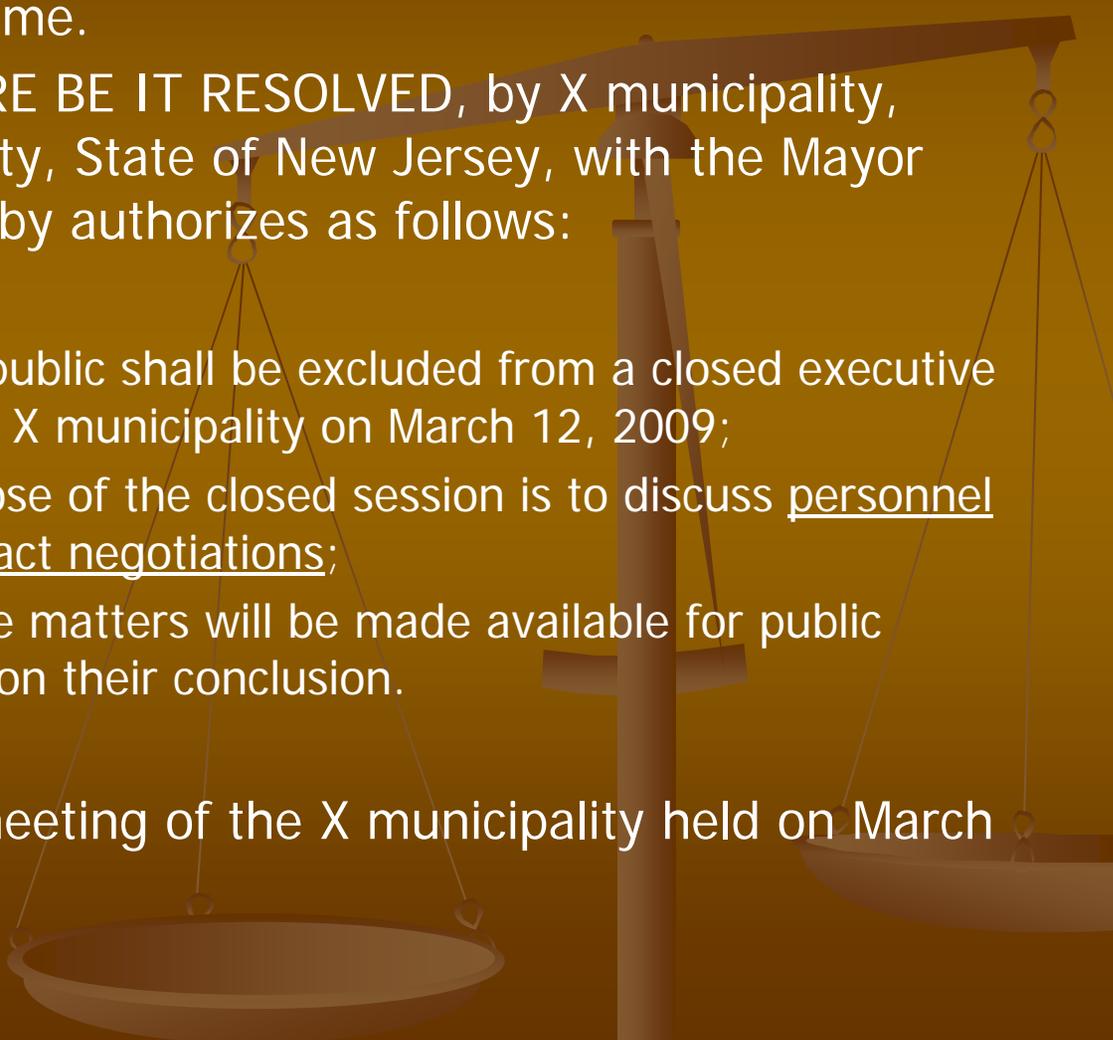
■ Proper Procedure

- A Resolution must be adopted in the open portion of a meeting, for example one adopted during the 6pm public work session would suffice. The advertising of the closed session is fine, but you may not take official action in a closed session, as they advertised they would.
 - The resolution must specifically describe the subject matter of the closed session (which we will focus on more specifically later in this presentation)
 - You cannot vote on matters in closed; you must go back into open session that night or at a subsequent meeting for any action taken (A topic that we will focus more on later in this presentation)
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Case Study #2

- Adequacy of the Resolution (Boiler Plate)
 - Statement of the Problem
 - MUNICIPALITY # 1
 - Resolution to enter a closed executive session of X Municipality, County of Gloucester, State of New Jersey
 - Whereas, Section 8 of the Open Public Meetings Act (N.J.S.A. 10:4-12b(1-9) permits a body to exclude the Public from a portion of a meeting of said body during which certain matters are discussed, and



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- WHEREAS, N.J.S.A. 10:4-12b. (8) permits the exclusion of the public from a meeting of a public body where there is discussion of “personnel”, and
 - WHEREAS, there is a need for discussion regarding said matters at this time.
 - NOW THEREFORE BE IT RESOLVED, by X municipality, Gloucester County, State of New Jersey, with the Mayor concurring, hereby authorizes as follows:
 1. That the public shall be excluded from a closed executive session of X municipality on March 12, 2009;
 2. The purpose of the closed session is to discuss personnel and contract negotiations;
 3. That these matters will be made available for public review upon their conclusion.
 - Approved at a meeting of the X municipality held on March 12, 2009.

■ MUNICIPALITY # 2

- Resolution to enter a closed executive session of X Municipality, County of Gloucester, State of New Jersey
- Whereas, Section 8 of the Open Public Meetings Act (N.J.S.A. 10:4-12b(1-9) permits a body to exclude the Public from a portion of a meeting of said body during which certain matters are discussed, and
- WHEREAS, N.J.S.A. 10:4-12b. (8) permits the exclusion of the public from a meeting of a public body where there is discussion of “personnel”, and
- WHEREAS, there is a need for discussion regarding said matters at this time.
- NOW THEREFORE BE IT RESOLVED, by X municipality, Gloucester County, State of New Jersey, with the Mayor concurring, hereby authorizes as follows:
 1. That the public shall be excluded from a closed executive session of X municipality on March 9, 2010;
 2. The general nature of the subjects to be discussed is litigation and personnel;
 3. That these matters will be made available for public review upon their conclusion.
- Approved at a meeting of the X municipality held on March 9, 2010.

■ MUNICIPALITY # 3

- Resolution to enter a closed executive session of X Municipality, County of Gloucester, State of New Jersey
- Whereas, Section 8 of the Open Public Meetings Act (N.J.S.A. 10:4-12b(1-9) permits a body to exclude the Public from a portion of a meeting of said body during which certain matters are discussed, and
- WHEREAS, N.J.S.A. 10:4-12b. (8) permits the exclusion of the public from a meeting of a public body where there is discussion of "personnel", and
- WHEREAS, there is a need for discussion regarding said matters at this time.
- NOW THEREFORE BE IT RESOLVED, by X municipality, Gloucester County, State of New Jersey, with the Mayor concurring, hereby authorizes as follows:
 1. That the public shall be excluded from a closed executive session of X municipality on May 18, 2010;
 2. The general nature of the subjects to be discussed is Contract Negotiations and Personnel;
 3. That these matters will be made available for public review upon their conclusion.
- Approved at a meeting of the X municipality held on May 18, 2010.

