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Open Government in a Time of Coronavirus

COVID-19 requires us to examine new questions about Tennessee's Open Meetings Act, which is often called the "Sunshine Law." The Act is still one of the strongest and simplest in the country – guaranteeing that "[a]ll meetings of any governing body are declared to be public meetings open to the public at all times." T.C.A. § 8-44-102(a).

But what if the people *cannot* come to the meeting? And what if the members of the governing body *cannot* come, either? The consequence of wrongly answering these questions can be severe: "Any action taken at a meeting in violation of [the Open Meetings Act] shall be void and of no effect." T.C.A. § 8-44-105.

All meetings open at all times seems simple, but when, for example, is a City Council meeting open? Is it when citizens can hear and see the meeting? Must the citizens be in the same room as the Council? Must citizens be merely present, or must they be able to participate in the meeting, as well?

With COVID-19 and social distancing mandates becoming ever more prevalent, Tennessee state municipalities and their citizens are traveling in murky waters with respect to the Open Meetings Act. The day-to-day business of government—rezoning property, setting budgets, issuing permits, and regulating licensed professionals—must be conducted timely and in the open, but the traditional rules of the Open Meetings Act combined with the spread of COVID-19 make this daily business difficult to accomplish when governing bodies and citizens cannot physically be together.

The solution requires invited, and not merely transparent, debate and engagement by the state's media, citizens, and governing bodies. Tennessee – and other states around the country – need the legislature to make an act that recognizes:

- The health emergency of COVID-19, while unprecedented, will prove to not be unique. Other emergencies can, and will, interrupt the ability of governing bodies to meet, and of

citizens to participate.

- This is the 21st century. If American business can function from home, American government can adopt and implement technology to engage even more citizens. Recognizing that broadband remains too expensive for many, and that the beauty of the open door is that any citizen can walk through it, the beauty of technology is its ability to connect citizens with their government if one cannot afford the luxury of time to attend a public meeting. Here, the recent Tennessee legislative experience can be illustrative.
- Technology can, and should, be interactive. Local governments should find new ways to engage citizens, wherever they are.

To understand where the Open Meeting Act needs to go, it is helpful to understand its origins. Forty-six years ago, the Tennessee Legislature declared, as a matter of public policy, “the formation of public policy and decisions is public business and shall not be conducted in secret.”

So reads the preface to the 1974 Tennessee Open Meetings Act.

Tennesseans caught their first glimpse of the new world in which we all find ourselves from March 16–19, 2020. The Tennessee General Assembly worked in an empty Capitol cleared by the first teeth of the coronavirus gale. Only accredited media were present as lawmakers passed a \$39 billion budget and recessed until June 1.

Closer to home, Tennessee City Councils, Boards of Aldermen, and Boards of Education cancelled meetings to avoid the spread of the coronavirus among themselves and their constituents.

Can a virus leverage the aspirations—and requirements—of a Watergate-era statute to bring Tennessee government to a halt?

“Sunshine is the best disinfectant,” is a familiar claim among open-government advocates. 44 years before Justice Brandeis penned those words,^[1] the Tennessee Constitution of 1870 had advanced a different claim in Article II, 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 General Assembly has continued to advance the cause of openness. The text of bills and amendments, legislative histories, and votes, are now publicly displayed on the General Assembly's web site. Floor sessions and committee hearings are livestreamed and archived.^[2] State boards and commissions have been able to conduct virtual meetings, typically by conference call, since at least 1999. T.C.A. § 8-44-108(b).^[3] Local government is not so free,^[4] nor do many local governing bodies possess the means to livestream proceedings or construct comprehensive web histories of legislative acts.

The Legislature recognized as much in its final weeks by advancing SB 2897/HB 2815. Amendments to the bills would have granted local governing bodies limited exemptions from the Sunshine Law during the coronavirus pandemic. The House and Senate versions, however, differed in material ways. The House favored wide use of virtual meetings for regular order, but required governing bodies to provide more real-time access through technology, in exchange for the ease of virtual meetings.^[5] The Senate version favored fewer virtual meetings, trusting that the limited content would require less real-time scrutiny.^[6]

In the final moments of the unique legislative week, lawmakers did not reconcile the bills' differences.^[7] However, relief appeared on March 20, 2020, when Tennessee Governor Bill Lee signed Executive Order 16 ("EO 16"), which fills many of the gaps left open by the unreconciled SB 2897/HB 2815.

"As a reasonable measure to protect the safety and welfare of Tennesseans while ensuring that government business may continue in a manner that is open and accessible to the public, the provisions of the [Open Meetings Act] are hereby suspended to the extent necessary to allow a governing body . . . to meet and conduct its essential business by electronic means . . . if the governing body determines that meeting electronically is necessary to protect the health, safety, and welfare of Tennesseans in light of the COVID-19 outbreak." EO 16.

