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OFFICE OF THE
ATTORNEY GENERAL
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May 14, 2003

Opinion No. 03-063

Application of Open Meetings Act to Economic Development Board

QUESTION

Are meetings of the Economic Development Board of Unicoi County (the “Board”) subject to the Open Meetings Act, Tenn. Code Ann. §§ 8-44-101, *et seq.*?

OPINION

Based on research conducted by the Municipal Technical Advisory Service, neither the Unicoi County Commission nor the legislative bodies of Unicoi or Erwin created the Board or conferred any authority on it. Assuming that neither the county nor either city played any role in creating or operating the Board, it appears that the Board is not a “governing body” within the meaning of the Open Meetings Act. The Board does, however, include two members from the Unicoi County Commission and two members from the Unicoi Board of Mayor and Aldermen. These are both governing bodies subject to the Open Meetings Act. If, in the course of Board meetings, members of either of these bodies deliberate toward county or city business, respectively, then they may have violated the Open Meetings Act as it applies to these governing bodies.

ANALYSIS

This opinion addresses whether meetings of the Economic Development Board of Unicoi County (the “Board”) are subject to the requirements of the Open Meetings Act, Tenn. Code Ann. §§ 8-44-101, *et seq.* (the “Open Meetings Act”). The request does not specify how the Board was formed or its purpose. The Municipal Technical Advisory Service, however, issued an opinion regarding the Board on August 6, 2002, and has provided this Office with a copy of that opinion. The opinion indicates that membership of the Board includes the Unicoi County Executive, the Chairman of the Unicoi County Commission, the Mayor of Erwin, the Mayor of Unicoi, and one member of the Unicoi Board of Mayor and Aldermen. The opinion indicates, further, that the city records of Unicoi and Erwin contain no resolution or ordinance that concerns the Board. The opinion also indicates that the Unicoi County Commission has taken no action concerning the Board. This Office has found no reference to an organization like the Board in Tennessee statutes, nor does the request cite any provision authorizing city or county officials to act as members of such an organization in their official capacity.

The Secretary of State's Office does contain records regarding a privately chartered corporation named "Economic Development Board of Unicoi County and the Town of Erwin." The charter of that organization gives the principal office of the corporation as the Office of the Unicoi County Executive. This Office is not aware of any authority for a privately chartered corporation to use resources of the county government or to associate itself with the county government in this way. Of course, citizens who hold local governmental offices are free to serve in their private capacity as directors of a privately chartered corporation, so long as the service does not interfere with their duties as governmental officials. Op. Tenn. Atty. Gen. U94-037 (March 10, 1994).

It is the policy of the State that the formation of public policy and decisions is public business and shall not be conducted in secret. Tenn. Code Ann. § 8-44-101. Under the Open Meetings Act, all meetings of any governing body are declared to be public meetings open to the public at all times, except as provided by the Tennessee Constitution. Tenn. Code Ann. § 8-44-102(a). The statute provides notice and other requirements regarding the meetings of a governing body.

The key issue in this inquiry is whether the Board is a "governing body" as defined under the Open Meetings Act. The Act defines "governing body" as follows:

(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 and also means a community action agency which administers community action programs under the provisions of 42 U.S.C. § 2790 [repealed]. Any governing body 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;

(B) The board of directors of any nonprofit corporation which contracts with a state agency to receive community grant funds in consideration for rendering specified services to the public; provided, that community grant funds comprise at least thirty percent (30%) of the total annual income of such corporation. Except such meetings of the board of directors of such nonprofit corporation that are called solely to discuss matters involving confidential doctor-patient relationships, personnel matters or matters required to be kept confidential by federal or state law or by federal or state regulation shall not be covered under the provisions of this chapter, and no other matter shall be discussed at such meetings;

(C) The board of directors of any not-for-profit corporation authorized by the laws of Tennessee to act for the benefit or on behalf of any one (1) or more counties, cities, towns and local governments pursuant to the provisions of title 7, chapter 54 [regarding municipal energy production facilities] or 58 [regarding municipal resource recovery and solid waste disposal systems]. The provisions of this subdivision (b)(1)(C) shall not apply to any county with a metropolitan form of government and having a population of four hundred thousand (400,000) or more according to the 1980 federal census or any subsequent federal census;

(D) The board of directors of any nonprofit corporation which through contract or otherwise provides a metropolitan form of government having a population in excess of five hundred thousand (500,000) according to the 1990 federal census or any subsequent federal census with heat, steam or incineration of refuse;

(E) (i) The board of directors of any association or nonprofit corporation authorized by the laws of Tennessee that:

(a) Was established for the benefit of local government officials or counties, cities, towns or other local governments or as a municipal bond financing pool;

(b) Receives dues, service fees or any other income from local government officials or such local governments that constitute at least thirty percent (30%) of its total annual income; and

(c) Was authorized as of January 1, 1998, under state law to obtain coverage for its employees in the Tennessee consolidated retirement system.

