



Understanding Ohio's Sunshine Laws: The Open Meetings Act

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This fact sheet is designed to address the most frequently asked questions about Ohio's Open Meetings Act as it applies to public boards of education. The information is of a general nature. Readers should seek the advice of legal counsel with specific legal problems or questions.

Ohio's Sunshine Laws include the Open Meetings Act (Ohio Revised Code Section (RC) 121.22) and the Public Records Act (RC 149.43). This fact sheet focuses on Ohio's Open Meetings Act, which requires that all acts and most deliberations of boards of education and other public bodies, as well as their committees and subcommittees, be conducted in public meetings. Since its enactment in 1975, the Open Meetings Act has been a continuing source of inquiry and litigation for boards of education.

To what entities does the Open Meetings Act apply?

The Open Meetings Act applies to boards of education and any committee or subcommittee of a board of education.

What is a committee or subcommittee to which the Open Meetings Act applies?

The law does not define the terms "committee" or "subcommittee." However, a court decision and Ohio attorney general opinion lead to some conclusions. A court has held that a local building leadership team on which no school board members serve is a committee to which the Open Meetings Act applies (*Weissfeld v. Akron Pub. School Dist.*, 94 Ohio App.3d 455, 640 N.E.2d 1201 (9th Dist.1994)).

The Ohio attorney general has issued an opinion that a citizens advisory committee is subject to the law, despite public officials or employees constituting less than a majority of its membership. That opinion states that if a law or rule requires the committee, or if a political subdivision created the committee, then it is subject to the Open Meetings Act. If the superintendent created a committee, it is not a committee "of" the board, and the Open Meetings Act does not apply (1994 Ohio Atty.Gen.Ops. No. 94-096).

Entities such as booster clubs, PTAs and PTOs that are not created by and do not report to the board probably are not covered by the law.

Must our board adopt rules?

Yes. Each board, committee and subcommittee must adopt rules by which any person may learn the time and place of all regular meetings and the time, place and purpose of all special meetings. The rules must provide for giving notice of meetings to any person and any news media requesting such notice.

What constitutes a meeting?

A "meeting" is defined as any prearranged discussion of the public business of a public body, committee or subcommittee by a majority of its members. "Discussion" suggests an exchange of words, comments or ideas between members of the public body (*Springfield Local School Dist. Bd. of Edn. v. Ohio Assn. of Pub. School Emp.*, Local 530, 106 Ohio App.3d 855, 667 N.E.2d 458 (9th Dist.1995)). Regardless of what terms are used to describe a gathering (such as work or study session or retreat) if it meets the definition, it is a meeting.

The Ohio Supreme Court has held that a series of meetings, each with a

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minority of members of a public body, can constitute an Open Meetings Act violation if appropriate notice of the meetings is not given (*State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540, 668 N.E.2d 903 (1996)). At least one court has subsequently held that separate one-on-one meetings between an administrator and individual board members does not violate the law where a majority of the board members were not present; the discussion was not between members of the board; the individual board members were merely obtaining information from the administrator; and the administrator met with only one board member at a time. The court found that the individual sessions, when viewed as a whole, could not be construed as a single meeting for the purposes of the Open Meetings Act (*Radtke v. Chester Twp.*, 2015-Ohio-4016, 44 N.E.3d 295 (11th Dist.)).

The Ohio Supreme Court has found that Ohio's Open Meetings Act 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 videoconference or electronically by email, text, tweet or other form of communication (*White v. King*, 2016-Ohio-2770.)

Meetings of a public body must be open to the public at all times. As a result, a public body may not conduct a meeting solely by teleconference or any other means that would prevent the public or a majority of the members of the public body from attending the meeting in person (2009 Ohio Atty. Gen. Ops. No. 2009-034).

Can a majority of the members of our board, committee or subcommittee gather without violating the Open Meetings Act?

Yes. If there is no prearranged discussion of the business of the board, committee or subcommittee, it would not be a meeting as defined by the statute. For example, a majority of board members could get together on social occasions, ride together to an event or attend a seminar without violating the law, so long as no discussions of board business take place. The same is true of the members of a committee or subcommittee. Common examples include holiday parties, graduation ceremonies and candidate forums, where there is no prearranged discussion of board business by a majority of its members. Discussing education matters in general (as might occur at a seminar) is distinguishable from discussing the business of a specific school district and would not be prohibited.

Can our board, committee or subcommittee lawfully hold meetings outside the school district?

Yes. There is no prohibition on holding meetings outside the district. However, the provisions of the Open Meetings Act are applicable and the public would be entitled to be present. If "out of district" meetings were conducted to curtail public accessibility, the practice could be found to be in contravention of the spirit of the Open Meetings Act.

When can we hold an executive session?

