



Municipal Technical Advisory Service
INSTITUTE *for* PUBLIC SERVICE

Published on *MTAS* (<https://www.mtas.tennessee.edu>)

January 17, 2020

Compliance with the Tennessee Open Meetings Act

Dear Reader:

The following document was created from the MTAS website ([mtas.tennessee.edu](https://www.mtas.tennessee.edu)). This website is maintained daily by MTAS staff and seeks to represent the most current information regarding issues relative to Tennessee municipal government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

Sincerely,

The University of Tennessee
Municipal Technical Advisory Service
1610 University Avenue
Knoxville, TN 37921-6741
865-974-0411 phone
865-974-0423 fax
www.mtas.tennessee.edu

Table of Contents

Compliance with the Tennessee Open Meetings Act	3
Tennessee Open Meetings Act.....	3
Governing Body	3
Meeting and Deliberation	4
Exception for Attorney-Client Privilege	5
Internet Forum	6
Adequate Notice of Public Meeting	6
Minutes of Governing Body Meetings	8
Violation and Remedies	8

Compliance with the Tennessee Open Meetings Act

Reference Number: MTAS-418

The Tennessee Open Meetings Act (hereinafter "TOMA") is commonly referred to as the "Open Meetings Law" or the "Sunshine Law," and it is one of the most comprehensive open meetings laws in the country. The statute declares that all public policy and public business decisions must be made in meetings that are open to the public. The TOMA not only requires that meetings be open to the public but also requires adequate public notice and thorough minutes of such meetings. This section explains the scope and application of this law so that city officials may understand how to perform their duties in compliance with the statute.

Tennessee Open Meetings Act

Reference Number: MTAS-426

The Tennessee Open Meetings Act (hereinafter "TOMA") is found at T.C.A. § 8-44-101, *et seq.* The TOMA prohibits multiple members of a governing body from meeting privately to deliberate towards or make decisions on public business. Subject to limited exceptions, almost every meeting of a municipality's governing body, boards and commissions is going to be subject to the TOMA.

Governing Body

Reference Number: MTAS-419

A two-pronged test must be used to analyze a meeting to determine if the Tennessee Open Meetings Act (hereinafter "TOMA") applies. First, a city/town must determine if the entity that is planning to meet is a "governing body" as defined in the TOMA. If the answer to that question is yes, it must then be determined if the governing body will be deliberating towards or making decisions on public business during the course of the meeting. If the governing body will be deliberating towards decisions or making decisions on public business during the course of a meeting, the meeting is subject to the TOMA, which means that it must be open to the public, there must be adequate public notice of the meeting provided and there must be minutes of the meeting recorded.

With regard to the first prong of the test, "governing body" is defined in T.C.A. § 8-44-102 as:

(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 ...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.*

Clearly, your city/town's legislative body fits this definition, but what about other boards or bodies established by your city/town or boards that include city/town officials? Court opinions shed some light on this issue.

The Tennessee Supreme Court provided guidance as to what types of entities constitute a "governing body" in *Dorrier v. Dark*, 537 S.W.2d 888 (Tenn. 1976). The court states:

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. *Id.* at 892 (*emphasis added*).

Based upon the language in *Dorrier*, in order for a board or body to be subject to the TOMA, it must have been formed by an ordinance, resolution, private act, or general law and it must have some authority to affect decisions related government business. Based on this reasoning, the Tennessee Court of Appeals ruled that a grievance committee created by the South Central Human Resource Agency is not subject to the TOMA, despite being established under a specific law, since the "sole

function of the committee is to hear and dispose of personnel complaints in accordance with the policies and procedures of the governing board." *Hastings v. South Central Human Resource Agency*, 829 S.W.2d 679, 686 (Tenn. Ct. App. 1992). The committee did not have the authority to make recommendations to the agency on matters of policy, rather it had the purpose of applying established policies in grievance hearings and, as such, was not subject to the TOMA.

