University of Arkansas at Little Rock Law Review

Volume 1 | Issue 2 Article 6

1978

The Arkansas Freedom of Information Act: Executive Session Subject Matter

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NOTE: THE ARKANSAS FREEDOM OF INFORMATION ACT: EXECUTIVE SESSION SUBJECT MATTER

In October 1975 the Board of Correction of the State of Arkansas met in executive session to discuss the possible dismissal or discipline of certain employees after a prison inmate died while under the employees' supervision. A reporter employed by appellant, Commercial Printing Company, had unsuccessfully objected to the call for an executive session, requesting the Board members to hold the meeting in public.

In circuit court appellant sought a declaratory judgment that the executive session violated title 12, sections 2801 through 2807 of the Arkansas Statutes Annotated, commonly known as the "Freedom of Information Act." The Act requires that governmental bodies meet in public, except when discussing or considering personnel matters.[1] A tape recording[2] of the Board of Correction's ses-

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1. Ark. Stat. Ann. §§ 12-2801 to -2807 (Repl. 1968). The pertinent sections are as follows:

12-2801. Title of act.—This Act [§§ 12-2801—12-2807] shall be known and cited as the "Freedom of Information Act" of 1967. . . .

12-2802. Declaration of public policy.—It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy. Toward this end, this act [§§ 12-2801—12-2807] is adopted, making it possible for them, or their representatives, to learn and to report fully the activities of their public officials. . . .

12-2803. Definitions.—. . . .

"Public meetings" are the meetings of any bureau, commission or agency of the state, or any political subdivision of the state, including municipalities and counties, Boards of Education, and all other boards, bureaus, commissions or organizations in the State of Arkansas, except Grand Juries, supported wholly or in part by public funds, or expending public funds. . . .

. . . .

12-2805. Open public meetings.—Except as otherwise specifically provided by law, all meetings formal or informal, special or regular, of the governing bodies of all municipalities, counties, townships, and school districts, and all boards, bureaus, commissions, or organizations of the State of Arkansas, except Grand Juries, supported wholly or in part by public funds, or expending public funds, shall be public meetings.

. . . .

Executive sessions will be permitted only for the purpose of discussing or considering employment, appointment, promotion, demotion, disciplining, or resignation of any public officer or employee.

Executive sessions must never be called for the purpose of defeating the reason or the spirit of the Freedom of Information Act.

No resolution, ordinance, rule, contract, regulation or motion considered or arrived at in executive session will be legal unless following the executive session, the public body reconvenes in public session and presents and votes on such resolution, ordinance, rule, contract, regulation, or motion. . . .

2. The tape recording of the meeting was made by the Board of Correction.

sion, examined *in camera* by the lower court, revealed that the discussion included general Board policies, procedures, and reports as well as the possibility of personnel action.[3] Additionally, the Commissioner of Correction and the Cummins Prison Superintendent were called into the executive session and questioned about the incident.[4]

The lower court refused to grant the relief requested. The Arkansas Supreme Court affirmed, holding that a public body meeting in executive session to consider personnel matters may discuss general policies, procedures, and reports related to the personnel matter. *Commercial Printing Co. v. Rush,* 261 Ark. 468, 549 S.W.2d 790 (1977).

At common law the people's right to attend meetings of governmental bodies was not recognized.[5] In seventeenth and eighteenth century England, the doors of Parliament were closed, and public reports of the proceedings were prohibited by law. These actions were taken largely because of the members' fears of reprisals by the Crown and also because of the members' desires to keep the debates and votes from public scrutiny.[6] Similarly, colonial legislatures in America routinely excluded the public from legislative proceedings.[7] Dissatisfaction with such blanket exclusion of the public grew during the formative years of the United States and resulted in harsh criticism of the secret meetings of the Constitutional Convention.[8] Today a majority of states have constitutional requirements that the public be admitted to meetings of their legislatures,[9] but no state or federal court has recognized a state or federal constitutional

