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Technical Bulletins: Public Meeting, Open Record Laws

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Public Meeting, Open Record Laws

By Mark Pullen, MTAS Legal Consultant

Councilmembers, eager for the chance to "freely" talk about new landfill sites, schedule a retreat. A public notice about the retreat says nothing about proposed landfill locations.

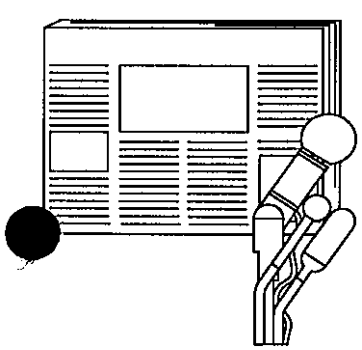
At the retreat, each councilmember — away from the public eye — speaks about the dump sites. An "informal" decision is made.

At the next council meeting, a quick vote decides the landfill issue. Stunned spectators look at each other. What happened?

The council broke the law. ...

A city contract is up for grabs. Four of five commissioners have dinner at the mayor's house. What's for dessert? A discussion of pending contracts. Later, when the contract's awarded, it goes to the same company that won out in the "informal" discussion at the mayor's house. What happened later?

A trial court invalidated the vote. ...

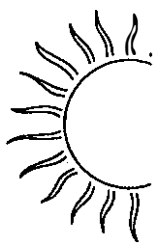


These examples are **purely fictional**, but they show what can happen when cities fall into the trap of conducting public business in private.

City officials should be up to date on two state laws dealing with media relations and, consequently, the public's right to know. These two laws are the Tennessee Public Meeting Law and the Open Record Law.

And cities, be warned: In the eyes of the courts, violating even the spirit of the Public Meeting Law is forbidden.

Tennessee Public Meeting Law



The Tennessee Public Meeting Law — better known as the Sunshine Law — is recognized as one of the most comprehensive in the nation.

The law (*Tennessee Code Annotated* 8-44-101--106) provides that "all meetings of any governing body are declared to be public meetings open to the public at all times, except as provided in the Tennessee Constitution." The reference to the state constitution affects only the legislature and is of no concern to local officials. The critical words are **meetings** and **governing body**.

The act itself defines a meeting as "... 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 in any matter. Meeting does not include any on-site inspection of any project or program." "Governing body" means "... the members of any public body which consists of two or more members, with the authority to make decisions for or recommendations to a public body on policy or administration."

This rather plain language is supplemented with *T.C.A.* Section 8-44-102(d), which provides that "nothing in this section shall be construed as to require a chance meeting of two or more members of a public body to be considered a public meeting. No such chance meetings, and informal assemblages, or electronic communications shall be used to decide or deliberate public business and circumvent the spirit or requirements of this part." Several recent cases have used this section to dramatically expand these definitions, particularly that of "meetings."

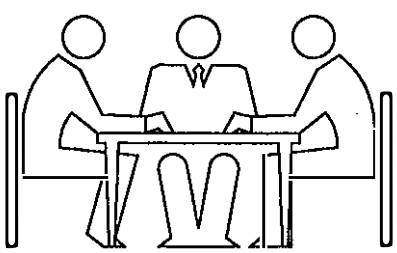
Of special interest is *State ex rel. Matthews v. Shelby County Board of Commissioners*, 15 TAM 14-9 (Tenn. App. 1990). In that case, several county commissioners met individually or spoke on the phone with most of the other commissioners in order to find a consensus candidate to fill a commission vacancy.

The trial court, citing the Public Meeting Law, invalidated the vote. The Court of Appeals affirmed the lower court and said **the act permitted courts to grant relief when challenged conduct violated the purpose of the act.**

The court further stated that though not within the literal definition of "meeting" found in the act, the commissioners' actions still constituted **an informal assemblage** of a governing body in which **public business was privately conducted** without public notice and thus subject to the act.

This court decision clearly illustrates that violations of the spirit of the law — found in Section 101, "... the formation of public policy and decisions is public business and should not be conducted in secret" — will not be tolerated in any form.

Informal meetings such as retreats or dinner parties can further cloud the issue of what may be considered a meeting under the act.



A retreat attended by a school superintendent and four of seven members of the school board was held to be a meeting (*Neese v. Paris Special School District*, 15 TAM 25-4 (Tenn. App. 1990)). The court focused on the nature of the discussions — the officials had talked about a controversial school "clustering" plan — and noted that substantive deliberations had taken place.

This does not mean that all informal get-togethers violate the law. The nature of what was discussed was also the nucleus in *Bundren v. Peters*, 732 F.Supp. 1486 (E.D. Tenn. 1989). In that case, a dinner party given by the superintendent for new board members was found not to be a meeting for the simple reason that no evidence was found that any discussion of board business had occurred.

