

Tennessee Open Meetings Law: Transparency in Government

Office of Open Records Counsel



Background Information

Tennessee's commitment to transparency in government was first evidenced in the Tennessee Constitution (1796, 1870).

- ◆ Section 22 of Article II says, “[t]he doors of each House and of committees of the whole shall be kept open, unless when the business shall be such as ought to be kept secret.”

Tennessee Open Government Statutes

- Tennessee Open Meetings Act, 1974
(T.C.A. § 8-44-101 et seq.)
- Tennessee Public Records Act, 1957
(T.C.A. § 10-7-501 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; and
 - ◆ The need of government employees to have an “intellectually safe” work environment.

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, or to set up a presentation, contact either Ann Butterworth or Elisha Hodge at:

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Office Location

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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

- ◆ 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]
- The Act does **not** apply to the General Assembly.
- Meetings may be closed to the public in very limited situations.

Open Meetings or the Sunshine Law

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.

Open Meetings or the Sunshine Law

T.C.A. § 8-44-102 (b) does not define “public body.”

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 v. Dark, 537 S.W.2d 888, 892 (Tenn. 1976), *rehearing denied*, 540 S.W.2d 658 (Tenn. 1976).



Open Meetings or the Sunshine Law

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

- County commission
- City council
- Utility committee
- Board of directors of an authority
- Board of commissioners of a utility district
- Utility Management Review Board
- Water and Wastewater Finance Board

Open Meetings or the Sunshine Law

- ◆ T.C.A. § 7-82-308(e)(1): The board of commissioners of every utility district created pursuant to this chapter shall meet at least once each quarter, the time and place of such meeting to be published in accordance with title 8, chapter 44.
- ◆ Op. Tenn. Atty. Gen. No. 85-161 opined that a board of commissioners of a UD (under law of 1937) is a governing body within the meaning of Open Meetings Law.

Open Meetings or the Sunshine Law

- ◆ T.C.A. § 7-82-309(a) The board of commissioners of any district has the power and authority to:
 - (1) Exercise by vote, ordinance or resolution all of the general and specific powers of the district;
 - (2) Make all needful rules, regulations and bylaws for the management and the conduct of the affairs of the district and of the board.

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

- ◆ 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

Open Meetings or the Sunshine Law

◆ 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.

Open Meetings or the Sunshine Law

- ◆ 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

Open Meetings or the Sunshine Law

- ◆ 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.

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

- ◆ **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.**

Court Opinion

- ◆ 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.

Open Meetings or the Sunshine Law

◆ 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.”

Open Meetings or the Sunshine Law

- State of Tennessee Audit Committee Act of 2005 (Tenn. Code Ann. Sections 4-35-101 et seq.)
 - ◆ Applies to state (not local) governing boards, councils, commissions and equivalent bodies that:
 - have authority to hire and fire employees; or
 - are responsible for preparation of financial statements.
 - ◆ Exemption may be granted by Comptroller.
 - ◆ Provides that reporting of suspected illegal, improper, wasteful or fraudulent activity is considered “audit working papers” and deemed confidential under the Tennessee Public Records Act (except as disclosed in a final report).

Open Meetings or the Sunshine Law

- ◆ State of Tennessee Audit Committee Act provides that confidential, non-public executive sessions may be held to discuss:
 - 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.

Open Meetings or the Sunshine Law

- ◆ State of Tennessee Audit Committee Act 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.

Open Meetings or the Sunshine Law

- ◆ State of Tennessee Audit Committee Act 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 4-35-108;
 - Executive session to commence when all unauthorized persons have departed; and
 - A full governing board, council, commission and equivalent body may hold an executive session under same constraints.

Open Meetings or the Sunshine Law

- 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.

Open Meetings or the Sunshine Law

- ◆ Minutes and records of meeting: T.C.A. § 8-44-104
 - 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

Open Meetings or the Sunshine Law

- ◆ Minutes and records of meeting: T.C.A. § 8-44-104
 - Roll call votes must be recorded indicating individual votes
 - 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

Open Meetings or the Sunshine Law

- ◆ **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.

Open Meetings or the Sunshine Law

◆ Electronic Participation T.C.A. § 8-44-108

- An eligible governing body may (but is not required to) permit a member to participate in a meeting by electronic or other means of communication.
 - ◆ Meeting must otherwise comply with the Act and not be used to circumvent the spirit or requirements of the Act
 - ◆ Notice of the meeting must specify that participation by electronic or other means of communication will be permitted
 - ◆ Members so participating must receive in advance copies of any documents to be discussed, substantially the same in content

Open Meetings or the Sunshine Law

- ◆ **Electronic Participation: T.C.A. § 8-44-108**
 - For any meeting at which participation by a member by electronic or other means of communication is permitted:
 - ◆ Members so participating must be able to simultaneously hear each other and speak to each other during the meeting and must be audible to the public at the meeting location.
 - ◆ Members so participating must identify all persons present with them.
 - ◆ All votes must be by roll call.
 - ◆ An electronic participant is not eligible for per diem reimbursement but may receive reimbursement related to the expense of the communication.