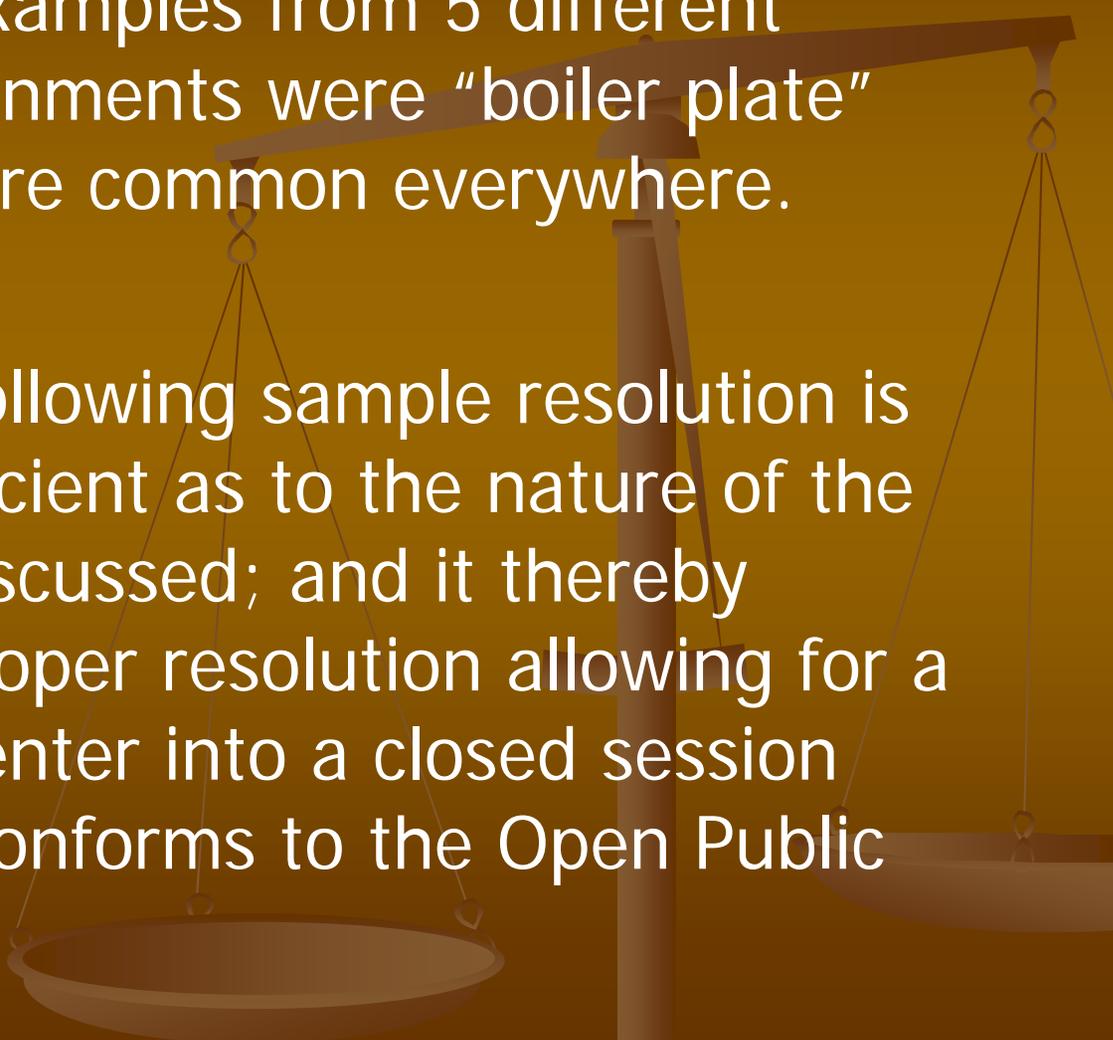
■ MUNICIPALITY # 4

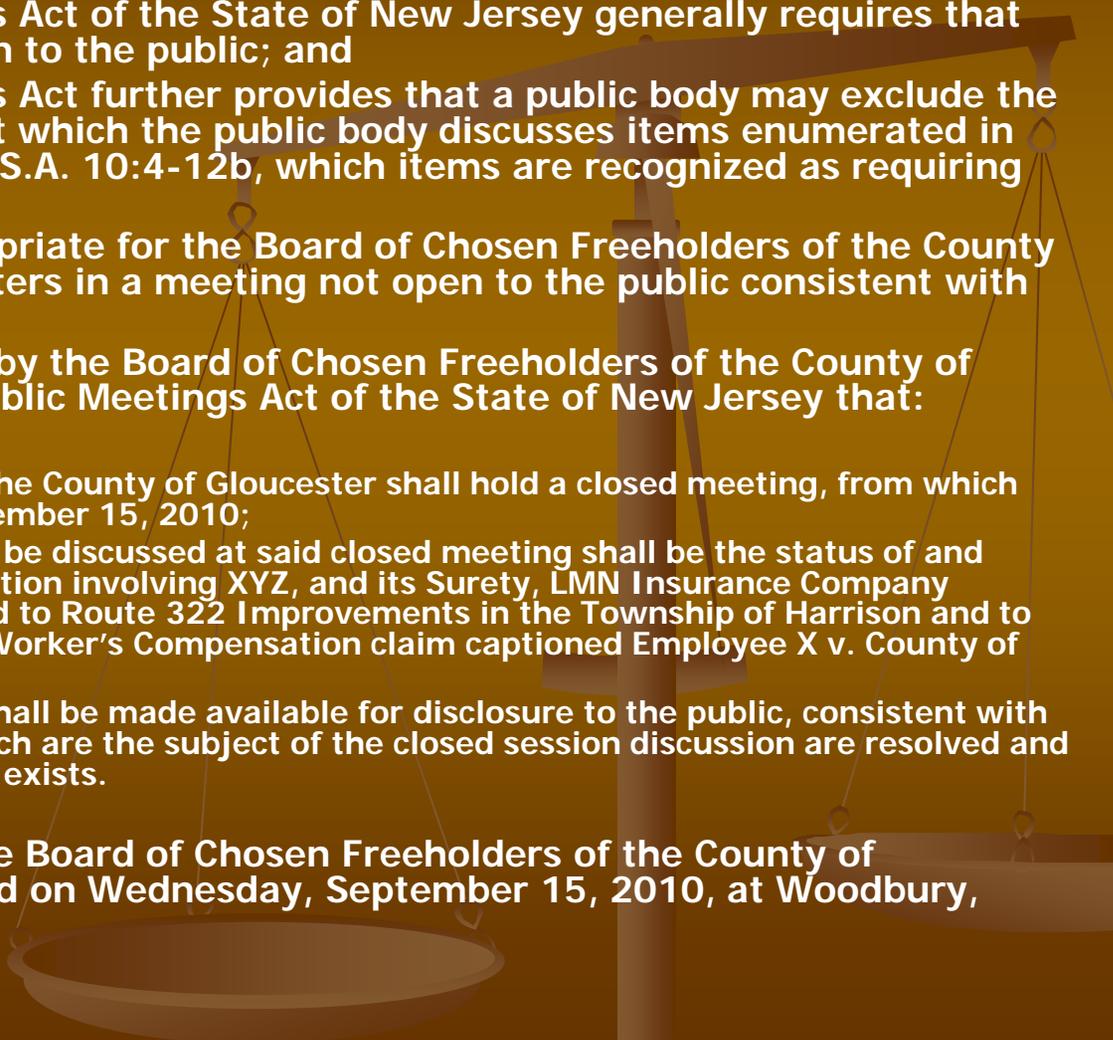
- Resolution to enter a closed executive session of X Municipality, County of Gloucester, State of New Jersey
- Whereas, Section 8 of the Open Public Meetings Act (N.J.S.A. 10:4-12b(1-9) permits a body to exclude the Public from a portion of a meeting of said body during which certain matters are discussed, and
- WHEREAS, N.J.S.A. 10:4-12b. (8) permits the exclusion of the public from a meeting of a public body where there is discussion of "personnel", and
- WHEREAS, there is a need for discussion regarding said matters at this time.
- NOW THEREFORE BE IT RESOLVED, by X municipality, Gloucester County, State of New Jersey, with the Mayor concurring, hereby authorizes as follows:
 1. That the public shall be excluded from a closed executive session of X municipality on December 30, 2004;
 2. The general nature of the subjects to be discussed is Personnel;
 3. That these matters will be made available for public review upon their conclusion.
- Approved at a meeting of the X municipality held on December 30, 2004.

