

Tennessee Open Meetings Law: A Presentation to Bradley County and the City of Cleveland

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Tennessee Open Meetings Act

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



Tennessee Open Government Statutes

- The Statutes 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.



Open Meetings or the Sunshine Law

- ◆ T.C.A. § 8-44-101(a): The general assembly hereby declares it to be the policy for this state that the formation of public policy and decisions is public business and shall not be conducted in secret.
 - The Act is to be construed most favorably to the public and applies to every meeting of a governing body except where statutory exclusion exists.
 - The Act does not guarantee citizens the right to participate in meetings but rather to attend and observe.

See Souder v. Health Partners, Inc., 997 S.W.2d 140 (Tenn. Ct. App. 1998)



Open Meetings or the Sunshine Law (cont.)

- ◆ 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]
- ◆ Tenn. Code Ann. Section 49-13-111(h) states, “The meetings of the governing body of a public charter school shall be deemed public business and must be held in compliance with title 8, chapter 44, part 1.

Open Meetings or the Sunshine Law (cont.)

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:

- County commission
- City council
- School Board
- Board of directors of an authority
- Board of commissioners of a utility district
- Any other County or Municipal Board or Commission

Compliance

- ◆ Establish a compliant meeting process
 - Meeting dates: review for governmental and religious holidays
 - Meeting preparation: time needed for preparation and distribution of materials for consideration at meeting
 - Agendas: clearly identify issues on which actions need to be taken
 - Record keeping: promptly prepare minutes, circulate timely for review

Compliance (cont.)

- ◆ Bylaws or rules of procedure aid in the orderly conduct of business in a meeting in compliance with the Act.
 - Regular scheduled meeting date, time and location
 - Special called meeting: authority to call and notice timeframe
 - Assignment of responsibility for records (preparation and retention)
 - Quorum (required number of voting members who must be present in order for business to be legally transacted at meeting)(not reference to the number who must vote)
 - Proxy/designee/ex officio
 - Agenda and order of actions

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"

- ◆ Adequate Public Notice: T.C.A. § 8-44-103
 - Regular meeting: previously scheduled by statute, ordinance or resolution (also by bylaws)
 - Special meeting: not pursuant to previous scheduling but adequate notice still required
 - Section supplemental to other provisions of law requiring notice

“Adequate Public Notice” (cont.)

- ◆ Adequate Public Notice: T.C.A. § 8-44-103
judged on facts and circumstances, not single formula
 - Notice timing: notice is 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.
 - Notice content: notice must reasonably described proposed action.

The Test for “Adequate Public Notice”

- ◆ Tennessee Court of Appeals for the Eastern Section outlined the following three-prong test for “adequate public notice”. *Englewood Citizens for Alternate B v. Town of Englewood*, No. 03A01-9803-CH-00098, slip op. (E.S.Tenn.Ct.App. June 24, 1999).
 - 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.

Compliance

- ◆ Notice posting: “location” where interested persons can become aware of meeting
 - Publication: Newspaper vs. internet;
Op. TN. Atty. Gen. 00-09
 - Physical posting: entity office vs. general public location
- ◆ Meeting Location
 - Physical layout: Space sufficiency and acoustics for both members and interested citizens
 - Access:
 - ◆ Procedures for entry to building, signage

Compliance (cont.)

- ◆ **ADA accommodations:** large print or Braille, sign language interpreter, availability of parking near meeting location
- ◆ **Meeting Notice**
 - **If any accommodations are needed for individuals with disabilities who wish to be present at the meeting, please contact** (individual's name) **at** (telephone number and TTY)(by writing to X at Y). **Requests should be made as soon as possible but at least** (time frame) **prior to the scheduled meeting in order for the entity to provide such needed aid or service.**

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

- ◆ Executive or closed sessions
 - Attorney-client privilege
 - ◆ Common law principle that communication between attorney and client should be free, without concern of disclosure.
 - ◆ Op. TN. Atty. Gen. 80-16 states that the TN Supreme Court in *Dorrier v. Dark*, 537 S.W.2d 888(1976) made “clear that actual decisions on matters of litigation (made after receiving the advice of counsel) are subject to the requirement that meetings be open. Only advisory sessions with attorneys would be exempted through operation of the privilege.”

