County Technical Assistance Service
INSTITUTE for PUBLIC SERVICE

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Open Government

Dear Reader:

The following document was created from the CTAS website (ctas.tennessee.edu). This website is maintained by CTAS staff and seeks to represent the most current information regarding issues relative to Tennessee county government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other CTAS website material.

Sincerely,

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Open Government

Reference Number: CTAS-2419

Open Meetings Act (Sunshine Law)

Reference Number: CTAS-2420

In enacting the Tennessee Open Meetings Act, the General Assembly declared it to be "the public policy of the state that the formation of public policy and decisions is public business and shall not be conducted in secret." T.C.A. § 8-44-101. As recognized by the Tennessee Court of Appeals, "Our Open Meetings Law is perhaps one of the most comprehensive and extensive in the nation. There are no exceptions except those situations which may be in conflict with the constitution." *Lakeway Publishers, Inc. v. Civil Service Board*, 1994 WL 315919 (Tenn. Ct. App.). Ironically, the General Assembly itself is not subject to this law. *See Mayhew v. Wilder*, 46 S.W.3d 760 (Tenn. Ct. App. 2001).

Requirements of the Open Meetings Act

Reference Number: CTAS-2421

The Open Meetings Act, commonly referred to as the "Sunshine Law," is found in T.C.A. § 8-44-101 *et seq*. The requirements of this law are as follows:

1. All meetings of any governing body are declared to be public meetings and must be open to the public at all times. T.C.A. § 8-44-102;
2. Adequate public notice of all regular and special meetings must be given. T.C.A. § 8-44-103;
3. The minutes of the meetings must be recorded and open to public inspection and at a minimum must contain a record of the persons present, all motions, proposals and resolutions offered, the results of any votes taken, and a record of individual votes in the event of a roll call. T.C.A. § 8-44-104(a); and
4. All votes must be by public vote, public ballot, or public roll call; secret votes are prohibited. T.C.A. § 8-44-104(b).

Any action taken in a meeting in violation of any of the foregoing requirements is void. T.C.A. § 8-44-105.

Meeting Agendas

Reference Number: CTAS-2488

Local government legislative bodies (i.e., the full county legislative body) are required to make their meeting agendas accessible to the public at least 48 hours prior to the meeting. Posting the agendas on the local government's website satisfies this requirement. Local government legislative bodies are authorized to consider matters not on the posted agenda as long as the bodies follow their bylaws or properly adopted rules and procedures and comply with all other applicable state laws. T.C.A. § 8-44-110.

Meetings Declared Public

Reference Number: CTAS-2422

All meetings of any governing body are declared to be public meetings. T.C.A. § 8-44-102. "Meeting" is statutorily defined as "the convening of a governing body of a public body to make a decision or to deliberate toward a decision on any matter." T.C.A. § 8-44-102(b)(2). "Governing body" is defined in the statute as "any public body consisting of two (2) or more members, with the authority to make decisions for or recommendations to a public body on policy or administration." T.C.A. § 8-44-102(b)(1). Notably, while county mayors are ex officio members of the county legislative body, they are not considered to be members of the county legislative body for purposes of the Open Meetings Act. Also, one or more members of a local legislative body can meet with one or more members of their state legislative delegation to exchange information (and not deliberate) without falling under the Open Meetings Act. T.C.A. § 8-44-102.

The Tennessee Supreme Court has held that the act was intended to apply to "any governmental board, commission, committee, agency or authority whose members have authority to make policy or administrative decisions. "*Dorrier v. Dark*, 537 S.W.2d 888 (Tenn. 1976). In *Dorrier*, the Supreme Court

created a two-part test for determining whether an organization is subject to the Sunshine Law: (1) whether its origin and authority may be traced to state, city or county legislative action, and (2) whether its members have authority to make decisions or recommendations on policy or administration affecting the conduct of the business of the people.