■ MUNICIPALITY # 5

- Resolution to enter a closed executive session of X Municipality, County of Gloucester, State of New Jersey
- Whereas, Section 8 of the Open Public Meetings Act (N.J.S.A. 10:4-12b(1-9) permits a body to exclude the Public from a portion of a meeting of said body during which certain matters are discussed, and
- WHEREAS, N.J.S.A. 10:4-12b. (8) permits the exclusion of the public from a meeting of a public body where there is discussion of "personnel", and
- WHEREAS, there is a need for discussion regarding said matters at this time.
- NOW THEREFORE BE IT RESOLVED, by X municipality, Gloucester County, State of New Jersey, with the Mayor concurring, hereby authorizes as follows:
 1. That the public shall be excluded from a closed executive session of X municipality on July 18, 2007;
 2. The general nature of the subjects to be discussed is Matters of Contractual Nature;
 3. That these matters will be made available for public review upon their conclusion.
- Approved at a meeting of the X municipality held on July 18, 2007.

■ Proper Procedure

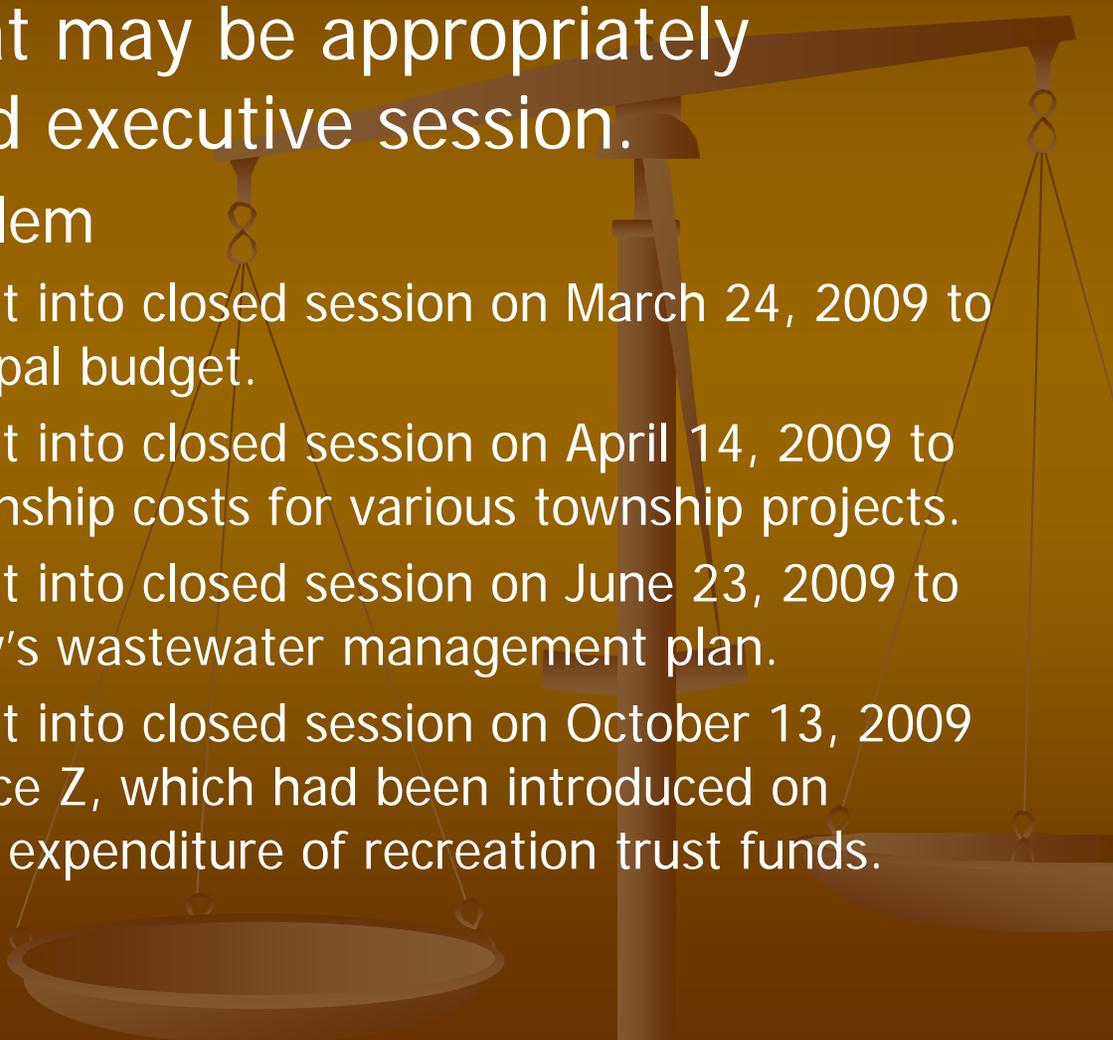
- All of these 5 examples from 5 different municipal governments were “boiler plate” language that are common everywhere.
 - However, the following sample resolution is specifically sufficient as to the nature of the matter being discussed; and it thereby constitutes a proper resolution allowing for a public body to enter into a closed session meeting, as it conforms to the Open Public Meetings Act.
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- **RESOLUTION AUTHORIZING A CLOSED SESSION OF THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF GLOUCESTER TO DISCUSS THE STATUS OF AND THE POSSIBLE SETTLEMENT OF POTENTIAL LITIGATION INVOLVING XYZ, AND ITS SURETY, LMN INSURANCE COMPANY AND TO DISCUSS THE POSSIBLE SETTLEMENT OF A WORKER'S COMPENSATION CLAIM CAPTIONED EMPLOYEE X V. COUNTY OF GLOUCESTER, PETITION NUMBER 2009 - X**