3. Commercial Printing Co. v. Rush, 261 Ark. 468, 474-75, 549 S.W.2d 790, 794 (1977).

4. [G]eneral items were discussed concerning (1) Heat stroke symptoms and policies of the prison relating to the recognition of and treatment of such symptoms; (2) Assignment procedures in connection with inmates relating to work detail; (3) Policies for re-evaluation of medical reports; (4) Procedures for interviewing transferred inmates; (5) Procedures dealing with transfer of information from officers at the Cummins unit to officers at the Tucker unit; (6) Work habits and propensities of deceased inmates; (7) Prison policies concerning meals, especially relating to inmates being transferred in early morning hours from one unit to the other; (8) General Harassment; (9) Procedures for handling inmates who will not work; (10) The composition of hoe squads; (11) Procedures dealing with transfer runs and transfer vehicles; (12) Questions asked of Commissioner Hutto and Superintendent Lockhart concerning the death of the inmate involved; (13) The State Police investigation into the death of the inmate in question; (14) Certain medical questions.

Id. at 472, 549 S.W.2d at 793.

5. H. Cross, The People's Right to Know 180-82 (1953).

6. J. Wiggins, Freedom or Secrecy 4 (1964).

7. H. Cross, *supra* note 5, at 182.

8. J. Wiggins, *supra* note 6, at 9.

9. Comment, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 Harv. L. Rev. 1199, 1203 (1962).

right to attend meetings of other governmental bodies.[10] Thus, it has become the responsibility of Congress and the state legislatures to protect by statute, if at all, the people's right of access to meetings of public bodies.[11]

To support the philosophy that "without an informed electorate, government cannot perform effectively,"[12] Congress and all state legislatures have enacted open meeting statutes.[13] The general provisions of such statutes broadly require open meetings of all governmental bodies.[14] The requirement of openness is not universal, however. When a particular interest involving a need for privacy is found to outweigh the public interest in an open meeting, legislatures provide for executive sessions to allow the governmental body to meet privately.[15] The most common exception to open meeting statutes allows executive sessions for discussion of personnel matters.[16]

The declared public policy of the Arkansas Freedom of Information Act is that public business should be conducted "in an open and public manner" so that the people will be advised of the performance of public officials and of the substance of public decisions.[17] The Act requires public access to meetings of all governmental bodies supported by or expending public funds except grand juries.[18] Executive sessions are permitted only to discuss specific personnel matters.[19]

In light of the public policy of the Freedom of Information Act,

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10. Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 Geo. Wash. L. Rev. 1 (1957).

11. Comment, *supra* note 9, at 1204.

12. Comment, *Open Meeting Laws: An Analysis and a Proposal*, 45 Miss. L.J. 1151, 1163 (1974).

13. *Id.* at 1151. In 1974 all but four states (Mississippi, New York, Rhode Island, and West Virginia) had enacted open meeting statutes. Since then, each of the four states has enacted such statutes, as has Congress. 5 U.S.C.A. § 552b (West 1977); Miss. Code Ann. §§ 25-41-1 to -41-7 (Cum. Supp. 1977); N.Y. Pub. Off. Law §§ 95-106 (McKinney Cum. Supp. 1977); R.I. Gen. Laws §§ 42-46-1 to -46-10 (Reen. 1977 & Supp. 1977); W. Va. Code §§ 6-9A-1 to -9A-6 (Cum. Supp. 1977).

14. *E.g.*, Ark. Stat. Ann. § 12-2805 (Repl. 1968 & Cum. Supp. 1977).

15. Comment, *supra* note 12, at 1164.

16. Comment, *supra* note 9, at 1208. Other exceptions allow executive sessions for discussion of matters of public security, for meetings with legal counsel, or at any time a majority of participants vote to meet in private, as long as no final action is taken.