The application of the Sunshine Law is very broad. Included, for example, are planning commission meetings (Op. Tenn. Att'y Gen. 88-132 (July 29, 1988)), conferences between a public body and its attorney except those concerning pending litigation (Smith County Education *Ass'n v. Anderson*, 676 S.W.2d 328 (Tenn. 1984)), local school board meetings (*Dorrier*), tenure hearings *(Kendall v. Board of Education*, 627 F.2d 1 (6th Cir. 1980)), work sessions of a legislative body (*State ex rel. Akin v. Town of Kingston Springs*, 1993 WL 339305 (Tenn. Ct. App. 9/8/93)), an out-of-state meeting of some school board members and the superintendent (*Neese v. Paris Special School District*, 813 S.W.2d 432 (Tenn. Ct. App. 1990)), meetings of a county hospital board (Op. Tenn. Atty. Gen. 01-042 (March 19, 2001)), dismissal or suspension hearings for tenured teachers (Op. Tenn. Att'y Gen. 98-111 (June 12, 1998)), councils on aging and senior citizen center boards (Op. Tenn. Atty. Gen. 84-310 (November 19, 1984)), and the board of directors of a preferred provider organization (PPO) that was a subsidiary of a county hospital district (*Souder v. Health Partners, Inc.*, 997 S.W.2d 140 (Tenn. Ct. App. 1998)).

The statute declares that a meeting occurs whenever a public body convenes for one of two purposes: to make a decision or to deliberate toward a decision. T.C.A. § 8-44-102(b)(2). Therefore, it is not necessary that a decision be reached before the Sunshine Law applies. The statute does state that a chance meeting between two or more members of a public body should not be considered a public meeting subject to the terms of the act. However, the same statute goes on to warn that chance meetings shall not be used to deliberate public business in circumvention of the spirit of the act. T.C.A. § 8-44-102. In the past, courts have held that informal assemblages of a governing body at which public business is discussed and deliberated, including informal telephone discussions between members of a governing body, fall under the Sunshine Law. *See, e.g., Littleton v. City of Kingston*, 1990 WL 198240 (Tenn. Ct. App. 1990). Because of how broadly the courts and the legislature have interpreted this act, the attorney general's office offered the following advice: "Two or more members of a governing body should not deliberate toward a decision or make a decision on public business without complying with the Open Meetings Act." Op. Tenn. Atty. Gen. 88-169 (Sept. 19, 1988). More recently, however, the Court of Appeals has taken a more narrow approach to what constitutes a "meeting" under the Act, holding that email communications between members of the Nashville Metropolitan Council, even emails copied to the entire council, did not constitute a "meeting" as defined in T.C.A. § 8-44- 102(b)(2). According to the Court, "Even though several emails copied all members of the Council, the exchanges among the members do not reflect either an intentional or inadvertent 'convening ... for which a quorum is required' for the purpose of making a decision." *Johnston v. Metropolitan Gov't of Nashville and Davidson County*, 320 S.W.3d 299 (Tenn. Ct. App. 2009), permission to appeal denied (Tenn. 2010). The Court found that some of the emails violated T.C.A. § 8-44-102(c), which prohibits electronic communications from being used to to decide or deliberate public business in circumvention of the Act. In that same case, the Court held that council members gathering in a council meeting room for the purpose of obtaining information--the council members reviewed survey data and petitions and were able to ask questions of various persons involved in the matter at issue--did not constitute a "meeting" within the meaning of the Act.

Local governing bodies and school boards are authorized to communicate via electronic forums only if they follow the procedures set out in T.C.A. § 8-44-109, which requires that such body:

1. Ensures that the forum through which the electronic communications are conducted is available to the public at all times other than that necessary for technical maintenance or unforeseen technical limitations;
2. Provides adequate public notice of the governing body's intended use of the electronic communication forum;
3. Controls who may communicate through the forum;
4. Controls the archiving of the electronic communications to ensure that the electronic communications are publicly available for at least one (1) year after the date of the communication; provided, that access to the archived electronic communications is user-friendly for the public; and
5. Provides reasonable access for members of the public to view the forum at the local public library, the building where the governing body meets or other public building.

The statute also requires that prior to a governing body initially utilizing a forum to allow electronic communications by its members the governing body shall file a plan with the office of open records counsel. The governing body may not initiate the forum until it receives a report of compliance from the

office of open records counsel.

