Members Only

AN INFORMATIONAL BRIEF PREPARED FOR MEMBERS OF THE OHIO GENERAL ASSEMBLY BY THE LEGISLATIVE SERVICE COMMISSION STAFF

Volume 126 Issue 9
September 18, 2006

Ohio's Open Meetings Law*

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Ohio's Open Meetings Law, section 121.22 of the Revised Code, requires all public bodies to take official action and to conduct all deliberations upon official business only in open meetings, unless specifically excepted by law. Although the Law requires that it be liberally construed with this goal in mind, there are exemptions from the Law as well as exclusions from the definition of a "public body."

All public bodies are required to take official action and to conduct deliberations upon official business in open meetings.

What is a public body?

The Law defines "public body" as (1) any board, commission, committee, council, or similar decision-making body of a state agency, institution, or authority, (2) any legislative authority or board, commission, committee, council, agency, authority, or similar decision-making body of any county, township, municipal corporation, school district, or other political subdivision or local public institution, (3) any committee or subcommittee of any of the bodies mentioned in (1) or (2) above, or (4) a court of jurisdiction of a sanitary district organized wholly for the purpose of providing a water supply for domestic, municipal, and public use when meeting for the purpose of the appointment, removal, or reappointment of a member of the board of directors of the district or for any other matter related to the district other than litigation involving it (R.C. 121.22(B)(1)). The following bodies or meetings are specifically exempted from the Law: a grand jury; an audit conference conducted by the Auditor of State or independent certified public accountants with officials of the public office that is the subject of the audit; the Adult Parole Authority when its hearings are conducted at a correctional institution for the sole purpose of interviewing inmates to determine parole or pardon; the Organized Crime Investigations Commission; a child fatality review board meeting; meetings between a public children services agency executive director and county prosecuting attorney regarding the release of

A limited number of public bodies are specifically exempted from the Open Meetings Law. An additional limited number are permitted to meet in executive session to discuss sensitive material.

* This Members Only Brief is an update of earlier Briefs on this subject dated November 8, 2002 (Volume 124 Issue 10) and October 4, 2004 (Volume 125 Issue 7).

information about a deceased child; the State Medical Board, the Board of Nursing, the State Board of Pharmacy, or the State Chiropractic Board when determining whether to suspend a license or certificate without a prior hearing under certain circumstances; or the Executive Committee of the Emergency Response Commission when determining whether to issue an enforcement order or request that a civil action, civil penalty action, or criminal action be brought to enforce the Emergency Planning Law (R.C. 121.22(D)).

The 120th General Assembly enacted legislation requiring all meetings of any legislative committee to be open to the public except caucus meetings and certain Joint Legislative Ethics Committee meetings.

Five specified bodies are permitted to meet in executive session (a closed portion of a meeting) upon a unanimous vote of those present to consider confidentially received information pertaining to marketing plans, specific business strategy, production techniques and trade secrets, financial projections, and personal financial statements of an applicant or members of an applicant's immediate family, including tax records or other similar information not open to public inspection. These bodies are the Controlling Board, the Development Financing Advisory Council, the Industrial Technology and Enterprise Advisory Council, the Tax Credit Authority, and the Minority Development Financing Advisory Board. (R.C. 121.22(E).) In addition, the Law specifically requires a veterans service commission to hold an executive session for specified purposes relating to applications for financial assistance unless an applicant requests a public hearing (R.C. 121.22(J)).

Municipal charters with provisions concerning meetings of municipal bodies take precedence over the Open Meetings Law.

The Ohio General Assembly is not covered by the Law as a public body. Instead, section 101.15 of the Revised Code requires all meetings of any legislative committee, other than caucus meetings and certain meetings of the Joint Legislative Ethics Committee (JLEC) to be open to the public. JLEC sessions addressing allegations against legislators and requests for advisory opinions remain secret. Section 101.15 makes meetings of the General Assembly open to the public in a manner similar to that required of most other public bodies by the Open Meetings Law.