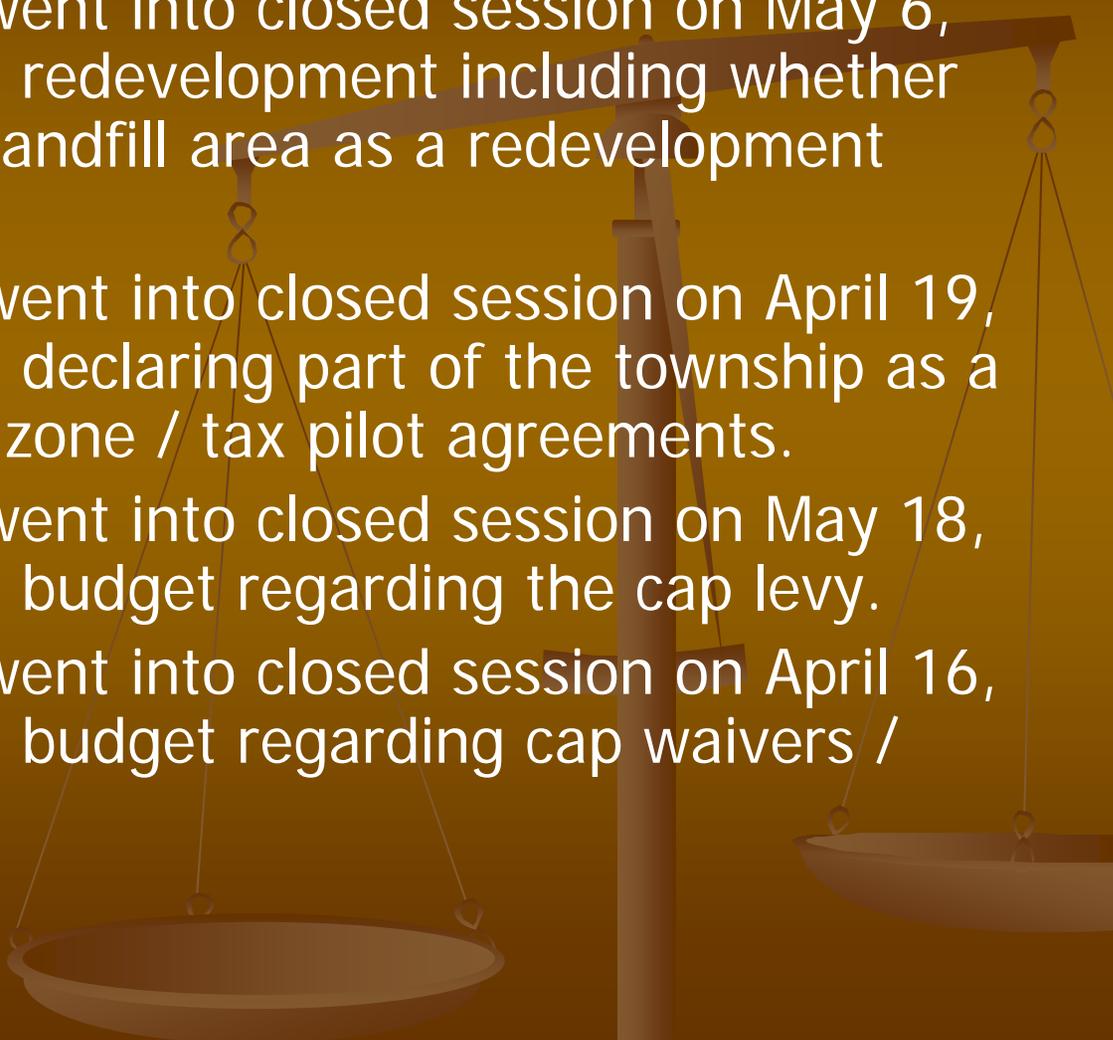
 - **WHEREAS, the Board of Chosen Freeholders of the County of Gloucester is subject to the requirements of the Open Public Meetings Act, N.J.S.A. 10:4-6 et. seq.; and**
 - **WHEREAS, the Open Public Meetings Act of the State of New Jersey generally requires that all meetings of public bodies be open to the public; and**
 - **WHEREAS, the Open Public Meetings Act further provides that a public body may exclude the public from a portion of a meeting at which the public body discusses items enumerated in the Open Public Meetings Act at N.J.S.A. 10:4-12b, which items are recognized as requiring confidentiality; and**
 - **WHEREAS, it is necessary and appropriate for the Board of Chosen Freeholders of the County of Gloucester to discuss certain matters in a meeting not open to the public consistent with N.J.S.A. 10:4-12b.**
 - **NOW, THEREFORE BE IT RESOLVED by the Board of Chosen Freeholders of the County of Gloucester, pursuant to the Open Public Meetings Act of the State of New Jersey that:**
 1. **The Board of Chosen Freeholders of the County of Gloucester shall hold a closed meeting, from which the public shall be excluded, on September 15, 2010;**
 2. **The general nature of the subjects to be discussed at said closed meeting shall be the status of and possible settlement of potential litigation involving XYZ, and its Surety, LMN Insurance Company regarding contract obligations related to Route 322 Improvements in the Township of Harrison and to discuss the possible settlement of a Worker's Compensation claim captioned Employee X v. County of Gloucester, Petition Number 2009-X;**
 3. **The minutes of said closed meeting shall be made available for disclosure to the public, consistent with N.J.S.A. 10:4-13, when the items which are the subject of the closed session discussion are resolved and a reason for confidentiality no longer exists.**

 - **ADOPTED at a regular meeting of the Board of Chosen Freeholders of the County of Gloucester, State of New Jersey, held on Wednesday, September 15, 2010, at Woodbury, New Jersey**