In another case, the Court of Appeals determined that the "governing body" definition applied to a preferred provider organization's (PPO) board of directors on grounds that the PPO's charter indicated that it was created as a government instrumentality of the county general hospital district. *Souder v. Health Partners, Inc.*, 997 S.W.2d 140 (Tenn. App. 1998). The PPO further made policy decisions and commingled funds with the county general hospital district. The court found the PPO to be subject to the TOMA and actions taken in closed meetings were invalidated.

If a board or committee appointed by your governing body is authorized to make recommendations to the governing body that may affect policy or decisions, the committee or board is a "governing body" subject to the TOMA. Such boards include planning commissions, beer boards, boards of zoning appeals, and economic development boards.

Boards that have the authority to carry out the policies of a city/town's governing body, do not necessarily meet the definition of "governing body" found in the law. Questions related to whether a board, commission, or council is a governing body should be referred to the city/town attorney or to your MTAS Management Consultant.

Meeting and Deliberation

Reference Number: MTAS-420

Although your city/town council or board clearly fits the description of a "governing body," meetings or functions of the body are only required to be open to the public under the law if the board is deliberating towards or making a decision on public business. The Tennessee Open Meetings Act (hereinafter "TOMA") states:

(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.

(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. T.C.A. § 8-44-102.

One must examine the topic of discussion as well as the purpose of a meeting to determine if a particular meeting or discussion between board members must be open to the public. For instance, if board members are discussing any matter that is pending before the board, the discussion must be held during an adequately noticed public meeting. If the board members are discussing personal matters or personal opinions on topics that will not come before the board for consideration, such discussions do not have to be open to the public.

Municipal governing bodies may not meet by conference call or other electronic means, except in two limited circumstances. T.C.A. § 8-44-108 permits cities organized under the general law city manager-commission charter, having a population no greater than 2,500 and a governing body of only three members to conduct meetings at which members may participate by electronic or other means when a physical quorum cannot be reached otherwise. Additionally, T.C.A. § 8-44-109 allows certain governing bodies to communicate electronically via an Internet forum. However, before a governing body can utilize an Internet forum, use must be approved by the Office of Open Records Counsel and the communications must be available for public viewing. Aside from these two provisions with limited application, municipal governing bodies may not hold meetings via conference call or any other electronic means.

It is permissible for a governing body to have a "retreat" or a closed-door meeting during which the relations of council members are discussed or the functions of the board are addressed in general, as long as no matters of city business are discussed. However, when board members meet in private it is often difficult to keep them from talking about matters pending before the board.

Such was the case in *Neese v. Paris Special School District*, 813 S.W.2d 432 (Tenn. App. 1990). Members of a board of education and the superintendent attended a retreat in another state where the issue of whether to adopt a clustering plan was discussed. The decision concerning the adoption of a clustering plan had been considered by the board for several years, and following the retreat the board finally approved a clustering plan at the next regular meeting. The plaintiffs argued that the board members discussed the proposed clustering plan at length during the retreat and made their decision before the next board meeting. The court found that the retreat was actually a "meeting" as defined in the TOMA, stating "regardless of whether any Board member made a decision at the meeting, we do not believe that the Board can successfully avoid the fact that it deliberated toward making a decision." *Id.* at 435. It is important to remember that even in situations when a vote is not taken or no quorum is present or required, the gathering of the members of a governing body may still be subject to the requirements of the TOMA. Any discussion of pending or anticipated city business must be held in an adequately noticed public meeting.

Private meetings may be held with city staff members for the purpose of gathering information if the person seeking comments has the authority to make decisions independent from the governing body. Meetings between city staff members and a purchasing agent in which staff provided their opinions regarding whether a contract should be awarded to a low bidder were found to be exempt from the TOMA, as the purchasing agent had the power to make the decision without staff input and no quorum was required. *Metropolitan Air Research Testing Authority, Inc. v. Metropolitan Government of Nashville and Davidson County*, 842 S.W.2d 611 (Tenn. Ct. App. 1992).

Phone calls made by a county commissioner to his fellow commissioners in which he solicited their support for his appointment as county trustee were determined not to violate the TOMA as no meeting took place as defined under the Act. *Jackson v. Hensley*, 715 S.W.2d 605 (Tenn. Ct. App. 1986).