The Sunshine Law does not apply to meetings pertaining to decisions that are to be made by a single public official. For example, if a decision is to be made by a county official acting alone, then meetings of a committee appointed to make recommendations to the county official regarding this decision would not fall under the Sunshine Law. *See, e.g., Metropolitan Air Research Testing Authority, Inc. v. Metropolitan Gov't*, 842 S.W.2d 611 (Tenn. Ct. App. 1992). Also, on-site inspections of any project or program are excluded from the definition of "meeting." T.C.A. § 8-44-102(b)(2).

Public Comment Periods

Reference Number: CTAS-2489

Governing bodies (as defined in the Open Meetings Act) are required to reserve a period of time for public comment to provide the public with the opportunity to comment on matters that are germane to the items on the agenda for the meeting. Governing bodies are authorized to put reasonable restrictions on the period for public comment, such as the length of the period, the number of speakers, and the length of time that each speaker will be allowed to provide comment. Governing bodies are also authorized to require a person to give notice in advance of their desire to offer comments at a meeting. The law directs governing bodies to take all practicable steps to ensure that opposing viewpoints are represented fairly, if any.

Notices for a public meeting must include instructions on how a person may indicate their desire to provide public comment at the meeting.

There are two exceptions to the public comment requirement: (1) A meeting of a governing body, or a portion thereof, where the governing body is conducting a disciplinary hearing for a member of the governing body or a person whose profession or activities fall within the jurisdiction of the governing body; or (2) A meeting for which there are no actionable items on the agenda. T.C.A. § 8-44-112.

Adequate Public Notice

Reference Number: CTAS-2423

In order to meet the requirements of the Sunshine Law, "adequate public notice" must be given before all meetings to which the act applies. T.C.A. § 8-44-103. The statute does not elaborate on the requirements for this notice. The Tennessee Supreme Court considered the phrase "adequate public notice" as contained in the statute and observed, "We think it is impossible to formulate a general rule in regard to what the phrase 'adequate public notice' means. However . . . adequate public notice means adequate public notice under the circumstances, or such notice based on the totality of the circumstances as would fairly inform the public." *Memphis Publishing Co. v. City of Memphis*, 513 S.W.2d 511 (Tenn. 1974).

If the meeting is one that would not be expected to be of interest to the general public, the notice requirements may not be as stringent as if the issue is one that is expected to be of great public concern. For example, adequate public notice was found to have been given for a special meeting of a city council to hear the appeal of a police officer who had been dismissed, where the meeting had been advertised by posting notice inside city hall where water bills were paid and over the entrance to the police department and council room and on the bulletin board at the post office because this was a personnel matter involving one individual. *Kinser v. Town of Oliver Springs*, 880 S.W.2d 681 (Tenn. Ct. App. 1994). On the other hand, in *Neese v. Paris* Special School District, 813 S.W.2d 432 (Tenn. Ct. App. 1990), the court found that the issue of clustering students in the same grade at one school was of "pervasive importance" and "arguably the most important action taken by the Board in many years." The notice was held to have been inadequate under the circumstances because the public was not notified that clustering would be discussed. Even though at that time Tennessee law did not require notice of a regularly scheduled meeting include an agenda of the meeting, the court found that the importance of the clustering issue required that the public be advised that it would be discussed at the meeting.

When faced with determining whether notice of a special meeting fairly informed the public under the totality of the circumstances, the Tennessee Court of Appeals outlined a three-prong test for "adequate public notice" of special meetings under the Sunshine Law, which includes the following: (1) Notice must be posted in a location where a member of the community could become aware of the notice, (2) the contents of the notice must reasonably describe the purpose of the meeting or the action to be taken, and (3) the notice must be posted at a time sufficiently in advance of the meeting to give citizens an opportunity to become aware of the meeting and to attend. *Englewood Citizens for Alternate B v. Town of Englewood*, 1999 WL 419710 (Tenn. Ct. App. 1999). In *Englewood*, the court noted that the town could

provide adequate public notice by simply choosing reasonable public locations and posting notices at these locations on a consistent basis.

