

**OPINION NO. 88-029****Syllabus:**

1. Pursuant to R.C. 4901.021, the Public Utilities Commission Nominating Council must simply *attempt* to insure that the primary focus of the background of two members of the Public Utilities Commission is in the area of energy, and that the primary focus of the background of two of the remaining three members of the Public Utilities Commission is in the area of transportation or communications technology. The Public Utilities Commission Nominating Council is not, therefore, required to nominate *only* persons with the relevant background called for by the current composition of the Public Utilities Commission, if, in the exercise of fair and impartial discretion, the Public Utilities Commission Nominating Council determines that to do so would not be in the best interest of the public and the Public Utilities Commission.
2. The Public Utilities Commission Nominating Council is a "public body" as that phrase is defined in R.C. 121.22. The Public

Utilities Commission Nominating Council is therefore required to hold any prearranged discussions of its public business in public, except where R.C. 121.22(G) allows a public body to hold an executive session.

3. With respect to "regular meetings," as that term is used in R.C. 121.22(F), the Public Utilities Commission Nominating Council is required to establish, by rule, a reasonable method whereby any person may determine the time and place of such meetings. The rule must provide for reasonable advance notification of all meetings at which a specific type of business is to be discussed to all persons requesting such notice and paying a reasonable fee.
4. With respect to "special meetings," as that term is used in R.C. 121.22(F), the Public Utilities Commission Nominating Council is required to establish, by rule, a reasonable method whereby any person may determine the time, place, and purpose of the meetings. The rule must provide for reasonable advance notification of all meetings at which a specific type of business is to be discussed to all persons requesting such notice and paying a reasonable fee.
5. Pursuant to R.C. 121.22(F), and except in the event of an emergency requiring immediate official action, the Public Utilities Commission Nominating Council is required to provide at least twenty-four hours' advance notice of all special meetings to the news media which have requested that they receive such notification. In the case of an emergency requiring immediate official action, the member or members calling the meeting must immediately notify all news media which have requested such notification of the time, place, and purpose of the meeting.

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**To: Thomas V. Chema, Chairman, Public Utilities Commission, Columbus, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, April 21, 1988**

I have before me your request for my opinion with reference to certain powers and duties of the Public Utilities Commission Nominating Council. In light of additional information that has been provided me, I have rephrased your specific questions as follows:

1. Is the Public Utilities Commission Nominating Council required by R.C. 4901.021(D)(2) to nominate persons so that at least two Commissioners will always have energy as the primary focus of their background, and at least two Commissioners will always have transportation or communications technology as the primary focus of their background?
2. Is the Open Meeting Act, R.C. 121.22, applicable to the activities of the Public Utilities Commission Nominating Council, and if so, what procedures should the Nominating Council follow in carrying out its statutory responsibility to comply with that law?

Your first question concerns the authority of the Public Utilities Commission Nominating Council (Nominating Council). R.C. 4901.02 provides for the creation and membership of the Public Utilities Commission. Of particular importance with respect to your question are those portions of R.C. 4901.02 which provide:

(A) There is hereby created the public utilities commission of Ohio, by which name the commission may sue and be sued. The commission shall consist of five public utilities commissioners appointed by the governor with the advice and consent of the senate. The governor shall designate one of such commissioners to be the chairman of the commission. The chairman of the commission serves

as chairman at the governor's pleasure. The commissioners shall be selected from the lists of qualified persons submitted to the governor by the public utilities commission nominating council pursuant to section 4901.021 of the Revised Code. Not more than three of said commissioners shall be affiliated with the same political party.

....  
 (D) Public utilities commissioners shall have at least three years experience in one or more of the following fields: economics, law, finance, accounting, engineering, physical or natural sciences, natural resources, or environmental studies. At least one commissioner shall be an attorney admitted to the practice of law in any state or the District of Columbia.

In accordance with this provision, R.C. 4901.021 sets out the powers and duties of the Nominating Council, providing in pertinent part:

(A) There is hereby created a public utilities commission nominating council....

