THE UNIVERSITY of TENNESSEE
MUNICIPAL TECHNICAL ADVISORY SERVICE

In cooperation with the Tennessee Municipal League

TECHNICAL bulletin

January 8, 2008

OPEN MEETINGS IN TENNESSEE: Compliance with the Public Meetings Law

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The Tennessee Public Meetings Law is commonly referred to as the "Open Meetings Law" or the "Sunshine Law," and it is one of the most comprehensive open meetings laws in the country. The statute declares that all public policy and public business decisions must be made in meetings that are open to the public. The Public Meetings Law not only requires that meetings be open to the public, but also requires adequate public notice and thorough minutes of such meetings. This publication explains the scope and application of this law so that city officials may understand how to perform their duties in compliance with the statute.

TENNESSEE PUBLIC MEETINGS LAW

The Public Meetings Law declares closed-door, back-room meetings by public officials illegal if there is any deliberation toward a decision. The text of the Public Meetings Law can be found at T.C.A. § 8-44-101, *et seq*. Practically all meetings of a city's governing body and boards are covered by the Public Meetings Law, with a few exceptions.

GOVERNING BODY

A two-pronged test must be used to analyze the meeting to determine if the Public Meetings Law applies: (1) Is the body a "governing body" under the act; and (2) Is there deliberation toward a decision. Following is the definition of "governing body" contained in the act:

(b)(1) "Governing body" means:

> *(A) 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...so defined by this section shall remain so defined, notwithstanding the fact that such governing body may have designated itself as a negotiation committee for collective bargaining purposes, and strategy sessions of a governing body under such circumstances shall be open to the public at all times; T.C.A. § 8-44-102 *(emphasis added)*.

Clearly, your city's governing body fits this definition, but what about other boards or bodies established by your city or boards that include city officials? Court opinions shed some light on this issue.

The Tennessee Supreme Court refined the definition of "governing body" used in the act in *Dorrier v. Dark*, 537 S.W.2d 888 (Tenn. 1976). The court states:

> It is clear that for the purpose of this Act, the Legislature intended to include any board, commission, committee, agency, authority or any other body, by whatever name, *whose origin and authority may be traced to State, City or County legislative action and whose members have authority to make decisions or recommendations on policy* or administration affecting the conduct of the business of the people in the governmental sector. *Dorrier*, at 892 *(emphasis added)*.

This opinion establishes a further two-pronged test for applicability of the Act: (1) There must be some ordinance, resolution, private act, or general law under which the board or body was formed for the Public Meetings Law to apply to its meetings; and (2) The board must have some authority to affect decisions made by the governing body.

Based on this reasoning, the Tennessee Court of Appeals has ruled that a grievance committee created by the South Central Human Resource Agency is not subject to the Public Meetings Law, despite being established under a specific law, since the "sole function of the committee is to hear and dispose of personnel complaints in accordance with the policies and procedures of the governing board." *Hastings v. South Central Human Resource Agency*, 829 S.W.2d 679, 686 (Tenn. App. W.S. 1992). The committee did not have the authority to make recommendations to the agency on matters of policy, but had the purpose of applying established policies in grievance hearings and, as such, was not subject to the Public Meetings Law.

The Court of Appeals determined that the "governing body" definition applied to a preferred provider organization's (PPO) board of directors on grounds that the PPO's charter indicated that it was created as a government instrumentality of the county general hospital district. *Souder v. Health Partners, Inc.*, 997 S.W.2d 140 (Tenn. App. 1998). The PPO further made policy decisions and comingled funds with the county general hospital district. The court found the PPO to be subject to the Public Meetings Law, and actions taken in closed meetings were invalidated.

If a board or committee appointed by your governing body has the purpose of making recommendations to the governing body that may affect policy or decisions, the committee or board is a "governing body" subject to the Public Meetings Law. Such boards include planning commissions, boards of zoning appeals, and economic development boards.

Boards that have the authority to carry out the policies of your governing body, however, do not necessarily meet the definition of "governing body" found in the law. An example is the civil service board, which hears employment matters and renders decisions based on the city's policies. If the board has the authority to make recommendations to the governing body on matters of policy, however, then such meetings must be open to the public.

MEETING AND DELIBERATION

Although your city council or board clearly fits the description of a "governing body," not all meetings or functions of the body

are required to be open under the law, unless the board is deliberating toward a decision. The act states:

> (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.
>
> (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. T.C.A. § 8-44-102.

One must examine the topic of discussion as well as the purpose of a meeting to determine if a particular meeting or discussion between board members must be open to the public. For instance, if board members are discussing any matter that is pending before the board, the discussion must be held during an open meeting. If the board members are discussing personal matters or personal opinions on topics that will not come to a vote before the board, such discussions do not have to be open to the public.

