

## OVERVIEW OF THE SUNSHINE LAW

### I. OPEN MEETINGS

The Act provides that "official action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public" unless otherwise permitted under the Act. 65 Pa.C.S.A. §704. "Official action" is defined as:

- (1) Recommendations made by an agency pursuant to statute, ordinance or executive order.
- (2) The establishment of policy by an agency.
- (3) The decisions on agency business made by an agency.
- (4) The vote taken by any agency or any motion, proposal, resolution, rule, regulation, ordinance, report or order.

"Deliberation" is defined as the discussion of agency business held for the purpose of making a decision. As such, any action taken by a quorum of the members of an agency which results in the framing, preparation, making or enactment of laws, policy or regulations, the creation of liability by contract or otherwise, or the adjudication of rights, duties and responsibilities must be performed at a meeting open to the public.

"Agency" is defined by the Act as . . . The body, and all committees thereof authorized by the body to take official action or render advice on matters of agency business, of . . . any board, council, authority or commission of the Commonwealth or any political subdivision of the Commonwealth or any State, municipal, township or school authority, **school board**, school governing body commission. . .

### II. EXCEPTIONS

There are exceptions, however, to what an agency must discuss in public. The Act sets forth the following matters that can be conducted in an executive session:

- (1) Personnel matters - any discussions relating to the appointment, termination, terms and conditions of employment, evaluation of performance, promotion or discipline of an employee.
- (2) Negotiation matters - any discussions relating to the negotiation or arbitration of a collective bargaining agreement.
- (3) The purchase or lease of real estate. (This also includes by reasonable implication the sale of real estate owned by the District.)
- (4) Litigation - any discussion regarding information or strategy in connection with litigation or with issues on which identifiable complaints are expected to be filed.

- (5) To review and discuss agency business which if conducted in public would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law. (Discussion of confidential student information, which is subject to disclosure only in compliance with the Family Educational Rights and Privacy Act, is one example.)

### **III. PUBLIC PARTICIPATION**

The Act also provides for public participation in agency meetings. An agency must provide the public an opportunity to comment on matters of concern, official action or deliberation which are or may be before the agency. This includes all meetings of the agency which are required to be conducted in public, including special voting meetings and work-sessions at which agency business is deliberated. The Act also now permits a Board or Council, if there is not sufficient time, to defer the public comment to the next regular meeting or to a special meeting occurring in advance of the next regular meeting. In addition, the Act now also permits any person to raise an objection at any time during such meetings to a perceived violation of the Sunshine Act. 65 Pa.C.S.A. §710.1.

It should also be noted that "recording devices" are permitted under the Act. Clearly given the current technology, tape recorders are allowed. Videotape cameras, as long as they are not disruptive, may also be covered under the definition of "recording device." 65 Pa.C.S.A. §711.

Importantly, school boards are permitted to adopt rules and regulations necessary for the conduct of its meetings and the maintenance of order. Such rules and regulations can contain reasonable time restraints on public comments and regulate the manner in which recording devices are used during a meeting. 65 Pa.C.S.A. §710.

### **IV. NOTICE OF PUBLIC MEETING**

The Act contains several provisions regarding notification of the public of an agency's meetings. The Act requires that agencies give public notice of the first regular meeting of each calendar or fiscal year not less than three days before the meeting. At that time, notice of the remainder of the regularly scheduled meetings also is to be published. Any special meetings of the agency (defined as any meeting scheduled after the regular schedule has been established at the beginning of the year) requires 24 hour public notice. Public notice is not required in the case of an emergency meeting. 65 Pa.C.S.A. §709.

### **V. SPEAKER PHONES**

The Pennsylvania Supreme Court has held that a quorum under the Sunshine Law can consist of board members not physically present at the meeting, but who participate by speaker phone. Participation by speaker phone is permitted provided the absent member is able to hear the comments of those physically present at the meeting, and those present at the meeting are able to hear the comments of the absent member, contemporaneously.

### **VI. E-MAIL**

The Sunshine Act does not specifically address the use of electronic communication. One must, therefore, apply to chat rooms and e-mail communications the same rules as would

apply to teleconferencing and regular U.S. mail. While e-mail communications can be regarded as no different as first-class mail for purposes of Sunshine, the similarities begin to dissipate when the e-mail communications begin to occur in “real time;” in other words when the lapse of time between e-mail communications becomes so small as to be contemporaneous and more akin to a teleconference or chat room. The fact that the contemporaneous communication is typed rather than verbal does not alter whether the communication constitutes deliberations or official action if done by a quorum of the Board.

There are no Pennsylvania cases, either federal or state, that address the issue of e-mail communications under Sunshine. However, the Washington Court of Appeals in **Wood v. Battle Ground School District** liberally construed the definition of “meeting” under that state’s open meeting law and held that an exchange of e-mails can constitute a meeting under certain limited circumstances. The Court recognized, however, the need for balance between the right of the public to have agency business conducted in the open and the need for members of governing bodies to obtain information and communicate in order to function effectively. The court stated that the mere use or passive receipt of e-mail does not automatically constitute a meeting under Washington law. It is collective action which is intended to be regulated by the law, not the passive receipt of e-mail by members absent a concerted plan to engage in collective deliberations. (The Court remanded the OPMA challenge to the lower court for a trial to see if the underlying facts in that case supported the allegation of a violation.)

It is important to note that Board members may communicate with each other by any electronic means including e-mail so long as there is not a quorum simultaneously participating in what otherwise constitutes official action or deliberations. Where there is no collective intent to deliberate or take official action, and the receipt of the e-mail is “passive receipt” akin to receiving information through first-class mail (as opposed to the active engagement of dialogue), then the Sunshine Law is not implicated. As in the **Wood** case, the extent to which Sunshine is implicated will turn on the circumstances and facts pertinent to the e-mail communications being questioned.

## VII. PENALTIES

Action can be invalidated – Residents of the District have the power to file an action in Common Pleas Court. The Court has the power to “render declaratory judgments or to enforce the Act by injunction or other remedy deemed appropriate by the Court.” If the court finds that the District violated the Act, it may deem any or all actions invalid. 65 Pa. C.S. § 713 and § 715.

Penalties Any board member who intentionally violates the Sunshine Act commits a summary offense and may be sentenced to pay \$100.00 plus costs. 65 Pa. C.S. § 714. In willful violations, the District can be forced to pay attorney’s fees and costs. 65 Pa. C.S. § 714.1.