What about meetings between city officials and consultants in which the consultants solicit the officials' opinions as guidance? The Tennessee Attorney General has opined that meetings of a third-party consultant with individual board members to discuss each member's preferences regarding a list of candidates for a new city manager are not subject to the act and may be held privately. Op. Tenn. Atty. Gen. No. 99-193. However, the consultant cannot serve as a conduit taking information back and forth between the members.

Further, language has been added to T.C.A. § 9-3-405(d)(3) that allows local government audit committees and the governing body of a local government meeting with the city/town's audit committees to go into executive session to discuss pending or ongoing audits and audit related investigations.

Exception for Attorney-Client Privilege

Reference Number: MTAS-421

The Tennessee Supreme Court used similar reasoning to determine when meetings between multiple members of a governing body and their attorney concerning pending litigation are required to be open. Although there is no attorney-client privilege exception explicitly set out in the Tennessee Open Meetings Act (hereinafter "TOMA"), the court found that an exception for such communications exists based upon the language in the TOMA that reads "except as provided by the Constitution of Tennessee." The Tennessee Supreme Court held:

The majority of states have fashioned an exception to their states' open meeting laws to permit private attorney-client consultation on pending legal matters even where the statute itself makes no such express exception ... Two approaches, both based upon the same policy consideration, are given for permitting this exception: (1) the evidentiary privilege between lawyer and client and (2) the attorney's ethical duty not to betray the confidences of his client ... we believe the second approach, the attorney's ethical duty to preserve the confidences and secrets of his client, provides a better basis for establishing an exception to the Open Meetings Act. *Smith County Education Association v. Anderson*, 676 S.W.2d 328, 332-333 (Tenn. 1984).

The exception has also been applied to discussions between multiple members of a governing body and their attorney concerning pending controversies that have not yet reached litigation. *Van Hooser v. Warren County Board of Education*, 807 S.W.2d 230 (Tenn. 1991). But not all meetings between multiple members of a governing body and their attorney to discuss pending or threatened litigation may

be closed to the public. The application of the exception, whether litigation is threatened or pending, depends on the discussion that takes place. The court in *Smith County* held:

Clients may provide counsel with facts and information regarding the lawsuit and counsel may advise them about the legal ramifications of those facts and the information given to him. However, *once any discussion, whatsoever, begins among the members of the public body regarding what action to take based upon the advise of counsel, whether it be settlement or otherwise, such discussion shall be open to the public* and failure to do so shall constitute a clear violation of the Open Meetings Act. *Id.* at 334 (*emphasis added*).

After the members of the governing body provide the attorney facts and information related to the litigation or controversy and the attorney provides the governing body legal advise on the issues, all discussions related to what actions to take and any decisions made related to those discussions must take place in an adequately noticed public meeting.

Internet Forum

Reference Number: MTAS-422

The General Assembly passed Public Chapter 175, Acts of 2009, which permits local government officials to participate in meetings via an Internet forum. This law expands a pilot project in Knox County by making the option available to city/town governing bodies and school boards. Codified at T.C.A. § 8-44-109, the law permits governing bodies and school boards to "allow electronic communication between members by means of a forum over the Internet", if specific requirements are met. Before permitting such Internet discussions, the governing body must:

1. Ensure that the forum be "available to the public at all times other than that necessary for technical maintenance or unforeseen technical limitations;"
2. Provide "adequate public notice" of use of the forum;
3. Control who may communicate through the forum;
4. "Control the archiving of the electronic communications to ensure that the electronic communications are publicly available for at least one (1) year," and access to the archived communications must be "user-friendly for the public;" and
5. "Provide reasonable access to members of the public to view the forum at the local public library, the building where the governing body meets or other public building."

The law further requires that such Internet forums "shall not substitute for decision making by the governing body in a meeting."