It is permissible for a governing body to have a "retreat" or a closed-door meeting during which the relations of council members are discussed or the functions of the board are addressed in general, as long as no matters of city business are discussed. However, when board members meet in private it is often difficult to keep them from talking about matters pending before the board.

Such was the case in *Neese v. Paris Special School District*, 813 S.W.2d 432 (Tenn. App. 1990). Members of a board of education and the superintendent attended a retreat in another state at which the issue of whether to adopt a clustering plan was discussed. The decision concerning the adoption of a clustering plan had been considered by the board for several years, and following the retreat the board finally approved a clustering plan at the next regular meeting. The plaintiffs argued that the board members discussed the proposed clustering plan at length during the retreat and made their decision before the next board meeting. The court found that the retreat was actually a "meeting" as defined in the Public Meetings Law, stating "regardless of whether any Board member made a decision at the meeting, we do not believe that the Board can successfully avoid the fact that it deliberated toward making a decision." *Neese* at 435. It is important to remember that the fact that a vote is not called or that a quorum may not be present does not relieve board members of the requirements of the Public Meetings Law. Any discussion of pending or anticipated city business must be held in an open forum with notice to the public.

Private meetings may be held with public officials for the purpose of gathering information if the person seeking comments has the authority to make decisions

independent from the governing body. Meetings between city officials and a purchasing agent in which the officials provided their opinions regarding whether a contract should be awarded to a low bidder were found to be exempt from the Public Meetings Law, as the purchasing agent had the power to make the decision without the officials' input and no quorum was required. *Metropolitan Air Research Testing Authority, Inc. v. Metropolitan Government of Nashville and Davidson County*, 842 S.W.2d 611 (Tenn. App. MS, 1992).

Phone calls made by a county commissioner to his fellow commissioners in which he solicited their support for his appointment as county trustee were determined not to violate the Public Meetings Law as no meeting took place as defined under the Act. *Jackson v. Hensley*, 715 S.W.2d 605 (Tenn. App. ES, 1986).

What about meetings between city officials and consultants in which the consultants solicit the officials' opinions as guidance? The Tennessee Attorney General has opined that meetings of a third-party consultant with individual board members to discuss each member's preferences regarding a list of candidates for a new city manager are not subject to the Act and may be held privately. Op. Tenn. Atty. Gen. No. 99-193.

The Attorney General has further opined that exit conferences between the State Comptroller and members of a governing body to discuss results of an audit or investigation are not required to be open under the Act as such conferences are held for the limited purpose of providing information to the local officials and no deliberation occurs. Op. Tenn. Atty. Gen. No. 99-090.

EXCEPTION FOR ATTORNEY-CLIENT PRIVILEGE

The Tennessee Supreme Court used similar reasoning to determine when meetings between governing bodies and their attorneys concerning pending litigation are required to be open. Although there is no exception stated in the Act to preserve the attorney-client privilege, the court found the exception to be covered under the phrase "except as provided by the Constitution of Tennessee," which appears in the opening sentence of T.C.A. § 8-44-102 of the Public Meetings Law. The Tennessee Supreme Court states on this issue:

> The majority of states have fashioned an exception to their states' open meeting laws to permit private attorney-client consultation on pending legal matters even where the statute itself makes no such express exception.... Two approaches, both based upon the same policy consideration, are given for permitting this exception: (1) the evidentiary privilege between lawyer and client and (2) the attorney's ethical duty not to betray the confidences of his client...we believe the second approach, the attorney's ethical duty to preserve the confidences and secrets of his client, provides a better basis for establishing an exception to the Open Meetings Act. *Smith County Education Association v. Anderson*, 676 S.W.2d 328, 332-333 (Tenn. 1984).

The exception has been applied to discussions between public officials and their attorneys concerning pending controversies that have not yet reached litigation. *Van Hooser v. Warren County Board of Education*, 807 S.W.2d 230 (Tenn. 1991). But not all meetings between governing bodies and their attorneys to discuss pending litigation or controversies may be closed meetings. The application of the exception depends on the discussion that takes place.

> Clients may provide counsel with facts and information regarding the lawsuit and counsel may advise them about the legal ramifications of those facts and the information given to him. However, *once any discussion, whatsoever, begins among the members of the public body regarding what action to take based upon the advise of counsel, whether it be settlement or otherwise, such discussion shall be open to the public* and failure to do so shall constitute a clear violation of the Open Meetings Act. *Smith County*, at 334 *(emphasis added)*.

After the attorney has updated the officials on the status of a case and the board and counsel have received the factual information needed, if the discussion turns to what action the city should take based on such information the meeting must be open to the public at that point.

