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Opinion No. 06-038

Constitutionality of Legislation Placing General Assembly Under Open Meetings Act

## QUESTION

Whether legislation placing the General Assembly under the provisions of the Open Meetings Act, but allowing the General Assembly to exempt itself by adopting a rule, is constitutional?

## OPINION

To the extent that the legislation permits judicial enforcement of the Open Meetings Act against a General Assembly that has not exempted itself by rule and has violated the Act, the legislation violates the separation of powers and is, therefore, unconstitutional.

## ANALYSIS

You have asked whether an act would be constitutional that places the General Assembly under the Open Meetings Act but provides that the General Assembly may exempt itself by adopting a rule. The Open Meetings Act declares that "[a]ll meetings of any governing body are declared to be public meetings open to the public at all times, except as provided by the Constitution of Tennessee." Tenn. Code Ann. § 8-44-102(a). A "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 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means a community action agency which administers community action programs under the provisions of 42 U.S.C. § 2790 [repealed].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.

Tenn. Code Ann. § 8-44-102(b)(1)(A).

In *Mayhew v. Wilder*, 46 S.W.3d 760, 770 (Tenn. Ct. App. 2001), *p.t.a. denied* (2001), the Tennessee Court of Appeals held that it could not find any indication that the Legislature intended to bind itself to the provisions of the Open Meetings Act when it passed the Act and, therefore, the Open Meetings Act did not apply to the Legislature. The Court further held that even if the Legislature had intended to bind itself when it passed the Open Meetings Act, the Act would not bind a subsequent General Assembly. *Id*. In doing so, the *Mayhew* Court first noted that the Tennessee Supreme Court had long recognized that "'each successive General Assembly is a law unto itself in this regard. It is constitutional, and not statutory, prohibitions which bind the legislature.'" *Id*. (quoting *Daughtery v. State*, 159 Tenn. 573, 20 S.W.2d 1042, 1043 (1929)). The Court further noted that Article II, Section 12, of the Tennessee Constitution provides that:

> Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member, but not a second time for the same offence; and shall have all other powers necessary for a branch of the Legislature of a free State.

Furthermore, Article II, Sections 21 and 22, of the Constitution provide:

> Section 21. Each House shall keep a journal of its proceedings, and publish it, except such parts as the welfare of the State may require to be kept secret; . . .
> Section 22. The doors of each House and of committees of the whole shall be kept open, unless when the business shall be such as ought to be kept secret.

The *Mayhew* Court concluded that binding the Legislature with procedural rules, such as the Open Meetings Act, passed by another General Assembly would violate these constitutional provisions.

In *Mayhew*, the Court of Appeals found that the Open Meetings Act in effect at that time did not apply to the General Assembly. While the Court noted that one session of the General Assembly cannot bind a future session, it did not address whether one session of the General Assembly may constitutionally bind itself under all provisions of the Open Meetings Act. In 1989, however, this Office addressed this issue. Op. Tenn. Att'y Gen. 89-139 (December 6, 1989). In that opinion, this Office concluded that, to the extent the Act as applied to the General Assmbly permits judicial enforcement, it is inconsistent with each House's authority to determine its own rules and, therefore, unconstitutional. That position remains the position of this Office. For these reasons, legislation placing the General Assembly under the Open Meetings Act would be unconstitutional.

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