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INFORMATION SHEET: ADVISORY OPINION NO. 2020-02
CONFIDENTIALITY RESTRICTION (R.C. 102.03(B))

What is the question in the opinion?

Does R.C. 102.03(B) prohibit a public official from disclosing information discussed during executive session?

What is the general restriction?

R.C. 102.03(B) prohibits any present or former public official or employee from disclosing or using, without appropriate authorization, any information acquired by the public official or employee in the course of the public official's or employee's official duties that is confidential because of statutory provisions, or that has been clearly designated to the public official or employee as confidential when that confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

What is the answer in the opinion?

The use of executive session does not by itself create confidentiality; however, if it is clearly demonstrated that a public body has met all of the legal requirements necessary to appropriately discuss a specific matter in executive session, and the information is confidential by statute, or has been clearly designated as confidential when such designation is warranted and necessary, then the information discussed may be considered confidential under R.C. 102.03(B) because: the majority of a quorum of the public body voted that the executive session is necessary and the Open Meetings Act affords a privacy status to executive session discussions; and the Open Meetings Act strictly limits the types of approved government business permitted to be discussed in executive session; and the information acquired in executive session is confidential by statutory provision or has been clearly designated as confidential when such designation is warranted and necessary to the proper conduct of government business.

R.C. 102.03(B) does not prohibit a public body from adopting a resolution, rule, or formal action in an open meeting that results from a discussion in executive session in compliance with the Open Meetings Act.

If a document is a "public record" and is not otherwise exempt under one of the exemptions to the Public Records Act, the document may still be subject to public disclosure even if the public body appropriately discussed it in executive session.

To whom do the conclusions in this opinion apply?

The conclusions apply to any similarly situated state or local public officials and employees.

When did the conclusions in this opinion become effective?

The opinion became effective upon acceptance by the Commission.

THIS COVER SHEET IS PROVIDED FOR INFORMATION PURPOSES. IT IS NOT AN ETHICS COMMISSION ADVISORY OPINION. ADVISORY OPINION NO. 2020-02 IS ATTACHED.

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Advisory Opinion
Number 2020-02
April 17, 2020
Confidential Information

Syllabus by the Commission:

- (1) R.C. 102.03(B) prohibits any present or former public official or employee from disclosing or using, without appropriate authorization, any information acquired by the public official or employee in the course of the public official's or employee's official duties that is confidential because of statutory provisions, or that has been clearly designated to the public official or employee as confidential when that confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.
- (2) The use of executive session does not by itself create confidentiality; however, if it is clearly demonstrated that a public body has met all of the legal requirements necessary to appropriately discuss a specific matter in executive session, and the information discussed is confidential by statute; or has been clearly designated as confidential when such designation is warranted and necessary, the information discussed may be considered confidential under R.C. 102.03(B) because: the majority of a quorum of the public body voted that the executive session is necessary; the Open Meetings Act affords a privacy status to executive session discussions; and the Open Meetings Act strictly limits the types of approved government business permitted to be discussed in executive session.

However, R.C. 102.03(B) does not prohibit a public body from adopting a resolution, rule, or formal action in an open meeting that results from a discussion in executive session in compliance with the Open Meetings Act.

Also, the privacy afforded to executive session discussions does not automatically make confidential all documents that a public body may discuss in executive session. If a document is a "public record" and is not otherwise exempt under one of the exemptions to the Public Records Act, then the document may still be subject to public disclosure even if the public body appropriately discussed it in executive session.

* * * * *

The Commission has been asked when information discussed in executive session is confidential under R.C. 102.03(B).