17. Ark. Stat. Ann. § 12-2802 (Repl. 1968).

18. Ark. Stat. Ann. § 12-2805 (Repl. 1968 & Cum. Supp. 1977).

19. *Id.* An earlier statute, enacted in 1953, required public bodies to meet in public except when considering the employment, discharge, or investigation of an individual. Ark. Stat. Ann. § 6-604 (Repl. 1976). There apparently has been no judicial construction of this earlier statute. The Freedom of Information Act, which encompasses public access to records and meetings, has been the basis of all open meeting cases presented to the court.

the Arkansas Supreme Court has given broad effect to the open meeting requirement[20] and has refused to extend the executive session provision beyond its stated limits.[21] In *Laman v. McCord,*[22] the first case involving the open meeting requirement and the executive session exception, the Arkansas Supreme Court held that a private meeting between a city council and a city attorney to discuss a state administrative proceeding to which the city was a party violated the Freedom of Information Act. Finding no specific statutory language excepting such a meeting from the Act's requirements, the court emphasized the Act's declared public policy[23] in announcing its decision:

> Whether a statute should be construed narrowly or broadly depends upon the interests with which the statute deals. . . .As a rule, statutes enacted for the public benefit are to be interpreted most favorably to the public. . . .We have no hesitation in asserting our conviction that the Freedom of Information Act was passed wholly in the public interest and is to be liberally interpreted to the end that its praiseworthy purposes may be achieved.[24]

In *Arkansas State Police Comm'n v. Davidson,*[25] the only other case dealing with the executive session exception,[26] the State Police Commission refused to conduct publicly a reinstatement hearing guaranteed by law to a discharged employee despite the employee's request for a public hearing.[27] The executive session privilege was described by the court as a limited right of the police commissioners to discuss and consider privately the personnel decision to be reached. While recognizing that a personnel matter was involved, the court refused to construe the Act's executive session provision to encompass a statutory hearing where testimony would be heard.[28] Therefore, the hearing involved was held subject to the open meeting requirements of the Act.[29]

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20. Laman v. McCord, 245 Ark. 401, 432 S.W.2d 753 (1968).
21. Arkansas State Police Comm'n v. Davidson, 253 Ark. 1090, 490 S.W.2d 788 (1973).
22. 245 Ark. 401, 432 S.W.2d 753 (1968).
23. Ark. Stat. Ann. § 12-2802 (Repl. 1968).
24. Laman v. McCord, 245 Ark. 401, 404-05, 432 S.W.2d 753, 755 (1968).
25. 253 Ark. 1090, 490 S.W.2d 788 (1973).
26. Ark. Stat. Ann. § 12-2805 (Repl. 1968).
27. Arkansas State Police Comm'n v. Davidson, 253 Ark. 1090, 490 S.W.2d 788 (1973).
28. *Id.* at 1093, 490 S.W.2d at 790.
29. Ark. Stat. Ann. § 12-2805 (Repl. 1968). Liberal construction of the Act to further the public interest has also been the basis of the court's determination of which groups, organizations, and subdivisions thereof are within the scope of the Statute. The court has repeatedly interpreted "governing bodies" broadly. North Cent. Ass'n of Colleges & Schools v. Troutt Bros., 261 Ark. 378, 548 S.W.2d 825 (1977) (an accrediting agency supported in part by public funds); Mayor of El Dorado v. El Dorado Broadcasting Co., 260 Ark. 821, 544

In *Commercial Printing Co. v. Rush*[30] the Arkansas Supreme Court held that when an executive session is called to consider possible personnel action, members of the group may also discuss policies, procedures, and reports pertaining to the matter under discussion without violating the Freedom of Information Act.[31] Writing for the majority, Special Justice William C. Adair, Jr., characterized the issue as one of balancing "'the public's right to know' versus the protection of the 'rights of individuals' involved."[32] The court observed that the legislature had recognized the existence of both rights in the Freedom of Information Act. Open meetings were required to further the public interest, whereas executive sessions for consideration of personnel matters were permitted to protect individuals from unnecessary adverse publicity and damage to reputation.[33] In construing the Act, the court should attempt to accommodate both interests and give meaning to all portions of it.[34]

