

13. Must minutes be kept of executive sessions?

No. Minutes should not be kept of executive sessions. However, the minutes of the meeting at which the executive session occurs must reflect the general subject matter discussed in the executive session.

14. What notice must be given of special board meetings?

The board, committee or subcommittee must comply with its own rules to provide notice to any person who has requested it. The board, committee or subcommittee also must provide at least 24 hours advance notice to the news media that have previously requested notice of the time, place and purpose of any special meeting.

Failure to notify local media of an emergency or special meeting as required by RC 121.22(F) could make action taken invalid (RC 121.22(H)) (see question 22 for consequences of a Sunshine Law violation).

15. Does this mean the two-day notice to board members of special meetings is no longer required?

No. The two-day notice to board members is still required by RC 3313.16. The Ohio Attorney General has ruled, however, that failure to give two-day written notice to all board members is irrelevant if all board members attend the meeting (1933 Ohio Atty. Gen. Ops. No. 314).

16. Can our board, committee or subcommittee hold emergency meetings?

Yes. An emergency meeting can be called upon immediate notification to all news media who have previously requested notice. The two-day notice provision to board members remains in effect, but is satisfied if all members attend the meeting.

17. Must an employee be notified if the employee is to be the subject of an executive session discussion?

The Sunshine Law states that investigations of charges or complaints against an employee, official or student can be heard in executive session unless the individual requests a public hearing. The Ohio Supreme Court has held that this language does not prevent a school board from discussing in executive session an employee's possible nonrenewal, even if the employee has requested a public hearing (*Matheny v. Board* (1980), 62 Ohio St.2d 362). However, laws regarding employee terminations and student suspensions and expulsions have specific requirements. Consult your board's attorney.

18. Does the Sunshine Law grant the public the right to participate in meetings of our board, committee or subcommittee?

No. The Sunshine Law contains no such provision. However, most boards of education provide an opportunity for public participation. The board may adopt reasonable rules as to the time, place and manner of public comments.

19. Can a member of our board, committee or subcommittee participate in meetings when he or she is not physically present?

A member of a board, committee or subcommittee can participate in discussions even though the member is not physically present through equipment such as a speaker phone (1985 Ohio Atty. Gen. Ops. No. 048). However, a provision of the Sunshine Law specifically requires an individual to be "present in person" in order to be considered as part of a quorum or to vote.

20. Are there situations in which the Sunshine Law does not apply?

Yes. The Sunshine Law does not apply to an audit conference conducted by either the Bureau of Inspection and Supervision of

Public Offices or by independent certified public accountants with officials of the school district. Collective bargaining meetings between the board and employee organizations also are not subject to the Sunshine Law (RC 4117.21).

21. Can anyone sue our board, committee or subcommittee claiming a Sunshine Law violation?

Yes. Any person may bring an action in the court of common pleas to enforce the Sunshine Law. That person may seek an injunction to halt a violation or threatened violation of the law. Such a suit must be brought within two years of the violation or threatened violation.

22. What happens if we violate the Sunshine Law?

Any action taken in executive session is void. So is any action taken in open session which results from an unlawful executive session. One court invalidated the creation of a new school district by an educational service center (ESC) because the ESC board had conducted improper executive sessions (*Piekutowski v. South Central Ohio Educational Service Center Governing Board*, Adams App. No. 04CA791, 2005-Ohio-2868). The Sunshine Law makes it clear that any board action is invalid if the board violated any of the notice provisions of the law. A court may issue an injunction compelling members of the board, committee or subcommittee to comply with the Sunshine Law.

23. What penalties may a court assess?

If the court issues an injunction, it is required to assess a civil penalty of \$500 against the board, committee or subcommittee and require that entity to pay all court costs. The court also is to require the public body to pay the reasonable attorneys fees of the party who brought the suit, although such fees can be reduced if the court determines that the public body

acted reasonably in believing that it was not violating the Sunshine Law, and that its conduct served a public purpose.