The notice requirements of the Sunshine Law are in addition to, and not in substitution for, any other notice that may be required by law. T.C.A. § 8-44-103(c). Meetings of county legislative bodies, for example, are also governed by the provisions of T.C.A. §§ 5-5-104 and -105, under which regular meetings must be set by resolution of the county legislative body, and special called meetings require newspaper notice at least five days prior to the meeting that contains the agenda for the meeting. When publishing notices in the newspaper, you should be aware that newspapers are now required to also publish the notices on their own websites as well as on a statewide website maintained by Tennessee newspapers at no extra charge. T.C.A. § 1-3-120.

Minutes of Meetings

Reference Number: CTAS-2424

The minutes of meetings to which the Sunshine Law applies must be recorded and open to public inspection, and must contain a record of the persons present, all motions, proposals and resolutions offered, the results of any votes taken, and a record of individual votes in the event of a roll call. T.C.A. § 8-44-104(a). Strict compliance with the statute is necessary. For example, the actions of a beer board denying a beer permit were invalidated because the minutes of the meeting did not contain the required information, and the court required the beer board to reconvene and consider anew the application for a beer permit in question. *Grace Fellowship Church of Loudon County, Inc. v. Lenoir City Beer Board*, 2002 WL 88874 (Tenn. Ct. App. 1/23/02).

Limited Exception for Attorney-Client Discussions

Reference Number: CTAS-2425

In *Smith County Education Association v. Anderson*, 676 S.W.2d 328 (Tenn. 1984), the Tennessee Supreme Court recognized a narrow exception to the Sunshine Law for meetings between a public body and its attorney concerning pending litigation. The exception applies only to discussions between the members of the public body and the attorney; once any discussion begins among members of the public body as to what action should be taken based on the advice of counsel, those discussions must be open to the public.

The application of the exception in the Smith County case was limited to cases in which there was present and pending litigation and the public body was named in the lawsuit. In *Van Hoosier v. Warren County Board of Education*, 807 S.W.2d 230 (Tenn. 1991), the Tennessee Supreme Court extended the exception to a meeting of the board with its attorney regarding a pending controversy that was likely to result in litigation. *See also Baltrip v. Norris*, 23 S.W.3d 336 (Tenn. Ct. App. 2000)(school board's private meeting with attorney to discuss legal options concerning a pending charge of unprofessional conduct against a teacher did not violate the Open Meetings Act).

In summary, this narrow exception applies only to meetings between a public body and its attorney that meet the following criteria: (1) The meeting must concern litigation that has already been filed or that is likely to be filed and to which the county is or will be a party, and (2) the private meeting must be limited to discussions between the attorney and members of the public body regarding the public body's legal options, and no discussions between members of the public body as to what action should be taken can take place.

Electronic Communications Exceptions

Reference Number: CTAS-2426

Members of county commissions and school boards may communicate with each other electronically on a forum over the internet without violating the sunshine law if the commission or board—

1. Ensures that the forum is open to the public at all times;
2. Provides public notice of its intended use of such forum;
3. Controls who may communicate on the forum;
4. Archives all communications and makes such publically available for at least a year; and
5. Provides reasonable access to members of the public to view such forum at the library, courthouse or other public building.

Prior to utilizing a forum for electronic communications by its members, the county commission or school board must file a plan with the office of open records counsel regarding how they plan to ensure

compliance with all of the acts conditions and must receive notice from the office of open records counsel that such plan is sufficient. The forum cannot substitute for a meeting of the county commission or school board and no member shall receive a per diem for communicating on the forum. T.C.A. § 8-44-109.

County boards of education may allow a member to attend a scheduled board meeting by by electronic means if the member is absent due to work, family emergency, or military service, as long as the statutory requirements are met. T.C.A. § 49-2-203.

