PRIMER ON OPEN MEETINGS LAWS

Facilitated by
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AGENDA

- Introduction
- History of Open Meeting Laws
- D.C. Open Meetings Act History
- Cases

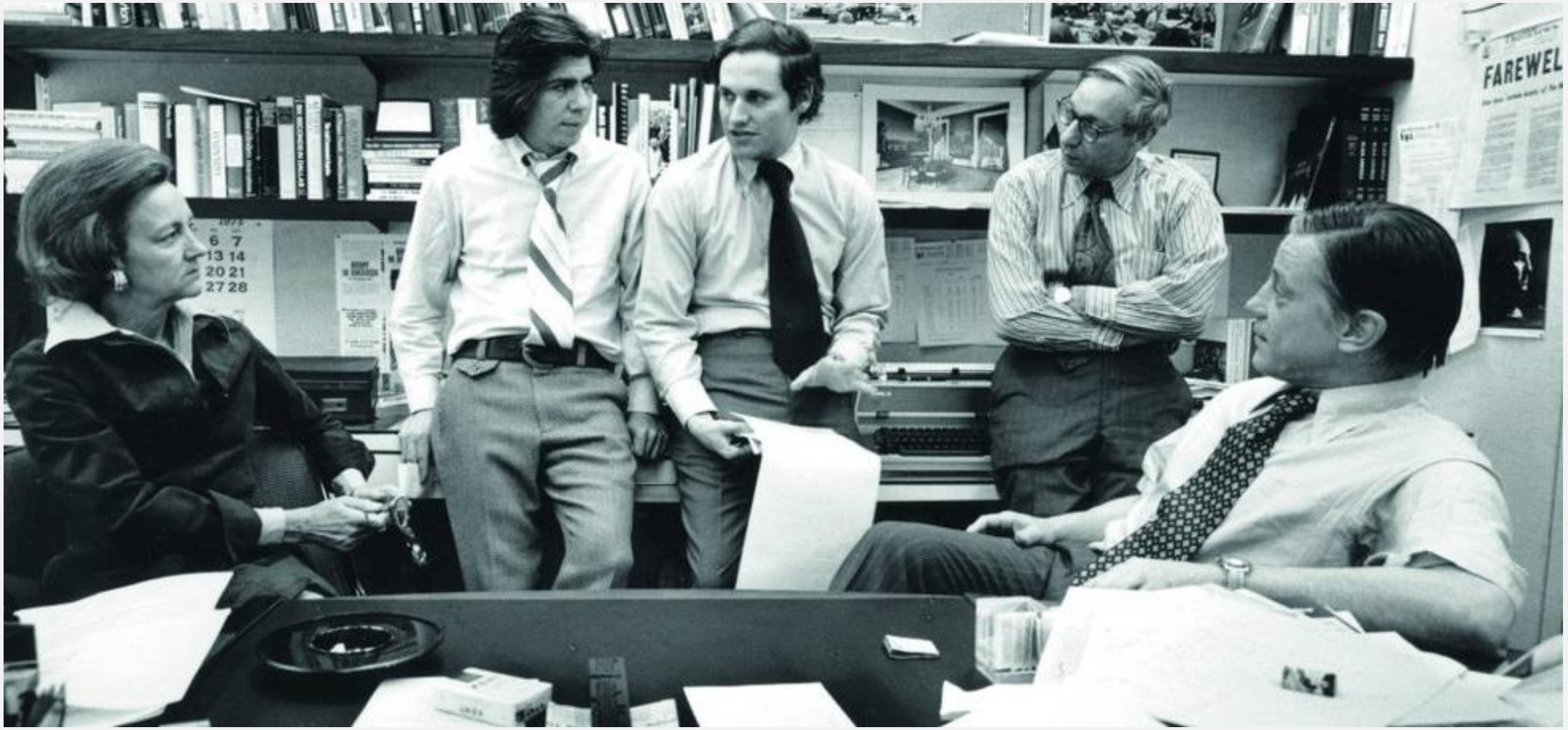
INTRODUCTION

OFFICE OF OPEN GOVERNMENT
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY

Establishment of BEGA and the Office of Open Government

- BEGA was created in response to a need for a more robust and independent body to oversee ethics and government accountability within the District.
- The establishment of BEGA was part of a broader effort to improve ethical standards and accountability within the District government, as outlined in D.C. Law 19-124, the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, which became effective on April 27, 2012.
- BEGA plays a key role in promoting open government practices, through the Office of Open Government by its government-wide enforcement of the Open Meetings Act and monitoring of agency compliance with the Freedom of Information Act. We issue binding advisory opinions on the OMA regarding compliance issues.
- BEGA is also the primary ethics enforcement agency for the District, responsible for investigating alleged ethics violations and conducting mandatory ethics training,

