

December 7, 2017

Via Email to: jcolangelo@law.ga.gov

Ms. Jennifer Colangelo
Georgia Department of Law
40 Capital Square SW
Atlanta, Georgia 30334-1300

RE: *Open Meetings Act Complaint from David Dunagan regarding the
Augusta-Richmond County Coliseum Authority*

Dear Ms. Colangelo:

This letter is in response to your letter of December 4, 2017 concerning a complaint filed by Mr. David Dunagan. Mr. Dunagan believes the Augusta-Richmond County Coliseum Authority (the "Authority") violated the Open Meetings Act during its November 28, 2017 regularly called meeting when the Authority voted to continue its meeting in executive session while allowing four members of the Augusta Commission to stay in the room. I appreciate the mediation process the Attorney General has established and our opportunity to respond to these charges.

I have served as outside legal counsel for the Authority since 2003. Over the course of several months, at the direction of the Authority, I have negotiated with Cardinal Management--the owner of a large tract of land currently the site of a defunct shopping mall--as the possible location of a new arena the Authority intends to build. At the Authority meeting on November 28, 2017, I reported to the Authority that I had terms from the mall's owner to present to the Authority concerning a possible acquisition of the mall property. I advised the Authority they had the right to vote to continue the meeting in executive session based on the "real estate acquisition" exception to the Georgia Open Meetings Act.

O.C.G.A. § 50-14-3(b)(1)(B,D).



The week prior to the Authority meeting, the Augusta Commission had voted 7-3 on a motion stating, “Move to approve if an acceptable agreement is not reached by 11:00 P.M. on Thursday, November 30, 2017 the Augusta Coliseum Authority should move forward and select another site for the arena.”

Four members of the Augusta Commission attended the Authority meeting on November 28th. At the meeting, Authority member Darren Smith moved to continue the meeting in executive session based on the real estate acquisition exception. Authority member Brad Usry made a substitute motion to go into executive session but allow the four Augusta Commissioners present to remain in the session. Several members of the media objected to the Authority allowing the Augusta Commissioners to stay in the executive session while excluding the public.

I have attached the term sheet I presented to the Authority that day. The term sheet is a matter of public record because the Authority did not vote to approve the terms applicable to the Authority until after they voted to come out of executive session. As is clear from the term sheet, Cardinal Management had requested terms not only from the Authority but also from the Augusta Commission.

When members of the media objected to the Augusta Commissioners being allowed to stay in the meeting, the Authority asked for my opinion whether it was legal for the Augusta Commissioners to stay. I advised the Authority that the statute is silent on who may be included in an executive session, but that they could include the Commissioners if they felt the Commissioners might be helpful in making their decision.

Prior to the motion to include the Commissioners, all Authority members—and for that matter the general public—were aware that during negotiations the mall owners had consistently requested tax relief from the Augusta Commission

as part of any deal for the Authority to acquire their land. Also, the Authority members knew that ultimately the Augusta Commission would have to approve funding for the project because the Authority has no taxing power and no positive revenue stream for financing. The Authority relies on hotel/motel tax allocated by the Augusta Commission to finance any bonds and to help cover operating losses. Because the Augusta Commission is so integrally involved in any decision about where to place the new arena and how to finance it, I advised the Authority the Commissioners could legally remain in the room.

Mr. Usry's motion to include the Commissioners in the executive session passed. After the Authority came out of executive session and the public was allowed back into the room, Darren Smith moved "to accept the Cardinal Management offer and the offer be delivered to the Augusta Commissioners for action." This motion passed 4-2. This was two days before the Augusta Commission's stated deadline of November 30, so I delivered the terms to the Commission's attorney that afternoon.

Mr. Dunagan's complaint is apparently based upon comments by Georgia Press Association General Counsel, David E. Hudson. Mr. Hudson contends that the Commissioners are simply citizens and if the Authority allowed the Commissioners, as citizens, into the executive session, the Authority should have also allowed everyone else.

To my knowledge, the only legal authority that addresses this question is Georgia Attorney General Opinion Number U98-3 dated February 25, 1998. That opinion clearly states:

[I]t is my opinion that the Open Meetings Act does not contain a limitation on the persons who may be invited into an "executive session." . . . the General Assembly did not intend to place a specific limitation on who may remain in the room during a closed session. It precisely listed the circumstances under which a

meeting can be closed and the procedures that must be followed when a meeting is closed. However, there is no specific statutory limitation on who may attend a closed meeting. Had the legislature intended to limit those who may be present, it could have done so Agencies must determine on a case-by-case basis which people may remain in a closed session, permitting only those persons whose presence is consistent with an applicable exception to remain in the closed meeting.