An executive session may be held only in conjunction with a regular or special meeting of the board, committee or subcommittee.

What can we do in executive session?

Executive sessions are for the purpose of deliberations of permitted subjects. No action of any kind may be taken during an executive session. The Open Meetings Act provides eight reasons, seven of which are applicable to a board of education, to remove itself from the public to engage in discussion.

What topics may we discuss in executive session?

- The appointment, employment, dismissal, discipline, promotion, demotion or compensation of an employee or official, or the investigation of charges or complaints against an employee, official, licensee or student, unless the employee, official, licensee or student requests a public hearing.
- The purchase of property for public purposes, the sale of property at competitive bidding or the sale or disposition of unneeded, obsolete or unfit-for-use property under RC 505.10.
- Conferences with the board's attorney to discuss matters which are the subject of pending or imminent court action. The board's attorney must be present during executive sessions held for this purpose.
- Preparing for, conducting or reviewing negotiations or bargaining sessions with employees.
- Matters required to be kept confidential by federal or state law or rules.
- Specialized details of security arrangements.
- Confidential information related to marketing plans, specific business strategy, production techniques, trade secrets or personal financial statements of an applicant for economic development assistance, or related to negotiations with other political subdivisions regarding requests for economic development assistance, if both the following conditions apply:
 - ◆ The information is directly related to a request for economic development assistance that is to be provided or administered under the statutes set forth in RC 121.22(G)(8)(1) or involves public

infrastructure improvements or the extension of utility services that are directly related to an economic development project;

◆ A unanimous quorum of the board of education determines, by a roll call vote, that the executive session is necessary to protect the interests of the applicant or the possible investment or expenditure of public funds to be made in connection with the economic development project.

Each executive session discussion must be limited to the purpose or purposes stated. It is unlawful to state only one purpose for an executive session, then discuss a second topic (although an executive session may be called for the purpose of discussing several topics provided that the motion lists the purposes for each) (*Vermilion Teachers' Assn. v. Vermilion Local School Dist. Bd. of Edn.*, 98 Ohio App.3d 524, 648 N.E.2d 1384 (6th Dist.1994)).

Is information obtained during an executive session confidential?

OSBA strongly believes that board members, as a matter of ethics, should not divulge executive session discussions. Furthermore, it should be noted that some matters discussed in executive session also can be legally confidential. In fact, RC 102.03(B) provides that confidentiality of information shared in executive session is legally required when the following apply:

- notice of a subject's confidentiality is given;
- when confidentiality is necessary for the proper conduct of board business.

This part of RC 102.03(B) does not function automatically; it requires action by your board. If RC 102.03(B) is violated, it is a first-degree misdemeanor.

Must we follow a particular procedure to go into executive session?

Yes. There must be a motion and second to go into executive session followed by a roll-call vote. The motion must state which of the purposes listed under subsections (G)(1) through (G)(8) of RC 121.22 is the purpose for the executive session. If the executive session is to discuss a personnel matter under subsection (G)(1), the motion cannot simply state that the executive session is for "personnel matters." The motion must state exactly which type of personnel action is to be discussed, but need not include the name of any person to be considered (*Caldwell v. Westlake Bd. of Edn.*, Cuyahoga C.P. No. CV-91-210345 (May 3, 1991)). A session to discuss a personnel matter must be about an individual or individuals, rather than about a subject in general (for example, a board may discuss the nonrenewal of one or more specific people, but not nonrenewal

procedures in general) (see *Gannett Satellite Information Network v. Chillicothe City School District*, Ross App. No. 1427 (Apr. 4, 1998)).

Make sure the resolution to adjourn into executive session uses words from the statutory list. While it is fine to use general topics to help remember the reason(s) the board can properly go into executive session, the actual wording of the resolution should incorporate the words found in the statute. Mistakes may be able to be "cured" by subsequent action taken in public (*Biesel v. Monroe Co. Bd. of Educ.*, Monroe App. No. 6A-678 (Aug. 29, 1990), *Kuhlman v. Village of Leipsic*, Putnam App. No. 12-94-9 (Mar. 27, 1995)).

Who is entitled to attend executive sessions?

All of the members of the board, committee or subcommittee that is calling the executive session are entitled to attend. The board, committee or subcommittee may invite any other persons that it wishes into an executive session. This means the law allows a board to conduct an executive session without the superintendent or treasurer if it so chooses.

Must minutes be kept of executive sessions?

No. Minutes should not be kept of executive sessions. However, the minutes of the meeting at which the executive session occurs must reflect the general subject matter discussed in the executive session.

What notice must be given of special board meetings?

The board, committee or subcommittee must comply with its own rules to provide notice to any person who has requested it. The board, committee or subcommittee also must provide at least 24 hours advance notice to the news media that have previously requested notice of the time, place and purpose of any special meeting.

