



October 31, 2022

Via U.S. Mail

Raymond D'Agostino, Jr.
Lancaster, PA 17602

RE: Request for Advisory Opinion

Dear Mr. D'Agostino:

The Office of Open Records ("OOR") is in receipt of your request for an Advisory Opinion concerning whether "the plan to interview candidates for appointment to a vacancy on the school board ... [is] a violation of the Sunshine Act...."

The OOR respectfully declines to issue an Advisory Opinion on this matter. Courts of common pleas are the proper venues to determine whether an agency has violated the Sunshine Act, as they have the ability render declaratory judgments or to otherwise enforce the provisions of the Sunshine Act. 65 Pa.C.S. § 715. As a result, the OOR does not believe it would be appropriate to render judgment as to whether an agency's actions will violate the Sunshine Act.

Due to the OOR declining to issue an Advisory Opinion, the OOR does not believe it is necessary to answer your second question, which asks for an answer "[i]f the answer to #1 [concerning the Sunshine Act] is "no".

Please note that this correspondence will be placed on the OOR website at <https://www.openrecords.pa.gov/RTKL/AdvisoryOpinions.cfm>.

Sincerely,

/s/ Kyle Applegate

Kyle Applegate

Chief Counsel

Cc: Elizabeth Wagenseller, Executive Director
Nathanael Byerly, Deputy Director

Raymond D'Agostino, Jr.

October 17, 2022

Liz Wagenseller, Executive Director
Pennsylvania Office of Open Records
333 Market Street, 16th Floor
Harrisburg, PA 17101-2234



RE: Advisory Opinion

Dear Ms. Wagenseller:

This letter seeks an Advisory Opinion from the Office of Open Records on a matter that is currently before a local school board. The information contained herein is based on information provided publicly by the school board.

The school board plans to hold a pre-arranged “informational gathering” or “conference” at which a quorum of members will be present but will not be open to the public. The purpose of the gathering is to interview candidates for a vacant school board director position. At the gathering, current members of the school board intend to ask questions of the individual candidates. Just prior to interviewing the candidates, the board will discuss and decide which questions will be asked by which board member. The Board does not intend to deliberate or further discuss the candidates at the gathering. Each candidate will be assigned a number or letter so that they can be identified in an anonymous manner at a subsequent public meeting.

At the subsequent public meeting of the Board, the members will discuss the candidates, using the unique identification number or letter, based on what they heard from the interviews. They will also deliberate to determine a candidate to appoint and then vote to appoint one of the candidates at this public meeting.

The School Board has been counseled that the gathering does not meet the definition of a “meeting” in the Sunshine Act because the Board will not be deliberating nor taking any official. Therefore, the gathering does not qualify as a public meeting or executive session. The solicitor stated this counsel is based on a PA Supreme Court, which held that if board members do not “deliberate” then it does not meet the definition of a meeting. This is likely referring to the PA Supreme Court decision in *Smith v. Township of Richmond*, 82 A.3d 407 (Pa. 2013).

However, the Supreme Court seemed to also not allow discussions on topics in private not otherwise allowable in executive session per the Sunshine Act. In this case, Section 709(a)(1), which permits executive sessions for the purpose of discussing any matter involving what are commonly referred to as “personnel matters,” specifically states that “the provisions of this paragraph shall not apply to any meeting involving the appointment or selection of any person to fill a vacancy in any elected office.”

It seems clear that a public board cannot appoint or select a person to employ in executive session, that must be accomplished in a public meeting. And there is no question that a public agency can interview candidates for employment in executive session under Section 709(a)(1). However, the last sentence of this section seems to state that this is not the case for "any meeting involving the appointment or selection of a person to fill a vacancy in elected office." As you are aware, the aforementioned sentence was specifically added to the end of the referenced section in the mid-1990's by the legislature to ensure public discourse on the appointment of public officials.

Questions seeking response from the OOR:

1. Is the plan to interview candidates for appointment to a vacancy on the school board as outlined above a violation of the Sunshine Act?
2. If the answer to #1 is "no," then,
 - a. Are the names of individuals who submitted for consideration of appointment to the school board public information (excluding any contact information)?
 - b. If the school board or other officials of the school district assign some identifier (such as a number or letter) to school board candidates, which is provided and known to the current school board members, is this public information?

Thank you for your time and consideration to this request.

Sincerely,



Raymond D'Agostino, Jr.