HISTORY OF OPEN MEETING LAWS



VARIOUS STATES CLAIM TO HAVE THE FIRST OPEN MEETING LAW:

The earliest open meeting laws required certain entities to meet in public. Comprehensive open meeting laws followed.

- **A Kansas Statute Governing School Board Meetings was enacted in 1895 - Kansas Statutes Section 75-2929b(c).**
- **A Michigan Court identified an Open Meeting Law, passed in 1895, requiring public city council meetings – *Wexford County Prosecuting Attorney v. Pranger*, 83 Mich.App. 197, 268 N.W.2d 344, 346 n.5 (1978).**
- **Oklahoma enacted a law governing meetings of county commissioners in 1897 - Okla.Terr.Sess.Laws ch. XII, art. 2, § 4 (1897).**
- **Utah's First Law – governing city councils – was passed in 1898. *Accord v. Booth*, 33 Utah 278, 93 P. 734, 735 (1908)(city council "shall sit with open doors and keep a journal of its own proceedings).**
- **Florida enacted its first open meeting law in 1905 – Fla.Laws ch. 5463 § § 1-3 (1905), *superceded by* Fla.Stat § 286.011 (2011).**

COMPREHENSIVE OPEN MEETING LAWS

Alabama enacted the first comprehensive open meeting law in the US in 1915, and until 1950, was the only state with such laws. The 1915 Alabama open meetings law was essentially a statement of principles without the features of modern open meeting laws and was in effect until 2005 when it was repealed and replaced by the Alabama Open Meetings Act.

By 1959, twenty states had comprehensive open meetings laws. But after 1976, all states had open meeting laws. These state laws are referred to as "sunshine laws" – "open door laws" – "right to know laws" – and "open meeting acts."

WATERGATE

The Watergate scandal was a major political scandal in the United States involving the administration of President Richard Nixon. It began with a break-in at the Democratic National Committee headquarters in the Watergate Hotel and office complex in 1972. The scandal escalated as Nixon and his aides engaged in a cover-up of their involvement in the burglary and other illegal activities, ultimately leading to Nixon's resignation in 1974.

"A decade ago revelations of secret abuse of official power shocked this nation and seared in our minds a lesson vital to the health of a democratic polity: government should conduct the public's business in public. In the Sunshine Act Congress moved to ensure that those in government do not forget that they are above all accountable to the people of this nation."

Philadelphia Newspapers, Inc. v. Nuclear Regulatory Comm'n, 727 F.2d 1195,1203 (D.C. Cir. 1984).

WATERGATE

"Though many open meetings laws were enacted before Watergate, most state laws in this area were enacted or strengthened because of public's dismay over the extensive corruption and abuse of power at the highest levels of the federal government.

Former Chief Justice Earl Warren opined the following in an ABA Journal article in 1974:"if anything is to be learned from our present difficulties, compendiously known as Watergate, it is we must open our public affairs to public scrutiny on every level of government." *Warren, Governmental Secrecy: Corruption's Ally*, 60 A.B.A.J. 550 (1974).

HOW WATERGATE LED TO STRONGER OPEN MEETINGS LAWS – CONGRESSIONAL ACTION

Watergate severely undermined public trust in government institutions. The scandal highlighted how closed-door decisions, secret meetings, and lack of transparency allowed illegal and unethical behavior to flourish without public scrutiny.

In response to Watergate, there was a bi-partisan push to institute laws to prevent abuses of power, increase transparency, and ensure public participation in government affairs by opening the doors.