Failure to notify local media of an emergency or special meeting as required by RC 121.22(F) could make action taken invalid (RC 121.22(H)).

Does this mean the two-day notice to board members of special meetings is no longer required?

No. The two-day notice to board members is still required by RC 3313.16. The Ohio attorney general has ruled, however, that failure to give two-day written notice to all board members is irrelevant if all board members attend the meeting (1933 Ohio Atty.Gen.Ops. No. 33-314).

Can our board, committee or subcommittee hold emergency meetings?

Yes. An emergency meeting is a subcategory of a special meeting and can be called upon immediate notification to all news media that have previously requested notice. The two-day notice provision to board members remains in effect, but is satisfied if all members attend the meeting.

Must an employee be notified if the employee is to be the subject of an executive session discussion?

The Open Meetings Act states that investigations of charges or complaints against an employee, official or student can be heard in executive session unless the individual requests a public hearing. The Ohio Supreme Court has held that this language does not prevent a school board from discussing in executive session an employee's possible nonrenewal, even if the employee has requested a public hearing (*Matheny v. Frontier Local Bd. of Edn.*, 62 Ohio St.2d 362, 405 N.E.2d 1041 (1980)). However, laws regarding employee terminations and student suspensions and expulsions have specific requirements, so boards should consult their legal counsel to ensure statutory hearing requirements have been met.

Does the Open Meetings Act grant the public the right to participate in meetings of our board, committee or subcommittee?

No. The Open Meetings Act contains no such provision. However, most boards of education provide an opportunity for public participation. The board may adopt reasonable rules as to the time, place and manner of public comments.

May a member of our board, committee or subcommittee participate in meetings when he or she is not physically present?

A member of a board, committee or subcommittee may participate in discussions even though the member is not physically present through equipment such as a speaker phone (1985 Ohio Atty.Gen.Ops. No. 048). However, a provision of the Open Meetings Act specifically requires an individual to be "present in person" in order to be counted for quorum purposes or to vote.

Are there situations in which the Open Meetings Act does not apply?

Yes. The Open Meetings Act does not apply to an audit conference conducted by the auditor of state or by independent certified public accountants with officials of the school district (RC 121.22(D)(2)). Collective bargaining meetings between the board and employee organizations also are not subject to the Open Meetings Act (RC 4117.21).

Can anyone sue our board, committee or subcommittee claiming an Open Meetings Act violation?

Yes. Any person may bring an action in the court of common pleas to enforce the Open Meetings Act. That person may seek an injunction to halt a violation or threatened violation of the law. Such a suit must be brought within two years of the violation or threatened violation.

What happens if we violate the Open Meetings Act?

Any action taken in executive session is void, as is any action taken in open session that results from an unlawful executive session. One court invalidated the creation of a new school district by an educational service center (ESC) because the ESC governing board had conducted improper executive sessions (*Piekutowski v. S. Cent. Ohio Educational Serv. Ctr. Governing Bd.*, 161 Ohio App.3d 372, 2005-Ohio-2868 (4th Dist.)). The Open Meetings Act makes it clear that any board action is invalid if the board violated any of the legal notice provisions. A court may issue an injunction compelling members of the board, committee or subcommittee to comply with the Open Meetings Act.

What penalties may a court assess?

If the court issues an injunction, it is required to assess a civil penalty of \$500 against the board, committee or subcommittee and require that entity to pay all court costs. The court also must require the public body to pay the reasonable attorney fees of the party who brought the suit, although such fees can be reduced if the court determines that the public body acted reasonably in believing that it was not violating the Open Meetings Act and that its conduct served a public purpose.

May our board, committee or subcommittee recover costs and attorney fees if we were subjected to a frivolous lawsuit?

Yes. However, the court must not only find in favor of the board, committee or subcommittee, but it also must determine that the lawsuit was "frivolous conduct" on the part of the person who sued the board.

Are there any penalties for individual board members?

Yes. A board member who knowingly violates an injunction granted by a court may be removed from office. In two separate cases, board members have been removed from office in part due to repeated violations of the Open Meetings Act. In both cases, the boards repeatedly held lengthy executive sessions, then returned to open session to vote on matters after little or no public discussion (*Evans v. Rock Hill Local School Dist. Bd. of Edn.*, 2005-Ohio-5318 and *In re: removal of Kuehnle*, 161 Ohio App. 3d 399, 2005-Ohio-2373).

Caution: The information in this fact sheet is designed to provide authoritative general information. It should not be relied upon as legal advice. Because of the complexity of the Open Meetings Act and continuously changing court decisions, OSBA recommends that questions of interpretation of the law be directed to your board's legal counsel.