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Opinion No. 12-60

Application of Open Meetings Act

QUESTION

Can members of a county or city legislative body share a meal together and casually discuss county or city business and/or issues before their respective legislative bodies under the Open Meetings Act, if the discussion is for informative purposes only and no decisions are reached or attempts made to obtain commitments?

OPINION

The private discussion of public business at a meal by two or more members of a governing body could present the potential issue of whether a chance meeting, or informal assemblage, was used to decide or deliberate public business in circumvention of the spirit or requirements of the Open Meetings Act. Court decisions under the Act are necessarily fact dependent. Nonetheless, to avoid any violation of the Act the best advice is that, while two or more members may share a meal together in which public business is discussed, such discussion should not constitute deliberations, *i.e.*, "examin[ing] and consult[ing] in order to form an opinion . . . weigh[ing] arguments for and against a proposed course of action." *See Johnston v. Metropolitan Government of Nashville and Davidson County*, 320 S.W. 3d 299, 311 (Tenn. Ct. App. 2009).

ANALYSIS

Your question requires interpretation of the Open Meetings Act, codified at Tenn. Code Ann. §§ 8-44-101 to -111. The Act applies to all meetings of any governing body. Tenn. Code Ann. § 8-44-102(a). The term "governing body" is defined as "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." Tenn. Code Ann. § 8-44-102(b)(1). A "meeting" is defined 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 on any matter." Tenn. Code Ann. § 8-44-102(b)(2). A "meeting" does not, however, include any on-site inspection of any project or program. *Id*. Furthermore, to balance the policy favoring open government against the need for efficiency in government, the Act recognizes that not every encounter among members of a public body will be considered a meeting but also cautions that such encounters are not to be used to circumvent the Act:

> 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 communications shall be used to decide or deliberate public business in circumvention of the spirit or requirements of this part.

Tenn. Code Ann. § 8-44-102(c).

The question posed is whether the members of a city or county legislative body could share a meal together and casually discuss city or county business or issues pending before those legislative bodies without violating the Open Meetings Act. It is difficult to formulate definitive guidelines regarding under what circumstances members of a governing body can privately discuss public business without violating the Open Meetings Act. However, the case law illustrates that the courts will examine the totality of the facts surrounding an alleged violation of the Act to determine whether a violation has occurred.

For example, in *Jackson v. Hensley*, 715 S.W.2d 605 (Tenn. Ct. App. 1986), the Roane County Commission elected one of its members to the position of Trustee of Roane County. The plaintiff alleged the election was void under Tenn. Code Ann. § 8-44-105 because the Commission violated the Open Meetings Act. In rejecting this contention, the Court of Appeals stated:

> The record establishes that, upon learning of the vacancy in the trustee's office, Hensley contacted several of his fellow commissioners by telephone, soliciting their vote. In one instance, Hensley visited a commissioner at the latter's home asking for his vote. There was no meeting in the statutory sense until the commission met to elect the new trustee. The chancellor correctly determined that Hensley's solicitations were not "in circumvention of the spirit or requirements" of the Act. As the chancellor observed, Hensley "was doing nothing more than what a private citizen – any individual – would have had the right to do under the same or similar circumstances."

Id. at 607.

In *The University of Tennessee Arboretum Society, Inc. v. The City of Oak Ridge*, 1983 WL 825161, (Tenn. Ct. App. May 4, 1983), *cert. denied* (Tenn. Aug. 29, 1983), the Court of Appeals found that a mayor and two city councilmen had not violated the Open Meetings Act when they met with a representative of the Federal Aviation Administration to discuss the funding of an environmental impact statement needed for a proposed municipal report. In affirming the Chancellor's finding that no meeting had occurred in contravention of Tenn. Code Ann. § 8-44-102, the Court noted there was no attempt by the three individuals to make a decision or to deliberate toward a decision as prohibited by the Act. *Id*. at *2. Rather, the Court concluded the meeting was an effort to gather information necessary for future deliberations with regard to the airport. *Id.*

Other decisions by the Court of Appeals are instructive on the broad question of under what circumstances members of a governing body can privately discuss public business without violating the Open Meetings Act. *See*Op. Tenn. Att'y Gen. 88-169 (Sept. 19, 1988) [citing *Tyler v. Henry County Nursing Home Board of Trustees*, slip op.(Tenn. Ct. App. Jan. 4, 1983) (Act was not violated when four of five Board members were confronted after regular meeting by disgruntled employees and heard their grievances but did not decide to terminate plaintiff until after a hearing on certain charges); *Selfe v. Bellah*, slip op. (Tenn. Ct. App. March 11, 1981) (telephone conversation and chance meeting between city councilmen prior to meeting in which zoning matter was considered did not violate Act when participants did not make a decision, solicit commitments or weigh and consider reasons for and against matter with a view to making a choice or determination)].

More recently, in *Johnston v. Metropolitan Government of Nashville and Davidson County*, 320 S.W.3d 299 (Tenn. Ct. App. 2009), the Court of Appeals addressed the issue of whether email communications among Council members were used to "deliberate public business" in circumvention of the Open Meetings Act. The Court first noted that the Act does not require an intent to circumvent the Act in order to find a violation, *i.e*., a violation of the Open Meetings Act can occur inadvertently if the electronic communication has the effect of circumventing "the spirit or requirements" of the Act. *Id*. at 312 (citing Tenn. Code Ann. § 8-44-102(c)). The Court then examined whether the emails constituted deliberation, noting that the term "deliberate" had previously been defined as "to examine and consult in order to form an opinion. . . . [T]o weigh arguments for and against a proposed course of action." *Id*. at 311 (quoting *Neese v. Paris Special Sch. Dist*., 813 S.W.2d 432, 435 (Tenn. Ct. App. 1990), quoting Black's Law Dictionary 384 (5th ed. 1979)).

The Court examined three categories of emails. The first category appeared to be merely the dissemination of information, such as emails from affected residents stating their position, that had been forwarded to other Council members. The second category included emails between individual Council members discussing strategy for gaining passage of the legislation in question. The Court found that neither of these emails constituted "deliberation," *i.e*., "weigh[ing] arguments for and against a proposed course of action." *Id*. at 312.

The third category, however, included emails between Council members in which they were clearly weighing arguments for and against the proposed legislation. These emails, most of which were copied to all Council members, were found to "mirror the type of debate and reciprocal attempts at persuasion that would be expected to take place at a Council meeting, in the presence of the public and the Council as a whole." *Id*. Accordingly, the Court of Appeals found that these emails were "electronic communications . . . used to . . . deliberate public business in circumvention of the spirit or requirements" of the Open Meetings Act. *Id*.

In light of the above authority, the private discussion of public business at a meal by any number of members of a governing body would certainly present the potential issue of whether a chance meeting, or informal assemblage, was used to decide or deliberate public business in circumvention of the Open Meetings Act. Whether a violation occurred would depend upon what was said and what transpired during the meeting. Thus, while the case law does not lend itself to hard and fast rules because the decisions are so fact dependent, some cautious advice readily

appears. While two or more members may share a meal together in which public business is discussed, such discussion should not constitute deliberations, which term has been defined to mean to "examine and consult in order to form an opinion" or to "weigh arguments for and against a proposed course of action." *Johnston v. Metropolitan Government*, 320 S.W.3d at 311.

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