Tenn. Code Ann. § 8-44-102(b)(1).

Based on the facts available to this Office, the Board does not appear to fall within the definitions in subdivisions (B), (C), (D) or (E) above. The question remains, then, whether the Board is a “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” under subdivision (A). The term “public body” is not defined in the Open Meetings Act; however, the Tennessee Supreme Court has noted with respect to the term:

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).

The Tennessee Court of Appeals has concluded that a not-for-profit corporation chartered by a public hospital authority in accordance with the private acts creating it is a “governing body” subject to the Open Meetings Act. *Souder v. Health Partners, Inc.*, 997 S.W.2d 140 (Tenn. Ct. App. 1998), *no appeal filed*. Similarly, this Office has concluded in the past that an organization created by the legislative body of a local government satisfies the first part of the two-part *Dorrier* test because its authority may be traced to action by the local government’s legislative body. Op. Tenn. Atty. Gen. 99-012 (January 25, 1999) (the meetings of a not for profit corporation organized by the Humphreys County Commission are subject to the Open Meetings Act if the corporation was created pursuant to some action of the county commission, and corporation members are authorized to make decisions or recommendations on policy or administration affecting the conduct of the business of the people in the governmental sector); Op. Tenn. Atty. Gen. 96-040 (March 12, 1996) (a committee created by the county commission to advise the commission regarding airport matters is a “governing body” subject to the Open Meetings Act); Op. Tenn. Atty. Gen. U93-73 (June 17, 1993) (the industrial committee of a privately chartered chamber of commerce is not a “governing body” subject to the Open Meetings Act); Op. Tenn. Atty. Gen. 87-91 (May 15, 1987) (a not-for-profit corporation created pursuant to a metropolitan government ordinance to supervise community-based programming is a “governing body” subject to the Act).

Based on the research conducted by the Municipal Technical Advisory Service, neither the Unicoi County Commission nor the legislative bodies of Unicoi or Erwin created the Board or conferred any authority on it. Assuming the request refers to the corporation whose charter is filed in the Secretary of State’s Office, we also assume that the County Commission did not authorize the corporation to list the Unicoi County Executive’s address as its address. Based on these facts and assumptions, it appears that the Board is not a “governing body” within the meaning of the Open Meetings Act.

But the analysis cannot end here. We note that the Mayor of Unicoi and a member of the Unicoi Board of Mayor and Aldermen are Board members. The Town of Unicoi is incorporated under the mayor-aldermanic charter, Tenn. Code Ann. §§ 6-1-101, *et seq.* The mayor of a city incorporated under the mayor-aldermanic charter is a member of the Board of Mayor and Aldermen with a right to vote on all matters coming before the Board of Mayor and Aldermen. Tenn. Code Ann. § 6-3-106. The Unicoi Board of Mayor and Aldermen is clearly a “governing body” subject to the Open Meetings Act. If, during Board meetings, these two members deliberate toward any decision regarding matters that will be taken up before the Unicoi Board of Mayor and Aldermen, then these two members may have violated the Open Meetings Act as it applies to the Unicoi Board of Mayor and Aldermen. See Op. Tenn. Atty. Gen. 88-169 (September 19, 1988) (application of Open Meetings Act to meetings of mayor with various numbers of council members).

The Board also includes the Unicoi County Executive and the Unicoi County Commission Chairman. A county executive is a nonvoting *ex officio* member of the county legislative body. Tenn. Code Ann. § 5-6-106(b)(1). All county commission resolutions must be submitted to the county executive, who may veto some types of resolutions. Tenn. Code Ann. § 5-6-107(b). A county commission elects a chair from its membership, or it may elect the county executive as its chair. Tenn. Code Ann. § 5-5-102(b). The Unicoi County Commission is clearly a governing body within the meaning of the Open Meetings Act. If, during Board meetings, these two members deliberate toward any decision regarding matters that will be taken up before the Unicoi County Commission, then these two members may have violated the Open Meetings Act as it applies to the Unicoi County Commission. See Op. Tenn. Atty. Gen. 88-169 (September 19, 1988).

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