R.C. 102.03(B)—Disclosure of Confidential Information

A “public official or employee”¹ is subject to R.C. 102.03(B), which reads:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by the public official or employee in the course of the public official’s or employee’s official duties that is confidential because of statutory provisions, or that has been clearly designated to the public official or employee as confidential when that confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

The Ethics Commission has explained that the application of the Ethics Laws is dependent upon the facts and circumstances of each individual situation.² A violation of R.C. 102.03(B) is punishable as a first-degree misdemeanor.³

R.C. 102.03(B) prohibits a present or former public official or employee from recklessly⁴ disclosing or using, without proper authorization, information acquired by him or her in the course of his or her official duties when that information:

1. Is confidential because of a statutory provision; or
2. Has been clearly designated to the public official or employee as confidential when:
 - a) The confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received; and
 - b) Preserving its confidentiality is necessary to the proper conduct of government business.⁵

The Ethics Commission has explained that whenever a statute mandates that certain information is confidential, the terms of that statute control the circumstances under which public officials and employees may release information.⁶

The person or entity authorized to provide consent to the use of confidential information depends on the facts and circumstances of each case.⁷

R.C. 102.03(B) and Executive Sessions⁸

The Ethics Commission’s advisory authority is limited to interpreting Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code.⁹ The Public Records and Open Meetings Acts, collectively referred to as “the Sunshine Laws,” are not a part of the Ohio Ethics Law and

related statutes. The Ohio Ethics Commission does not have the authority to advise individuals or entities on the Sunshine Laws or related issues and cannot make any determinations on whether an individual or entity has complied with these laws.¹⁰ For specific guidance and advice on the Sunshine Laws, individuals or entities should contact their legal counsel or the Ohio Attorney General's Office.

As explained in the "Ohio Attorney General Dave Yost - Ohio Sunshine Laws 2020: An Open Government Resource Manual, (Sunshine Law Manual)"¹¹ an "executive session" is a conference between members of a public body¹² from which the public is excluded.¹³ The Open Meetings Act strictly limits the use of executive sessions.¹⁴ The Open Meetings Act: limits the matters that may be discussed in executive session;¹⁵ requires that specific procedures are followed to move into an executive session;¹⁶ and prohibits a public body from taking any formal action in an executive session.¹⁷

Under R.C. 121.22(G),¹⁸ a majority of a quorum of the public body may vote to hold an executive session for the sole purpose of the consideration of any of the following matters:

- Certain personnel matters¹⁹
- Purchase or sale of property²⁰
- Pending or imminent court action²¹
- Collective bargaining matters²²
- Matters required to be kept confidential²³
- Security matters²⁴
- Hospital trade secrets²⁵
- Confidential business information of an applicant for economic development assistance²⁶

Also, R.C. 121.22(J)(1) states that certain matters related to veterans service commission applications should be discussed in executive session.

R.C. 102.03(B) prohibits a present or former public official or employee from recklessly disclosing or using, without proper authorization, information acquired by him or her in the course of his or her official duties when that information is confidential because of statutory provisions. Some matters discussed in executive session are expressly required to be kept confidential by federal and state laws or regulations.²⁷ Those matters would also be considered confidential under R.C. 102.03(B).

R.C. 102.03(B) also prohibits a present or former public official or employee from recklessly disclosing or using, without proper authorization, information acquired by him or her in the course of his or her official duties when that information has been clearly designated to the public official or employee as confidential when: (a) the confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received; and (b) preserving its confidentiality is necessary to the proper conduct of government business.

If it is clearly demonstrated that a public body has met all of the legal requirements necessary to appropriately discuss a specific matter in executive session, and the information discussed is confidential by statute, or has been clearly designated as confidential when such designation is warranted and necessary, then the information discussed may be considered confidential under R.C. 102.03(B) because: (a) the majority of a quorum of the public body voted that the executive session is necessary and the Open Meetings Act affords a privacy status to executive session discussions; (b) the Open Meetings Act strictly limits the types of approved government business permitted to be discussed in executive session; and (c) the information acquired in executive session is confidential by statutory provision or has been clearly designated as confidential when such designation is warranted and necessary to the proper conduct of government business. In that case, a present or former public official or employee is prohibited from disclosing or using, without proper authorization, that confidential information. The person or entity authorized to provide consent to use or disclose the confidential information depends on the facts and circumstances of each case.²⁸ R.C. 102.03(B) does not prohibit a public body from adopting a resolution, rule, or formal action in an open meeting that results from a discussion in executive session in compliance with the Open Meetings Act.²⁹

