June 26, 2012

The Honorable Stephen K. Haller
Greene County Prosecuting Attorney
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Second Floor, Suite 200
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SYLLABUS: 2012-022

1. A public body that wishes to hold an executive session pursuant to R.C. 121.22(G)(1) must, in the motion and vote to hold that executive session, state which one or more of the approved purposes listed in R.C. 121.22(G)(1) are the purposes for which the executive session is to be held. This requirement is not satisfied if the motion and vote state, without further explanation, that the session is to discuss a "personnel matter."

2. Any vote or action by a county children services board officially placing its executive director on administrative leave is a formal action under R.C. 121.22(H) that must occur in a meeting open to the public. The failure to comply with this requirement renders the vote or action invalid.

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OPINION NO. 2012-022

The Honorable Stephen K. Haller
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Dear Prosecutor Haller:

I am in receipt of your request for an opinion on various aspects of Ohio's open meetings law, R.C. 121.22. Your opinion request states that the Greene County Children Services Board met in executive session on April 26, 2012, and placed its executive director on administrative leave. In this context, you have asked the following questions:

1. May the Children Services Board adjourn into executive session to discuss a "personnel matter" without being more specific?

2. During an executive session to discuss a "personnel matter," may the Children Services Board place its executive director on administrative leave without taking formal action in open session?

3. If the Open Meetings Act was violated, does this affect the validity of the Children Services Board's decision to place its executive director on administrative leave?

As an initial matter, the Attorney General does not exercise adjudicative authority. Thus, I cannot formally determine whether the Children Services Board complied in a given instance with R.C. 121.22, or whether a vote by the Board on a particular matter is legally valid and enforceable. *See* 2011 Op. Att'y Gen. No. 2011-009, at 2-73; 2005 Op. Att'y Gen. No. 2005-043, at 2-472. Such a determination can only be made by a court of law having jurisdiction over the subject matter and controversy in question. I can, however, discuss general principles of law applicable to the questions you have asked. 2011 Op. Att'y Gen. No. 2011-009, at 2-73; 2005 Op. Att'y Gen. No. 2005-043, at 2-472.

A county children services board carries out various responsibilities with respect to children who are in need of public care or protective services. *See* R.C. 5153.16-.19; 1995 Op. Att'y Gen. No. 95-027, at 2-134. Unless the board of county commissioners provides otherwise, a county children services board consists of five members. R.C. 5153.03. "A majority of the members of the [county

children services] board shall constitute a quorum, and the action of a majority of the members present shall constitute the action of the board." R.C. 5153.04. Each county children services board shall have an executive director, and the county children services board may enter into a written contract with the executive director specifying the terms and conditions of the executive director's employment. R.C. 5153.06; R.C. 5153.10.[1]

R.C. 121.22 governs the meetings of public bodies. R.C. 121.22(B)(1)(a) defines a "public body" to include any "board, commission, committee, council, agency, authority, or similar decision-making body of any county[.]" A county children services board is a county board or agency and, thus, a public body for purposes of R.C. 121.22. *See* R.C. 5153.15; 2009 Op. Att'y Gen. No. 2009-030, at 2-203 to 2-204 n.4; 1986 Op. Att'y Gen. No. 86-104, at 2-573; *see also Thomas v. White*, 85 Ohio App. 3d 410, 412, 620 N.E.2d 85 (Summit County 1992) (a citizens advisory committee for a county children services board is also a public body for purposes of R.C. 121.22).

Unless otherwise provided by law, all meetings of a public body are public meetings that must be open to the public at all times. R.C. 121.22(C); *see also* R.C. 121.22(A) ("[R.C. 121.22] shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law"); R.C. 121.22(B)(2) (a "meeting" means "any prearranged discussion of the public business of the public body by a majority of its members"). R.C. 121.22(G) is an exception to the general rule in R.C. 121.22(C) and permits a public body to hold executive sessions during which it may deliberate and discuss in private the subject matters identified in R.C. 121.22(G)(1)-(7). *See* R.C. 121.22(G); *Jones v. Brookfield Twp. Trustees*, Trumbull County App. No. 92-T-4692, 1995 Ohio App. LEXIS 2805, at *6 (June 30, 1995); 1985 Op. Att'y Gen. No. 85-044, at 2-159 (overruled in part, and on other grounds, by 2000 Op. Att'y Gen. No. 2000-035). The specific exception relative to your opinion request is R.C. 121.22(G)(1), which permits a public body to hold an executive session to "consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official, or the investigation of charges or complaints against a public employee, official, licensee, or regulated individual, unless the public employee, official, licensee, or regulated individual requests a public hearing."[2]

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[1] For purposes of this opinion, I will assume that the decision by the Children Services Board to place its executive director on administrative leave is consistent with the terms of any employment contract that may exist.

