S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

December 12, 2002

Opinion No. 02-131

Legislator's Private Meeting with Citizens' Groups in a Public Facility

QUESTIONS

1. May a legislator or citizen meet privately with individuals constituting a group on matters of interest to that group in a public facility such as Legislative Plaza or another state, municipal or county facility, presuming approval of the appropriate facility manager has been obtained?

2. Do any constitutional, statutory or other legal requirements mandate such meetings to be open to the general public and the press when held on state property?

3. If such meeting is required to be open, what form of notice must be given of the meeting.

OPINIONS

1. Yes. A single legislator's presence does not convert an otherwise private meeting of an interest group into a meeting required to be open under the Open Meetings Act found at Tenn. Code Ann. §§ 8-44-101, *et seq.*

2. Not in general. Certain areas of state property may by use or designation be open to the public at large, and the facilities manager should be knowledgeable as to the particular designation of a meeting area being used. A meeting being held in a meeting space that has been made available for use by private groups and individuals would not be required under the First Amendment to be open to the public on account of its being held on governmental property, if the group holding the meeting wishes it to remain private and barred to the press.

3. In light of the answers in 1. and 2., this question need not be answered.

ANALYSIS

Tenn. Code Ann. § 8-44-102(a) in the Open Meetings Act provides that "[a]ll meetings of any governing body are declared to be public meetings open to the public at all times, except as provided by the Constitution of Tennessee." The first part of this opinion assumes that the citizens' group or civic interest group having the gathering in the public facility is not itself subject to the

Open Meetings Act as a governing body for the meeting in question. Facts and circumstances specific to the particular group would be required to determine if the Open Meetings Act applied to a given meeting, and cannot be answered as a general principle.

The presence of a legislator, however, would not convert a meeting that is not required to be open under the Act into one that must be open. The Open Meetings Act does not apply to the General Assembly; moreover, there is no right of access to legislative meetings under the First Amendment of the United States Constitution. *Mayhew v. Wilder*, 46 S.W.3d 760, 770, 777 (Tenn. Ct. App.), *p.t.a. denied* (2001). Thus, a legislator's attendance at discussions by citizen groups would not open the meetings on that fact alone.

Therefore, the questions presented will turn on whether the fact of holding the meeting in public governmental facilities, such as in Legislative Plaza, requires that meetings of citizens, with or without a legislator present, be open to the public and press.[1] "The Government's ownership of property does not automatically open that property to the public." *United States v. Kokinda*, 497 U.S. 720, 725 (1990). However, the government need not exclude the public. A governmental owner of property generally has the power to allow the public to use the property for private purposes, at least at times when the property is not otherwise in use. *See* 10 Eugene McQuillin, *Municipal Corporations* § 28.42 (3d ed.).

When public property is made available for private use, that private use may be protected from intrusion by the laws against trespassing. *See Otwell v. State*, 850 S.W.2d 815 (Tex. Ct. App. 1993) (demonstrator arrested for failure to leave private reception held on public property).

The First Amendment does not create a general right of access to government property. For example, in *Houchins v. KQED*, 438 U.S. 1 (1978), the Supreme Court held that the First Amendment did not grant the press a right to have access to a county jail for news-gathering purposes. The First Amendment has been held not to create any right of access to information by the press beyond that available to the general public. *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972). Thus, the press is subject to generally applicable laws, even if those laws incidentally hinder a reporter's ability to gather information. *Cohen v. Cowles Media Company*, 111 S. Ct. 2513 (1993). Moreover, for First Amendment purposes, government restrictions on access to property are subject to less heightened scrutiny when the government is acting as a proprietor, managing its internal operations, than when it acts as a lawmaker, exercising its power to regulate or license. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 112 S.Ct. 2701, 2705 (1992) [ISKCON]. The ISKCON court explained that: "consistent with the notion that the government — like other property owners — has power to preserve the property under its control for the use to which it is lawfully dedicated, the government does not create a public forum by inaction. Nor is a public forum