Congress passed the Government in the Sunshine Act in 1976. This law required federal agencies to hold meetings in public when deliberating on official business. The act was passed to increase public confidence in government by allowing citizens to observe the decision-making processes of federal agencies. It ensures that government business is conducted in a transparent manner. The act generally requires that all meetings of multi-member federal agencies be open to the public. https://www.ecfr.gov/current/title-45/subtitle-B/chapter-XVII/part-1703

HOW WATERGATE LED TO STRONGER OPEN MEETINGS LAWS – STATE-LEVEL REFORM

1. Enactment and Strengthening of Open Meetings Laws: As mentioned previously, all 50 states and D.C. had enacted open meeting laws (also known as Sunshine Laws) by 1976. These laws mandate that government bodies conduct their meetings in public, allowing citizens and the media to attend and observe the decision-making processes. The goal was to prevent government bodies from making decisions behind closed doors, a major concern raised by the Watergate scandal.

2. Mandated Transparency: These laws generally require government entities to give advance notice of meetings, including the date, time, place, and agenda, and in many cases, mandate that a record of what transpired at the meeting be published afterward.

3. Focus on Citizen Participation and Understanding: The principle behind these laws, as articulated in the Oklahoma Court's decision in *Oklahoma Ass'n of Municipal Attorneys v. State*, 577 P.2d 1310 (Supreme Court of Oklahoma 1978), is to ensure that citizens are informed about government actions and decisions that affect their lives.

HOW WATERGATE LED TO STRONGER OPEN MEETINGS LAWS – "SUNSHINE MOVEMENT"

The "Sunshine Movement" in government after Watergate refers to the period of increased legislative action focused on government transparency and openness. Laws passed in the Watergate period have transformed, among other things, the federal budget process, government practices for protecting individuals' personal information, and oversight of the intelligence community. While these reform efforts have not been uniformly successful, they reflect the resolve of the policymakers of that era, who had a broad understanding of the abuses that needed to be addressed and who were willing to take broad actions to address them. In addition to open meeting laws, several key transparency laws were enacted or strengthened during this time:

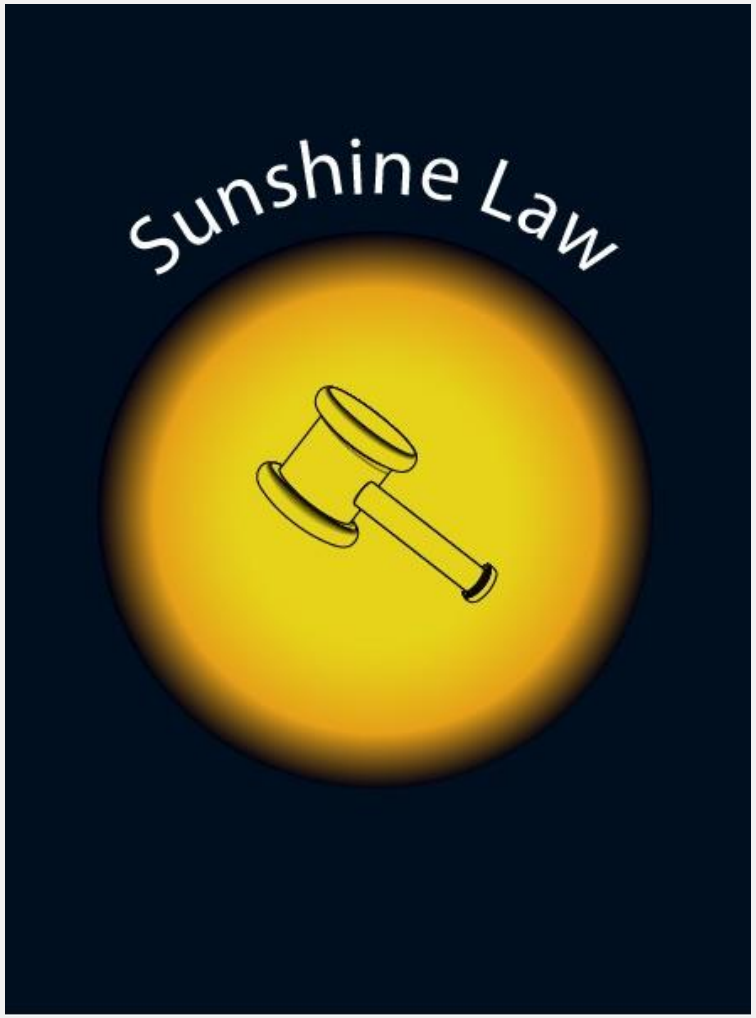
- Freedom of Information Act (FOIA) (1974 revision): Congress overrode a presidential veto to strengthen FOIA, providing new tools for the public and media to access executive branch information.
- Federal Advisory Committee Act of 1972: This law, enacted before Nixon's resignation, sets rules for federal advisory committees to ensure their advice is objective and accessible to the public.
- Ethics in Government Act of 1978: This act required financial disclosure by executive and judicial branch officials and created the Office of Government Ethics.

