

STATE OF TENNESSEE

Office of the Attorney General



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January 28, 2015

The Honorable Mike Carter
State Representative
Suite G-3 War Memorial Building
Nashville, TN 37243

Dear Representative Carter:

Enclosed is the attached opinion per your request. Please let us know if you have any further questions. As always, we appreciate your assistance and cooperation.

Sincerely,

A handwritten signature in cursive script that reads "Herbert H. Slattery III".

HERBERT H. SLATERY III
Attorney General and Reporter

Enclosure

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

January 28, 2015

Opinion No. 15-08

Authority of Public Hospitals to Meet in Closed Session Under Tenn. Code Ann. § 68-11-238

QUESTIONS

1. Whether the provisions of Tenn. Code Ann. § 68-11-238 would permit the board of a public hospital to meet in closed session to discuss executive compensation and executive bonuses?
2. Whether Tenn. Code Ann. § 68-11-238 requires records to be kept of all issues discussed and/or decided in a closed meeting?
3. When must records from a closed meeting under Tenn. Code Ann. § 68-11-238 be made available for public inspection?
4. Does Tenn. Code Ann. § 68-11-238 require a minimum of seven days between a closed meeting and a public vote to adopt a particular plan or strategy?

OPINIONS

1. Tenn. Code Ann. § 68-11-238(a) would not permit the board of a public hospital that is subject to the Tennessee Open Meetings Act and Tennessee Public Records Act to meet in closed session to discuss executive compensation and executive bonuses.

2. and 3. Tenn. Code Ann. § 68-11-238 does not require that any records be kept in a closed meeting held pursuant to the provisions of the statute. If, however, studies are considered by the board in the adoption of a specific marketing strategy or plan, those studies shall be made available for public inspection at least seven days before any public meeting of the board to adopt the strategy or plan.

4. In the event that there are studies that were considered by the board in the adoption of a particular marketing strategy or plan, then the statute would require a minimum of seven days between the closed meeting and a public vote to adopt that particular plan or strategy in order to make the studies available for public inspection during the seven-day time period required by subsection (a) of the statute. Any meeting of the board to adopt a specific plan or strategy must still comply with the Tennessee Open Meetings Act, including the notice provisions. If, however, no

such studies were considered by the board, the seven-day time period for inspection is not applicable.

ANALYSIS

1. Your question concerns the application of Tenn. Code Ann. § 68-11-238, which was passed by the General Assembly in 2008 as part of its regulation of health facilities. This statute creates an exception to Tennessee's Open Meetings Act, Tenn. Code Ann. §§ 8-44-101, *et seq.*, and to Tennessee's Public Records Act, Tenn. Code Ann. §§ 10-7-501, *et seq.*, for certain meetings and records of the boards of public hospitals.

The statute provides that the boards of public hospitals, which are otherwise subject to the Open Meetings and Public Records Acts,

may discuss and develop marketing strategies and strategic plans in closed meetings, not open to the public, and the records addressing marketing strategies and strategic plans, including feasibility studies, may be treated as confidential and not public records, but shall be subject to subpoena. Action by the board of the hospital adopting a specific strategy or plan shall be subject to the open meetings laws and the adopted strategy or plan, and the studies that were considered in the adoption of the specific strategy or plan, shall then be subject to the public records laws. The records shall be available for public inspection at least seven (7) days before any vote to adopt such strategy.

Tenn. Code Ann. § 68-11-238(a).

However, in order to conduct such a closed session, the statute requires that certain procedures first be followed:

- (1) A quorum of the board shall convene in a public meeting. The presiding officer shall cite or explain to the members and the public assembled the specific legal authority for closing the meeting to the public;
- (2) Members of the board shall vote by roll call in the public portion of the meeting on whether closing the meeting to the public is necessary. A simple majority vote of those members of the board in attendance at the meeting shall be required to go into a closed meeting; and

(3) The presiding officer shall explain to the members of the board and any members of the public present at the public portion of the meeting that no other business other than the business described in subsection (a) shall be discussed during the closed meeting.

Tenn. Code Ann. § 68-11-238(b).

You have asked whether the provisions of Tenn. Code Ann. § 68-11-238 would allow the board of a public hospital to meet in closed session in order to discuss executive compensation and executive bonuses. The plain language of the statute only authorizes the board of a public hospital to meet in a closed session to “discuss and develop marketing strategies and strategic plans.” The statute does not define what constitutes marketing strategies and strategic plans.” It is, however, a basic rule of statutory construction that courts must “ascertain and carry out the legislature’s intent without unduly restricting or expanding a statute beyond its intended scope.” *Lavin v. Jordan*, 16 S.W.3d 362, 365 (Tenn. 2000). In so doing, courts “examine the ‘natural and ordinary meaning of the language used, without a forced or subtle construction that would limit or extend the meaning of the language.’ Where the language of the statute is clear and unambiguous, ... [courts] will give effect to the statute according to the plain meaning of its terms.” *Id.* at 365 (citations omitted).

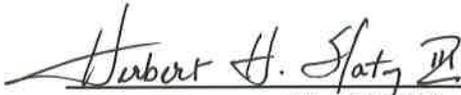
The term “marketing” is commonly defined as “[t]he act or process of promoting and selling, leasing, or licensing products or services.” Black’s Law Dictionary (8th ed.) at 990. The term “strategy” is commonly defined as “a careful plan or method for achieving a particular goal usually over a long period of time.”¹ Based on these definitions, it is apparent that the legislature intended the confidentiality provisions of Tenn. Code Ann. § 68-11-238(a) to apply to a public hospital’s discussion and development of its long-term plans for promoting the products and services of the hospital and not the determination of executive compensation and executive bonuses. This construction is further supported by the legislative history, which reflects that the intent of this statute was to allow public hospitals to compete with private hospitals by allowing them to conduct their business development meetings in a closed session. Accordingly, the board of a public hospital could not use the provisions of Tenn. Code Ann. § 68-11-238 to conduct a closed session for the purposes of discussing executive compensation and executive bonuses.

2. and 3. You have also asked what records must be kept of closed sessions conducted pursuant to Tenn. Code Ann. § 68-11-238. The statute itself does not require that any records be kept. But if records are kept, the statute provides that all “records addressing marketing strategies and strategic plans, including feasibility studies, may be treated as confidential and not public records.” However, any strategy

¹ See <http://www.merriam-webster.com/dictionary/strategy>.

or plan that is adopted by the board is subject to the Public Records Act. Additionally, "the studies that were considered in the adoption of the specific strategy or plan . . . shall be available for public inspection at least seven (7) days before any vote to adopt such strategy." Tenn. Code Ann. § 68-11-238(a). Thus, to the extent that a board considers any studies in the adoption of a specific marketing strategy or plan, those studies become public records and are to be made available for inspection at least seven days before any public meeting of the board to adopt such strategy or plan.

4. Your last question asks whether the statute requires a minimum of seven days between a closed meeting and a public vote to adopt a particular plan or strategy. If there are studies that were considered by the board in the adoption of a particular marketing strategy or plan, then the statute would require a minimum of seven days between the closed meeting and a public vote to adopt that particular plan or strategy in order to make such studies available for public inspection during the seven-day time period required by subsection (a) of the statute. If, however, no such studies were considered by the board, the seven-day time period for inspection is not applicable. Any meeting of the board to adopt a specific strategy or plan still must comply with the provisions of the Tennessee Open Meetings Act, including providing adequate notice. See Tenn. Code Ann. § 8-44-103.


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