....  
 (D) The council shall:  
 (1) Review and evaluate possible appointees for the office of commissioner of the public utilities commission;  
 (2) Consistent with division (D) of section 4901.02 of the Revised Code, not less than sixty days prior to the expiration of the term of a public utilities commissioner or not more than thirty days after the death of, resignation of, or termination of service by, a public utilities commissioner, provide the governor with a list of four individuals who are, in the judgment of the council, the most fully qualified to accede to the office of commissioner. The council shall not include the name of an individual upon the list, if the appointment of that individual by the governor would result in more than three members of the commission belonging to or being affiliated with the same political party. The council shall include on the list only the names of attorneys admitted to the practice of law in any state or the District of Columbia if an attorney must be appointed to fulfill the requirement of division (D) of section 4901.02 of the Revised Code. *To the extent possible, in its performance of this duty, the council shall continually attempt to ensure that the primary focus of the background of two commissioners is in energy and that the primary focus of the background of two commissioners is in transportation or communications technology.* (Emphasis added.)

It is this provision which leads you to inquire whether the Nominating Council is under a mandatory obligation to only include on its list of nominees persons who would maintain a balance on the Public Utilities Commission of at least two commissioners with energy as the primary focus of their background, and at least two commissioners with transportation or communications technology as the primary focus of their background.

As a governmental entity, created by statute, the authority of the Nominating Council is limited to those powers expressly conferred upon it by statute or which may be implied therefrom. *Dayton Communications Corp. v. Public Utilities Commission*, 64 Ohio St. 2d 302, 414 N.E.2d 1051 (1980); *Burger v. Thomas*, 42 Ohio St. 2d 377, 329 N.E.2d 693 (1975); *State ex rel. Williams v. Glander*, 148 Ohio St. 188, 74 N.E.2d 82 (1947). Thus, it is clear that if the Nominating Council has the authority to employ its discretion with respect to the primary focus of the background of the nominees it chooses to forward to the Governor, it must derive that authority from the appropriate statutes.

Where the General Assembly has employed the word "shall" in a statute, the language is usually held to impose a mandatory duty. *State ex rel. City of Niles v. Bernard*, 53 Ohio St. 2d 31, 372 N.E.2d 339 (1978); *Dorrian v. Scioto Conservancy District*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971); *Cleveland Railway Co. v. Brescia*, 100 Ohio St. 267, 126 N.E. 51 (1919). However, the word "shall," depending upon the context of its use, may be interpreted as allowing the exercise of discretion by a governmental entity. *Lindsey v. Public Utilities Commission*, 111 Ohio St. 6,

144 N.E. 729 (1924); *State ex rel. Methodist Children's Home Association v. Board of Education*, 105 Ohio St. 438, 138 N.E. 865 (1922).

In attempting to ascertain the General Assembly's intention in the enactment of a statute, it is often helpful to compare the language used elsewhere in dealing with related subjects. See *Lake Shore Electric Ry. Co. v. Public Utilities Commission of Ohio*, 115 Ohio St. 311, 319, 154 N.E. 239, 242 (1926) (had the legislature intended a term to have a particular meaning, it could easily have found language to express that purpose, having used such language in other connections). In the first portion of R.C. 4901.021(D)(2), relating to the nomination of persons to limit the political affiliations of the commissioners to no more than three of one party and requiring that at least one attorney be a commissioner, the General Assembly has employed the word "shall" without any modifying language. The use of the word "shall" standing alone, suggests that the General Assembly intended to impose a mandatory duty upon the Nominating Council to ensure compliance with the dictates of R.C. 4901.02(D). In the last portion of R.C. 4901.021(D)(2), however, the General Assembly has not employed the same language. Rather than simply repeating the word "shall," the General Assembly has inserted the phrase "[t]o the extent possible, the council shall continually attempt to..." (Emphasis added.) The differing formulations of these two provisions thus suggests that the General Assembly intended the final portion of R.C. 4901.021 to be directive in nature, rather than imposing a mandatory duty upon the Nominating Council. Therefore, I conclude that the Nominating Council is not absolutely required to nominate only persons with the relevant background called for by the current composition of the Public Utilities Commission.