DC OPEN MEETINGS LAWS

The Sunshine Act and Open Meetings Act

SECTION 742 OF THE HOME RULE ACT IS KNOWN AS THE SUNSHINE ACT.

[DISTRICT OF COLUMBIA HOME RULE ACT, § 742, EFFECTIVE DECEMBER 24, 1973 (87 STAT. 831; D.C. OFFICIAL CODE § 1-207.42 (2012 REPL.)).]



such person assumes such office.

OPEN MEETINGS

SEC. 742. (a) All meetings (including hearings) of any department, agency, board, or commission of the District government, including meetings of the District Council, at which official action of any kind is taken shall be open to the public. No resolution, rule, act, regulation or other official action shall be effective unless taken, made, or enacted at such meeting.

Written transcript, availability.

(b) A written transcript or a transcription shall be kept for all such meetings and shall be made available to the public during normal business hours of the District government. Copies of such written transcripts or copies of such transcriptions shall be available upon request to the public at reasonable cost.

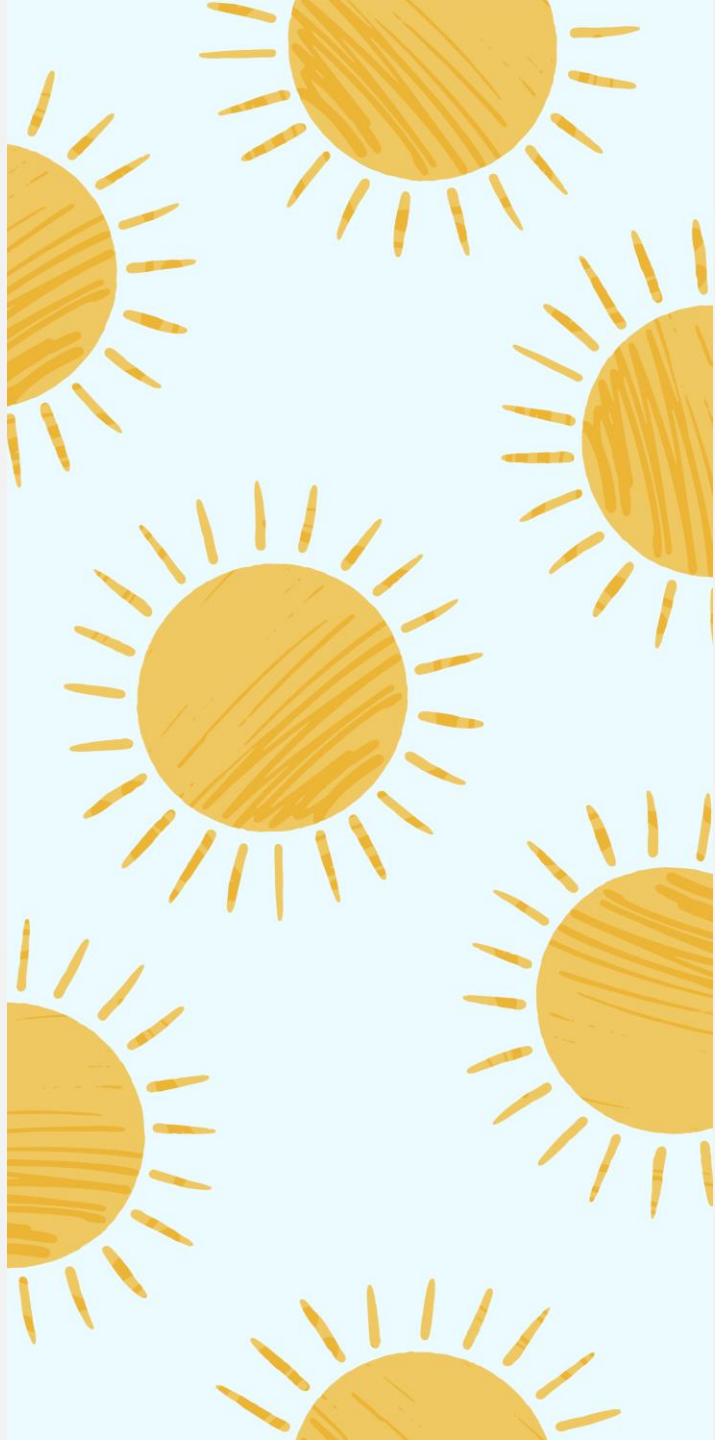
THE D.C. SUNSHINE ACT :