These cases underscore the guidance found in Opinion of the Attorney General No. 88-169: "Court decisions under the Act are fact dependent and cautious advice is that 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 Act." This is good advice for avoiding future problems.

As previously noted, the meaning of "governing body" has also received scrutiny. One of the earliest and most cited cases on this is *Dorrier v. Dark*, 537 S.W.2d 888 (Tenn. 1976). In that case, the Tennessee Supreme Court flatly stated:

> It is clear that for the purpose of the Act, the Legislature intended to include any board, commission, committee, agency, authority or any other body by whatever name ... whose **members** have authority to make decisions or recommendations affecting the conduct of the business of the people in the governmental sector (emphasis added).

As can be seen, this is very inclusive. About the only thing left out are individual officials acting alone. A fine example of this is found in *Mid-South Publishing Co. v. Tennessee Board of Regents*, 16 TAM 5-8 (Tenn. App. 1990). This case held that the act did not apply to a meeting of the chancellor of the Board of Regents with advisers when he was the only one to receive the advice.

The court did remark that if the advisers were to have later addressed the board as a whole, then the law would have applied.

The State Open Record Law and Confidential Records

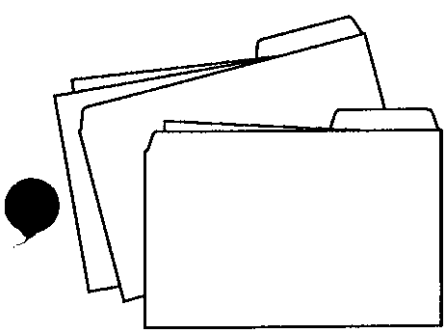
Although the Open Record Law (*T.C.A.* 10-7-503) has not undergone as much change as the Public Meeting Law, there are still several cases of interest.

Memphis Publishing Co. v. Holt, 710 S.W.2d 513 (Tenn. 1986), involves investigative records, one of the specific exemptions from this law. The Tennessee Supreme Court made a clear distinction between which investigative records should not be made public and which ones should, and it based this distinction on the status of the investigation.

The court held that if the records pertain to an ongoing investigation and are relevant to a pending or contemplated criminal proceeding, then they should not be released. However, if the investigation is closed — with no further criminal action contemplated — then the records must be open.

Records that a municipality did not generate but instead received and are in its possession are also subject to the law. This is demonstrated by *Griffin v. City of Knoxville*, 16 TAM 49-1, Su. Ct. (12/2/91). The Tennessee Supreme Court held that suicide notes collected during the course of an investigation became public records once the investigation ended.

Personnel records of state and local employees are generally open, but in 1991 the legislature added a subsection d to 10-7-504. This bars the release of any records associated with an employee's use of an assistance program to overcome health, alcohol, drug, marriage, or mental health problems.



For this section to apply, these records **must** be segregated from the employee's other records.

Even if a document is found to be exempt from the Open Record Law, it does not mean there may be no disclosure of any of its contents whatsoever.

Opinion of the Attorney General No. 88-191 indicates that if the confidential portions of a document can be excised without destroying the gist of the work, then it comes under the statute.

The most active part of this area has involved cases determining what is a government document subject to the act. Records of an independent corporation acting as an agent for a municipality have been found to be subject (*Creative Restaurants v. Memphis*, 795 S.W.2d 672 (Tenn. App. 1990)). The theory behind this ruling: The company in question was a leasing agent performing a function for the city with city property.

The presence of significant government funding may not make a third party's records accessible, however, as long as it is truly independent of the government and not acting in an agency capacity (*Memphis Publishing Co. v. Shelby County Health Care Corp.*, 799 S.W.2d 225 (Tenn. App. 1990)).

From reading the cases, it is my opinion that the courts are fairly sensitive in the documents area and will not give it the wide open reading they do to the Sunshine Law.

For more information

City officials should consult with their legal counsel if they have questions about the Tennessee Public Meeting or Open Record laws.

MTAS legal or communication consultants also may be able to answer your questions or advise you. Call MTAS in Knoxville at (615) 974-0411; Nashville at (615) 256-8141; or Jackson at (901) 423-3710.

The Municipal Technical Advisory Service (MTAS) is a statewide agency of The University of Tennessee's Institute for Public Service. MTAS operates in cooperation with the Tennessee Municipal League in providing technical assistance services to officials of Tennessee's incorporated municipalities. Assistance is offered in areas such as accounting, administration, finance, public works, communications, ordinance codification, and wastewater management.

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