[2] The other permissible reasons for holding an executive session include: the purchase of property for a public purpose or the sale of property through competitive bidding, R.C. 121.22(G)(2); conferences with an attorney concerning disputes involving the public body that are the subject of pending or imminent court action, R.C. 121.22(G)(3); discussions relating to negotiations or bargaining sessions with public employees, R.C. 121.22(G)(4); matters required to be kept confidential under state or federal law, R.C. 121.22(G)(5); details relating to security arrangements and emergency response protocols for a public body or public office if disclosure of the matters

In addition to restricting the subject matters that may be discussed in executive session, R.C. 121.22(G) sets forth a number of procedural requirements a public body must follow when convening an executive session. First, "the members of a public body may hold an executive session only after a majority of a quorum of the public body determines, by a roll call vote, to hold an executive session and only at a regular or special meeting." R.C. 121.22(G). Further, if an executive session is to be held pursuant to R.C. 121.22(G)(1), "the motion and vote to hold that executive session shall state which one or more of the approved purposes listed in [R.C. 121.22(G)(1)] are the purposes for which the executive session is to be held, but need not include the name of any person to be considered at the meeting." R.C. 121.22(G)(1); *see also* R.C. 121.22(G)(7) ("[i]f a public body holds an executive session to consider any of the matters listed in [R.C. 121.22(G)(2)-(7)], the motion and vote to hold that executive session shall state which one or more of the approved matters listed in those divisions are to be considered at the executive session").

In 1988 Op. Att'y Gen. No. 88-029, at 2-120 to 2-121 n.1, the Attorney General explained the procedural requirements for an executive session:

> [R.C. 121.22 imposes three] requirements before a public body may go into executive session. First, the vote to go into executive session must be by a majority roll call vote, rather than mere voice vote. Second, the public body must specify in both its motion and vote, which of the purposes listed in R.C 121.22(G) the public body will discuss in executive session. Finally, if the public body is going into executive session for the purpose of discussing one or more of the matters listed in R.C. 121.22(G)(1) concerning personnel, *the public body must specify in its motion and vote, which of the particular matters listed* in [R.C. 121.22(G)(1)] the public body will discuss. (Emphasis added.)

Accord Jones, 1995 Ohio App. LEXIS 2805, at *7-8.

Your first question essentially asks whether a public body has complied with R.C. 121.22(G)(1) if the public body specifies in the motion and vote calling for the executive session that the session is to discuss a "personnel matter," without providing any additional detail. The plain language of R.C. 121.22(G)(1) provides that the motion and vote to hold an executive session must identify which one or more of the approved purposes listed in R.C. 121.22(G)(1) are the purposes for which the executive session is to be held. As "personnel matter" is not one of the approved purposes in R.C. 121.22(G)(1), prevailing principles of statutory interpretation indicate such a description does not satisfy R.C. 121.22(G)(1). *See, e.g.*, *State v. Droste*, 83 Ohio St. 3d 36, 39, 697 N.E.2d 620 (1998)

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discussed reasonably could be considered a security risk, R.C. 121.22(G)(6); and matters related to certain publicly owned or operated hospitals, R.C. 121.22(G)(7). Of these additional grounds for holding an executive session, the only one conceivably relevant to your inquiry is R.C. 121.22(G)(3). Your opinion request, however, gives no indication that the Children Services Board met in executive session with an attorney concerning a matter that is the subject of pending or imminent court action.

("[u]nder the general rule of statutory construction *expressio unius est exclusion alterius*, the expression of one or more items of a class implies that those not identified are to be excluded").

This is the same conclusion reached by the Ohio Supreme Court. *See State ex rel. Long v. Cardington Vill. Council*, 92 Ohio St. 3d 54, 748 N.E.2d 58 (2001). The petitioner in *State ex rel. Long* requested, among other relief, a writ of mandamus compelling the village council to conduct meetings in public except for those meetings properly constituting executive sessions. On three previous occasions, the village council had held executive sessions for the purposes of "personnel and finances," "personnel," and "personnel matters," respectively, and the petitioner argued these descriptions failed to identify with the requisite specificity the purposes for which executive sessions were being convened. *Id.* at 55. Relying on both 1988 Op. Att'y Gen. No. 88-029 and *Jones*, the Ohio Supreme Court concluded that, "[b]y using general terms like 'personnel' and 'personnel and finances' instead of one or more of the specified statutory purposes, respondents violated R.C. 121.22(G)(1)." *Id.* at 59; *see also Jones*, 1995 Ohio App. LEXIS 2805, at *9 ("a reference to 'police personnel matters' is insufficient to satisfy the notice requirement of R.C. 121.22(G)(1)").