Scope

D.C. Official Code § 1-207.42(a) requires that all meetings of government entities, including the Council, be open to the public when official action is taken. No official action is effective unless taken at a public meeting.

Records

D.C. Official Code § 1-207.42(b) requires that a written transcript or a transcription be kept for all DC government meetings and shall be made available to the public during normal business hours of the District government. Copies of written transcripts or copies of such transcriptions shall be available, upon request, to the public at reasonable cost.



THE D.C. OPEN MEETINGS ACT

Pre-2010

The D.C. Sunshine Act was not considered a comprehensive open meeting law.

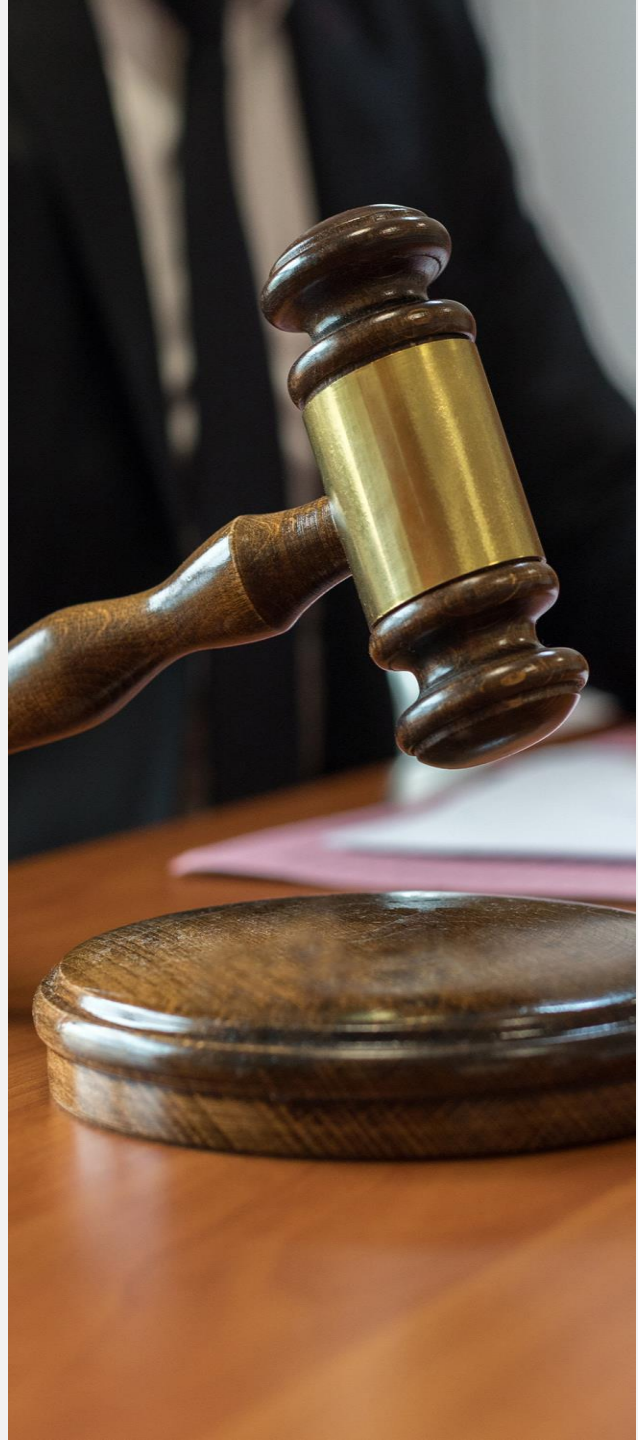
Some openness was expected of public bodies, but there was no legal framework guaranteeing that meetings would be open to the public and agencies would be held accountable for opening their meeting.