24. Can our board, committee or subcommittee recover costs and attorneys fees if we were subjected to a non-meritorious suit?

Yes. However, the court must not only find in favor of the board, committee or subcommittee, but it also must determine that the bringing of the lawsuit by the plaintiff was "frivolous conduct."

25. Is there any penalty which applies to individual board members?

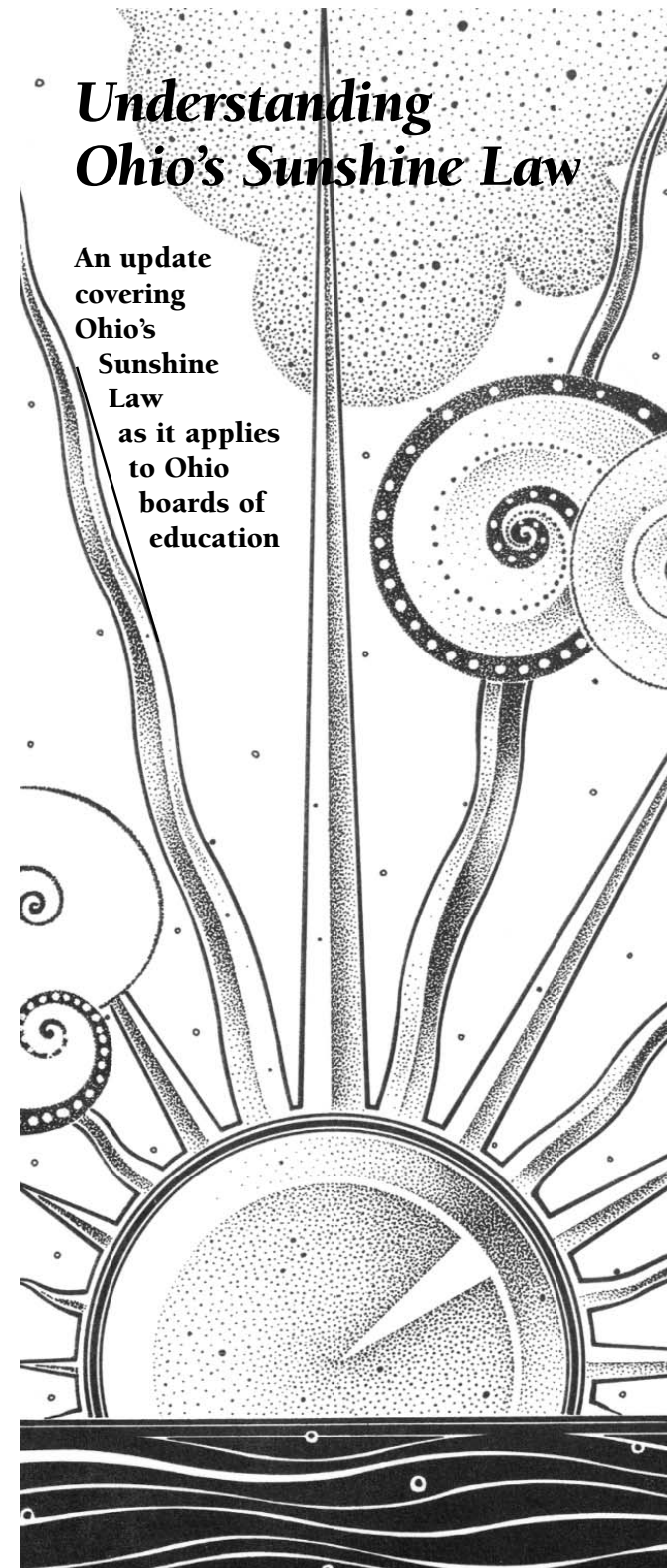
Yes. A board member who knowingly violates an injunction which has been granted by a court may be removed from office. In two separate cases, board members have been removed from office in part due to repeated violations of the Sunshine Law. In both cases, the boards repeatedly held lengthy executive sessions, then returned to open session to vote on matters after little or no public discussion (*Evans v. Rock Hill Local School District Board of Education*, Lawrence App. No. 04CA39, 2005-Ohio-5318, and *In re: removal of Kuehnle*, 161 Ohio App. 3d 399, 2005-Ohio-2373).