Municipal charters with provisions concerning meetings of municipal bodies take precedence over the Law.[1]

In *Stegall v. Joint Twp. Dist. Memorial Hosp.* (1985), 20 Ohio App.3d 100, 103, a three-tiered test for determining public body status was established: (1) the body must be among the types of entities covered by the Law, (2) it must be a "decision-making body," and (3) the body must be created by operation of law. A more recent case, *Smith v. City of Cleveland* (1994), 94 Ohio App.3d 780, used a two-step analysis: the first focusing on the nature of the entity (is it a board, commission, committee, etc.?) and the second focusing on its relationship to listed entities (is it a board, commission, committee, etc., "of" a municipal corporation, school district, or other political subdivision or local public institution, etc.?). Under either test, it is not always clear whether a

particular entity is a public body.[2] The following have been determined to be public bodies: a board of directors of a county agricultural society; an advisory committee created by a board of county commissioners to make recommendations about a new jail; a housing advisory board created by a county pursuant to section 176.01 of the Revised Code; an advisory committee to a board of health of a general health district; a private nonprofit corporation acting as a PASSPORT administrative agency; a group of architectural consultants for a city known as an urban design review board; and a building leadership team authorized by a school district collective bargaining agreement.[3]

A governmental decision-making body cannot assign its decision-making powers to a private body in order to avoid public scrutiny under the Law. If a private body is organized pursuant to statute and is statutorily authorized to receive, and to make decisions about how to expend, government funds for a governmental purpose, it is a public body.[4]

What is a meeting?

In general

The Open Meetings Law defines a "meeting" as any prearranged discussion of the public business of the public body by a majority of its members (R.C. 121.22(B)(2)).

In *State ex rel. The Fairfield Leader v. Ricketts* (1990), 56 Ohio St.3d 97, the Ohio Supreme Court found that if a majority of the members of a public body attend, in their official capacity, a meeting where public business is discussed, the gathering may be a meeting of the public body, regardless of who initiated the meeting. In this case, a majority of county, township, and city officials met at the request of the city mayor for a "retreat" where public business was discussed, but where no specific proposals were made and no official action was taken. The Court held that if a majority of the members of a public body gather with representatives of other public bodies, the gathering may constitute a meeting under the Open Meetings Law separately for each public body that has a majority of members present. Under the facts of this case, the news media were denied access and were told that the meetings were intended to be private.

Some courts have found, however, that a gathering of the members of a public body is not a meeting if the members act only as passive observers in an *informational* session or in a ministerial *fact-gathering* capacity.[5] The simple presentation of information to a public body, without more, may not constitute a "discussion" of its public business.[6] Similarly, a presentation to a public body by its legal counsel where legal advice is received by it may not constitute "deliberations" by the public body.[7]

A function where public business is discussed and where a majority of the members of a public body attend in official capacity may be construed as a meeting of that public body, regardless of who initiated the function.

If a private body is organized and authorized to receive government funds and to make decisions about expending those funds, the body is considered a public body, and the Open Meetings Law applies to it.

Conversations and sequential meetings

One-to-one conversations about public business between individual members of a public body, in person or by telephone, do not violate the Open Meetings Law.[8] However, deliberations during one-to-one conversations in which an item of business is sequentially but separately discussed with a majority of a public body's members apart from a traditional meeting violate the Law.[9] Similarly, a series of closed "back-to-back" meetings with less than a majority in attendance, where the same topics of public business are discussed, is an unlawful circumvention of the law.[10] In addition, a conference call among a majority of members generally is prohibited; *physical* presence generally is required at a meeting of a public body (R.C. 121.22(C)).[11]

One-to-one conversations between individual members of a public body about public business violate the Open Meetings Law if the same matter is sequentially addressed with a majority of members.

E-mail communications

Despite the otherwise liberal construction usually applied to the Open Meetings Law, one Ohio court has held that the Law does not apply to e-mail communications. In *Haverkos v. Northwest Local School District Bd. of Education* (2005), 2005 Ohio App. LEXIS 3237 (Ct. App. Hamilton County), the court of appeals determined that the Law does not cover e-mail communications because the General Assembly did not include specific language about electronic communications in a 2002 revision of the Law and because no Ohio case holds that these communications are subject to the Law. The facts of this case did not support a finding of a pre-arranged meeting in that an e-mail communication by one school board member to two other members was unsolicited and not responded to (mere "passive" receipt of e-mail).