Advocacy groups criticized DC for its lack of transparency and public access to its meetings.

2010: D.C. Open Meetings Act Enactment

The D.C. Council passed the Open Meetings Act in 2010, in response to growing concerns about transparency and accountability in the District government.

Law 18-350, the "Open Meetings Amendment Act of 2010", was introduced in Council and assigned Bill No. 18-716, which was referred to the Committee on Government Operations and the Environment. The Bill was adopted on first and second readings on December 7, 2010, and December 21, 2010, respectively. Signed by the Mayor on January 19, 2011, it was assigned Act No. 18-700 and transmitted to both Houses of Congress for its review. D.C. Law 18-350 **became effective on March 31, 2011.**



DC OPEN MEETINGS LAWS

The Sunshine Act	The Open Meetings Act
All meetings at which official action is taken are open to the public. (D.C. Official Code § 1-207.42(a)).	All meetings are open to the public unless it falls into an exemption that permits a public body to have a closed session. (D.C. Official Code § 2-575(b)) Public body meetings covered and are specifically defined as a quorum of the members assembled to consider conduct and advise on public business. (D.C. Official Code § 2-575(b)).
There are no notice requirements in the Sunshine Act, but it requires that the public have access to the government's meetings.	The OMA requires public bodies to issue a notice of the meeting no less than 48 hours or two business days prior to the meeting, whichever is greater. (D.C. Official Code § 2-576).
The Sunshine Act requires transcripts of all meetings and that the transcripts be made available upon request to the public. (D.C. Official Code § 1-207.42(b)).	The OMA requires all meetings be recorded by audio or videotape. If not feasible, then meetings must be accompanied by detailed minutes. (D.C. Official Code § 2-578(a)).
The language in the Sunshine Act and Open Meetings infer that citizens may bring a lawsuit under the Sunshine Act. (D.C. Official Code § 2-579(a)(2)).	The OMA provides mechanisms for the OOG to enforce the provisions of the legislation but does not provide a private right of action for citizens for violation of the OMA. (D.C. Official Code § 2-579(a)-(b)).

OPEN MEETINGS CASES

Recent Litigation Concerning

Open Meetings

WHETHER E-MAIL DISCUSSIONS AMOUNT TO A PUBLIC MEETING

N.C. Citizens for Transparent Government, Inc., et. al. v. The Village of Pinehurst, et. al.

QUESTION – PUT <u>YES OR NO</u> IN THE CHAT

IN THE DISTRICT OF COLUMBIA, CAN PUBLIC BODIES MEET VIA E-MAIL?

ANSWER

NO – A PUBLIC BODY CANNOT CONDUCT MEETINGS VIA EMAIL UNDER THE OMA

D.C. OFFICIAL CODE § 2–577(c) E-mail exchanges between members of a public body shall not constitute an electronic meeting.

N.C. CITIZENS FOR TRANSPARENT GOVERNMENT, INC., ET. AL. V. THE VILLAGE OF PINEHURST, ET. AL.

Facts of the Case:

This lawsuit alleged that Pinehurst, NC officials broke the state's open-meetings law in 2021 by conducting business via email. Former Pinehurst Village Council member Kevin Drum and his group NC Citizens for Transparent Government accused the Pinehurst Village Council of using email to avoid NC's open-meetings requirements.

The legal dispute stemmed from events that started on Sept. 20, 2021. During a closed session, three council members raised concerns about Drum and a colleague. The discussion focused on "conversations with the Chief of Police, Moore County legislators, aggressive e-mails to business owners, and other behaviors that council members believed violated the Village Ethics Policy," according to the NC Appeals Court opinion.

Between that meeting and another meeting on Oct. 12, 2021, other council members and top town staff exchanged emails about Drum's and his colleague's conduct. Additional emails followed between Oct. 12 and an Oct. 26 meeting. The emails included a "draft motion for censure."

No censure vote ever happened. Drum lost his re-election bid and formed his citizens group in February 2022. Drum and the group filed suit against town officials in May 2022.

N.C. CITIZENS FOR TRANSPARENT GOVERNMENT, INC., ET. AL. V. THE VILLAGE OF PINEHURST, ET. AL.

The lawsuit sought "declaratory and injunctive relief for violations of the Open Meetings Law alleged to have occurred at the 20 September 2021 special called meeting and during the e-mail communications occurring between 20 September and 12 October 2021," the Appeals Court opinion explained.