Case Study #3



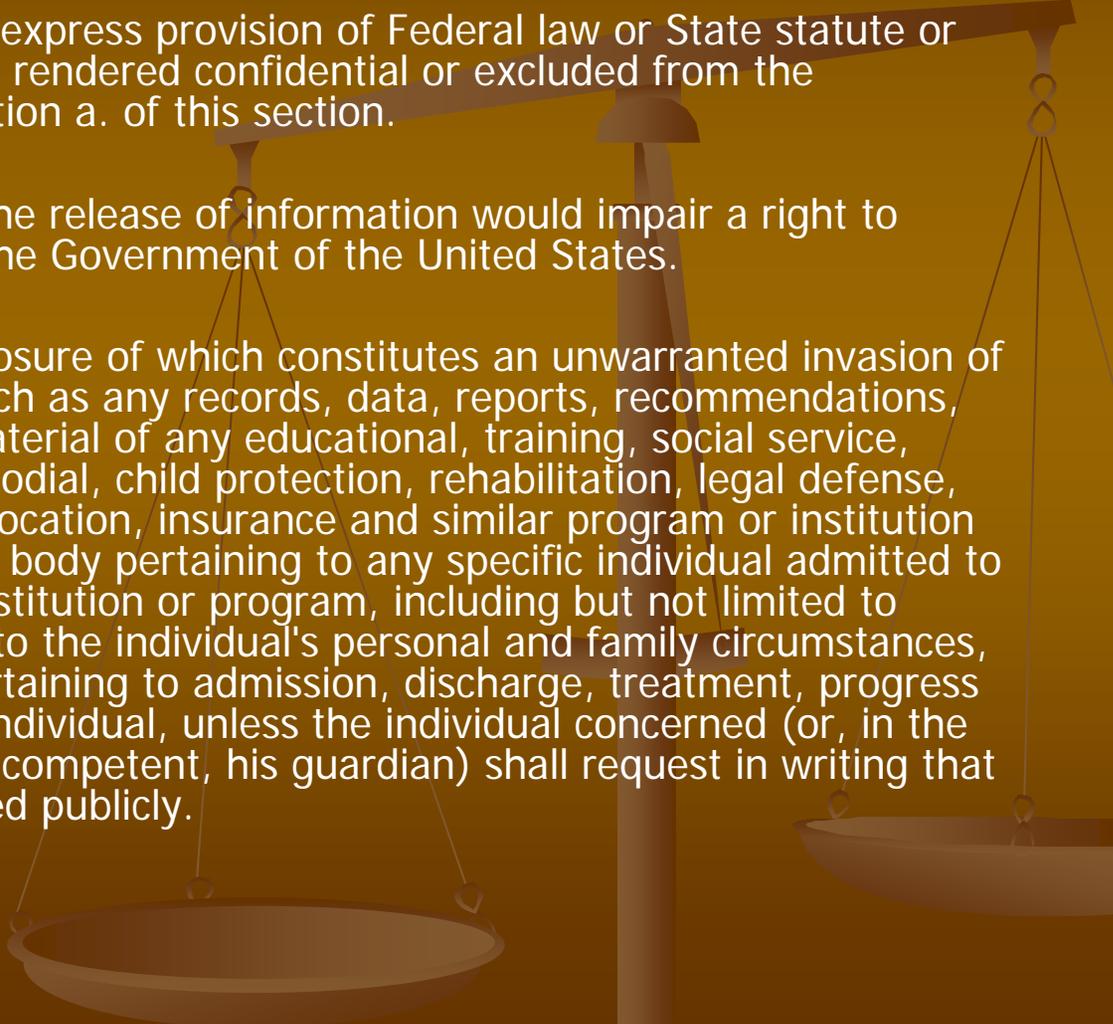
- Subject Matter that may be appropriately discussed in closed executive session.
 - Statement of Problem
 - Municipality X went into closed session on March 24, 2009 to discuss the municipal budget.
 - Municipality X went into closed session on April 14, 2009 to discuss actual township costs for various township projects.
 - Municipality X went into closed session on June 23, 2009 to discuss the County's wastewater management plan.
 - Municipality X went into closed session on October 13, 2009 to discuss ordinance Z, which had been introduced on 9/22/09 regarding expenditure of recreation trust funds.

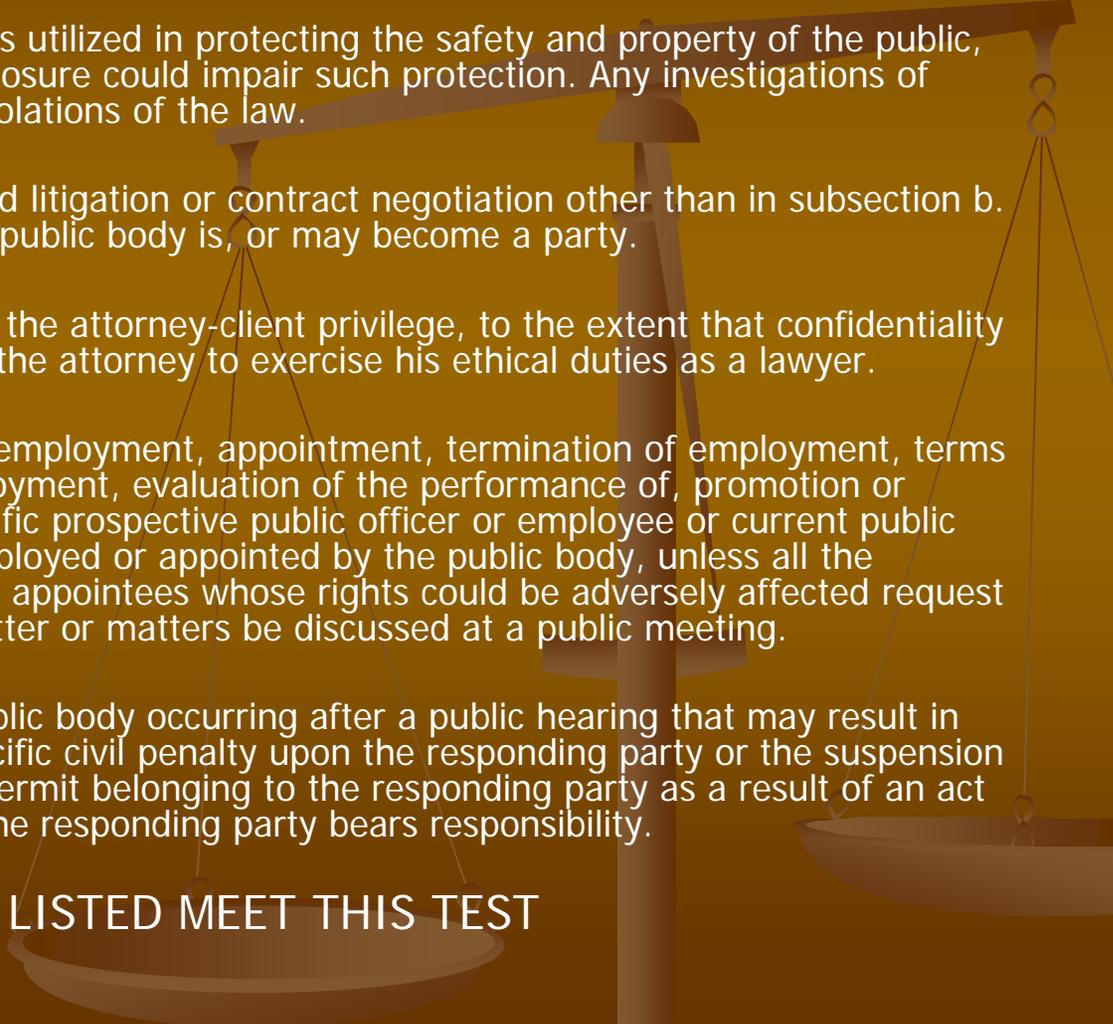
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- Municipality X went into closed session on October 20, 2009 to discuss amending their zoning ordinance by adopting an ordinance regulating campgrounds.
 - Municipality X went into closed session on May 6, 2010 to discuss redevelopment including whether to designate a landfill area as a redevelopment zone.
 - Municipality X went into closed session on April 19, 2010 to discuss declaring part of the township as a redevelopment zone / tax pilot agreements.
 - Municipality X went into closed session on May 18, 2010 to discuss budget regarding the cap levy.
 - Municipality X went into closed session on April 16, 2008 to discuss budget regarding cap waivers / surplus.

■ Proper Procedure

- Under Open Public Meetings Act, there are 9 items indicated that are permissible for closed session.

