March 4, 2005

The Hon. Patrick Lynch
Attorney General
150 S. Main Street
Providence, RI 02903

Dear Attorney General Lynch:

On March 1, the Senate Judiciary Committee held a hearing on a bill, sponsored by Sen. Frank Ciccone, specifying that the Open Meetings Act's restriction on the use of "electronic communication" to hold meetings include "telephonic communication." While the ACLU supported this clarification, we were puzzled as to why it was even necessary. I was stunned to learn from Sen. Ciccone that the bill was introduced in order to overturn a contrary reading of the statute your office rendered in an advisory opinion in December. Because that advisory opinion has enormous adverse consequences for open government and overturns over 25 years of precedent, I am writing to urge you to withdraw that opinion.

The advisory opinion (ADV OM 04-08), in response to a request from the Public Utilities Commission, addressed the question of whether the Commission, which is comprised of three voting members, would violate the Open Meetings Act "if it conducted a properly noticed meeting with one or two commissioners participating via a conference telephone." The opinion answered that question in the negative. This conclusion was reached notwithstanding explicit language in the Act declaring that: "No meeting of members of a public body or use of electronic communication shall be used to circumvent the spirit or requirements of this chapter … [and] discussions of a public body via electronic communication shall be permitted only to schedule a meeting." R.I.G.L. §42-46-5(b).

The opinion came to this rather startling conclusion by determining that the General Assembly did not intend the term "electronic communication" to encompass telephonic communication. It largely reached this conclusion by examining a few dictionary definitions of "electronic" – including one as recent as 2004 which defines "electronic" as referring to "implemented on or by means of a computer" – and deciding that those definitions do not encompass telephonic communication.

One significant problem with this analysis is that it fails to acknowledge that the term "electronic communication" that is contained in the Open Meetings Act dates back to 1976, the year the statute was adopted. To refer to 2004 definitions to determine the legislature's intent in using this phrase in 1976 turns statutory interpretation on its head. "Had the legislature wished to

prohibit telephonic communications in the OMA," claims the opinion, "they easily could have done so." But that is precisely what the General Assembly did in using this term in 1976. Telephones were, and remain, devices that are considered "electronic communication." Indeed, a quick Internet search for the word "telephone" shows definitions describing the device as "electronic equipment." *See*, e.g., http://www.wordreference.com/definition/telephone. The 1976 General Assembly was most certainly not thinking of computers, or even fax machines, when it used this phrase. The advisory opinion fails to even hint at what legislators might have intended by the term, if not telephonic communication.

Just as revealing, until this advisory opinion was issued, the Act's reference to "electronic communication" had been uniformly interpreted to include telephones. A 1988 R.I. ACLU report on Open Meetings Act compliance in the state cites a 1978 opinion from then-Attorney General Julius Michaelson, in which he held that a "telephone poll" by a public body was in violation of the OML. As far as we can tell, every Attorney General since then has held, or at least assumed, that the reference to "electronic communication" in the Act includes telephone communication.

Indeed, as recently as last year, an opinion *from your office* specifically referred to this statutory language in addressing an open meetings complaint concerning alleged illegal telephonic communications. It is worth noting that, while that opinion rejected the complaint, it was not because it deemed telephone conversations uncovered by the term, but instead because the specific phone calls at issue did not involve "official actions" on behalf of a public body. *Cross v. Town of Exeter*, Advisory Opinion 04-03, March 17, 2004. In fact, that opinion favorably cites a 1994 Attorney General advisory opinion, *Dempsey v. Rhode Island Ethics Commission*, OM 94-14, which explicitly interpreted the term "electronic communication" to include telephones.[1]

This latest advisory opinion tries to mitigate the untoward natural consequences of its ruling by suggesting some guidelines on how such telephonic "meetings" would need to be conducted (e.g., the proceedings would have to be "audible," and votes taken by roll call). But that cannot obscure the fact that, under this opinion, a seven-member Town Council could post a meeting to be held at the Chairperson's house, with all other members at their own homes participating by speakerphone.

[1] As a second ground for its conclusion, the opinion also argues that "a search of the General Laws reveals a pattern in which references to 'electronic,' or 'electronic communications' are separate from references to 'telephonic,' or 'telephonic communications.'" The opinion cites four statutes for this proposition. Two of them – references to sections of the Uniform Commercial Code – are erroneously cited. The terms appear only in the "official comments" to those sections, which are copyrighted comments of the NCCUSL, not the General Assembly. In any event, adoption of a nationally-drafted code like the UCC hardly speaks to legislative intent in an open meetings statute. More importantly, this argument proves too much, for one could just as easily point to other statutes that would directly undermine the opinion's view that "electronic" refers to computer communications. The General Assembly has differentiated those terms as well. *See*, e.g., R.I.G.L. §11-49.1-2(1), which refers to "electronic device ***or*** computer hardware or software." (emphasis added).

There are many obvious reasons why the legislature wanted to restrict the use of electronic – including telephonic – meetings. The physical presence of a "public body" which is so crucial to the idea of a public "meeting" disappears when business is conducted by phone. And no matter how good the speakerphone, members of the public who are listening may not be able to tell who is speaking at any given time. It is thus not surprising that the only explicit exception to the "electronic communication" restriction that the General Assembly approved involves a purely administrative task – the scheduling of a meeting.

The ramifications of the advisory opinion's unprecedented interpretation of the Open Meetings Act are enormous. We therefore urge you to withdraw the opinion and reinstate the unbroken line of rulings from your predecessors that have recognized that the Open Meetings Act's restrictions on "electronic communication" were meant to apply to telephone calls.

Your prompt attention to this request would be appreciated.

Sincerely,

Steven Brown
Executive Director

cc: Sen. Frank Ciccone