CAUTION: Because of the complexity of the Sunshine Law and continuously changing court decisions, OSBA recommends that questions of interpretation of the law be directed to your board's legal counsel.

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Understanding Ohio's Sunshine Law

An update covering Ohio's Sunshine Law as it applies to Ohio boards of education

Ohio's Sunshine Law (Ohio Revised Code Section (RC) 121.22) requires that all acts and most deliberations of boards of education and other public bodies, as well as their committees and subcommittees, be conducted in public meetings. Since its enactment in 1975, the Sunshine Law has been a continuing source of inquiry and litigation for boards of education. This brochure attempts to provide answers to the most commonly asked questions about the Sunshine Law as it applies to public boards of education.

1. To what entities does the Sunshine Law apply?

The Sunshine Law applies to boards of education, and to any committee or subcommittee of a board of education.

2. What is a committee or a subcommittee to which the Sunshine Law applies?

The law does not define the terms "committee" or "subcommittee." However, a court decision and an opinion of the Ohio Attorney General lead to some conclusions. A court has held that a local building leadership team on which no school board members serve is a committee to which the Sunshine Law applies (*Weissfeld v. Akron Pub. School Dist.* (1994), 94 Ohio App.3d 455).

The Ohio Attorney General has issued an opinion that a citizens advisory committee is subject to the law, despite public officials or employees constituting less than a majority of its membership. That opinion states that if the committee is required by a law or rule, or if a political subdivision created the committee, then it is subject to the Sunshine Law. If a committee is created by the superintendent, it is not a committee "of" the board and the Sunshine Law does not apply (1994 Ohio Atty. Gen. Ops. No. 096).

Entities such as booster clubs, PTAs and PTOs, which are not created by the board, probably are not covered by the law.

3. Must our board adopt rules?

Yes. Each board, committee and subcommittee must adopt rules by which any person may learn the time and place of all regular meetings and the time, place and purpose of all special meetings. The rules must provide for giving notice of meetings to any person and any news media who request such notice.

4. What constitutes a meeting?

A "meeting" is defined as any prearranged discussion of the public business of a board of education, committee or subcommittee by a majority of its members. "Discussion" suggests an exchange of words, comments or ideas between members of the public body (*Springfield Local School Dist. Bd. of Edn. v. Ohio Assn. of Pub. School Emp., Local 530* (1995), 106 Ohio App.3d 855). Regardless of what name is given for a gathering (work session, study group, retreat, etc.), if it meets this definition, it is a meeting. The Ohio Supreme Court has held that a series of meetings, each with a minority of members of a public body, without giving proper notice, can constitute a Sunshine Law violation (*State ex rel. Cincinnati Post v. Cincinnati* (1996), 76 Ohio St.3d 540). It may be possible for a meeting to occur by having a majority of members of a board participate simultaneously in a telephone conference call or an online chat room. The only reported case to date regarding a series of electronic mail messages constituting a possible meeting for purposes of the Sunshine Law held that electronic mail is not subject to the Sunshine Law (*Haverkos v. Northwest Local School District Board of Education* (July 8, 2005), Hamilton App. Nos. C-040578, C-040589). Other courts may reach a different conclusion.

5. Can a majority of the members of our board, committee or subcommittee gather without violating the Sunshine Law?

Yes. If there is not a prearranged

discussion of the business of the board, committee or subcommittee, it would not be a meeting as defined by the statute. A majority of board members could, for example, get together on social occasions, ride together to an event, or attend a seminar without violating the law, so long as discussions of board business do not take place. The same is true of the members of a committee or subcommittee. Common examples include holiday parties, graduation ceremonies and candidate forums, where there is no prearranged discussion of board business by a majority of its members.