---

[1] The Attorney General of Maryland has opined on a similar question in Op. Md. Atty. Gen. 95-030 (August 4, 1995) (opining that a member of the press may be excluded from a private meeting held in a public building, when that meeting was not required to be open under that state's open meetings act).

created whenever members of the public are permitted freely to visit a place owned or operated by the Government. The decision to create a public forum must instead be made by intentionally opening a nontraditional forum for public discourse . . .. [T]he location of property also has bearing because separation from acknowledged public areas may serve to indicate that the separated property is a special enclave, subject to greater restriction." *Id.* at 679-80, 112 S.Ct. at 2706 (citations and quotations omitted).

As a proprietor, the government may regulate to preserve the property for the use to which it is properly dedicated. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 50-51 (1985). The "existence of a [First Amendment] right of access to public property and the standard by which limitations upon such right must be evaluated differ depending on the character of the property at issue." *Id.* at 44. The *Perry* Court explained that three categories have been recognized into which all government property must fall: public fora, limited public fora, and non-public fora. Public fora are "places which by long tradition or by government fiat have been devoted to assembly and debate," and in such fora "the rights of the State to limit expressive activity are sharply circumscribed." *Id.* at 45. The prime example of public fora are streets and parks, which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 59 S.Ct. 954, 963 (1939). In public fora, the State may enforce regulations as to time, place, and manner of expression. These regulations must be content-neutral and narrowly tailored to serve a significant government interest leaving open ample alternate channels of communication. *Perry, supra*, at 45. *See* Op. Tenn. Atty. Gen. 90-105 (Dec. 19, 1990).

The questions do not appear to involve the use of streets or parks, but rather the use of meeting space made available by the State or local governments. This appears to be most likely occurring in a second category of property, which is called the limited, or designated, public forum. This is government property which the State has opened for use by the public as a place for expressive activity. The State may not be required to create the forum in the first place and is not required to keep the facility open indefinitely, but "as long as it does so it is bound by the same standards as apply in a traditional public forum." *Perry*, at 46. A limited public forum may be opened only to certain groups. Finally, for purposes of First Amendment analysis, a "nonpublic forum" is public property which is not by tradition or designation a forum for public communication; in addition to time, place, and manner regulations, a state may reserve a nonpublic forum for its intended purposes, communicative or otherwise, as long as regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose a speaker's view. *Id.* For example, the lobby of a state welfare office was not a "designated public forum" for purposes of First Amendment analysis, absent evidence that the office had a policy of free access to its lobby for expressive activities. *Families Achieve Independence and Respect v. Nebraska Dept. of Social Services*, 111 F.3d 1408 (8th Cir. en banc 1997). Under these decisions, regulation of speech in a nonpublic forum must be reasonable and not be an effort to suppress expression merely because public officials oppose a speaker's view. Governmental control over access to a nonpublic forum may be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and they are viewpoint neutral. Further, the

government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation.

But, even if government property is made available to a variety of groups, that fact, at most, would render the property a public forum for group access — that is, various groups could use the space when available. When any given group uses the property, however, that group would retain its prerogative to define the nature of the event. Sometimes the private group would intend its event to be open to all comers, effectively creating a public forum for that event; at other times, the private group would intend its event to be limited to invitees, maintaining a nonpublic forum. The First Amendment does not bar the latter. In *Otwell v. State*, 850 S.W.2d 815 (Tex. Ct. App. 1993), a city had leased a park for one evening for a private group's reception. "The reception was not open to members of the general public. Indeed, only [the group's] members and invited guests were admitted . . .. Therefore, on [that] evening . . . the [park] was a nonpublic forum . . .." 850 S.W.2d at 817. For purposes of these questions, if the citizen or interest groups hold a meeting that could be closed to the public if held on private property, that meeting, even though held on governmental property, would be a nonpublic forum, and members of the press or public could be excluded.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

SARAH A. HIESTAND
Senior Counsel

Requested by:

Honorable Tommie F. Brown
State Representative
Suite 36 Legislative Plaza
Nashville, TN 37243-0128