Before city/town officials may hold such Internet chats, the governing body must file a plan with the Office of Open Records Counsel (hereinafter "OORC"). The plan is then evaluated by Open Records Counsel, who will report whether or not the plan complies with the requirements above within thirty (30) days. If the plan fails to comply, Open Records Counsel will provide written comments to the governing body. No Internet forums are allowed under the law until the OORC issues a report of compliance.

The OORC has documents which make the process of developing an Internet forum plan simpler for cities/towns. These documents include: "Plan Considerations," which contain extensive comments by Counsel on each requirement of the law; a template resolution or ordinance to be passed by the governing body submitting the plan; and, a template "Terms of Use Agreement." These documents may be printed from the Open Records Counsel website [1].

Plans for Internet forums should be submitted to the OORC.

Adequate Notice of Public Meeting

Reference Number: MTAS-423

Another question that frequently arises under the Tennessee Open Meetings Act (hereinafter "TOMA") is what constitutes adequate public notice for meetings. The TOMA states:

§ 8-44-103. Notice

(a) NOTICE OF REGULAR MEETINGS. Any such governmental body which holds a meeting previously scheduled by statute, ordinance, or resolution shall give adequate public notice of such meeting.

(b) NOTICE OF SPECIAL MEETINGS. Any such governmental body which holds a meeting not previously scheduled by statute, ordinance, or resolution, or for which notice is not already provided by law, shall give adequate public notice of such meeting.

(c) The notice requirements of this part are in addition to, and not in substitution of, any other notice required by law.

No definition of "adequate public notice" is provided in the TOMA. The courts in Tennessee have been reluctant to adopt a specific meaning of "adequate public notice," saying:

We think it is impossible to formulate a general rule in regard to what the phrase "adequate public notice" means. However, we agree with the Chancellor that adequate public notice means adequate public notice under the circumstances, or such notice based on the totality of the circumstances as would fairly inform the public. *Memphis Publishing Company v. City of Memphis*, 513 S.W.2d 511, 513 (Tenn. 1974).

However, an unpublished opinion, *Englewood Citizens for Alternate B v. The Town of Englewood*, 1999 WL 419710 (Tenn. Ct. App. June 24, 1999), provides some guidance concerning what constitutes adequate public notice in the context of special called meetings only. The court in *Englewood* held:

First, the notice must be posted in a location where a member of the community could become aware of such notice. Second, the contents of the notice must reasonably describe the purpose of the meeting or the action proposed to be taken. And, third, the 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.

Id. at *2. The *Englewood* case concerns the selection of a route for a highway construction project. A special meeting was scheduled for December 12, and the town recorder testified that notice of the meeting was posted on December 10 at the local post office, at city hall, and at a bank. The city recorder also faxed a copy of the notice to the local newspaper, but the paper did not publish the notice. Although the court found the locations of the posting of the notice to be reasonable, the contents of the notice were insufficient to adequately inform the public of the purpose of the meeting. The notice simply stated "letter to State concerning HWY 411." The court determined that "a more substantive pronouncement stating that the commission would reconsider which alternative to endorse for Highway 411 should have been given." *Id.* at *3.

Notice of a city council meeting to hear an appeal from a discharged police officer was found to be adequate in *Kinser v. Town of Oliver Springs*, 880 S.W.2d 681 (Tenn. Ct. App. 1994). Without discussing the contents of the notice, the court determined that the posting of notices inside city hall, where people pay their water bills and above the entrance to the police department and council room to be sufficient. It is important to note that the *Kinser* case involved an appeal of a termination by an employee and was not a matter affecting a number of city residents.

The Court of Appeals found the content of a meeting notice to be inadequate in *Neese v. Paris Special School District*, 813 S.W.2d 432 (Tenn. Ct. App. 1990). Members of a board of education and the superintendent attended a retreat in another state at which the issue of whether to adopt a clustering plan was discussed. The planned retreat was announced at a prior regular meeting of the board and was further mentioned in media reports. The notice published in the paper stated that two issues would be addressed at the retreat but made no mention of consideration of the clustering plan. *Id.* at 435. The court found the notice to be insufficient, stating "'adequate public notice under the circumstances' is not met by misleading notice." *Id.* at 436.