■ N.J.S.A. 10:4-12(b)(1-9)

- (1) Any matter which, by express provision of Federal law or State statute or rule of court shall be rendered confidential or excluded from the provisions of subsection a. of this section.
 - (2) Any matter in which the release of information would impair a right to receive funds from the Government of the United States.
 - (3) Any material the disclosure of which constitutes an unwarranted invasion of individual privacy such as any records, data, reports, recommendations, or other personal material of any educational, training, social service, medical, health, custodial, child protection, rehabilitation, legal defense, welfare, housing, relocation, insurance and similar program or institution operated by a public body pertaining to any specific individual admitted to or served by such institution or program, including but not limited to information relative to the individual's personal and family circumstances, and any material pertaining to admission, discharge, treatment, progress or condition of any individual, unless the individual concerned (or, in the case of a minor or incompetent, his guardian) shall request in writing that the same be disclosed publicly.
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- (4) Any collective bargaining agreement, or the terms and conditions which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body.
- (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.
- (6) Any tactics and techniques utilized in protecting the safety and property of the public, provided that their disclosure could impair such protection. Any investigations of violations or possible violations of the law.
- (7) Any pending or anticipated litigation or contract negotiation other than in subsection b. (4) herein in which the public body is, or may become a party.
- Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.
- (8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.
- (9) Any deliberations of a public body occurring after a public hearing that may result in the imposition of a specific civil penalty upon the responding party or the suspension or loss of a license or permit belonging to the responding party as a result of an act or omission for which the responding party bears responsibility.

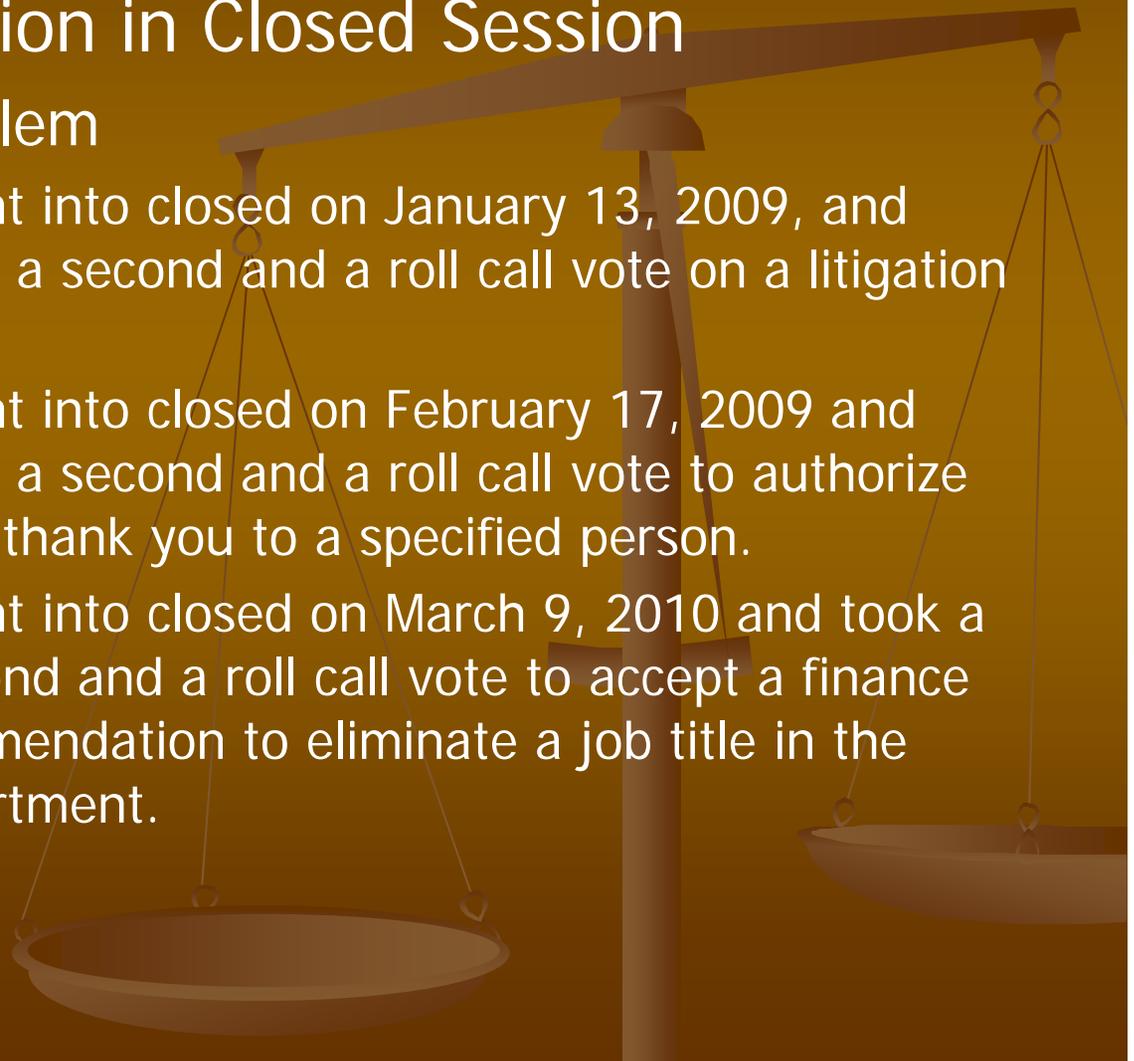
■ NONE OF THE EXAMPLES LISTED MEET THIS TEST