In addition, you have inquired as to the "weight" which must be accorded to the language of R.C. 4901.021(D) in question. The language of R.C. 4901.021(D) provides that, "to the extent possible," the Nominating Council must "continually attempt to ensure" that the primary focus of the applicants' backgrounds are in the appropriate subject area. The Nominating Council is also under a duty to nominate those persons who are "in the judgment of the council, the most fully qualified to accede to the office of commissioner." (Emphasis added.) R.C. 4901.021(D)(2). These provisions, when read together, indicate that the General Assembly intended for the Nominating Council to employ its discretion in assuring the nomination of the most qualified applicants. In general, where an officer of the state is authorized by statute to perform certain discretionary functions, but no express statutory direction is given as to the manner in which the functions are to be performed, the officer may perform the functions in any reasonable manner. See *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 12, 112 N.E. 138, 141 (1915), *aff'd*, 241 U.S. 565 (1916) (where no direction has been given, an officer "has implied authority to determine, in the exercise of a fair and impartial official discretion, the manner and method" of performing his duties). Thus, the Nominating Council is given the discretion to determine the best "manner and method" in which to interpret and implement the directives set out in R.C. 4901.021. The Nominating Council's decision must, however, be a reasonable one. I therefore conclude that the Nominating Council is not strictly required to nominate only persons with the relevant background called for by the current composition of the Public Utilities Commission, if, in the exercise of fair and impartial discretion, the Nominating Council determines that to do so would not be in the best interest of the public and the Public Utilities Commission.

Your second question asks whether the Ohio Open Meetings Act requires that the Public Utilities Commission Nominating Council consider all matters pertaining to nomination of commissioners in public meetings. The Open Meeting Act, or "Sunshine law," is found in R.C. 121.22, and provides in pertinent part:

(C) All meetings of any public body are declared to be public meetings open to the public at all times. A member of the public body must be present in person at a meeting open to the public in order to be considered present or to vote at the meeting and for purposes of determining whether a quorum is present at the meeting.

The minutes of a regular or special meeting of any such public body shall be promptly recorded and open to public inspection. The minutes need only reflect the general subject matter of discussions in executive sessions authorized under division (G) of this section.

The Act defines a "meeting" as "any prearranged discussion of the public business of the public body by a majority of its members." R.C. 121.22(B)(2). A "public body" is further defined as meaning "any board, commission, committee, or similar decision-making body of a state agency, institution, or authority...." R.C. 121.22(B)(1). This language has been broadly interpreted to include almost all "decision-making" governmental entities, unless otherwise provided by law. See *Stegall v. Joint Township District Memorial Hospital*, 20 Ohio App. 3d, 484 N.E.2d 1381 (1985)(a board of hospital governors of joint district hospital is a "public body" within the meaning of R.C. 121.22); *Maser v. City of Canton*, 62 Ohio App. 2d 174, 405 N.E.2d 731 (Ct. App. Stark County 1978)(a committee appointed by a city council to investigate problems within a city department is a "public body" under R.C. 121.22); 1986 Op. Att'y Gen. No. 86-091 (the Ohio Legal Rights Service Commission is a public body for purposes of R.C. 121.22); 1985 Op. Att'y Gen. No. 85-044 (a township board of zoning appeal is a "public body" for purposes of R.C. 121.22); 1979 Op. Att'y Gen. No. 79-061 (the governing board of a community improvement corporation that has been designated as an agency of a county, a municipal corporation, or a combination thereof, pursuant to R.C. 1724.10, constitutes a "public body" for purposes of R.C. 121.22); 1978 Op. Att'y Gen. No. 78-059 (the internal security committee, established by the Industrial Commission and the Bureau of Worker's Compensation is a public body for purposes of R.C. 121.22); but cf. *Hills & Dales, Inc. v. Wooster*, 4 Ohio App. 3d 240, 448 N.E.2d 163 (Ct. App. Wayne County 1982)(a charter municipality, in the exercise of its sovereign powers of local self-government, is not bound to follow the provisions of R.C. 121.22); *Piqua v. Piqua Daily Call*, 64 Ohio App. 2d 222, 412 N.E.2d 1331 (Ct. App. Miami County 1979)(where a municipality has adopted a charter form of government under the "home rule" amendment to the Ohio Constitution, the provisions of R.C. 121.22 regarding when, how, where, and under what circumstances a city charter commission or assembly may meet are not applicable); 1976 Op. Att'y Gen. No. 76-062 (the board of trustees of a comprehensive mental health center, which is a private, non-profit corporation, does not constitute a "public body" for purposes of R.C. 121.22). As discussed above, the Nominating Council is created and empowered by R.C. 4901.021 for the purpose of nominating candidates for the office of commissioner of the Public Utilities Commission. As such, the Nominating Council would certainly fall under the broad heading of a "similar decision-making body," and thus constitutes a "public body" for purposes of R.C. 121.22. In addition, your staff has indicated that the Nominating Council's meetings are prearranged. Thus, the Nominating Council is generally required to hold the entirety of its meetings in public. See also Recchie and Chernoski, *Government in the Sunshine: Open Meeting Legislation in Ohio*, 37 Ohio St. L.J. 497 (1976).