"At issue here is whether the e-mails in question were 'simultaneous communication' between a 'majority' of the council members," Judge April Wood wrote for the court. "The question of whether e-mail exchange is a form of communication by which an official meeting can be conducted has not been directly answered by North Carolina courts."

"In reviewing the legislature's use of simultaneous communication in statute, e-mail is not considered a simultaneous communication subject to open meetings requirements but rather work product subject to public records requests," Wood wrote.

N.C. CITIZENS FOR TRANSPARENT GOVERNMENT, INC., ET. AL. V. THE VILLAGE OF PINEHURST, ET. AL.

Many states requiring simultaneous communication have found e-mails generally do not meet the requirement of 'simultaneity,'" Wood added, citing court decisions in Virginia, Pennsylvania, and California. "While the holdings of these jurisdictions are not binding on this Court, we find their reasoning to be both instructive and persuasive."

Wood focused on the nature of the exchanges among the mayor, other council members, and the village manager and attorney.

"A council member who generates two e-mails containing seven sentences of less than ninety words over the course of five days is not engaging in 'simultaneous communication,' 'conducting hearings, participating in deliberations, or voting upon or otherwise transacting the public business,'" Wood wrote. "When limited communication takes place hours or days apart, it does not constitute 'simultaneous communication.'"

LEGAL ADVICE IN CLOSED SESSION

Wayne Gray, et. al. v. Dickson County

QUESTION – PUT <u>YES OR NO</u> IN THE CHAT

IN THE DISTRICT OF COLUMBIA, DOES THE PRESENCE OF LEGAL COUNSEL ALONE JUSTIFY A CLOSED MEETING?

ANSWER

NO … THE PUBLIC BODY MUST BE RECEIVING LEGAL ADVICE.

HERE IS THE DC OMA PROVISION:

DC OFFICIAL CODE SECTION 2-575 permits meeting closure …

(4)(A) To consult with an attorney to obtain legal advice and to preserve the attorney-client privilege between an attorney and a public body, or to approve settlement agreements; provided, that, upon request, the public body may decide to waive the privilege.

(B) Nothing herein shall be construed to permit a public body to close a meeting that would otherwise be open merely because the attorney for the public body is a participant.

WAYNE GRAY, ET. AL. V. DICKSON COUNTY

In the consolidated appeals of Wayne Gray et al. v. Dickson County, Tennessee, the court examined citizen challenges to the approval process of a settlement agreement between Dickson County and Titan Partners, L.L.C.

Petitioners claimed they were entitled to notice regarding the discussion of the settlement at Planning and County Commission meetings and alleged improper use of executive sessions, violating the Open Meetings Act.

The trial court ruled in favor of the commissions, finding no violations. The appellate court affirmed this decision, agreeing there was no breach of the Open Meetings Act.

Gray v. Dickson Cnty., 2022 Tenn. App. LEXIS 207

WAYNE GRAY, ET. AL. V. DICKSON COUNTY

This is an Open Meetings Act case regarding the Dickson County Planning Commission's approval and subsequent denial of a site plan for the construction and operation of a fuel terminal. A non-profit and two Dickson County residents (Plaintiffs) argued that the Planning Commission acted in violation of the Open Meetings Act when it held an unpublicized meeting and initially approved the site plan. Thereafter, at the next Planning Commission meeting, the Planning Commission overturned its prior approval of Project DV.

After the denial, Titan Partners filed lawsuits against Dickson County. Dickson County Commissioners and counsel for Titan Partners engaged in non-public, "executive sessions" regarding the litigation brought by Titan Partners.

The Plaintiffs allege that executive sessions were improperly utilized to discuss the settlement agreement in violation of the Open Meetings Act. the Planning Commission held its regularly scheduled public meeting which was livestreamed on Dickson County's YouTube channel; public notice was given for the meeting, including an agenda, but the published agenda did not include any mention of the settlement agreement or Project DV.

