Douglas L. Blankenship
Deputy Attorney General
Department of Law

March 5, 1991

663-91-0351

465-3600

Mental Health Lands
working group

James L. Baldwin
Assistant Attorney General
Governmental Affairs Section

This will confirm oral advice given to you on Friday, March 1, 1991, concerning whether the meetings of a mental health lands working group are covered by the Open Meetings Act (AS 44.62.310). During our Friday meeting you informed us that the working group consists of the opposing parties in Weiss v. State, certain legislators, and a representative of the Alaska Municipal League. You also informed us that the purpose of the meeting is to begin settlement discussions to resolve the legal issues in dispute in Weiss.

We believe that the so-called "working group" is not a public body covered by the Open Meetings Act. As we understand it, the working group is not a formally established entity with a charge to take specific action or give specific advice. Nor are the activities of the group financed by public money. Rather, it consists of individuals representing opposing parties in a lawsuit, potential parties to the same lawsuit, and legislators who may or may not sponsor legislation to implement a settlement. Specifically, the attorney general and the commissioner of natural resources will represent the state, and counsel for the Weiss plaintiffs will also be present.

We are aware of no Alaska case that makes meetings with principal department heads subject to the Open Meetings Act. Nor is there similar authority applicable to meetings between department heads and individual legislators. A 1981 informal opinion of this office construes the Open Meetings Act as applied to meetings of ad hoc groups. 1981 Inf. Op. Att'y Gen. (May 11; 366-655-81). There we concluded:

> Despite the use of the words "agency" and "agencies," we believe . . . that the law does not apply to the meeting together of persons who merely occupy positions within an agency or within two or more agencies.

Id. at 2.

You informed us that the membership of the group is not set by formal appointment and may change from meeting to meeting. The identity of each participant remains intact and will not merge into a collective entity. Any agreement reached will be the product of arm's length negotiation. In other words, agreement will not be reached through the taking of a vote of those present. This further supports our conclusion that the working group will not be taking collective action as an administrative "body" as that term is used in the Open Meetings Act. The Act clearly contemplates bodies that take collective action by requiring votes to be conducted such in a manner that the public will know the vote of each member. AS 44.62.310(a). Additionally, a vote must be taken before a body may convene in executive session. AS 44.62.310(b).

Even if the group assembled for these discussions were covered by AS 44.62.310, the subjects under consideration could be discussed in executive session under AS 44.62.310(c)(1) and (3). Topics to be discussed will adversely affect the finances of the state in this extremely prolonged and costly litigation. Further, the communications anticipated to occur are largely privileged.

In order to be successful, settlement negotiations must be candid. For this reason, settlement negotiations are not admissible in evidence, either as proof of the merits of a claim or amount in dispute, or to impeach the participants with prior inconsistent statements. Evidence Rule 408. The purpose of this protection is to encourage free and open negotiations, as well as the nonjudicial resolution of disputes. See Alaska Rules of Court, Commentary to Evidence Rule 408 at 379. Certainly actions that foster meaningful negotiations with a view toward ending extremely costly litigation are consistent with public policy, and actions that thwart such discussions will clearly have an immediate adverse affect on the state's finances.

Further, the communications among some of the participants are likely privileged under the attorney/client, executive, and deliberative process privileges. The primary purpose of the meeting is to discuss settlement of the litigation under the supervision of counsel. It is relatively well settled that discussions with counsel about pending litigation need not be conducted in public session. See, e.g., Hui Malama Aina O Ko'olau v. Pacarro, 666 P. 177, 183 (Hawaii App. 1983); McKay v. Bd. of County Comm'rs, 746 P.2d 124 (Nev. 1987); Port of Seattle v. Rio, 559 P.2d 18, 23 (Wa. App. 1977). The fact that others besides the attorney general's clients are present to provide information does not defeat the essential nature of the gather-

ing, which is to begin negotiations of the litigation afresh.

The Alaska Supreme Court has acknowledged that an important public policy is served by encouraging settlement negotiations. In Anchorage School Dist. v. Anchorage Daily News, 779 P.2d 1191, 1193 (Alaska 1989), the court determined that a public agency could not, in the circumstances presented by the case, agree to keep the terms of a settlement agreement confidential. Here, however, there is no question of secret terms. The purpose of the meeting is to foster a climate in which the parties can discuss potential alternative forms of settlement; the purpose is not to enter into a secret agreement. To the extent that any settlement of this litigation involves appropriations or the enactment of laws, the public debate has yet to begin. To the extent that any executive decision is to be made, recommendations made by counsel to his clients, by staff to the chief executive, and by lower echelon staff to their superiors are privileged as a matter of law, Doe v. Superior Court, 721 P.2d 617, 625-26 (Alaska 1986), and not subject to the Open Meetings Act.

This gathering will aid the decision-making process if the parties have the opportunity to engage in frank discussion; it will probably be of little use if the legislator and plaintiff members feel constrained by the presence of the press to decline to discuss the weakness of the parties' legal and policy arguments.

The situation might be different if the group had some power to take action or make recommendations as a group. Cf. Int'l Ass'n of Firefighters v. Thorpe, 632 P.2d 408, 411 (Okla. 1981). But it does not. Each person can only return to his or her staff or constituents with information or recommendations. The participants are negotiators who must attempt to reach an accord and then return to their principals for action resulting in settlement of the case. Limited to that capacity, the participants are arguably not an administrative body covered by the Open Meetings Act. Joiner v. City of Sebastapol, 125 Cal. Rptr. 299 (Cal. App. 1981); Washington School Dist. No. 6 v. Superior Court, 541 P.2d 1137 (Ariz. 1975). If the settlement requires approval and implementation by a public body, that action will be covered by the Act.

We hope this memorandum accurately records the oral advice given.

JLB:jr