R.C. 121.22 does, however, provide certain exceptions to the general rule that a public body must hold the entirety of its meetings in public. These exceptions are found in R.C. 121.22(G), which provides in pertinent part:

(G) The members of a public body may hold an executive session only at a regular or special meeting for the sole purpose of consideration of the following matters:

(1) ...[T]o consider the appointment, [or] employment of a public employee or official, or the investigation of charges or complaints against a public employee, official, licensee, or regulated individual.

Under this section, the Nominating Council may go into executive session at one of its regularly called sessions, or at a session that has been specifically called in conformity with R.C. 121.22(F).<sup>1</sup> Where the Council has done so, the Council may

<sup>1</sup> The recently passed amendments to the Open Meetings Act, Am. Sub. S.B. 150 (eff. June 29, 1988), will further regulate the manner in which a public body may go into executive session. As amended, R.C. 121.22 reads in pertinent part:

(G) 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 such a session and only at a regular or special meeting for the sole purpose of the consideration of any of the following matters:

hold "discussions" pertaining to the appointment of the candidate for the office of commissioner. See R.C. 121.22(C). However, the General Assembly's use of the word "discussions," in connection with its admonition in R.C. 121.22(A) that the Open Meetings Act be "liberally construed to require public officials to take official action...only in open meetings," clearly conveys the intention that the Council's final determination be made in open session. See also *State ex rel. Humphrey v. Adkins*, 18 Ohio App. 2d 101, 247 N.E.2d 330 (Ct. App. Montgomery County 1969) (while an executive session may be permitted, official actions may only be taken in an open meeting).<sup>2</sup>

In addition to asking whether the provisions of R.C. 121.22 are applicable to the activities of the Nominating Council, you have also inquired as to the proper procedures for implementing the Open Meetings Act. Specifically, it is my understanding that you are concerned with the requirements with regard to the notification of the news media and the general public.

The requirements for notification will differ depending upon the type of meeting that has been called. As suggested by the portion of R.C. 121.22(C) quoted

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(1) 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. Except as otherwise provided by law, no public body shall hold an executive session for the discipline of an elected official for conduct related to the performance of his official duties or for his removal from office. If a public body holds an executive session pursuant to division (G)(1) of this section, the motion and vote to hold that executive session shall state which one or more of the approved purposes listed in division (G)(1) of this section 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.

....  
 If a public body holds an executive session to consider any of the matters listed in divisions (G)(2) to (6) of this section, 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. (Emphasis added.)

In effect, the amendments to R.C. 121.22 impose three additional 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 subdivision (G)(1) the public body will discuss.