The appellants argued that an executive session was authorized only to determine if evidence warranted taking personnel action against employees, and such a determination could take place only *after* a public discussion was held, information supplied, and comments elicited.[35] The court rejected this argument, observing that such an interpretation would render the exception meaningless. In the majority's view, not only was the simple determination of the necessity of personnel action to be protected, but also the individual's reputation which a public discussion could damage without basis in fact.[36] The court noted that the ultimate decision reached in executive session would be made public and that then the Board's actions and evidentiary facts supporting the actions would be open to question and public scrutiny.[37]

In addition to protection of the individual's rights, the court found other considerations in *Commercial Printing* to support its holding. First, the executive session was called for the purpose of discussing a genuine personnel matter and not for the forbidden

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S.W.2d 206 (1976) (a business meeting of city officials less in number than a quorum); Arkansas Gazette Co. v. Pickens, 258 Ark. 69, 522 S.W.2d 350 (1975) (a state university's board of trustees committee).

30. 261 Ark. 468, 549 S.W.2d 790 (1977).

31. *Id.* at 475-76, 549 S.W.2d at 794-95.

32. *Id.* at 472, 549 S.W.2d at 793.

33. *Id.* at 473, 549 S.W.2d at 793.

34. *Id.* (citing Arkansas Tax Comm'n v. Crittenden County, 183 Ark. 738, 38 S.W.2d 318 (1931); Callahan v. Little Rock Distrib. Co., 220 Ark. 443, 248 S.W.2d 97 (1952)).

35. *Id.* at 473, 549 S.W.2d at 794.

36. *Id.* at 474, 549 S.W.2d at 794.

37. *Id.*

purpose of circumventing the Freedom of Information Act.[38] Second, the policies, procedures, and reports were discussed within the general context of conduct possibly requiring official personnel action.[39] Third, a free discussion of the facts, policies, and procedures was necessary for the Board of Correction to reach an informed decision.[40]

The court acknowledged that the presence and questioning of the Commissioner of Correction and the Cummins Prison Superintendent constituted a violation of the Freedom of Information Act at the time of the meeting in October 1975. Because of this violation, the appellants argued that the transcript of the meeting should have been made public. The court held that such a procedural irregularity did not destroy the confidentiality of an otherwise valid meeting.[41] The court did note, however, that the Freedom of Information Act was amended by the legislature in the 1976 Special Session to allow appearances by these officials in executive sessions.[42]

Special Chief Justice Lewis D. Jones, one of three dissenting justices,[43] argued that the majority rendered the language of the executive session exception meaningless by allowing discussion of policies, procedures, and reports "under the umbrella of the fact that disciplinary procedures might be invoked."[44] The result, in the dissenters' opinion, might be that the general purpose of the Statute could be defeated, since there would be few matters which a board could not relate to possible personnel action.[45]

Rebutting the majority's reasoning that its decision was necessary to protect individual employees from unnecessary adverse publicity or damage to reputation, the dissent noted that the Statute in question does not require executive sessions, nor did any employee request an executive session.[46] The dissent considered it obvious that the Board members were more concerned than the em-

38. *Id.*

39. *Id.* at 475, 549 S.W.2d at 794.

40. *Id.*

41. *Id.* at 478, 549 S.W.2d at 796.

42. *Id.*; Ark. Stat. Ann. § 12-2805 (Cum. Supp. 1977). Under the 1976 amendment, "the person holding the top administrative position in the public agency, department or office involved; the immediate supervisor of the employee involved; and the employee may be present at the executive session when so requested by the . . . public body holding the executive session." *Id.*

43. Commercial Printing Co. v. Rush, 261 Ark. 468, 478, 549 S.W.2d 790, 796 (1977) (Jones, Special C.J., dissenting).

44. *Id.* at 479-80, 549 S.W.2d at 797.