Notice of meetings

Every public body is required to establish by rule a reasonable method for the public to determine the time and place of all regularly scheduled meetings and the time, place, and purpose of all special meetings. The rule must provide that any person, upon request and payment of a reasonable fee, may obtain reasonable advance notification of all meetings at which a specific type of public business is to be discussed. The public body must give at least 24 hours' advance notice of each special meeting to all news media that have requested notification; or, for an emergency meeting requiring immediate official action, the member or members of a public body calling the meeting must immediately notify all news media that have requested notification. (R.C. 121.22(F); *Wyse v. Rupp* (1995), 1995 Ohio App. LEXIS 4008; 1988 Op. Att'y Gen. No. 88-029.)

Minutes

Public bodies are required to promptly prepare, file, and maintain minutes of all regular and special meetings. The minutes must be open

to public inspection. They need not detail discussions occurring during executive sessions, but must reflect the general subject matter of those discussions. The minutes must contain sufficient facts and information to permit the public to understand and appreciate the rationale behind the relevant public body's decision.[12] (R.C. 121.22(C).) Meetings of a public body should be conducted in public meeting places and within the geographical jurisdiction of the public body. 1992 Op. Att'y Gen. No. 92-032; 1944 Op. Att'y Gen. No. 44-7038.

Executive sessions

An executive session is a portion of a meeting from which the public is excluded and at which only the persons a public body may invite are permitted to be present.[13] Apart from the special executive session provisions described previously with regard to five specified public bodies, the Open Meetings Law provides that the members of a public body may hold an executive session only after a majority of a quorum of the public body determines, by a roll call vote, to hold such a session and only at a regular or special meeting for the sole purpose of considering any of the following (R.C. 121.22(G)):

(1) The appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official, or the investigation of charges or complaints against a public employee, public official, licensee, or regulated individual, unless the employee, official, licensee, or regulated individual requests a public hearing. However, except as otherwise provided by law, no public body is permitted to hold an executive session for the discipline of an elected official for conduct related to the performance of the official's duties or for the official's removal from office.

(2) The purchase of property, or the sale of property by competitive bidding, if premature disclosure of information would give an unfair competitive or bargaining advantage to certain persons. 1988 Op. Att'y Gen. No. 88-003.

(3) Conferences with an attorney for the public body concerning disputes involving it that are the subject of pending or imminent court action;

(4) Preparing for, conducting, or reviewing negotiations or bargaining sessions with public employees concerning their compensation or other terms and conditions of their employment;

(5) Matters required to be kept confidential by federal law or rules or state statutes;

(6) Details of security arrangements and emergency response protocols for a public body or a public office, if disclosure of the matters to be discussed in executive session could reasonably be expected to jeopardize the security of the public body or public office;

(7) In the case of a county or municipal hospital, to consider trade secrets.

Executive sessions exclude the public and may be called only for limited purposes and with majority approval.

The motion and vote to go into executive session must specify the purpose of the executive session. If the purpose is personnel-related, the public body must indicate the specific personnel action to be discussed. For example, if the dismissal of an employee will be discussed, the public body must specify that the executive session is for the purpose of discussing an employee's dismissal, but the name of the employee need not be specified.[14]

If the use of an executive session is called into question, the public body has the burden of showing that one of the statutory exceptions permits the use of an executive session. Only deliberation on the specified subjects may be held in executive session; decision making must be conducted in public.[15]

A resolution, rule, or formal action of any kind by a public body is invalid unless adopted in an open meeting.

Enforcement

Any person may bring an action in the appropriate court of common pleas to enforce the Open Meetings Law within two years after the date of an alleged or threatened violation of it. The court is required to issue an injunction to compel the public body to comply with the Law upon proof of a violation or threatened violation. (R.C. 121.22(I)(1).) If an injunction is issued, the court also is required to order the public body to pay a civil forfeiture of $500 to the party seeking the injunction, and must award that party court costs and reasonable attorney's fees, which may be reduced as described below. The court may reduce or eliminate an attorney's fees award if it determines (1) that a well-informed public body reasonably would believe that it was not violating or threatening a violation of the Law and (2) that it was reasonable for the public body to believe that its conduct or threatened conduct would serve the public policy underlying the authority asserted as permitting the conduct or threatened conduct. (R.C. 121.22(I)(2).)

