



1 Plaintiff now moves for summary judgment dismissing each affirmative defense and  
2 granting the relief demanded in the complaint or alternatively to extend the time for discovery to  
3 be completed and this action to be ready for trial.  
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5 **APPLICABLE STANDARD**

6 A party moving for summary judgment must present evidence in admissible form that  
7 establishes that there are no material issues of fact in existence and that he is entitled to judgment  
8 as a matter of law.  
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10 It is well settled that in order to be entitled to a preliminary injunction, a movant must  
11 clearly demonstrate (1) a likelihood of ultimate success on the merits, (2) irreparable injury  
12 absent granting of the preliminary injunction, and (3) a balancing of the equities in the  
13 movant's favor (see, e.g., *Doe v Axelrod*, 73 N.Y.2d 748, 536 N.Y.S.2d 44, 532 N.E.2d 1272;  
14 *Doe v Poe*, 189 A.D.2d 132, 595 N.Y.S.2d 503).  
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16 **FORMAL JUDICIAL ADMISSIONS**

17 Defendants have admitted the following in their Answer:

18 That a number of legislators met in an office in the Liberty Building with County  
19 Executive Giambra on the evening of December 8, 2005 (Answer to ¶ 5 of the Amended  
20 Verified Complaint)  
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22 The Defendants' Fourth Affirmative Defense admits that meetings in violation of the  
23 Open Meetings Law took place on February 12, 13 and 14 with Court-appointed mediators and  
24 were countenanced by the Court itself.  
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2 **ARGUMENT**

3 **OPEN MEETINGS LAW VIOLATIONS**  
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5 As evidenced by the affidavit of Albert DeBenedetti sworn to on the 27<sup>th</sup> day of  
6 December, 2004 incorporated into the Amended Verified Complaint as Exhibit “B”, there was a  
7 private meeting held on December 8, 2004 in the Liberty Building between County Executive  
8 Joel Giambra and others with 10 members of the legislature. This meeting does not fall within  
9 the ambit of a political caucus because members of differing political affiliations were present.  
10 Public business was discussed and based on the votes had thereon an inference can be made that  
11 there was a quid pro quo arrangement made where some legislators would support the sales tax  
12 increase in exchange for certain items to be included in the budget and for a sharing of the sales  
13 tax revenue. Mr. DeBenedetti avers in ¶ 8 of his affidavit “That during said meeting considerable  
14 discussion and deliberation took place regarding disputed items in the tentative budget proposed  
15 by County Executive Giambra and the Legislature’s amendments thereto.” Additionally the  
16 Legislature failed to provide public notice of the special meeting at a reasonable time prior  
17 thereto (Public Officers Law § 104 [2]). Mr. Collucci’s affidavit provided by the Defendant’s in  
18 opposition to my prior motion for a preliminary injunction corroborates the affidavit of Mr.  
19 DeBenedetti.  
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21  
22 There is no dispute that the Erie County Legislature is a public body as that term is defined in  
23 Public Officers Law § 102(2). Nor is it seriously disputed that the meetings that took place on December  
24 8, 2004, February 12, 13 and 14<sup>th</sup> of 2005 were meetings as that term is defined in Public Officers Law §  
25 102(1).

The Defendants do not allege that these meetings fall within any of the exemptions set forth in  
Public Officers Law § 108 or that a quorum of the Erie County Legislature was not present.

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3 The Defendants raise four affirmative defenses in their answer: failure to state a cause of action;  
4 lack of standing; mootness; and three of the private meetings were countenanced by the Court itself.

5 **FIRST AFFIRMATIVE DEFENSE SHOULD BE DISMISSED**

6 In order to state a cause of action under the Open Meetings Law plaintiff must establish that if  
7 any private or secret meetings or assemblages of a public entity are held when a quorum of its members  
8 is present and when the topics for discussion and eventual decision are matters of public business a  
9 violation of the New York Open Meetings Law occurs (see Matter of Orange County Pub., Div. of  
10 Ottaway Newspapers v Council of City of Newburgh, 60 A.D.2d 409, affd 45 N.Y.2d 947). As set forth  
11 above it is clear that various private meetings of members of the Erie County Legislature, in a number  
12 sufficient to constitute a quorum, and that did not fall within any of the exemptions of the Open  
13 Meetings Law where held to discuss the 2005 Erie County Budget. (see also Buffalo Evening News v.  
14 Buffalo Municipal Housing Authority, 134 Misc.2d 155) Public bodies may not escape public view by  
15 claiming that they did not formally convene when, in fact, a meeting took place at which business of  
16 public interest was discussed (Matter of Oneonta Star Div. of Ottaway Newspapers v Board of  
17 Trustees, 66 A.D.2d 51, 54).

18 **SECOND AFFIRMATIVE DEFENSE SHOULD BE DISMISSED**

19 In regards to the affirmative defense that plaintiff lacks standing to maintain this action Public  
20 Officers Law § 107(1) provides that any aggrieved person shall have standing to enforce the provisions  
21 of the Open Meetings Law against a public body by the commencement of a proceeding pursuant to  
22 Article 78 of the CPLR and/or by an action for declaratory judgment and injunctive relief.

23 Plaintiff is aggrieved by the violations of the Open Meetings Law by the Erie County  
24 Legislature because I was deprived of viewing the debate and discussion of public business of my  
25 representatives by the acts and omissions of the Defendants (Perez v. City University, 195 Misc.2d 16,  
753 N.Y.S.2d 641 (N.Y.Sup. 11/20/2002)).



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Buffalo, New York

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