I find *State ex rel. Long*, *Jones*, and 1988 Op. Att'y Gen. No. 88-029 to be persuasive. Accordingly, a public body that wishes to hold an executive session pursuant to R.C. 121.22(G)(1) must, in the motion and vote to hold that executive session, state which one or more of the approved purposes listed in R.C. 121.22(G)(1) are the purposes for which the executive session is to be held. This requirement is not satisfied if the motion and vote state, without further explanation, that the session is to discuss a "personnel matter."

Your second question asks whether a county children services board may, in an executive session, place its executive director on administrative leave. If this act cannot occur at an executive session and must occur in an open meeting, your third question asks what the ramifications are if a county children services board violates this requirement.

R.C. 121.22(H) states that a "resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body." Under Ohio law, "[v]oting by the members of a public body is a formal action that must occur in a meeting open to the public." 2011 Op. Att'y Gen. No. 2011-038, at 2-306 (citations omitted). Interpreting the scope of R.C.121.22(H), the Attorney General has also advised that the General Assembly "clearly … intended to require public bodies to take all official action in open meetings." 1980 Op. Att'y Gen. No. 80-083, at 2-329 (overruled in part, and on other grounds, by 2011 Op. Att'y Gen. No. 2011-038); *see also Black's Law Dictionary* 1114 (7th ed. 1999) ("official" means "[a]uthorized or approved by a proper authority"). By contrast, deliberations or preliminary discussions that have no legal effect do not necessarily constitute formal or official action. *See Kauffman v. Tiffin City Council*, Seneca County App. No. 13-84-9, 1985 Ohio App. LEXIS 8627, at *10-11 (Aug. 14, 1985) (in an executive session to discuss the filling of a vacant council seat, the city council did not engage in a formal action by choosing two favorites from a list of potential candidates; the official resolution appointing the new council member was passed at a public meeting, and there was no formal action until the official resolution filling the vacancy was passed).

As noted previously, a county children services board has express statutory authority to hire an executive director and enter into an employment contract with the executive director specifying the terms of the executive director's employment. *See* R.C. 5153.06; R.C. 5153.10. The Revised Code further specifies that, to constitute an action of a county children services board, the action must be approved by a majority of a quorum of board members present at a duly called meeting of the board. *See* R.C. 5153.04.

The decision by a children services board to discipline or place its executive director on administrative leave is part of the overall statutory employment relationship between the board and its executive director. Accordingly, any vote or action by a county children services board placing its executive director on administrative leave—as opposed to deliberations or preliminary discussions as to whether administrative leave is warranted—is a formal action by the board that must occur in a meeting open to the public. Furthermore, if the vote or action occurred in an executive session and not in a meeting open to the public, the plain language of R.C. 121.22(H) directs that the vote or action is invalid and has no legal effect. *See State v. Elam*, 68 Ohio St. 3d 585, 587, 629 N.E.2d 442 (1994) ("[w]here the wording of a statute is clear and unambiguous, [the] only task is to give effect to the words used"); *Black's Law Dictionary* 829 (7th ed. 1999) ("invalid" means, in part, "[n]ot legally binding"); *see also* 2011 Op. Att'y Gen. No. 2011-038, at 2-306; 2005 Op. Att'y Gen. No. 2005-033, at 2-348.[3]

In conclusion, it is my opinion, and you are hereby advised as follows:

1. A public body that wishes to hold an executive session pursuant to R.C. 121.22(G)(1) must, in the motion and vote to hold that executive session, state which one or more of the approved purposes listed in R.C. 121.22(G)(1) are the purposes for which the executive session is to be held. This requirement is not satisfied if the motion and vote state, without further explanation, that the session is to discuss a "personnel matter."

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[3] As noted previously, I cannot adjudicate or formally determine the legal rights of individual parties. R.C. 121.22(I)(1) provides that any person may bring an action to enforce the provisions of R.C. 121.22.

2. Any vote or action by a county children services board officially placing its executive director on administrative leave is a formal action under R.C. 121.22(H) that must occur in a meeting open to the public. The failure to comply with this requirement renders the vote or action invalid.

Very respectfully yours,

MICHAEL DEWINE
Ohio Attorney General