If a violation of the Open Meetings Law is proven, a court of common pleas must issue an injunction against the public body to compel compliance. A $500 civil forfeiture must be paid by the body to the party who sought the injunction along with court costs and possibly an award of reasonable attorney's fees.

Similarly, if the court of common pleas does not issue an injunction and determines that the bringing of the action was frivolous, the court must award court costs and reasonable attorney's fees to the public body (R.C. 121.22(I)(2)).

A member of a public body who knowingly violates an injunction may be removed from office by an action brought in the court of common pleas for that purpose by the prosecuting attorney or the Attorney General (R.C. 121.22(I)(4)).

Finally, a resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of a public body. A resolution, rule, or formal action adopted in an open meeting that results from deliberations in a meeting not open to the public is invalid unless the deliberations were for a purpose specifically authorized by the Open Meetings Law and conducted at an executive session.[16] In addition, a resolution, rule, or formal action adopted in an open meeting is invalid if the public body that adopted it violated the Law's notice provisions. (R.C. 121.22(H).)

Endnotes

[1] *State ex rel. Fenley v. Kyger* (1995), 72 Ohio St.3d 164; *State ex rel. The Fairfield Leader v. Ricketts* (1990), 56 Ohio St.3d 97; *Fox v. Lakewood* (1988), 39 Ohio St.3d 19; *State ex rel. Plain Dealer Publishing Co. v. Barnes* (1988), 38 Ohio St.3d 165.

[2] *Maser v. Canton* (1978), 62 Ohio App.2d 174; 1992 Op. Att'y Gen. No. 92-077; 1992 Op. Att'y Gen. No. 92-065; 1979 Op. Att'y Gen. No. 79-110; 1979 Op. Att'y Gen. No. 79-061.

[3] 1995 Op. Att'y Gen. No. 95-001; 1994 Op. Att'y Gen. No. 94-096; 1992 Op. Att'y Gen. No. 92-078; 1992 Op. Att'y Gen. No. 92-077; 1992 Op. Att'y Gen. No. 92-065; *The Cincinnati Enquirer v. Cincinnati* (2001), 145 Ohio App.3d 335; *Weissfeld v. Akron Public School Dist.* (1994), No. 16410 (Ct. App. Summit County).

[4] *State ex rel. Toledo Blade Co. v. Economic Opportunity Planning Assn. of Greater Toledo* (1990), 61 Ohio Misc.2d 631.

[5] *Steingass Mech., Inc. v. Warrensville Heights Board of Ed.* (2003), 151 Ohio App.3d 321.

[6] *DeVere v. Miami University Board of Trustees* (1986), 1986 Ohio App. LEXIS 7171 (Ct. App. Butler County).

[7] See *Steingass Mech., Inc., supra.*

[8] *Maser v. Canton* (1978), 62 Ohio App.2d 174; *McIntyre v. Westerville School Dist.* (1991), No. 90AP-1024 (Ct. App. Franklin County).

[9] *State ex rel. Floyd v. Rock Hill Local School Bd. of Education* (1988), No. 1862 (Ct. App. Lawrence County).

[10] *State ex rel. Cincinnati Post v. Cincinnati* (1996), 76 Ohio St.3d 540.

[11] Current law that governs the meetings of financial planning and supervision commissions established for specific school districts allows members of these entities to be "present" at a meeting other than "in person" if it is held by teleconference and provisions are made for public attendance at any location involved in the teleconference (R.C. 3316.05(K)).

[12] *State ex rel. Long v. Cardington Village Council* (2001), 92 Ohio St.3d 54; *White v. Clinton Cty. Bd. of Commrs.* (1996), 76 Ohio St.3d 416.

[13] *Dayton Newspapers v. Dayton* (1971), 28 Ohio App.2d 95.

[14] *Beisel v. Monroe Cty. Bd. of Education* (1990), No. CA-678 (Ct. App. Monroe County).

[15] *State ex rel. Bond v. Montgomery* (1989), 63 Ohio App.3d 728; *State ex rel. Humphrey v. Adkins* (1969), 18 Ohio App.2d 101.

[16] *State ex rel. Delph v. Barr* (1989), 44 Ohio St.3d 77.

Published by the Ohio Legislative Service Commission Staff

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