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OHIO COUNCIL OF SCHOOL BOARD ATTORNEYS
SCHOOL LAW WORKSHOP

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"Electronic Discussions and the Open Meetings Act"

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I. Introduction

A. Ohio's Open Meetings Act, R.C. 121.22, does not define "meeting" to include electronic communications.

1. R.C. 121.22(B)(2): "Meeting" means any prearranged discussion of the public business of the public body by a majority of its members.

B. Compare to other states' analogous provisions:

1. Colorado Rev. Stat. Ann, 24-6-402(1)(b): "Meeting" means any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication.

2. Utah Code Ann. 52-4-103(6)(a): "Meeting" means the convening of a public body or a specified body, with a quorum present, including a workshop or an executive session, whether in person or by means of electronic communications, for the purpose of discussing, receiving

comments from the public about, or acting upon a matter over which the public body or specific body has jurisdiction or advisory power.

C. The Ohio Legislature's failure to amend R.C. 121.22 to include "electronic communications" as being within the definition of "meeting" led Judge Colleen Mary O'Toole of the Eleventh District Court of Appeals to note in her concurrence to Radtke v. Chester Twp., 2015-Ohio-4016, at ¶44:

> "R.C. 121.22 fails to take into consideration various technological advancements, including not only e-mail, but other advancements as well, such as instant messaging, group text messaging, FaceTime, and Skype. R.C. 121.22 also fails to take into consideration the simultaneous nature of such communication. In essence, R.C. 121.22, as written, creates a conundrum. In other words, the spirit of the law is not in tune with the letter of the law."

D. Thus, the Ohio Supreme Court in White v. King, 2016-Ohio-2770, at *syl.* has stepped in to address this shortfall between the letter and the spirit of R.C. 121.22, holding:

> "R.C. 121.22 prohibits any private prearranged discussion of public business by a majority of the members of a public body regardless of whether the discussion occurs face to face, telephonically, by video conference, or electronically by e-mail, text, tweet, or other form of communication."

II. The Open Meetings Act Generally (R.C. 121.22)

A. The Open Meetings Act requires public bodies to take official action and conduct all deliberations upon official business only in open meetings where the public may attend and observe, unless the subject matter is specifically excepted by law. R.C. 121.22(A).

1. All meetings of any public body are considered public meetings open to the public at all times.

2. The Open Meetings Act is intended to be read broadly in favor of openness. R.C 121.22(A).

B. Public bodies must provide advance notice to the public.

C. Public Body.

1. Definition.

"Public body" is any board, commission, committee, or similar decision-making body of a state agency, institution, or authority, and any legislative authority or board, commissions, committee, agency, authority or similar decision-making body of any county, township, municipal corporation, school district, or other political subdivision or local public institution or any committee or subcommittee of a body. R.C. 121.22(B)(1).

2. A body is a decision-making body even if it is only able to decide the course of action to recommend to a board of education. According to Ohio Atty. Gen. Op. 94-096: "The weight of the authority indicates that the term 'decision-making,' . . . is to be construed broadly, and does not exclude any entity that otherwise meets the definition of public body on the grounds that its function is solely advisory."

3. Board of education committees and subcommittees.

a. Board committees and subcommittees are required to follow all of the requirements of the Open Meetings Act.

b. Board members do not have to comprise a majority of the committee for it to be a committee of the Board.

c. If the committee is required by law, rule, or regulation, or has been created by action of the board itself, it is subject to the Open Meetings Act. 1994 Op. Atty. Gen No. 94-096.

d. A board of education cannot delegate committee-making authority to the Superintendent or some other administrator to avoid a committee from being designated as a board committee.

e. A building leadership team authorized by a collective bargaining agreement as a form of site-based management, where teachers and building administrators engage in building-level decision-making, qualifies as a public body. Weissfeld v. Akron Pub. School Dist., 94 Ohio App. 3d 455 (9th Dist. Summit County 1994).

4. Body or committee established by the superintendent.

A body established solely by the Superintendent generally is not subject to the requirements of the Open Meetings Act.

D. Meetings.

1. "Meeting" means any pre-arranged discussion of the public business of the public body by a majority of its members. R.C. 121.22(B)(2).

a. Pre-arranged discussion.

b. Public business.

c. Public body.

d. Majority of members.

2. The Open Meetings Act applies to members of a public body whenever they are taking official action, conducting deliberations, or discussing public business.

3. A member of a public body shall be present in person at a meeting open to the public to be considered present or to vote at the meeting and for purposes of determining whether a quorum is present at the meeting. R.C. 121.22(C).

4. For purposes of the definition of a "meeting," if a majority of Board members do not attend a scheduled session, a "meeting" has not taken place. Tyler v. Village of Batavia, 12th Dist. No. CA2010-01-002, 2010-Ohio-4078.