The Opinion goes on to give examples of persons who might be permissibly included in an executive session to discuss a real estate transaction, such as real estate agents and selling property owners. A copy of the Opinion is attached for your convenience.

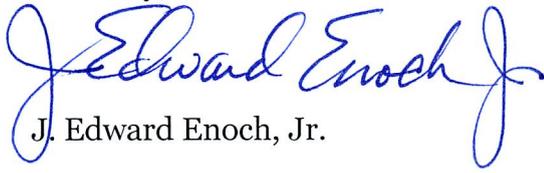
Clearly, this Opinion of the Attorney General's office shows the Authority had the discretion to allow the Commissioners to remain during the closed session and the Authority exercised its discretion in a legally permissible manner. Contrary to Mr. Hudson's assertions, the Augusta Commissioners were exactly the kind of people described in the Attorney General Opinion.

In the proposed transaction, the Augusta Commission would have to be a party to the transaction. Plus, the Commission had already weighed in on the matter by setting a deadline to receive the terms of the deal from the Authority. Finally, the Commission is essentially the "banker" for any new arena as they will ultimately have to fund any approved transaction. The Augusta Commission's integral participation in the transaction is ultimately displayed by the fact that, in their meeting held December 5, 2017, the Augusta Commission voted to "reject the offer that the Coliseum Authority sent to the Augusta Commission from Cardinal Management to build the new civic center at the old Regency Mall property." This offer consisted of the terms discussed in the Authority's executive session on November 28.

I have represented the Coliseum Authority for 14 years and guided them through numerous executive sessions. In all that time, this is the first complaint we have ever received about how we conducted an executive session. That is because we err on the side of keeping meetings open where the public can have access to the decisions made by people in their government. Even in this case, there is no complaint to set aside some action taken in a closed session, because no action was taken until after the Authority came out of executive session and a debatable motion was put on the floor.

For the reasons I have set out above, it is clear the Authority did not violate the Open Meetings Law at their November 28, 2017 meeting.

Sincerely,

A handwritten signature in blue ink that reads "J. Edward Enoch, Jr." The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

J. Edward Enoch, Jr.

Enc.

Cardinal Management Offer

1. **Property Gift.** Cardinal will gift to the City the tract of land where the Montgomery Wards was, which is 10.18 acres.
2. **Easement.** Cardinal will sign Cross Easement for parking as set forth hereinbelow.
3. **Authority Obligations.** Authority will perform the following:
 - a. Maintain all existing parking areas in all four parcels that constitute the Regency Mall for a period of five years. After five years, Authority's obligations are limited to the parking lots designated to their use (+/- 29 acres). Maintenance will include an initial re-asphalting and re-lamping of all parking, and providing drainage, utilities, landscaping and all other maintenance repair or replacement required.
 - b. Authority will construct an entertainment/sports arena with an occupancy of 12,000-15,000 seats and sufficient parking for the arena without use of any parking retained by Grantor.
4. **Cross-Easements.** Cardinal and Authority would enter into a cross-easement agreement for access and use of their respective parking areas with coliseum authority assuming all responsibilities including but not limited to maintenance, insurance and real estate taxes for +/- 29 acres of parking designated for its use for the useful life of the arena.
5. **City Obligations.** The City will perform the following:
 - a. Grant full tax abatement to the property Cardinal retains for **10 years**;
 - b. Confirm to the satisfaction of Cardinal's attorney Cardinal's right to develop the remaining 860,000 square feet of the original developed property and the additional 200,000 square feet of property approved as part of the original Mall plan;
 - c. Confirm to the satisfaction of Cardinal's attorney that the zoning and parking for the retained property will be appropriate for uses compatible with and complimentary to an entertainment/sports arena including but not limited to shops, restaurants, office space, hotels, and residential.

U98-3 The Open Meetings Act generally requires agencies to make official meetings open to the public, but portions of such meetings may be closed or conducted in executive sessions under certain specific circumstances if the proper procedures are followed.

February 25, 1998

To:

Senator District 13

Senator District 11

Representative District 164

Representative District 165

Representative District 166

Re:

The Open Meetings Act generally requires agencies to make official meetings open to the public, but portions of such meetings may be closed or conducted in executive sessions under certain specific circumstances if the proper procedures are followed.

You have asked for my opinion about a number of specific questions regarding the Open Meetings and Records laws. While your questions are raised in the context of the operations of a local government, they are important questions, the answers to which apply to all entities covered by the Acts. I will address each of your questions in turn. In summary, however, it is my unofficial opinion that the Open Meetings Act generally requires agencies to make official meetings open to the public, but portions of such meetings may be closed or conducted in “executive” sessions under certain specific circumstances if the proper procedures are followed. Agencies may go into closed “executive” sessions, along with other necessary participants, for discussion and deliberation under the proper circumstances. All votes, though, even on privately discussed matters, must be taken in public. Although these Acts do not require that minutes detailing the substance of the closed sessions be kept, the public must be properly notified prior to a closed meeting.