However, with respect to documents that may be reviewed in an executive session, the Sunshine Manual states:³⁰

The privacy afforded by the Open Meetings Act to executive session discussions does not make confidential any documents that a public body may discuss in executive session. If a document is a “public record” and is not otherwise exempt under one of the exemptions to the Public Records Act, the record will still be subject to public disclosure even if the public body appropriately discussed it in executive session. In other words, an executive session under the Open Meetings Act is not an exemption for public records under the Public Records Act. For instance, if a public body properly discusses pending litigation in executive session, a settlement agreement negotiated during that executive session and reduced to writing may be subject to public disclosure.³¹

Also, as explained in Ohio Ethics Commission Advisory Opinion No. 93-012, R.C. 102.03(B) does not prohibit a public official or employee from disclosing any document that is a “public record” as defined in R.C. 149.43(A)(1)).³² Therefore, the privacy afforded to executive session discussions does not automatically make confidential all documents that a public body may discuss in executive session. If a document is a “public record” and is not otherwise exempt under one of the exemptions to the Public Records Act, then that document may still be subject to public disclosure even if the public body appropriately discussed it in executive session.

Conclusion

Limited to questions arising under Chapter 102 and Sections 2921.42 and 2921.43 of the Revised Code, it is the opinion of the Commission and the Commission advises if it is clearly demonstrated that a public body has met all of the legal requirements necessary to appropriately discuss a specific matter in executive session, and the information discussed is confidential by statute, or has been clearly designated as confidential when such designation is warranted and

necessary to the proper conduct of government business, then the information discussed may be considered confidential under R.C. 102.03(B) because: the majority of a quorum of the public body voted that the executive session is necessary; the Open Meetings Act affords a privacy status to executive session discussions; the Open Meetings Act strictly limits the types of approved government business permitted to be discussed in executive session; and the information discussed is confidential by statute, or has been clearly designated as confidential when such designation is warranted and necessary to the proper conduct of government business. However, R.C. 102.03(B) does not prohibit a public body from adopting a resolution, rule, or formal action in an open meeting that results from a discussion in executive session in compliance with the Open Meetings Act. While the Open Meetings Act permits executive sessions under certain circumstances to promote free and open discussion on particularly sensitive matters, it would be unreasonable to hold that everything discussed in an executive session is statutorily confidential, absent other provisions of state or federal law expressly making the information confidential. Also, the privacy afforded to executive session discussions does not automatically make confidential all documents that a public body may discuss in executive session. If a document is a “public record” and is not otherwise exempt under one of the exemptions to the Public Records Act, the record may still be subject to public disclosure even if the public body appropriately discussed it in executive session.



Merom Brachman, Chairman
Ohio Ethics Commission

The Ohio Ethics Commission Advisory Opinions referenced in this opinion are available on the Commission’s Web site: www.ethics.ohio.gov

¹ R.C. 102.01(B) (“public official or employee” means any person who is elected or appointed to an office or is an employee of any public agency). R.C. 102.01(C)(1) (a “public agency” means the general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a county, city, village, or township, the five state retirement systems, or any other governmental entity).

² Ohio Ethics Commission Advisory Opinion No. 87-008.

³ R.C. 102.99

⁴ See RECKLESSLY. 4 Ohio Jury Instructions 409.21; R.C. 2901.22(C). See also, Comments from the Criminal Law Subcommittee of the OSBA Jury Instruction Committee. The Committee believes that R.C. 102.03(B) does not impose strict liability, so recklessness is sufficient culpability to commit the offense. See *State v. Wac* (1981), 68 Ohio St.2d 84, 22 O.O.3d 299, 428 N.E.2d 428, applying R.C. 2901.21(B).

⁵ Between 2006 and 2010, the Criminal Law Subcommittee of the OSBA Jury Instruction Committee issued several jury instructions for offenses that were not covered by the Ohio Jury Instructions Committee’s Handbook. Utilizing Ohio Ethics Commission precedents, the Subcommittee recommended, and the Committee adopted a model instruction for R.C. 102.03(B), similar to the one outlined above.