When providing notice of public meetings, a city/town should follow its normal procedures established for the posting of notices. The attorney general opined that a city did not provide adequate public notice of a special meeting when it failed to follow its normal procedure for posting meeting notices. This attorney general's opinion also considered the fact that city employees were not aware of the meeting, and employees informed some members of the public that no meeting was scheduled for that date. Op. Tenn. Atty. Gen. No. 00-095.

Posting notices of meetings on an Internet site likely will not satisfy the adequate public notice requirement of the TOMA, unless notice is also posted in locations around the city/town and/or through media outlets. Op. Tenn. Atty. Gen. No. 00-090.

A governing body may temporarily adjourn or recess a meeting, but adequate public notice must be provided as to when and where the meeting will be reconvened. Op. Tenn. Atty. Gen. No. 07-30.

Minutes of Governing Body Meetings

Reference Number: MTAS-424

The Tennessee Open Meetings Act (hereinafter "TOMA") also addresses minutes of meetings of governing bodies. The language in T.C.A. § 8-44-104 requires:

(a) The minutes of a meeting of any governmental body shall be promptly and fully recorded, shall be open to public inspection, and shall include, but not be limited to, a record of the persons present, all motions, proposals and resolutions offered, the results of any votes taken, and a record of individual votes in the event of a roll call.

(b) All votes of any such governmental body shall be by public vote or public ballot or public roll call. No secret votes, or secret ballots, or secret roll calls shall be allowed. As used in this chapter, "public vote" means a vote in which the "aye" faction vocally expresses its will in unison and in which the "nay" faction, subsequently, vocally expresses its will in unison.

In a rather alarming opinion, the Court of Appeals found beer board meeting minutes to be insufficient under the Act in the unreported case *Grace Fellowship Church of Loudon County v. Lenoir City Beer Board*, 2002 WL 88874 (Tenn. Ct. App. Jan. 23, 2002). The church challenged the issuance of a beer permit that was in violation of a distance requirement contained in the city ordinance. An application for the beer permit was denied at first but was granted on reconsideration at a later meeting. The minutes for both meetings state the time and location, identify the application being considered, name the member making the motion, and record the vote of each of the two board members. Nevertheless, the court found the minutes to be lacking information but failed to specify what was missing from the minutes. The minutes did not list the names of members present at the meeting, but since this was a board composed at the time of only two members whose votes were recorded, it is difficult to conclude that this omission alone led to the court's decision. In any event, cities should take notice of this opinion and strive to record in detail all events that occur in meetings.

Boards or councils may take action in subsequent meetings to correct or cure deficiencies in meeting minutes without being required to debate issues again or call for votes a second time as long as debate and discussion actually occurred during the earlier meeting. *Zselvay v. Metropolitan Government of Nashville and Davidson County*, 986 S.W.2d 581 (Tenn. Ct. App. 1999).

Additionally, notes from a meeting taken by staff or members of the governing body and minutes that are in draft format that have not been approved are subject to the Tennessee Public Records Act.

Violation and Remedies

Reference Number: MTAS-425

If a citizen brings a legal challenge, a court can find that the action taken by a governing body related to public business in a private meeting, in a meeting that was not adequately noticed, and/or at a meeting with insufficient minutes is a violation of the Tennessee Open Meetings Act (hereinafter "TOMA") and is therefore void, unless the action taken concerns the public debt of the city/town. T.C.A. § 8-44-105. A violation can be cured if the matter is brought before the governing body at an adequately noticed public meeting, the body fully discusses and makes a decision on the matter during an adequately noticed public meeting, and the minutes reflect that the issue was properly addressed.

