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Opinion No. 10-126

Open Meetings Act and Appointments by County Legislative Body

QUESTION

Whether a member of a county legislative body who is seeking consideration for appointment to the office of county mayor may contact his or her fellow commissioners to solicit their support without violating the Open Meetings Act?

OPINION

We think a court would find that a county commissioner's contacting fellow commissioners to solicit their support and/or vote to appoint him or her to fill a vacancy in the office of county mayor does not constitute a violation of the Open Meetings Act, as long as there is no decision to appoint or deliberation towards a decision to appoint such commissioner to fill the vacancy prior to a public meeting.

ANALYSIS

You have asked whether, in the event that a vacancy occurs in the office of county mayor, a member of a county legislative body may contact his or her fellow commissioners to discuss and solicit their support for appointment to the office of county mayor without violating the Open Meetings Act. [1]

Your question requires interpretation of the Open Meetings Act, Tenn. Code Ann. §§ 8-44-101, *et seq*. The Act provides 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 "[t]he 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). The Act defines "meeting" 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. „Meeting' does not include any on-site inspection of any project or program." Tenn. Code Ann. § 8-44-102(b)(2). The Act further provides that a chance meeting

[1] Tenn. Code Ann. § 5-1-104(b)(1) provides that "[v]acancies in county offices required by the Constitution of Tennessee or by any statutory provision to be filled by the people shall be filled by the county legislative body, and any person so appointed shall serve until a successor is elected at the next general election[.]"

of two (2) or more members of a public body is not to be considered a public meeting; however, "[n]o 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." Tenn. Code Ann. § 8-44-102(c).

From these definitions, it is clear that a convening of a quorum of the county legislative body during which the members make a decision or deliberate toward a decision on an appointment to fill a vacancy is a public meeting that may not be conducted privately under the Open Meetings Act. A meeting between one commissioner to solicit the support of a fellow commissioner for appointment to fill a vacancy presents a more difficult question and requires a a determination of several issues, including "whether the challenged meeting fits within the definition of meeting found in Tenn. Code Ann. [§ 8-44-102(b)(2)]" and "whether the public officials used the artifice of an apparently chance meeting or informal assemblage to conduct public business in circumvention of the Sunshine Law's spirit and purpose." *State ex rel. Akin v. Town of Kingston Springs,* 1993 WL 339305, slip op at *3 (Tenn. Ct. App. Sept. 8, 1993).

These questions were addressed by the Court of Appeals in the case of *Jackson v. Hensley*, 715 S.W.2d 605 (Tenn. Ct. App. 1986), *p.t.a. denied* (1986). In that case, the trustee of Roane County had resigned and designated George Jackson, a deputy in his office, to serve as "emergency interim successor" pursuant to Tenn. Code Ann. § 8-48-111 until the county legislative body could appoint someone to fill the vacancy. Gerald Hensley, a member of the Roane County Commission, learned of the trustee's resignation and contacted several of his fellow commissioners by telephone, and in one instance with a personal visit, to solicit their support and votes to appoint him trustee. Subsequently, at a public meeting of the Roane County Commission, Mr. Hensley was appointed trustee. Shortly thereafter, Mr. Hensley discharged Mr. Jackson, who then filed suit, alleging among other things, that Mr. Hensley's appointment was void as the Roane County Commission had violated the Open Meetings Act. *Id*. at 607. Both the trial and appellate court found that Mr. Hensley's solicitations of his fellow commissioners were not "in circumvention of the spirit or requirements" of the Act and that 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*.

The issue arose again several years later in a case involving a vacancy on the Shelby County Commission; however, the facts in that case were significantly different. *See State ex rel. Matthews v. Shelby County Board of Commissioners*, 1990 WL 29276 (Tenn. Ct. App. March 21, 1990), *p.t.a. denied* (1990). That case dealt primarily with the issue of whether the complaint stated a cause of action for violation of the Open Meetings Act. The complaint alleged that the defendants had engaged in secret telephone conversations and/or meetings and deliberating and deciding their vote for the person to fill a vacancy on the County Commission prior to the announced public meeting. *Id*. at *3. Specifically, the complaint alleged that various commissioners had met and discussed personally and by telephone the pros and cons, merits and demerits of the announced candidates and decided among themselves that none of the announced candidates was acceptable to a majority of the Commission. The complaint further alleged that certain commissioners were charged with finding an acceptable compromise candidate and that these commissioners, prior to the public meeting, had secured the votes of a majority of the Commission for the "consensus" candidate. *Id*. The trial court dismissed the complaint,

however, on the grounds that "there was no meeting in the statutory sense as defined in [the Act] until the County Commission met to elect a new County Commissioner." *Id*. at *2.

On appeal, the Court of Appeals first noted that one of the purposes of the Open Meetings Act "is to prevent, at non-public meetings, the crystallization of secret decisions to a point just short of ceremonial acceptance." *Id*. at *5. The Court went on to find:

> In enacting T.C.A. [§ 8-44-102(c)] as a loophole closer, the General Assembly recognized that public officials could evade the literal "quorum" and "meeting" requirements of the Act. The provision permits the courts to grant relief when the challenged conduct, though violating the purposes of the Act, does not squarely fall within the literal definitions of the Act.

Id. The appellate court reversed the dismissal of the complaint for failure to state a claim, finding that although the conduct alleged in the complaint did not fall within the Act's definition of a "meeting," it

> constitute[d] informal assemblages of a governing body at which public business was privately deliberated and decided, without public notice, in contravention of the spirit and requirements of the Open Meetings Act all of which is proscribed by subsection [(c)] of the foregoing code section.

Id. at *6. The Court of Appeals found that *Jackson v. Hensley* was inapplicable:

> The key factor that existed in *Jackson* which is absent in the instant case is that there was no allegation or proof that those commissioners who ultimately voted to appoint Hensley had deliberated or decided among themselves prior to the public meeting on Hensley as the candidate to be elected.

Id. at *7.

Based upon these decisions, we think a court would find that a county commissioner's contacting fellow commissioners to solicit their support and/or vote to appoint him or her to fill a vacancy in the office of county mayor does not constitute a violation of the Open Meetings Act, as long as there is no decision to appoint or deliberation towards a decision to appoint such commissioner to fill the vacancy prior to a public meeting. We would note that the appellate courts have held that merely the dissemination of information does not constitute deliberation; rather, to deliberate is "to examine and consult in order to form an opinion. . . . [T]o weigh 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), *p.t.a. denied* (2010) (citing *Neese v. Paris Special Sch. Dist*., 813 S.W.2d 432, 435 (Tenn. Ct. App. 1990)).

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