Open Meetings or the Sunshine Law

- ◆ Electronic Participation: T.C.A. § 8-44-108
 - If a physical quorum is present at location of meeting, no finding of necessity is required.
 - If a physical quorum is not present at location, then governing body must find that necessity exists.
 - Findings of necessity must be filed with Secretary of State no later than two (2) working days after the meeting. SOS is to report to General Assembly at least annually regarding the filings.

Open Meetings or the Sunshine Law

- ◆ Electronic Participation: T.C.A. § 8-44-108
 - “Necessity” means that the matters to be considered by the governing body at that meeting require timely action by the body, that physical presence by a quorum of the members is not practical within the period of time requiring action, and that participation by a quorum of the members by electronic or other means of communication is necessary.

Open Meetings or the Sunshine Law

- ◆ 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).

Open Meetings or the Sunshine Law

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

- ◆ 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.

2008 Open Meetings Legislation

- ◆ PC 917 permits public hospitals to discuss and develop marketing strategies and strategic plans in closed meetings and related records are confidential until board of hospital moves to adopt. Amends T.C.A. § 68-11-269.
- ◆ PC 1179 establishes the Office of Open Records Counsel, directs the development of OM educational programs, and requires the collection of data on OM law inquiries and problems.
- ◆ Additionally PC 923, effective July 1, 2008, allows Knox County government to utilize internet relay chat on a pilot project basis. T.C.A. § 8-44-109.

<https://knoxgov.net/commission/commissionforum>



Stated Use and Purpose of Knox Forum:

“On May 15, 2008, the Governor signed into law an amendment to the Public Meetings Act - Tenn. Code Ann. §§ 8-44-108(b) and 109. The Amendment enables the members of the Knox County Commission to communicate by electronic means under certain conditions, including the creation of a web site through which electronic communication by commissioners is conducted and is available for viewing by the public at all times and the archiving of the electronic communications to ensure that such electronic communications are publicly available for at least one (1) year after the date of the communication.”

Stated Use and Purpose of Knox Forum:

“The postings on this forum are unedited. Once published, nothing can be deleted or edited in any fashion by Administrators or Commissioners and the postings become part of a stored record that will be available, by law, for a minimum of one (1) year after the date of the communication. Again, posting to this web site is strictly limited to the membership of the Knox County Commission.”

<https://knoxgov.net/commission/commissionforum/viewforum.php?f=2>



Chat example from 85 topics

Protest of Process of Election of Committee Chairman by **Richard Briggs** on Fri Sep 05, 2008 12:55 am

To Chairman Strickand:

I wish to express my concern regarding the proceedings on August 29, 2008 after the election of the Chairman and Vice Chairman of the Knox County Commission. The Committee on Committees retired to deliberate in private on the assignment of commissioners to the various Committees of the Knox County Commission. The deliberations were not held in public as required under the Open Meetings Act and the Committee returned to the Assembly Room to announce their appointments.

The Finance and Intergovernmental Committees then “huddled” in private to select the Chairman, Vice Chairman, and Secretary of the



Chat continued

Committees. The proceedings were not conducted in the customary open fashion for electing officers. I can speak only for the Finance Committee, but no explanation was offered to the process for the newly sworn in commissioners, no nominations solicited for the chairmanship, no discussion took place, and no vote taken by roll call.

For those of us recently elected, we ran on a platform of openness and accountability in government. I feel we have a mandate from the public to insist business is conducted in an open and fair manner and it will no longer be "business as usual." All commissioners, even the new ones, have the right to participate and understand the process. We will not tolerate the appearance or perception of impropriety. I have grave concerns that the deliberations mentioned above met neither the letter nor the spirit of the Open Meetings Act. No minutes were taken on the nominations of the officers for the committees and no record made of the vote - thus no accountability. . . .



Potential 2009 Open Meetings Legislation

- ◆ Expansion of electronic participation:
 - Eligible governing bodies
 - Removing/reducing restriction of “necessity”
- ◆ Increase number of members triggering “meeting”
- ◆ Elimination of requirement of newspaper or print publication
- ◆ Expansion of executive or closed sessions