Local Government Modernization Act of 2005 and Executive Sessions

- ◆ Local Government Audit Committees established in accordance with T.C.A. Section 9-3-405 may hold confidential, nonpublic executives sessions to discuss the following:
 - Public records exempted from public access or inspection;
 - Litigation;
 - Audits or investigations;
 - Information protected by federal law; and
 - Reports of suspected illegal, improper, wasteful or fraudulent activity.

Local Government Modernization Act of 2005 and Executive Sessions (cont.)

- ◆ Local Government Modernization Act of 2005 provides that:
 - No other matters may be discussed in the confidential, non-public executive sessions;
 - Agenda for meeting must disclose in general terms the nature of the discussion to be held in the executive session; and
 - If a meeting has both public and executive session matters, public matters must be conducted first.

Local Government Modernization Act of 2005 and Executive Sessions (cont.)

- ◆ Local Government Modernization Act of 2005 provides that:
 - Chair of meeting must announce adjournment of public portion of meeting and that remainder of meeting will be held in executive session pursuant to Tenn. Code Ann. Section 9-3-405(d);
 - Executive session commences when all unauthorized persons have departed; and
 - A full governing board, council, commission and equivalent body may hold an executive session under same constraints.

Executive Sessions (cont.)

- Quasi Executive Session:
 - ◆ Op. TN. Atty. Gen. 80-50 states that a request by a governing body for certain persons to leave an open meeting is not directly prohibited by Act. However, such a request may not coerce a waiver of right to be present. Departure *must* be on voluntary basis.

Meeting Minutes and Records

- ◆ T.C.A. § 8-44-104(a) states:
 - Minutes shall be:
 - ◆ promptly and fully recorded
 - ◆ open to public inspection
 - Minutes shall include:
 - ◆ record of persons present
 - ◆ 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
 - If roll call votes are taken, the vote must be recorded indicating individual votes

Electronic Participation

- ◆ **Electronic Participation: T.C.A. § 8-44-108**
 - Limited to boards, agencies and commissions of state government and “municipal governing bodies organized under title 6, chapter 18, and having a city commission of three (3) members, and having a population of more than two thousand five hundred (2,500), according to the 2000 federal census or any subsequent federal census”.
 - ◆ Op. TN. Atty. Gen. 99-15: county school board member not allowed to participate by telephone.



What Happens When a 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.
 - 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 a Violation Occurs? (cont.)

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 are to be filed with minutes of governing body.
- Court “shall permanently enjoin any person adjudged by it in violation of this part from further violation of this part. Each separate occurrence of such meetings not held in accordance with this part constitutes a separate violation.”
- Jurisdiction retained for one (1) year from entry of judgment; written reports due semiannually from defendants.

Compliance

- ◆ Individual board member compliance:
 - Op. TN Atty. Gen. 98-047 states that a member-elect who “has completed all the requirements necessary to qualify to perform the official duties of a member and whose term has begun” is subject to the Act.
 - Review materials in advance of meeting:
 - ◆ Pose questions to staff, not other members, in advance of meeting.

Compliance (cont.)

- ◆ Op. TN. Atty. Gen. 99-144 meetings between single member of a governing body and a third party consultant are not “meetings” of governing body subject to the Act as long as not used to deliberate towards or make a decision.
- Avoid discussions about board business outside of published meetings:
 - ◆ Establish “walls” for social settings.
 - ◆ Avoid “respond all” e-mails even if only cc’ing other members.
- Prior to vote engage in open and public discussion of item during meeting.

Office of Open Records Counsel

- ◆ Established by Public Chapter 1179, Acts of 2008
- ◆ Effective July 1, 2008
- ◆ Directed to establish educational programs and materials regarding open meeting laws in Tennessee that are to be made available to the public and to public officials.
- ◆ Directed to collect data on open meetings inquiries and problems and provide educational outreach on open meetings laws.
- ◆ Guides the Advisory Committee on Open Government in reviewing and providing written comment on any proposed legislation regarding open meetings law.

OORC Contact Information

For questions regarding open meetings laws or open records issues, contact Elisha Hodge at:

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