A violation of the TOMA by a committee that reports to a governing body may be cured by the governing board but only if a full discussion and reconsideration of the matter occurs. In the unreported opinion *Allen v. City of Memphis*, 2004 WL 1402553 (Tenn. Ct. App. June 22, 2004), the Court of Appeals found that a committee appointed by the city council to analyze costs associated with a proposed annexation violated the law by failing to keep minutes of meetings. In one committee meeting held between the first and second readings on the ordinance, the scope of the annexation was changed by removing an area from the property description. The committee meeting was open to the public and proper notices were posted, but minutes were not kept of the discussion that led to the alteration of the ordinance. The Memphis City Council later approved the amended ordinance after a public hearing, but

there was no discussion of the reasons the ordinance was changed. The court, citing the *Neese v. Paris Special School District* opinion, stated:

We do not believe that the legislative intent of this statute was forever to bar a governing body from properly ratifying its decision made in a prior violative manner. However, neither was it the legislative intent to allow such a body to ratify a decision in a subsequent meeting by a perfunctory crystallization of its earlier action. We hold that the purpose of the act is satisfied if the ultimate decision is made in accordance with the Public Meetings Act, and if it is a new and substantial reconsideration of the issues involved, in which the public is afforded ample opportunity to know the facts and to be heard with reference to the matters at issue. *Id.* at *5, citing *Neese v. Paris Special School District*, 813 S.W.2d 432, 436 (Tenn. Ct. App. 1990).

The court found that the city failed to cure the violation of the law since there was no new and substantial reconsideration of the issue in the council meeting.

In contrast, the court held that Kingsport's Board of Mayor and Aldermen acted appropriately to cure a violation of the TOMA by holding numerous public meetings and engaging in new and substantial reconsideration of an issue that the members met about and discussed privately. *Dossett v. City of Kingsport*, 258 S.W.3d 139 (Tenn. Ct. App. 2007). In this unreported case, some members of Kingsport's Board of Mayor and Aldermen attended private meetings to discuss a potential sale of city property. Despite such private meetings, the Court of Appeals found:

After two private meetings, each of which included two members of the Board, the entire Board then met in several public meetings to consider selling the EAP Building to TriSummit. After carefully reviewing the record, including the minutes of these public meetings, we hold that the Board conclusively established that it cured the alleged violations of the Open Meetings Act by fully and fairly considering the proposed sale during its five public meetings following the last private gathering. It is undisputed that the public was afforded at these five public meetings both ample opportunity to know the facts and to be heard as to the proposed sale. It was only after these public meetings that the decision to sell the property ultimately was made. *Id.* at 150.

Governing bodies that violate the TOMA and do not take appropriate corrective action may be sued in circuit or chancery court by any party affected by the board action. T.C.A. § 8-44-106. If the trial court determines that the Act has been violated, it will issue an order called an "injunction" that permanently forbids the governing body from violating the law. The court will have jurisdiction over the governing body for one year, during which time the council or board must report to the court twice, in writing, regarding its compliance with the TOMA T.C.A. § 8-44-106(c),(d).

Even if a governing body takes action to cure a defect in the meeting minutes or deliberates an issue a second time at a properly noticed meeting, the body may not be able to avoid a court order. If a lawsuit has been filed and the court determines that a violation occurred, whether intentional or not, an order may be issued that requires the governing body to remain under the court's watch for a full year. *Zselvay v. Metropolitan Government of Nashville and Davidson County*, 986 S.W.2d 581 (Tenn. Ct. App. 1999).

Once city officials realize that a violation of the TOMA has occurred, the governing body must act to place the issue on the next meeting agenda for full discussion and reconsideration. If an ordinance was passed following discussions that violated the law, the ordinance should be reconsidered and the readings and votes should be repeated as soon as possible, in order to avoid litigation.

Links:

[1] https://www.comptroller.tn.gov/openrecords/internet_forums.asp

DISCLAIMER: The letters and publications written by the MTAS consultants were written based upon the law at the time and/or a specific sets of facts. The laws referenced in the letters and publications may have changed and/or the technical advice provided may not be applicable to your city or circumstances. Always consult with your city attorney or an MTAS consultant before taking any action based on information contained in this website.

Source URL (retrieved on 01/17/2020 - 3:02pm): <https://www.mtas.tennessee.edu/reference/compliance-tennessee-open-meetings-act>