5. Some courts in Ohio have determined that gatherings strictly of an investigative and information-seeking nature where no actual discussion or deliberation of the public body occurred are not "meetings" for the purposes of the Open Meetings Act. *See* Steinglass Mechanical Contracting, Inc. v. Warrensville Heights Bd. of Ed., 2003-Ohio-28; Holeski v. Lawrence, 85 Ohio App.3d 824 (11th Dist. 1993); Theile v. Harris, 1st Dist. No. C-860103, 1986 WL 6514 (June 11, 1986); and Piekutowski v. S. Cent. Ohio Ed. Serv. Ctr. Gov. Bd., 2005-Ohio-2868 (4th Dist.). *But*, see, State ex rel. Chrisman v. Clearcreek Twp., 2013-Ohio-2396 (whether or not a public body's information-gathering and fact

finding meetings violated the Open Meetings Act is a question of fact requiring testimony regarding whether the meetings were prearranged, the purpose of the meeting and if any deliberations took place.

6. Work Sessions.

"Work sessions," "workshops," and "work retreats" are meetings when a public body discusses public business among a majority of the members of a public body at a prearranged time. As with any other meeting, the public body must open these work sessions to the public, properly notify the public, and maintain meeting minutes.

E. Collective bargaining sessions are private and not subject to the Open Meetings Act, even if a majority of the members of the board of education are present or on the bargaining team. R.C. 4117.21.

III. When Non-Traditional "Meetings" Constitute a "Meeting" Under the Open Meetings Act

A. Back-to-Back Meetings.

1. The Open Meetings Act cannot be circumvented by scheduling back-to-back meetings which, taken together, are attended by a majority of a public body. State ex rel. Cincinnati Post v. Cincinnati, 76 Ohio St.3d 540 (1996).

a. Cincinnati and Hamilton County needed to act quickly on an agreement to build a new stadium in order to keep the Bengals.

b. The city manager did not want discussions about such an agreement to be public, so he arranged for three sets of back-to-back meetings between the city manager and groups of council members, each totaling less than a quorum of such members.

c. The city manager admitted at deposition that, "the reason for having fewer than a majority of members of council at a meeting is so that we wouldn't violate Ohio['s] Open Meetings Law."

d. Following the back-to-back meetings, council met and approved an agreement which contained key differences from the one initially proposed by the county.

e. The Supreme Court held that:

(i) The statute does not prohibit impromptu hallway meetings.

(ii) The statute does not prohibit member-to-member prearranged discussions.

(iii) The statute concerns itself only with situations where a majority meets. Although a majority of council members were not in the same room at the same time, a majority of them did attend a prearranged meeting to deliberate on issues of great interest to the public.

(iv) The statute cannot be circumvented by scheduling back-to-back meetings which, taken together, are attended by a majority of a public body.

2. One-on-one sessions between township trustees and a conservancy field director do not constitute "meetings" under the Open Meetings Act. Radtke v. Chester Township, 2015-4016.

a. Chester Township was considering whether to grant an easement for the Western Reserve Land Conservancy.

b. The field director for the Conservancy met individually with three Township trustees to discuss the proposed easement.

c. After these meetings, which all occurred on the same day, the field director was able to make revisions to the proposed easement, which was eventually approved by the Township six months later.

d. The Court held that such one-on-one meetings between individual members of the board and a third party do not constitute a "meeting".

e. The Court distinguished the Cincinnati decision, as that case dealt with multiple council members in each meeting during which they could discuss and deliberate public business, contrasted with this case where there was never more than one trustee in a meeting, and therefore, no discussions or deliberations.

f. Thus, the Court found that, "the three sessions, when viewed as a whole, cannot be construed to constitute a single meeting for purposes of the Open Meetings Act at which a majority of the trustees attended." Id., at ¶38.

3. One-on-one meetings between school board members and the school superintendent at informal settings such as social occasions, athletic events, or school plays do not constitute a "meeting" for purposes of Missouri's Open Meetings Act. Hanten v. School Dist. of Riverview Gardens, 183 F.3d 799 (8th Cir. 1999).

B. Telephone Calls.

1. A public body which used serial telephone calls between a quorum of the members of the public body and the president of the public body was a "meeting" for purposes of Nevada's Open Meetings Act. Del Papa v. Board of Regents of University and Community College System of Nevada, 114 Nev. 388, 956 P.2d 770 (1998).