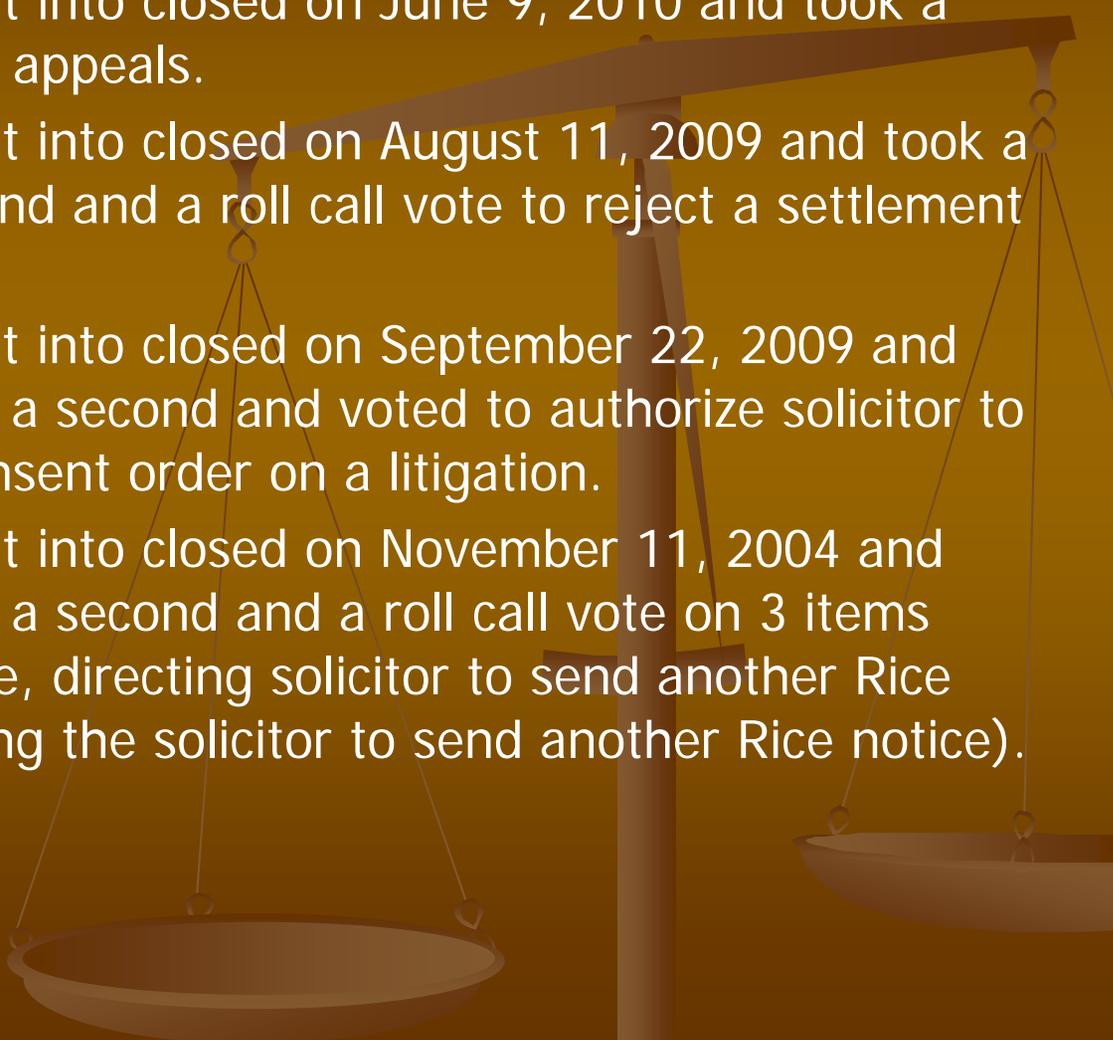
Case Study #4

■ Taking Formal Action in Closed Session

■ Statement of Problem

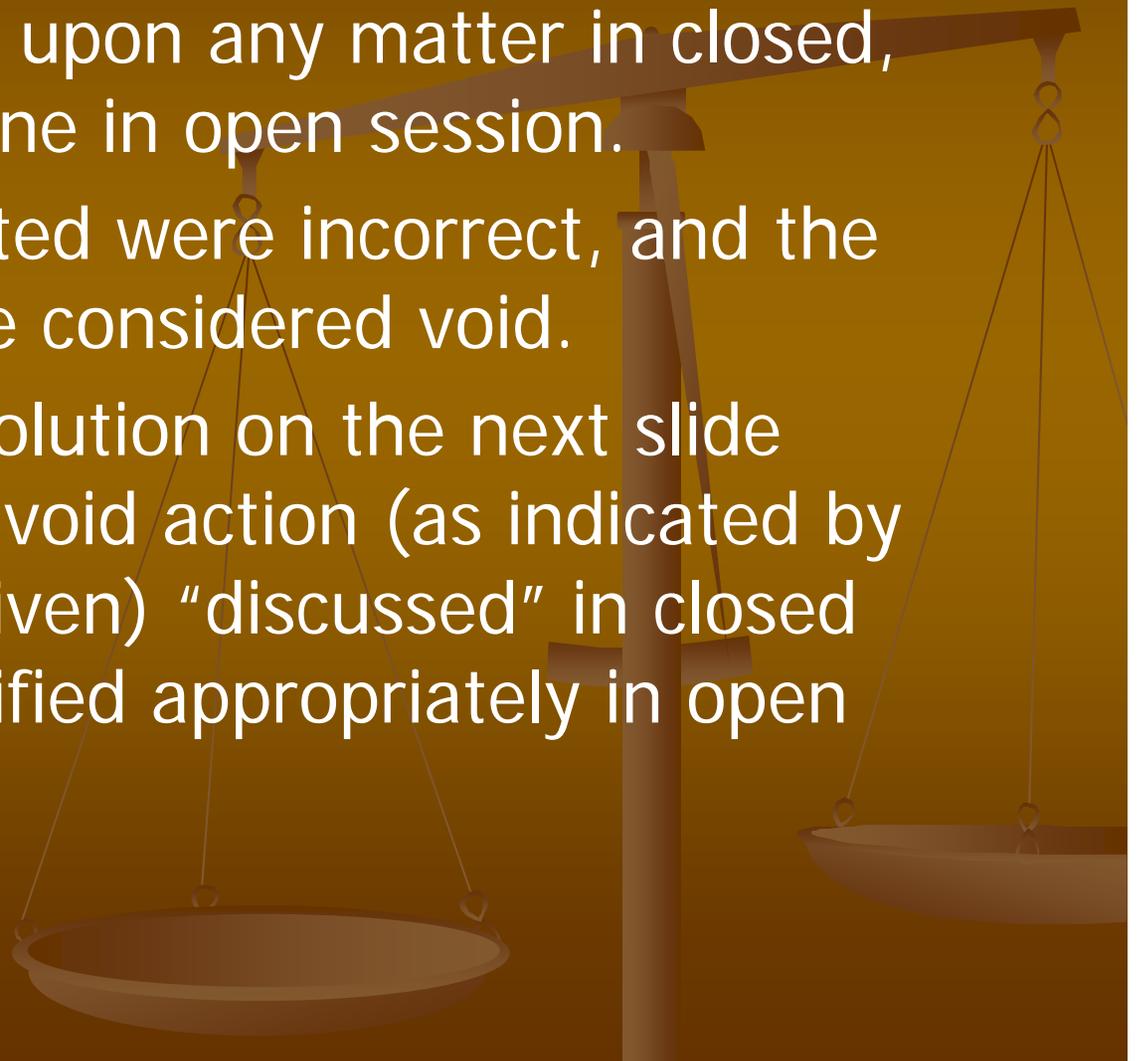
- Municipality X went into closed on January 13, 2009, and took a motion and a second and a roll call vote on a litigation matter.
- Municipality X went into closed on February 17, 2009 and took a motion and a second and a roll call vote to authorize solicitor to send a thank you to a specified person.
- Municipality X went into closed on March 9, 2010 and took a motion and a second and a roll call vote to accept a finance committee recommendation to eliminate a job title in the construction department.



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- Municipality X went into closed on April 13, 2010 and took a motion and a second and a roll call vote to adopt a resolution authorizing the solicitor to file a counterclaim. (Note: This municipality had an actual resolution number for this item)
 - Municipality X went into closed on June 9, 2010 and took a vote regarding tax appeals.
 - Municipality X went into closed on August 11, 2009 and took a motion and a second and a roll call vote to reject a settlement offer.
 - Municipality X went into closed on September 22, 2009 and took a motion and a second and voted to authorize solicitor to proceed with a consent order on a litigation.
 - Municipality X went into closed on November 11, 2004 and took a motion and a second and a roll call vote on 3 items (issue a Rice notice, directing solicitor to send another Rice notice, and directing the solicitor to send another Rice notice).

■ Proper Procedure

- A public body can only debate on a matter in closed, statute refers to this as “discuss” and they cannot act upon any matter in closed, this must be done in open session.
- All examples listed were incorrect, and the action taken are considered void.
- The sample resolution on the next slide portrays how a void action (as indicated by the examples given) “discussed” in closed session was ratified appropriately in open session.