NOTICE

Another issue that frequently arises under the Public Meetings Law is adequate notice of public meetings. The Act states:

> § 8-44-103. Notice
>
> (a) NOTICE OF REGULAR MEETINGS. Any such governmental body which holds a meeting previously scheduled by statute, ordinance, or resolution shall give adequate public notice of such meeting.
>
> (b) NOTICE OF SPECIAL MEETINGS. Any such governmental body which holds a meeting not previously scheduled by statute, ordinance, or resolution, or for which notice is not already provided by law, shall give adequate public notice of such meeting.
>
> (c) The notice requirements of this part are in addition to, and not in substitution of, any other notice required by law.

No definition of "adequate public notice" is provided in the Act. Tennessee courts have been reluctant to adopt a specific meaning of "adequate public notice":

> We think it is impossible to formulate a general rule in regard to what the phrase "adequate public notice" means. However, we agree with the Chancellor that 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 Company v. City of Memphis*, 513 S.W.2d 511, 513 (Tenn. 1974).

An unpublished opinion, *Englewood Citizens for Alternate B v. The Town of Englewood*, 1999 WL 419710 (Tenn. App. 1999), provides further guidance concerning what constitutes adequate public notice:

> First, the notice must be posted in a location where a member of the community could become aware of such notice. Second, the contents of the notice must reasonably describe the purpose of the meeting or the action proposed to be taken. And, third, the 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.

The *Englewood* case concerns the selection of a route for a highway construction project. A special meeting was scheduled for December 12, and the town recorder testified that notice of the meeting was posted on December 10 at the local post office, at city hall, and at a bank. The city recorder also faxed a copy of the notice to the local newspaper, but the paper did not publish the notice. Although the court found the locations of the posting of the notice to be reasonable, the contents of the notice were insufficient to adequately inform the public of the purpose of the meeting. The notice simply stated "letter to State concerning HWY 411," and the court determined the notice was inadequate, stating "a more substantive pronouncement stating that the commission would reconsider which alternative to endorse for Highway 411 should have been given."

Notice of a city council meeting to hear an appeal from a discharged police officer was found to be adequate in *Kinser v. Town of Oliver Springs*, 880 S.W.2d 681 (Tenn. App. ES 1994). Without discussing the contents of the notice, the court determined that the posting of notices inside city hall, where people pay their water bills, and over the entrance to the police department and council room to be sufficient. It is important to note that the *Kinser* case involved an appeal of a termination by an employee and was not a matter affecting a number of city residents.

The Court of Appeals found the content of a meeting notice to be inadequate in *Neese v. Paris Special School District*, 813 S.W.2d 432 (Tenn. App. WS 1990). Members of a board of education and the superintendent attended a retreat in another state at which the issue of whether to adopt a clustering plan was discussed. The planned retreat was announced at a prior regular meeting of the board and was further mentioned in media reports. The notice published in the paper stated that two issues would be addressed at the retreat but made no mention of consideration of the clustering plan. *Neese*, at 435. The court found the notice to be insufficient, stating "'adequate public notice under the circumstances' is not met by misleading notice." *Neese*, at 436.

When providing notice of public meetings, a city should follow its normal procedures established for the posting of notices. The Attorney General opined that a city did not provide adequate public notice of a special meeting when it failed to follow

its normal procedure for posting meeting notices. This Attorney General's opinion also considered the fact that city employees were not aware of the meeting, and employees informed some members of the public that no meeting was scheduled for that date. Op. Tenn. Atty. Gen. No. 00-095.

Posting notices of meetings on an Internet site will likely not satisfy the adequate public notice requirement of the Public Meetings Act unless combined with other posting locations and notice published in the media. Op. Tenn. Atty. Gen. No. 00-090.

MINUTES

The Public Meetings Law also addresses minutes of meetings of governing bodies. The Act requires:

> § 8-44-104. Meetings recorded and open to the public — Secret votes prohibited.
>
> (a) The minutes of a meeting of any governmental body shall be promptly and fully recorded, shall be open to public inspection, and shall include, but not be limited to, 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.

In a rather alarming opinion, the Court of Appeals found beer board meeting minutes to be insufficient under the Act in the unreported case *Grace Fellowship Church of Loudon County v. Lenoir City Beer Board*, 2002 WL 88874 (Tenn. App. 2002). The church challenged the issuance of a beer permit that was in violation of a distance requirement contained in the city ordinance. An application for the beer permit was denied at first but was granted on reconsideration at a later meeting. The minutes for both meetings state the time and location, identify the application being considered, name the member making the motion, and record the vote of each of the two board members. Nevertheless, the Court found the minutes to be lacking information but failed to specify what was missing from the minutes. The minutes did not list the names of members present at the meeting, but since this was a board composed at the time of only two members whose votes were recorded, it is difficult to conclude that this omission alone led to the court's decision. In any event, cities should take notice of this opinion and strive to record in detail all events that occur in meetings.