Many of the details of the Executive Order echo the common provisions of SB 2897/HB 2815:

- Meetings must be publicly accessible, whether by live electronic access, if possible, or by providing audio recordings to the public “as soon as practicable following the meeting, and in no event more than two business days after the meeting.” EO 16 ¶ 1(a).
- Governing bodies must provide effective public notice of virtual meetings, including information on how to access the meeting. EO 16 ¶ 1(b).

By its language, EO 16 would appear to be the solution for municipal, as well as county and state governing bodies.

The devil, however, is in the details. EO 16, as with other recent coronavirus-related executive actions, is premised on the legislature’s grant of extraordinary powers to the Governor in a declared emergency. T.C.A. § 58-2-107. Gov. Lee’s recent executive orders, including EO 16, have cited to T.C.A. § 58-02-107(e)(1) for their authority: “[T]he governor may suspend any law, order, rule or regulation prescribing the conduct of state business or the orders or rules or regulations of any state agency, if strict compliance with any such law, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency.”

Is a municipality within the scope of T.C.A. § 58-02-107(e)(1)? In other words, is a municipality, for purposes of the governor’s exercise of emergency powers, a “state agency” that engages in “state business”? In Corporation of Collierville v. Fayette County Election Commission, the Tennessee Supreme Court held that yes, “a municipality is an agent of the state exercising a portion of the sovereign power of the state for the public good.” 539 S.W.2d 334, 336–37 (1976) (quoting Bricker v. Sims, 195 Tenn. 361, 259 S.W.2d 661, 664 (1953)). That statement of law has remained unchallenged since.

But an agent of the state is not the same thing as *the state*. If it were so, could the governor exercise emergency powers under T.C.A. § 58-2-107(e)(1) to suspend local zoning or health codes? Although the legislature could withdraw from municipalities the power to enact zoning ordinances, this power does not mean that those purely local ordinances are “state business.”

Tennessee's Open Meetings Act was born of suspicion. The next Open Meetings Act may be born out of necessity. Perhaps the shared burden of the coronavirus may offer us a more engaged and optimistic way through which we may rethink, with an open spirit, what we mean, need, and want by way of open local government.

For more information please contact [Tom Lee](#), [Katharine Fischman](#) or any attorney in Frost Brown Todd's [Government Services](#) or [Business Litigation](#) practice group.

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a [Coronavirus Response Team](#). Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.

[1] See Brandeis, Louis D., "Other People's Money and How the Bankers Use It" (1914).

[2] There is much, however, an observer in the legislative chambers can see that the cameras do not show. Senate cameras show individual members' votes on the chamber tote board; House cameras show only vote totals. Senate cameras remain on during pauses in proceedings and wide shots frequently capture member-to-member conversations. When House floor microphones go silent, viewers see a static shot of the chamber message board.

[3] Fascinatingly, the Belle Meade City Commission is also able to conduct virtual meetings under this same section. [T.C.A. § 8-44-108\(a\)\(1\)](#).

[4] Members of the Governing Bodies may electronically participate in meetings "for the benefit of the public and the governing body," provided a "physical quorum is present at the location specified in the notice of the meeting." [T.C.A. § 8-44-108\(b\)\(1\)](#). In the case of COVID-19, such a physical quorum could be ill-advised.

[5] The House approved its version 90-O-1 on March 19, 2020. This version would have allowed governing bodies to meet virtually if "the governing body determines that meeting by electronic means is necessary to prevent the spread of COVID-19...to protect the health, safety, and welfare of the public and members of the

governing body.” H. Amend. 687 § 1(2), HB 2815. The House amendment would have required the governing to make such a finding, on the record, and provide public access to the meeting by way of an audio or video feed. Finally, the House amendment forbade voice votes in virtual meetings, requiring all members of the governing body to vote by rollcall.

[6] The Senate approved its version 29–0 on March 19, 2020, just hours after the House. This version limited the content of virtual meetings to “essential business” that could not be delayed “in the judgment of the governing body, until after the state of emergency ceases to exist.” S. Amend. 657, § 1(5), SB 2897. In addition, the Senate’s version did not require local governing bodies to provide real-time electronic public access, allowing governing bodies that do “not have the technology or capacity to provide electronic access to meetings” to simply make an electronic recording, produced to the public within 48 hours of the meeting. *Id.* at § 1(9)(A)(i).

[7] The bills did not die—they just await the Legislature’s apparent return on June 1.

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