<sup>2</sup> Since the Nominating Council is a separate and distinct statutory entity from the Public Utilities Commission itself, it could be argued that R.C. 121.22(G)(1) is inapplicable to the present context. The statute does not, however, require that the potential appointment be for the decision-making body itself. It is a well-established rule that exceptions not provided for should not be read into a statute. *Wheeling Steel Corp. v. Porterfield*, 24 Ohio St. 2d 24, 263 N.E.2d 249 (1970); *Columbus Suburban Coach Line, Inc. v. Public Utilities Commission*, 20 Ohio St. 2d 125, 254 N.E.2d 8 (1969). Thus, I conclude that the Nominating Council may go into executive session at a regular or special meeting to discuss the appointment of a candidate for the office of Public Utilities Commissioner.

above, the Open Meetings Act distinguishes between "regular" and "special" meetings. Regular meetings are those which are held at prescheduled intervals. Such meeting would include, for example, monthly or annual meetings. Thus, the Nominating Council's annual meeting to select a chairman and secretary, *see* R.C. 4901.021(C), would constitute a regular meeting. With respect to such meetings, R.C. 121.22(F) requires that each public body establish, by rule, "a reasonable method whereby any person may determine the time and place" of the meetings. In addition, where a person so requests and pays a reasonable fee, the rule must also provide for the "reasonable advance notification of all meetings at which any *specific type of business* is to be discussed." (Emphasis added.) Such notification may include the sending of the meeting's agenda to persons requesting notice. *Id.*

While the term "special meeting" is not defined in R.C. 121.22, its use in context indicates that a reference to all meetings other than "regular" meetings was intended. With respect to special meetings, R.C. 121.22(F) requires that the public body establish, by rule, "a reasonable method whereby any person may determine the time, place, *and purpose*" of the meeting. (Emphasis added.) In addition, the public office is required to give at least "twenty-four hours' advance notice to the news media that have requested notification, except in the event of an emergency requiring official action." Once again, the rule must also provide for the "reasonable advance notification of all meetings at which any specific type of business is to be discussed." Where, however, immediate official action is required, "the member or members calling the meeting" are required to notify members of the news media that have requested such notice, of the time, place, and purpose of the meeting. *Id.*

Accordingly, it is my opinion and you are hereby advised that:

1. Pursuant to R.C. 4901.021, the Public Utilities Commission Nominating Council must simply *attempt* to insure that the primary focus of the background of two members of the Public Utilities Commission is in the area of energy, and that the primary focus of the background of two of the remaining three members of the Public Utilities Commission is in the area of transportation or communications technology. The Public Utilities Commission Nominating Council is not, therefore, required to nominate *only* persons with the relevant background called for by the current composition of the Public Utilities Commission, if, in the exercise of fair and impartial discretion, the Public Utilities Commission Nominating Council determines that to do so would not be in the best interest of the public and the Public Utilities Commission.
2. The Public Utilities Commission Nominating Council is a "public body" as that phrase is defined in R.C. 121.22. The Public Utilities Commission Nominating Council is therefore required to hold any prearranged discussions of its public business in public, except where the exceptions provided for by R.C. 121.22(G) may apply.
3. With respect to "regular meetings," as that term is used in R.C. 121.22(F), the Public Utilities Commission Nominating Council is required to establish, by rule, a reasonable method whereby any person may determine the time and place of such meetings. The rule must provide for reasonable advance notification of all meetings at which a specific type of business is to be discussed to all persons requesting such notice and paying a reasonable fee.
4. With respect to "special meetings," as that term is used in R.C. 121.22(F), the Public Utilities Commission Nominating Council is required to establish, by rule, a reasonable method whereby any person may determine the time, place, and purpose of the meetings. The rule must provide for reasonable advance notification of all meetings at which a specific type of business is to be discussed to all persons requesting such notice and paying a reasonable fee.

5. Pursuant to R.C. 121.22(F), and except in the event of an emergency requiring immediate official action, the Public Utilities Commission Nominating Council is required to provide at least twenty-four hours' advance notice of all special meetings to the news media which have requested that they receive such notification. In the case of an emergency requiring immediate official action, the member or members calling the meeting must immediately notify all news media which have requested such notification of the time, place, and purpose of the meeting.