

Tennessee Open Meetings Act

Tennessee Open Meetings Act, 1974
(T.C.A. § 8-44-101 et seq.)



Tennessee Open Meetings Act (cont.)

An attempt to balance the need of the public to know what government is doing with the need of members of governing bodies to be able to deliberate and reach best decisions.



Policy of Sunshine or Transparency*

The policy for this state is that the formation of public policy and decisions is public business and shall not be conducted in secret.

*As reflected in the Open Meetings Law (T.C.A. § 8-44-101)

Open Meetings or the Sunshine Law

T.C.A. § 8-44-102(a):

All **meetings** of any **governing body** are declared to be public meetings open to the public at all times, except as provided by the constitution of Tennessee.

[emphasis added]

Open Meetings or the Sunshine Law (continued)

- Construed in favor of the public
- Provides right to attend, observe and **hear** the proceedings
- Does not guarantee the right to participate in or speak at meetings.

Open Meetings or the Sunshine Law (continued)

T.C.A. § 8-44-102 (b) :

- (1)(A) “Governing body” means: The members of any public body which consists of two (2) or more members, with the authority ***to make decisions for or recommendations to a public body on policy or administration . . .***

(2) “Meeting” means the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter. “Meeting” does not include any on-site inspection of any project or program.

Public Body: Examples

T.C.A. § 8-44-102 (b) “public body” includes:

- School board
- County commission
- City council
- County election commissions
- Board of commissioners of a utility district
- Board of Mayor and Alderman
- Any other county or municipal board or commission

Chance Meetings

◆ Chance meeting: T.C.A. § 8-44-102(c)

Nothing in this section shall be construed as to require a chance meeting of two (2) or more members of a public body to be considered a public meeting. ***No such chance meetings, informal assemblages, or electronic communication shall be used to decide or deliberate public business in circumvention of the spirit or requirements of this part.***

"Adequate Public Notice"

- T.C.A. § 8-44-103
- Both regularly scheduled and not previously scheduled meetings require adequate public notice.
- Notice under the Open Meetings Act is in addition to any other notice required by law.

“Adequate Public Notice” (cont.)

- Requires review of the facts and circumstances, not a specific formula.
- Timing: deemed sufficient if “interested citizens” are given reasonable opportunity to exercise right to be present at meeting.
 - ◆ *Remember- the “right” is to be present, not to participate.*
- Content: must reasonably describe proposed action.

What Constitutes “Adequate Public Notice” for Special Called Meetings?

- ◆ Three-prong test for “adequate public notice” for special called meetings:
 - Notice must be posted in a location where a member of the community could become aware of such notice;
 - Contents of the notice must reasonably describe the purpose of the meeting or the action proposed to be taken; and
 - Notice must be posted at a time sufficiently in advance of the actual meeting in order to give citizens both an opportunity to become aware of and to attend the meeting.

Tennessee Courts on Executive Sessions



If experience should prove that the public interest is adversely affected by open meetings involving pending or prospective litigation, disciplinary hearings, promotion and demotion decisions, prospective land purchases, labor negotiations, etc., it is the Legislature, not the Judiciary, that must balance the benefits and detriments and make such changes as will serve the people and express their will.

*Lakeway Publishers, Inc. v. The Civil Service Board for the City of Morristown, 1994 WL 315919 at * 3 (Tenn. Ct. App.) (July 5, 1994).*

Attorney-Client Privilege and Executive Session

- Attorney-client privilege is common law principle.
- Communication between attorney and client should be free, without concern of disclosure.
- Op. TN. Atty. Gen. 80-16: only advisory sessions with attorneys exempted through operation of the privilege.

Attorney-Client Privilege and Executive Session (cont.)

- ◆ Limited to discussion of present and pending litigation.
- ◆ Clients may provide counsel with facts and information regarding the lawsuit.
- ◆ Counsel may advise as to legal ramifications of those facts and information.
- ◆ Any discussion regarding what action to take (whether settlement or otherwise) shall be in an open meeting.

Smith County Education Association v. Anderson, 676 S.W. 2d 328, 334 (Tenn. 1984). Also see *Putnam County Education Association v. Putnam County Commission*, 2005 WL 1812624 (Tenn. Ct. App. August 1, 2005).

And so . . .