The Applicable Law

The Georgia Open Meetings Act, found at O.C.G.A. § 50-14-1 et seq., intends to prohibit “closed meetings which engender in the people a distrust of its officials who are clothed with the power to act in their name.” *McLarty v. Board of Regents*, 231 Ga. 22, 23 (1973). The Act requires that any meeting of a “governing body of an agency or any committee thereof . . . at which official business or policy of the agency is to be discussed or at which official action is to be taken” be made open to the public. *Crosland v. Butts County Bd. of Zoning Appeals*, 214 Ga. App. 295, 296 (1994). It is to be “broadly construed to effect its purposes of protecting the public and individuals from closed-door meetings.” *Kilgore v. R.W. Page Corp.*, 261 Ga. 410, 411 (1991). The limited exceptions to its requirements are enumerated at O.C.G.A. § 50-14-3. While the mandates of openness must be read broadly, these statutory exceptions must be narrowly construed. *Kilgore*, 261 Ga. at 411.

1.

You have initially asked:

Is there any limitation on who [may] be invited into executive sessions by [a covered agency]? May [a] county attorney, county administrator, and county clerk attend? May third parties be invited into the executive session if the [agency] feels the need to do so to discuss business at hand?

In response to this question, it is my opinion that the Open Meetings Act does not contain a limitation on the persons who may be invited into an “executive session.” Of course, one’s primary concern in interpreting the meaning of a statute is to determine the intention of the General Assembly. O.C.G.A. § 1-3-1. Using the principle of expressio unius est exclusio alterius (the expression of one thing is the exclusion of another), one can reasonably infer that the General Assembly did not intend to place a specific limitation on who may remain in the room during a closed session. It precisely listed the circumstances under which a meeting can be closed and the procedures that must be followed when a meeting is closed. However, there is no specific statutory limitation on who may attend a closed meeting. Had the legislature intended to limit those who may be present, it could have done so.

However, this does not mean that a covered “agency” has carte blanche in determining who may remain in a closed meeting. Instead, such agencies must determine on a case-by-case basis which people may remain in a closed session, permitting only those persons whose presence is consistent with an applicable exception to remain in the closed meeting. For example, O.C.G.A. § 50-14-3(4) allows meetings to be closed for the purpose of “discussing the future acquisition of real estate.” It clearly would be appropriate for the board members, if they chose, to include in their closed session the current owners of the real estate in question and their attorneys or agents. Also, O.C.G.A. § 50-14-2(1) allows a meeting to be closed so that the government agency may “consult and meet with legal counsel pertaining to pending or potential litigation” and other such matters. Including the agency’s attorneys and other relevant staff members in these closed consultations would also be appropriate.

2.

Next, you have asked:

Does the law require advance publication of executive session meetings, or can the [agency] go into executive session in the middle of a regularly scheduled public meeting if a matter which would be an appropriate subject for an executive session comes to the [agency’s] attention during such regular meeting?

In this regard, it is my opinion that the Open Meetings Act does not require prior public notice that a portion of a properly advertised open meeting will be closed. However, any agency meeting at which official action will be taken which is also to be closed in its entirety must be properly advertised in advance just as an open meeting would. See O.C.G.A. § 50-14-

1(d). Official Code of Georgia Annotated § 50-14-4 describes the procedure that must be followed when a meeting or a portion of a meeting is closed to the public for one of the limited reasons listed in O.C.G.A. §§ 50-14-2 and 50-14-3. It provides as follows:

When any meeting of an agency is closed to the public pursuant to any provision of this chapter, the specific reasons for such closure shall be entered upon the official minutes, the meeting shall not be closed to the public except by a majority vote of a quorum present for the meeting, the minutes shall reflect the names of the members present and the names of those voting for closure, and that part of the minutes shall be made available to the public as any other minutes. Where a meeting of an agency is devoted in part to matters within the exceptions set forth in this chapter, any portion of the meeting not subject to any such exception, privilege, or confidentiality shall be open to the public, and the minutes of such portions not subject to any such exception shall be taken, recorded, and open to public inspection as provided in subsection (e) of Code Section 50-14-1.

O.C.G.A. § 50-14-4. See also 1988 Op. Att’y Gen. U88-30. It is apparent that the vote to close the meeting can only be taken in an open meeting which is itself held in accordance with these

statutory provisions. The Georgia Court of Appeals addressed the public’s right to know of the closing of a meeting in *Beck v. Crisp County Zoning Bd. of Appeals*, 221 Ga. App. 801 (1996). There, an agency of a local government properly advertised a public meeting. On the agenda, however, only certain parts of the meeting were listed as “public” although the entire meeting was subject to the Open Meetings Act. At the end of the listed “public” portions of the meeting, the chairman announced that the public portion of the meeting was adjourned and implied that the public should leave. No announcement was made that the commission would later reconvene in an open session. The agency then heard evidence regarding public matters.