6. Can our board, committee or subcommittee lawfully hold meetings outside the school district?

Yes. There is no prohibition on holding meetings outside the district. However, the provisions of the Sunshine Law are applicable and the public would be entitled to be present. If "out of district" meetings were conducted in order to curtail public accessibility, the practice would be in contravention of the spirit of the Sunshine Law and could be enjoined.

7. When can we hold an executive session?

An executive session may be held only in conjunction with a regular or special meeting of the board, committee or subcommittee.

8. What can we do in executive session?

Executive sessions are for the purpose of deliberations only. No action of any kind can be taken during an executive session.

9. What topics may we discuss in executive session?

* The appointment, employment, dismissal, discipline, promotion, demotion or compensation of an employee or official, or the investigation of charges or complaints against an employee, official, licensee or student, unless the employee, official, licensee or student requests a public hearing;

* The purchase of property for public purposes or the sale of property at competitive bidding;

* Conferences with the board's attorney to discuss matters which are the subject of pending or imminent court action;

* Preparing for, conducting, or reviewing negotiations or bargaining sessions with employees;

* Matters required to be kept confidential by federal law or rules or state statutes;

* Specialized details of security arrangements.

Each executive session discussion must be limited to the purpose or purposes stated. It is unlawful to state only one purpose for an executive session, but to then discuss a second topic (although an executive session may be called for the purpose of discussing several topics) (*Vermilion Teachers' Assn. v. Vermilion Local School Dist. Bd. of Edn.* (1994), 98 Ohio App.3d 524).

10. Is information obtained during an executive session confidential?

OSBA strongly believes that board members, as matter of ethics, should not divulge executive session discussions. Furthermore, it should be noted that some matters discussed in executive session also can be legally confidential. In fact, RC 102.03(B) provides that confidentiality of information shared in executive session is legally required when:

* notice of a subject's confidentiality is given and,

* when confidentiality is necessary for the proper conduct of government business.

This part of RC 102.03(B) does not function automatically; it requires action by your board. If RC 102.03(B) is violated, it is a misdemeanor of the first degree.

11. Must we follow a particular procedure to go into executive session?

Yes. There must be a motion and second to go into executive session followed by a

roll call vote. The motion must state which of the purposes listed under subsections (G)(1) through (G)(6) of the law (see response to question 9) is the purpose for the executive session. If the executive session is to discuss a personnel matter under subsection (G)(I), the motion cannot simply state that the executive session is for "personnel matters." The motion must state exactly which type of personnel action is to be discussed, but need not include the name of any person to be considered (*Caldwell v. Westlake Bd. of Educ.* (May 3, 1991), Cuyahoga C.P. No. CV-91-210345). A session to discuss a personnel matter must be about an individual or individuals, rather than about a subject in general (e.g. a board may discuss the nonrenewal of one or more specific people, but not nonrenewal procedures in general) (see *Gannett Satellite Information Network v. Chillicothe City School District* (April 4, 1988), Ross App. No. 1427, unreported).

Make sure the resolution to adjourn into executive session chooses words from the statutory list. While it is fine to use general topics to help remember the reason(s) the board can properly go into executive session, the actual wording of the resolution must incorporate the words found in the statute. Mistakes may be able to be "cured" by subsequent action taken in public (*Biesel v. Monroe Co. Bd. of Educ.* (Aug. 29, 1990), Monroe App. No. 6A-678, unreported, *Kuhlman v. Village of Leipsic*, (March 27, 1995), Putnam App. No. 12-94-9, unreported).

12. Who is entitled to attend executive sessions?

All of the members of the board, committee or subcommittee are entitled to attend executive sessions. The board, committee or subcommittee may invite any other persons that it wishes into an executive session. This means the board can hold an executive session without the superintendent or treasurer if it so chooses.