Penalties and Remedies for Noncompliance

Reference Number: CTAS-2427

Any action taken at a meeting in violation of the Sunshine Law is void. T.C.A. § 8-44-105. While this provision does not forever bar a public body from subsequently ratifying an action taken in violation of the act, it does not allow a public body to ratify an action in a subsequent meeting by perfunctory affirmation of its earlier action. In order to remedy a violation of the Sunshine Law, however, the ultimate decision must be made at a meeting that satisfies the Sunshine Law and there must be new and substantial reconsideration of the issues involved. *Neese v. Paris Special School District*, 813 S.W.2d 432 (Tenn. Ct. App. 1990); *Johnston v. Metropolitan Gov't of Nashville and Davidson County*, 320 S.W.3d 299 (Tenn. Ct. App. 2009), permission to appeal denied (Tenn. 2010). Even if a subsequent meeting is held in compliance with the Sunshine Law, the ratification and confirmation of an action will not remedy a prior violation of the Sunshine Law if it is merely a "perfunctory rubber stamp." *Souder v. Health Partners, Inc.*, 997 S.W.2d 140 (Tenn. Ct. App. 1998).

Under the act, any citizen may bring an action in circuit court, chancery court, or any court of equity to enforce the Sunshine Law. These courts are given broad authority to issue injunctions, impose penalties, and otherwise enforce the purposes of the act. Courts are authorized to assess all or part of petitioners' costs, including attorneys' fees, against the governing body if the court finds the body willfully refused to comply with the open meetings act. In deciding whether the body's actions were willful, authorizes the court to consider the testimony and other guidance provided to the body by the office of open records counsel. T.C.A. § 8-44-106.

Questions concerning the application of this law may be referred to the county attorney or the CTAS staff.

Public Records Act

Reference Number: CTAS-2428

Generally, county records must be open for personal inspection by any citizen of Tennessee during business hours of the various county offices. County officials in charge of these records may not refuse the right of any citizen to inspect them unless another statute specifically provides otherwise (T.C.A. § 10-7-503) or they are included in the list of specific records that are to be kept confidential under T.C.A. § 10-7-504 or some other legal authority. Information made confidential by Title 10, Chapter 7 must be redacted whenever possible. T.C.A. § 10-7-503(c)(2). In the event it is not practicable for a requested record to be promptly made available for inspection, the records custodian shall within seven business days: (i) make the record available; (ii) deny the request in writing stating the basis for the denial; or (iii) furnish the requestor a response form stating the time reasonably necessary to produce such record. T.C.A. § 10-7- 503(a)(2)(B).

The Office of Open Records Counsel, created in 2008, was charged with developing a schedule of reasonable charges which may be used as a guideline in establishing charges or fees, if any, to charge a citizen requesting copies of public records. On October 1, 2008, the Office of Open Records Counsel issued its Schedule of Reasonable Charges for Copies of Public Records. Records custodians are authorized by T.C.A. § 10-7-503(a)(7)(C)(i) to charge reasonable costs consistent with the schedule. The schedule, together with instructions for records custodians, can be found on the website of the Office of Open Records Counsel. Charges established under separate legal authority are not governed by the schedule, and are not to be added to or combined with charges authorized under the schedule. Questions regarding the schedule should be directed to the Office of Open Records Counsel.

A citizen denied access to a public record is entitled to file a petition for inspection in the circuit court or the chancery court of the county in which the records are located, or in any other court of that county having equity jurisdiction. The county official denying access to the record has the burden of proof to justify the reason for nondisclosure. If the court directs disclosure, the county official shall not be held criminally or civilly liable for the release of the records, nor shall he or she be responsible for any damages caused by the release of the information. If the refusal to disclose the record is willful, the court may assess all reasonable costs involved in obtaining the record, including reasonable attorneys' fees, against the county official. T.C.A. § 10-7-505.

For county governments, one important class of confidential records involves personal information of state, county, municipal, and other public employees. An employee's, including a former employee's, home telephone and personal cell phone numbers, bank account information, health savings account information, retirement account information, pension account information, Social Security number, residential address, driver's license information (except where driving is a part of the employee's job), and similar information for the employee's family and household members are confidential. Where this confidential information is part of a file or document that would otherwise be public information, such information shall be redacted if possible so that the public may still have access to the nonconfidential portion of the file or document. T.C.A. § 10-7-504(f) & (g).

In addition to creating a schedule of charges for records requests, the Office of Open Records Counsel has been charged with the duty to answer questions from and issue advisory opinions to public officials regarding public records. T.C.A. § 8-4-601. This office should be a valuable resource for questions on open records.

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