The court recognized that the closing of this meeting, without notification that it would reconvene later, mislead the public by leaving the impression the commission’s business was concluded, when in fact it was not. The court held that “where the agencies do specifically undertake to ‘advise’ the public, they must do so in an even-handed, balanced manner which does not mislead the public, whatever their avowed intentions.” *Id.* at 803. It should be understood, therefore, that government entities covered by the Open Meetings Act must be quite straightforward with the public when dealing with the public’s right to attend governmental meetings at which official action will be taken. 3.

You have also inquired: In hiring personnel each year, should the discussions concerning the appointment of [a] county attorney, county physician, and county administrator be discussed in an open meeting or can [an agency] go into executive session to discuss and vote on same?

Does the law require that evidence relating to personnel disciplinary proceedings be taken in an open meeting? And does the law require that deliberations concerning the filling of a vacancy in any agency related to our Board be made in an open meeting?

Under the applicable exception, official meetings can only be closed when the agency is “discussing or deliberating upon the appointment, employment, compensation, hiring, disciplinary action or dismissal, or periodic evaluation or rating of a public officer or employee.” O.C.G.A. § 50-14-3(6). It is my opinion, therefore, that a county board can discuss or deliberate on the appointment of a county attorney, county physician, or county administrator in closed session if they desire, but they must vote on the appointment in public. The board must also take evidence in regard to personnel disciplinary proceedings in public. *Id.*; 1995 Op. Att’y Gen. U95-15. Deliberations to fill an opening in an agency related to the board may be conducted in closed session with the vote being taken in public, but deliberations to fill a vacancy in the board itself would have to be done in public. O.C.G.A. § 50-14-3(6).

4.

In your fourth question, you asked:

Does the law apply in similar fashion to cities and to hospital authorities, particularly when hospital authorities are conducting “Strategic Planning Sessions” pursuant to Georgia law?

The Open Meetings Act by its very terms applies to all government agencies, which are defined to include, among other things, “[e]very county, municipal corporation, school district, or other political subdivision of this state” and “[e]very city, county, regional, or other authority established pursuant to the laws of this state.” O.C.G.A. § 50-14-1(a)(1)(B), (D) (emphasis added). It also applies to public hospital authorities and to private hospital corporations through which public hospital authorities carry out their official responsibilities. *Richmond County Hosp. Auth. v. Southeastern Newspapers Corp.*, 252 Ga. 19 (1984); *Northwest Ga. Health Sys. v. Times-Journal, Inc.*, 218 Ga. App. 336 (1995); 1980 Op. Att’y Gen. U80-6. Hospital authorities, however, may meet in closed session when “discussing the granting, restriction, or revocation of staff privileges or the granting of abortions under state or federal law.” O.C.G.A. § 50-14-3(5).

5.

Finally, you have asked whether “the open records act require[s] that minutes be taken of the proceedings in an executive session?” The Open Records Act imposes no requirements regarding the taking of such minutes. However, this issue is addressed in the Open Meetings statute. In reviewing that statute, my office has previously opined that “O.C.G.A. § 50-14-4 requires only that the official minutes reflect the specific reasons for closure [of the meeting], the names of those present, and their vote of the closure question. The law imposes no other requirements.” The opinion also notes that a limited exception is indicated for minutes dealing with closed meetings when an agency is discussing the future acquisition of real estate. See O.C.G.A. § 50-14-3(4); 1988 Op. Att’y Gen. U88-30, p. 149.

Conclusion

It is, therefore, my unofficial opinion that the Open Meetings Act generally requires agencies to make official meetings open to the public, but portions of such meetings may be closed or conducted in “executive” sessions under certain specific circumstances if the proper procedures are followed. Agencies may go into closed “executive” sessions, along with other necessary participants, for discussion and deliberation under certain circumstances, but all votes, even on privately discussed matters, must be taken in public. Although the Act does not require that minutes detailing the substance of the closed sessions be kept, the public must be properly notified prior to a closed meeting.

Prepared by:

CHRISTOPHER A. MCGRAW
Assistant Attorney General

For an extensive discussion of Georgia’s Open Meetings and Open Records Acts, see Mark H. Cohen & Stephanie B. Manis, *Georgia’s Open Records and Open Meetings Laws: A Continued March Toward Government in the Sunshine*, 40 Mercer L. Rev. 1 (1988).