

STATE OF TENNESSEE

Office of the Attorney General



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May 4, 2016

The Honorable Mike Bell
State Senator
309 War Memorial Building
Nashville, TN 37243

Dear Senator Bell:

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 black ink that reads "Herbert H. Slattery III".

HERBERT H. SLATERY III
Attorney General and Reporter

Enclosure

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

May 4, 2016

Opinion No. 16-16

Application of State Public Records and Open Meetings Laws to Search Firms Hired by School Boards

Question

Whether third parties, including but not limited to the Tennessee School Board Association and the Tennessee Organization of School Superintendents, hired by school boards to conduct searches for directors of schools, are subject to the Tennessee Open Meetings Act, Tenn. Code Ann. §§ 8-44-101 – 108 and the Tennessee Public Records Act, Tenn. Code Ann. §§ 10-7-501 – 516.

Opinion

Any records obtained by a third party in conjunction with an employment search for a director of schools for a school board are public records and subject to inspection under Tenn. Code Ann. § 10-7-503(f). Additionally, if the third party is one whose “origin and authority may be traced to state, city, or county legislative action,” then its meetings are subject to the Open Meetings Act.

ANALYSIS

Tennessee Public Records Act

Tennessee’s Public Records Act provides that “[a]ll state, county and municipal records shall, at all times during business hours, be open for personal inspection by any citizen of this state . . . unless otherwise provided by state law.” Tenn. Code Ann. §10-7-503(a)(2)(A). A “record” is defined as “all documents, papers, letters . . . or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.” Tenn. Code Ann. § 10-7-503(a)(1)(A).

The Public Records Act also specifically provides that

[a]ll records, employment applications, credentials and similar documents obtained by any person in conjunction with an employment search for a director of schools or any chief public administrative officer shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law. For the purposes of this subsection (f), the term “person” includes a natural

person, corporation, firm, company, association or any other business entity.

Tenn. Code Ann. § 10-7-503(f).

Accordingly, pursuant to these statutory provisions, any records obtained by a third party in conjunction with an employment search for a director of schools for a school board are public records and are subject to inspection under Tennessee's Public Records Act.

Tennessee Open Meetings Act

The Tennessee Open Meetings Act provides that "all 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). The Act defines "governing body" 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).

The Act does not define "public body," but the Tennessee Supreme Court has stated that, in using the term "public body,"

the Legislature intended to include any board, commission, committee, agency, authority, or any other body, by whatever name, whose origin and authority may be traced to state, city, or county legislative action and whose members have authority to make decisions or recommendations on policy or administration affecting the conduct of the business of the people in the governmental sector.

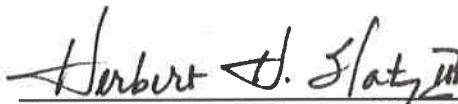
Dorrier v. Dark, 537 S.W.2d 888, 892 (Tenn. 1976). Clearly, if the third party is one whose "origin and authority may be traced to state, city, or county legislative action," then the meetings of the third party are subject to the Open Meetings Act.

A third party that was not organized pursuant to legislative action would ordinarily not be subject to the Open Meetings Act. By using the terms "governing body" and "public body" the statute contemplates a body with members who vote, recommend and make decisions. It does not necessarily include any third party involved in a search for a director of schools. Otherwise it would have included a much broader definition. Whether a third party would be subject to the Open Meetings Act would depend upon the facts and circumstances associated with the third party's role and responsibilities. Factors that a court would consider include the organizational structure of the third party, the existence or nonexistence of members, the public's involvement in the appointment of any members, the rights and obligations of the members, the authority of the third party, and the basis for such authority.

In *Souder v. Health Partners, Inc.*, 997 S.W.2d 140 (Tenn. Ct. App. 1998), the Court of Appeals addressed the issue of whether meetings of the board of directors of a nonprofit corporation acting on behalf of a governmental entity were subject to the Open Meetings Act. The nonprofit corporation at issue had one member, a general hospital district established by statute.

The district organized the nonprofit corporation as a governmental instrumentality, a subsidiary, and it appointed all of its directors. After examining all of the relevant factors, including the commingling of funds with those of the district, the court held that “subsidiaries to which municipal corporations have delegated their official responsibilities and authority are subject to the Open Meetings Act.” *Id.* at 146 (citing *Northwest Georgia Health Sys., Inc. v. Times-Journal, Inc.*, 218 Ga. App. 336, 461 S.E.d2d 297 (1995)).

While the statute confines the Open Meetings Act to a governing body and a public body, the *Souder* case raises the possibility that the Act may apply in certain circumstances to a third party to whom the public body or governing body has delegated its official responsibilities and authority. Whether there has been such a delegation that might trigger the requirements of the Act in any given circumstance will depend on the particular facts and the totality of the circumstances of the third party’s involvement, its organizational structure and origin, and its relationship with the governing body.


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