Boards or councils may take action in subsequent meetings to correct or cure deficiencies in meeting minutes without being required to debate issues again or call for votes a second time as long as debate and discussion actually occurred during the earlier meeting. *Zseltvay v. Metropolitan Government of Nashville and Davidson County*, 986 S.W.2d 581 (Tenn. App. 1999).

VIOLATION AND REMEDIES

Action taken at a meeting held by a public body in private and in violation of the Public Meetings Law is void unless the action taken concerns the public debt of the city. T.C.A. § 8-44-105. A violation can be cured if the matter is brought before the body at an open meeting, the body holds another

deliberation and discussion of the matter, and the minutes reflect that the issue was properly addressed. If board members violate the law by discussing pending matters outside open meetings, those discussions should be repeated in an open meeting, and the matter must be reconsidered.

A violation of the Public Meetings Law by a committee that reports to a governing body may be cured by the governing board, but only if a full discussion and reconsideration of the matter occurs. In the unreported opinion *Allen v. City of Memphis*, 2004 WL 1402553 (Tenn. App.), the Court of Appeals found that a committee appointed by the City Council to analyze costs associated with a proposed annexation violated the law by failing to keep minutes of meetings. In one committee meeting held between the first and second readings on the ordinance, the scope of the annexation was changed by removing an area from the property description. The committee meeting was open to the public and proper notices were posted, but minutes were not kept of the discussion that led to the alteration of the ordinance. The Memphis City Council later approved the amended ordinance after public hearing, but there was no discussion of the reasons the ordinance was changed. The court, citing the *Neese v. Paris Special School District* opinion, states:

> We do not believe that the legislative intent of this statute was forever to bar a governing body from properly ratifying its decision made in a prior violative manner. However, neither was it the legislative intent to allow such a body to ratify a decision in a subsequent meeting by a perfunctory crystallization of its earlier action. We hold that the purpose of the act is satisfied if the ultimate decision is made in accordance with the Public Meetings Act, and if it is a new and substantial reconsideration of the issues involved, in which the public is afforded ample opportunity to know the facts and to be heard with reference to the matters at issue. *Allen*, at p.5, citing *Neese v. Paris Special School District*, 813 S.W.2d 432, 436 (Tenn. App. 1990).

The court found that the city failed to cure the violation of the law since there was no new and substantial reconsideration of the issue in the council meeting.

A governing body acted appropriately to cure a violation of the Public Meetings Law by holding numerous public meetings on the topic. *Dossett v. City of Kingsport*, 2007 WL 4192020 (Tenn. App.). In this unreported case, some members of Kingsport's Board of Mayor and Aldermen attended private meetings to discuss a potential sale of city property. Despite such private meetings, the Court of Appeals found that any violation of the Public Meetings Law was subsequently cured:

> After two private meetings, each of which included two members of the Board, the entire Board then met in several public meetings to consider selling the EAP Building to TriSummit. After carefully reviewing the record, including the minutes of these public meetings, we hold that the Board conclusively established

> that it cured the alleged violations of the Open Meetings Act by fully and fairly considering the proposed sale during its five public meetings following the last private gathering. It is undisputed that the public was afforded at these five public meetings both ample opportunity to know the facts and to be heard as to the proposed sale. It was only after these public meetings that the decision to sell the property ultimately was made. *Dossett*, at p.10.

Governing bodies that violate the Public Meetings Law and do not take appropriate corrective action may be sued in circuit or chancery court by any party affected by the board action. T.C.A. § 8-44-106. If the trial court determines that the Act has been violated, it will issue an order called an "injunction" that permanently forbids the governing body from violating the law. The court will have jurisdiction over the governing body for one year, during which time the council or board must report to the court twice, in writing, regarding its compliance with the Act. T.C.A. § 8-44-106(c),(d).

Even if a governing body takes action to cure a defect in the meeting minutes or deliberates an issue a second time at a properly noticed meeting, the body may not be able to avoid a court order. If a lawsuit has been filed and the court determines that a violation occurred, whether intentional or not, an order may issue that requires the governing body to remain under the court's watch for a full year. *Zseltvay v. Metropolitan Government of Nashville and Davidson County*, 986 S.W.2d 581 (Tenn. App. 1999).

Once city officials realize that a violation of the Public Meetings Law has occurred, the governing body must act to place the issue on the next meeting agenda for full discussion and reconsideration. If an ordinance was passed following discussions that violate the law, the ordinance should be reconsidered and the readings and votes must be repeated. Otherwise the ordinance or other action taken by the governing body will be void, and the city may be subject to litigation.

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January 8, 2008

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MTAS1241 • E14-1050-000-034-08