REMEDY IN TENNESSEE FOR VIOLATION OF THE OPEN MEETINGS ACT

If a meeting is conducted in violation of the Open Meetings Act, actions taken at that meeting "shall be void and of no effect; provided that this nullification of actions taken at such meetings shall not apply to any commitment, otherwise legal, affecting the public debt of the entity concerned." Tenn. Code Ann. § 8-44-105

WAYNE GRAY, ET. AL. V. DICKSON COUNTY – COURT'S DECISION

The Court determined that "discussions between a public body and its attorney concerning pending litigation are not subject to the Open Meetings Act." Smith Cty., 676 S.W.2d at 335.

But, the exception is "narrow":[c]lients may provide counsel with facts and information regarding the lawsuit and counsel may advise them about the legal ramifications of those facts . . . [h]owever, once any discussion, whatsoever, begins among the members of the public body regarding what action to take based upon advice from counsel, whether it be settlement or otherwise, such discussion shall be open to the public.

The Court noted that Petitioners only proffered speculation as to the content of the executive sessions during which lawyers met with commissioners to discuss Titan Partners' lawsuits. There was no evidence, affidavits, deposition testimony, or otherwise of misuse of these executive sessions or any indication that impermissible deliberations occurred.

Due to the lack of evidence on the record, the Court found no violation of the Tennessee Open Meetings Act.

DISCUSSION OF EMPLOYMENT IN CLOSED SESSION

Barga v. St. Paris Village Council

QUESTION – PUT <u>YES OR NO</u> IN THE CHAT

IN THE DISTRICT OF COLUMBIA, IF A PUBLIC BODY DISCUSSES AN EMPLOYMENT MATTER RELATED TO A PUBLIC OFFICIAL, MAY THEY MEET IN CLOSED SESSION?

ANSWER

YES – THE PUBLIC BODY MAY CLOSE THE MEETING TO DISCUSS EMPLOYMENT MATTERS

DC OFFICIAL CODE SECTION 2-575(b) permits meeting closure …

(10) To discuss the appointment, employment, assignment, promotion, performance evaluation, compensation, discipline, demotion, removal, or resignation of government appointees, employees, or officials, or of public charter school personnel, where the public body is the board of trustees of a public charter school;

BARGA V. ST. PARIS VILLAGE COUNCIL

When a Champaign County village police chief requested a public hearing to contest her termination, the village council violated state law by going into a closed-door session to discuss firing her, the Supreme Court of Ohio ruled.

The village council conducted several hearings in public session to hear witnesses and review evidence, but entered into an executive session to deliberate on Chief Barga's fate. Council members emerged from closed-door discussions and cast a vote to remove Barga from the position.

Supreme Court found the Ohio Open Meetings Act, coupled with a state law outlining the process for disciplining a village police chief, entitled St. Paris Police Chief Erica Barga to have the full hearing process conducted in an open public meeting.

Barga challenged an attempt by the mayor in 2020 to fire her for insubordination and neglect of duty.

BARGA V. ST. PARIS VILLAGE COUNCIL

The Ohio Open Meetings Law - R.C. 121.22(G)(1) – permits a closed meeting "To consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official, or the investigation of charges or complaints against a public employee, official, licensee, or regulated individual, unless the public employee, official, licensee, or regulated individual requests a public hearing."

The Ohio Supreme Court cited the exception that allows public bodies to discuss certain issues in private, including employee termination, unless the public employee requests a "public hearing." The Court explained that if the public employee makes such a request, that means the entire process, including deliberations, must be open.

"Here, Barga requested a public hearing. Yet the village council chose to consider the charges against her in private. In doing so, it violated the plain terms of R.C. 121.22(G)(1)," the Court held.

The decision reversed a Second District Court of Appeals ruling, which sided with the village.

The Court invalidated Barga's termination and remanded the matter to the village council to conduct hearings in compliance with the law.

TAKEAWAYS

THE NEED FOR THE PUBLIC TO TRUST IN GOVERNMENT IS THE REASON FOR OPEN MEETING LAWS

- Open Meeting Laws Appeared in the US in the late 1890s.
- The Watergate Scandal Provided the Impetus for the Sunshine Movement that created our government transparency laws nationwide, including strengthened open meetings laws.
- In 2010, Local D.C. Government scandals created a public outcry for accountability leading to the creation of BEGA and the adoption of the comprehensive Open Meetings Act.

PUBLIC MEETINGS PROTECT THE PUBLIC SO FOLLOW THE OMA

- E-mail discussions are not public body meetings.
- Use Open Meeting Exemptions properly and provide the required notice to the public.

THANK YOU

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