45. *Id.* at 480, 549 S.W.2d at 797.

46. *Id.*

ployees about possible public reaction to the facts.[47] In the dissent's view, the public's right to know outweighed any possibility of personal embarrassment of Board members or supervisors due to public discussion of policies and procedures.[48]

The dissent concluded that both precedent and practicality require strict construction of the executive session exception. The dissent noted that the court had zealously protected the people's right to know in past cases by broadly construing the open meeting requirement of the Act and that continuation of this policy should require the narrow interpretation of any exceptions.[49] The dissent also pointed out that, in most cases, a tape recording of the executive session would not be available for judicial review. Therefore, it would be difficult in the future to ascertain what facts and policies a governmental body had discussed in executive session.[50]

The importance of the holding in *Commercial Printing* lies in its subtle change of the court's interpretation of the Freedom of Information Act. Previously the Arkansas Supreme Court had stated that the open meeting requirements of the Statute were enacted *wholly* in the public interest and were to be interpreted liberally to further that interest.[51] The privilege to hold executive sessions was to be strictly limited to the discussion of personnel action.[52] In light of *Commercial Printing,* however, that privilege is no longer quite so limited. A public body may now include in its executive session topics which had previously been considered improper subject matter for private meetings.[53]

The reason for allowing executive sessions to consider personnel matters is to prevent a public employee from being subjected to undue public scrutiny.[54] Such reasoning has substantial merit in most cases. However, where, as in *Commercial Printing,* an inmate has died while under the supervision of public employees, a public discussion of the reports, policies, and procedures surrounding the incident would best serve the public interest. Such a conclusion

47. *Id.*

48. *Id.*

49. *Id.* at 481, 549 S.W.2d at 797.

50. *Id.* at 480, 549 S.W.2d at 797.

51. Arkansas Gazette Co. v. Pickens, 258 Ark. 69, 522 S.W.2d 350 (1975); Laman v. McCord, 245 Ark. 401, 404, 432 S.W.2d 753, 755 (1968).

52. Arkansas State Police Comm'n v. Davidson, 253 Ark. 1090, 1093, 490 S.W.2d 788, 790 (1973).

53. Commercial Printing Co. v. Rush, 261 Ark. 468, 474-75, 549 S.W.2d 790, 794 (1977).

54. Arkansas State Police Comm'n v. Davidson, 253 Ark. 1090, 1094, 490 S.W.2d 788, 790 (1973); *see also* Comment, *Access to Governmental Information in California,* 54 Calif. L. Rev. 1650, 1657 (1966).

would seem to be consistent with the court's earlier decisions[55] and the declared public policy of the Freedom of Information Act that the people should be informed of public officials' performances and decisions.[56]

As noted by the dissent, the Arkansas Supreme Court may have opened the door to avoidance of the open meeting requirement through abuse of the executive session privilege.[57] The Freedom of Information Act requires open meetings of governmental bodies to insure that the public will have the opportunity to know how, why, and what decisions are made by those persons entrusted with the administration of public business. In light of the decision in *Commercial Printing,* once a public body has established a valid "personnel matter" purpose for executive session, the public will be excluded, the doors will be closed, and any item related in any way to the personnel matter may be discussed. Thus, some public business may no longer be *the public's* business.

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55. Arkansas State Police Comm'n v. Davidson, 253 Ark. 1090, 490 S.W.2d 788 (1973); Laman v. McCord, 245 Ark. 401, 432 S.W.2d 753 (1968).

56. Ark. Stat. Ann. § 12-2802 (Repl. 1968).

57. Commercial Printing Co. v. Rush, 261 Ark. 468, 479-80, 549 S.W.2d 790, 797 (1977) (Jones, Special C.J., dissenting).