◆ Executive Sessions:

- Rule #1, your attorney **MUST** be there.
- Rule #2, pending or threatened litigation must be the basis of the executive session.
- Rule #3, you cannot use the executive session to deliberate or to make decisions.
- Rule #4, yes these rules apply to settlement offers as well.

Meeting Minutes and Records

- ◆ T.C.A. § 8-44-104(a) states:
 - Minutes shall be:
 - ◆ Promptly and fully recorded and
 - ◆ Open to public inspection.
 - Minutes shall include:
 - ◆ Record of persons present and
 - ◆ All motions, proposals, and resolutions offered and results of votes taken.

Public vs. Secret Voting

- ◆ T.C.A. § 8-44-104(b) states:
 - All votes must be public (whether vote or ballot) and not secret.
 - ◆ Statute specifies that “public vote” means vocal expression of either “aye” or “nay”, in that order.
 - ◆ Remember, the law requires the ability to *hear* the proceedings, including votes,
 - If roll call votes are taken, the vote must be recorded indicating individual votes.

Electronic Participation

- ◆ Members of Boards and Commissions **DO NOT** have the authority to email one another and deliberate towards or make decisions on public business via email. See *Johnston v. Metropolitan Government of Nashville and Davidson County*, 320 S.W. 3d 299 (Tenn. Ct. App. 2009).
- ◆ ***Electronic communications about public business, including e-mails and text messages, are public records, even if the communications device is privately owned.***

Internet Forums

- ◆ 2009 legislation allows counties, cities, metropolitan forms of government, and school boards to set up Internet Forums.
 - Used to discuss (not decide) government business.
 - Decisions to be made at an adequately noticed public meeting.
- ◆ T.C.A. § 8-44-109: requirements for setting up an Internet Forum include submission of a plan to the OORC and receipt of a Letter of Compliance.

What Happens When an Open Meetings Violation Occurs?

- ◆ Remedial nature: T.C.A. § 8-44-105
 - If a meeting is held in violation of the Act, any action taken is void and of no effect; nullification of action rather than penal remedy.
 - Commitments affecting public debt that are otherwise legal are not nullified or voided.
 - The Open Meetings Act does not make a distinction between technical and substantive violations of its provisions. *Zselvay v. Metropolitan Government of Nashville and Davidson County*, 986 S. W.2d 581 (Tenn. Ct. App. 1998).

What Happens When an Open Meetings Violation Occurs? (continued)

Enforcement: T.C.A. § 8-44-106

- Circuit, chancery and other equity courts;
- Court's written findings of fact and conclusions of law and final judgment filed with minutes of governing body;
- Mandatory permanently enjoinderment of any person adjudged in violation from further violation of this part;
- Each separate occurrence of meetings not held in accordance with law is a separate violation; and
- Jurisdiction retained for one (1) year from entry of judgment; written reports due semiannually from defendants.

So who can I talk with about the business of the board/committee?

- ◆ Board/committee staff
- ◆ Legal advisor
- ◆ The Mayor, City Council members, members of other boards or committees, etc., so long as they aren't also members of your board or committee
 - A member of City Council can freely talk to a member of County Commission or the School Board, for instance
- ◆ Members of the public, so long as they don't have a quasi-judicial matter pending before the board or committee
- ◆ BUT, you can't use conversations with a third party as a way of getting around the Open Meetings Act!

The Bottom Line is.....

“[M]embers of a public body may freely discuss their grandchildren, the price of a cruise, the weather, events occurring in the former Soviet Union, books and movies, their vacations, and a host of other topics of interest to their personal lives or their professional lives..

The Bottom Line is.....

“They may not discuss, however, the items set on the next agenda for the public body on which they serve, nor subjects within the jurisdiction or scope of responsibility of the public body. Items that can properly appear on an agenda of the public body and subjects on which it is empowered to act or advise are similarly forbidden for non-complying discussion by the members of the public body.

The Bottom Line is.....

“When the topics for discussion and decision are such as would appropriately be addressed at a meeting of the public body, then the Open Meetings Act is applicable to the subject matter of the discussion.”

- Memorandum Opinion and Order of Chancellor Daryl Fansler, *McElroy v. Strickland*, Knox County Chancery Court, October 5, 2007.



QUESTIONS?