C. Email.

1. White v. King, 2016-Ohio-2770.

a. Plaintiff, a member of a local school district board of education ("Board") independently conducted an investigation into alleged improper expenditures by two athletic directors that resulted in one resigning and both being required to reimburse the district. The Board, with the exception of Plaintiff, thereafter amended Board policy to require that all communications between Board members and district staff first pass through the superintendent or the treasurer. The Columbus Dispatch published an editorial critiquing the Board's decision to adopt the policy, but praised Plaintiff for voting against it.

b. The Board President directed that the other Board members and Superintendent prepare a response to the editorial on behalf of the Board. The Board members and District employees engaged in a series of e-mail exchanges for the purpose of developing a response to the editorial, which the Board President signed and submitted for publication. Plaintiff was not consulted about the Board's response and filed a lawsuit claiming that the Board violated the Ohio's Open Meetings Act.

c. The trial court ruled in favor of the Board, finding there was no prearranged discussion of public business, and that R.C. 121.22 does not apply to email. The court of appeals affirmed this decision.

d. The Supreme Court of Ohio reversed, and ruled in the Plaintiff's favor. The Court held that nothing in the Act expressly mandates that a "meeting" occur face to face. Accordingly, the Court held that the Act "prohibits any private prearranged discussion of public business by majority of members of a public body regardless of whether discussion occurs face to face, telephonically, by video conference, or electronically by e-mail, text, tweet, or other form of communication." Id., ¶15.

e. The dissent argued that while it may be good public policy to expand the Open Meetings Act to include email discussions, such a change in the law should be enacted by the Legislature.

2. One email sent by a board member to two other board members, with no responses or counter-responses, does not constitute a discussion or a meeting under the Open Meetings Act. Haverkos v. Northwester Local School Dist.. Bd. of Edn., 2005-Ohio-3489.

3. A Washington court has held that that state's open meetings act was not implicated when board members receive emails about upcoming issues; "the mere use or passive receipt of email does not automatically constitute a 'meeting'." Wood v. Battle Ground School Dist., 107 Wash. App. 550, 564, 27 P. 3d 1208, 1217 (2001).

D. Other electronic forms of communication.

1. Texting and other messaging apps.

2. Skype/video conferencing.

3. Google docs and other on-line collaborative document creation and editing software.

4. Social media.

IV. Duties of a Public Body

A. Openness.

1. A public body must conduct its meetings in a venue that is open to the public. State ex rel. Randles v. Hill, 1993-Ohio-204 (locking doors to the meeting hall, whether intentional or unintentional, is not an excuse for failing to comply with the requirement that meetings be held open to the public).

2. Ability of a public body to meet this duty when meeting electronically?

B. Meeting Minutes.

1. A public body must keep full and accurate minutes of its meetings. Minutes are not required to be a verbatim transcript of the proceedings, but must include enough facts and information to permit the public to understand and appreciate the rationale behind the public body's decisions. White v. Clinton County Bd. of Comm'rs, 1996-Ohio-380.

2. Minutes of a regular or special meeting of any public body shall be promptly prepared, filed, and maintained and shall be open to public inspection.

3. Minutes need only reflect the general subject matter of discussions in executive sessions.

4. Audio recordings of meetings typically will not serve as a substitute for keeping full and accurate minutes, unless they are treated the same as official minutes.

V. Violations of the Open Meetings Act

A. Any action taken by a public body while that body is in violation of the Open Meetings Act is invalid. R.C. 121.22(H).

1. All formal action taken by a public body in a meeting for which it did not properly give notice is invalid. Mansfield City Council v. Richland City Council AFL-CIO, 5th Dist. No. 03 CA 55, 2003 WL 23652878.

2. Formal action taken by a public body following an improper executive session is invalid. State ex rel. Dunlap v. Violet Twp. Bd. of Trustees, 2013-Ohio-2295.

B. If any person believes that a public body has violated the Open Meetings Act, that person may file an injunctive action any time within two years of the alleged violation in the common pleas court to compel the public body to obey the Law. R.C. 102.03(I).

1. Courts reviewing alleged violations will strictly construe the Open Meetings Act in favor of openness. Gannett Satellite Information Network, Inc., v. Chillicothe Bd. of Edn., 41 Ohio App.3d 218 (4th Dist. 1988).

2. Upon proof of a violation of the Open Meetings Act, the court will conclusively and irrebuttably presume harm and prejudice to the person who brought the suit and will issue an injunction. R.C. 121.22(I)(1).

3. If an injunction is issued, the public body must correct its actions, may have to pay court costs, and must pay a fine of $500.

4. Whichever party loses the lawsuit may be required to pay the reasonable attorney fees of the other party, to the extent ordered by the court.

5. A member of the public body who knowingly violates an injunction imposed for a violation of the Open Meetings Act may be subject to a court action removing that official from office. R.C. 121.22(I)(4).

V. Conclusion