⁶ Adv. Op. No. 93-012. See also 1990 Ohio Atty.Gen.Ops. No 90-007.

⁷ See also, Comments from the Criminal Law Subcommittee of the OSBA Jury Instruction Committee.

⁸ See R.C. Chapter 121.22.

⁹ See R.C. 102.08.

¹⁰ Adv. Op. No. 93-012.

¹¹ <https://www.ohioattorneygeneral.gov/Legal/Sunshine-Laws> (Accessed March 25, 2020).

¹² R.C. 121.22(B)(1)

¹³ “Ohio Attorney General Dave Yost - Ohio Sunshine Laws 2019: An Open Government Resource Manual.”

¹⁴ *Id.*

¹⁵ R.C. 121.22(G)(1)-(8), (J).

¹⁶ R.C. 121.22(G)(1), (7) (requiring roll call vote and specificity in motion); *Wheeling Corp. v. Columbus & Ohio River R.R. Co.*, 147 Ohio App.3d 460, 473 (2001) (10th Dist. 2001) (finding a majority of a quorum of the public body must determine, by roll call vote, to hold executive session); *Vermillion Teachers' Assn. v. Vermillion Local School Dist. Bd. of Edn.*, 98 Ohio App.3d 524, 531-32 (6th Dist. 1994) (finding a board violated 121.22(G) when it went into executive session to discuss a stated permissible topic but proceeded to discuss another, non-permissible topic); 1998 Ohio Atty.Gen.Ops No. 98-029.

¹⁷ R.C. 121.22(H) (“A resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body. A resolution, rule, or formal action adopted in an open meeting that results from deliberations in a meeting not open to the public is invalid unless the deliberations were for a purpose specifically authorized in division (G) or (J) of this section and conducted at an executive session held in compliance with this section. A resolution, rule, or formal action adopted in an open meeting is invalid if the public body that adopted the resolution, rule, or formal action violated division (F) of this section.”) *See also Mathews v. E. Local School Dist.*, 4th Dist. No. 00CA647, 2001 WL 243501 (Jan. 4, 2001) (holding that a board was permitted to discuss employee grievance in executive session, but was required to take formal action by voting in an open meeting); *State ex rel. Kinsley v. Berea Bd. of Edn.*, 64 Ohio App.3d 659, 664 (8th Dist. 1990) (holding that, once a conclusion is reached regarding pending or imminent litigation, the conclusion is to be made public, even though the deliberations leading to the conclusion were private). *See also State ex rel Hutch v. Village of Boliver*, 2019 Ohio App LEXIS 3747.

¹⁸ *See also* R.C. 121.22(J)(1) (regarding veterans service commission applications and executive sessions).

¹⁹ R.C. 121.22(G)(1).

²⁰ R.C. 121.22(G)(2).

²¹ R.C. 121.22(G)(3).

²² R.C. 121.22(G)(4).

²³ R.C. 121.22(G)(5).

²⁴ R.C. 121.22(G)(6).

²⁵ R.C. 121.22(G)(7).

²⁶ R.C. 121.22(G)(8).

²⁷ R.C. 121.22(G)(5) and (G)(8).

²⁸ For example, a majority of a quorum of the public body may vote to provide consent to use or disclose the confidential information.

²⁹ R.C. 121.22(H).

³⁰ <https://www.ohioattorneygeneral.gov/Legal/Sunshine-Laws> (Accessed January 26, 2020).

³¹ *State ex rel. Findlay Publishing Co. v. Hancock Cty. Bd. of Commrs.*, 80 Ohio St.3d 134, 138, 1997-Ohio-353 (““Since a settlement agreement contains the result of the bargaining process rather than revealing the details of the negotiations which led to the result, R.C. 121.22(G)(3), which exempts from public view only the conferences themselves, would not exempt a settlement agreement from disclosure.””) (quoting *State ex rel. Kinsley v. Berea Bd. of Edn.*, 64 Ohio App.3d 659, 664 (8th Dist. 1990)).

³² Adv. Op. No. 93-012.