■ **RESOLUTION AUTHORIZING AND CONFIRMING WORKERS COMPENSATION SETTLEMENT WITH EMPLOYEE X**

■ **WHEREAS**, Employee X has filed a claim against the County of Gloucester with the State of New Jersey, Department of Labor, Division of Workers' Compensation; and

■ **WHEREAS**, the parties through Legal Counsel have reached a proposed resolution of the matter, said proposal having been received by the Court for reasonableness;

■ **NOW, THEREFORE, BE IT RESOLVED** by the Board of Chosen Freeholders of the County of Gloucester that disposition of the claim filed by Employee X is hereby authorized as follows:

<u>Claimant</u>	<u>Petition No.</u>	<u>Amount Of Award</u>
Employee X	2008-X	\$21,660.00

■ **BE IT FURTHER RESOLVED** that the proper County officials be and are hereby authorized to execute such documents as shall be necessary to effectuate the disposition set forth hereinabove.

■ **ADOPTED** at a regular meeting of the Board of Chosen Freeholders, County of Gloucester and State of New Jersey held on Wednesday, May 5, 2010 at Woodbury, New Jersey.

Case Study #5

- Concluding Closed Session matters / making a record in open session
 - Statement of Problem
 - Municipality X went into closed on April 20, 2009 at 8:58 PM and discussed the following: a shared services agreement; terminating an interlocal agreement; and, abolishing a position and elevating a Part-time employee to Full-time. They returned from the closed session at 9:54 PM and immediately adopted 3 resolutions regarding the subjects of closed (which on the one hand is proper) but then adjourned at 9:57 PM. (Unfortunately, there was no record made in public session regarding the closed session topics prior to any action being taken as required by the Casino Simulcasting Case, 398 N.J. Super. 7).
 - In fact, all of the towns/counties surveyed did not show a record of a public statement regarding the closed session topics prior to taking any action on the matter that was discussed in closed, which is required.

■ Proper Procedure

- The public body must deliberate and vote at a public meeting. The deliberations must include the information discussed in the closed session.
- The example below is an example of an actual action and statement taken that is reflective of the letter and spirit of the Casino Simulcasting decision.

■ Resolution authorizing and confirming workers' compensation settlements with Employee W, X, Y, and Z.

- Resolution which will authorize and confirm settlement of the workers' compensation matters of (a) Employee W in the amount of \$7,000.00, (b) Employee X in the amount of \$4,190.25, (c) Employee Y in the amount of \$37,378.00, and (d) Employee Z in the amount of \$10,000.00, as per the recommendations of the County's workers' compensation attorneys.

■ Statement:

With regard to agenda item **A-5**, these are claims made under the New Jersey workers' compensation statute wherein County employees allege work-related injuries. The events precipitating the claims were: occupational exposure; prisoner control; heavy lifting; and, a motor vehicle accident. This resolution affirms settlement and conclusion of the respective matters that were discussed in closed session.



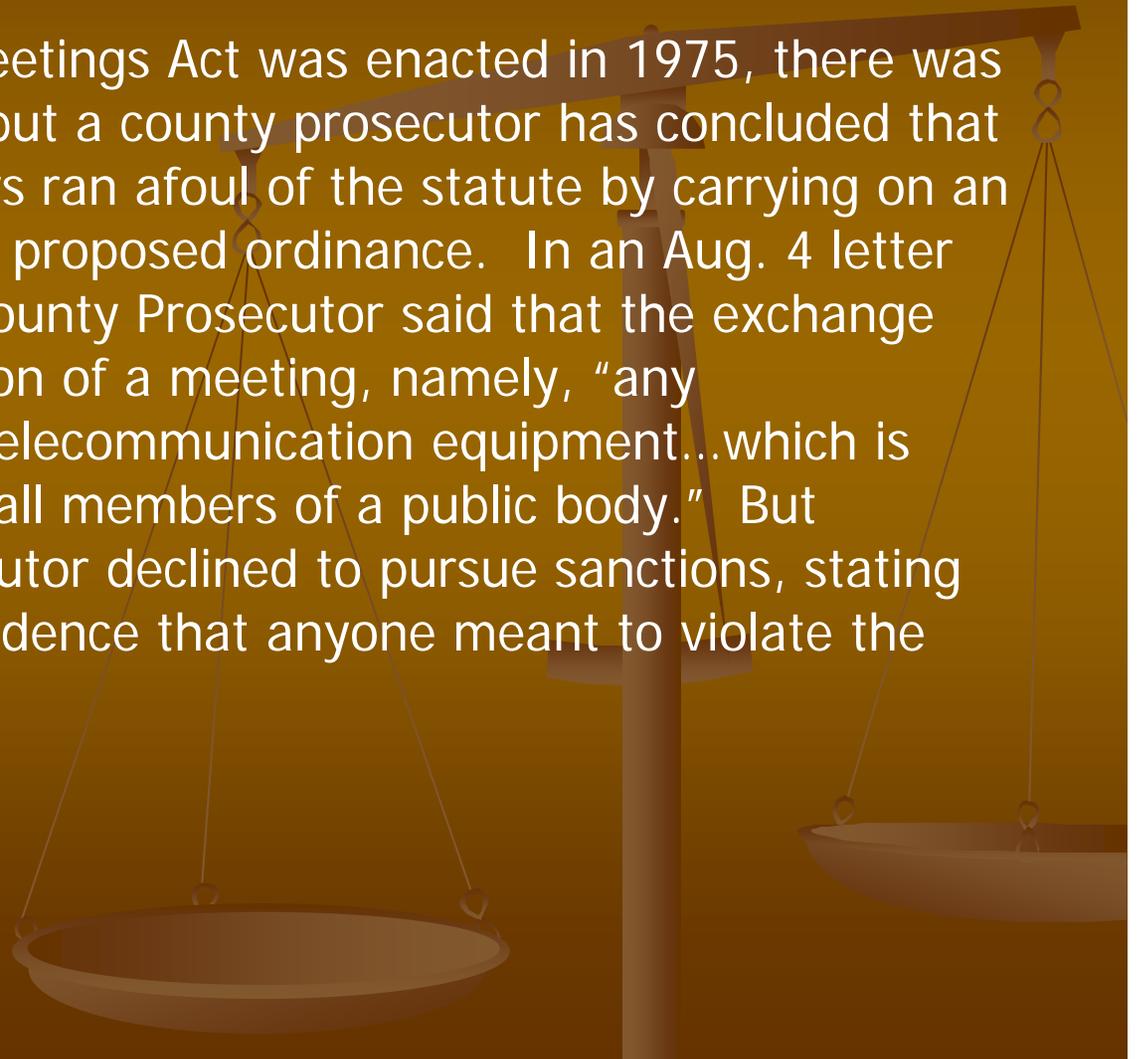
NEW JERSEY'S OPEN PUBLIC MEETINGS ACT

“THE SUNSHINE LAW”

WHAT'S NEW

- E-MAIL DISCUSSION ON ORDINANCE FOUND TO VIOLATE OPEN PUBLIC MEETINGS ACT

When the Open Public Meetings Act was enacted in 1975, there was no such thing as e-mail, but a county prosecutor has concluded that Evesham council members ran afoul of the statute by carrying on an e-mail discussion about a proposed ordinance. In an Aug. 4 letter opinion, the Burlington County Prosecutor said that the exchange met the statutory definition of a meeting, namely, "any gathering...by means of telecommunication equipment...which is attended by, or open to, all members of a public body." But Burlington County Prosecutor declined to pursue sanctions, stating there was not enough evidence that anyone meant to violate the law.



Concluding Remarks

Questions & Answers

Thank you for your Participation

