Opinion No. 63-55

May 20, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. Jack L. Love Assistant District Attorney County Court House Hobbs, New Mexico

QUESTION

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1. When a school board prepares its requested budget and submits it to the state educational budget auditor and the local budget commission pursuant to Section 73-7-3, N.M.S.A., 1953 Compilation, does the copy of such budget which is retained in the files of the school board become a public record within the Inspection of Public Records Act?

2. May a school board conduct the following matters in a closed session, (a) consideration of the hiring and firing of teachers, (b) consideration of the acceptance or rejection of resignations tendered by teachers, and (c) consideration of the reinstatement of a pupil who has been expelled and whose parents are seeking his readmission?

CONCLUSION

1. Yes.

2. See analysis.

OPINION

*{*113}* **ANALYSIS**

It is our opinion that the maintenance budget required to be prepared under Section 73-7-3, N.M.S.A., 1953 Compilation (P.S.) is a public record, and as such it can be inspected by members of the public.

Section 71-5-1, N.M.S.A., 1953 Compilation, provides that:

"Every citizen of this state has a right to inspect any public records of this state except records pertaining to physical treatment of persons confined to any institutions and except as otherwise provided by law."

Section 71-5-2, N.M.S.A., 1953 Compilation, provides as follows:

"All officers having the custody of any state, county **school,** city or town records in this state shall furnish proper and reasonable opportunities for the inspection and examination of all the records requested of their respective offices and reasonable facilities for making memoranda abstracts therefrom, during the usual business hours, to all persons having occasion to make examination of them for any lawful purpose." (Emphasis added)

"Public Record" is defined in 76 C.J.S., Records, Section 1, as follows:

"A 'public record' has been defined as one required by law to be kept, or necessarily to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office. **The elements essential to constitute a public record are, namely, that it be made by a public officer, and that the officer be authorized by law to make it..** . . ." (Emphasis added)

Those records which are necessary and incidental to the carrying out of the duties imposed upon an individual by operation of law are deemed public records and this office so stated in Opinion No. 61-137. 76 C.J.S., Records Section 1, Maintenance budgets prepared pursuant to the mandate of Section 73-7-3, N.M.S.A., 1953 Compilation (P.S.) are such records, and are therefore public records.

The answer to your second question depends upon a proper interpretation of Section 5-6-17, N.M.S.A., 1953 Compilation (P.S.), which provides in part as follows:

"The governing bodies of all municipalities, boards county commissioners, **boards of public instruction** and all other governmental boards and commissions of the state or its subdivisions, supported by public funds, **shall make all final decisions at meetings open to the public. . . ."** (Emphasis added)

In Attorney General Opinion No. 59-105, dated August 14, 1959, it was pointed out that this Section requires something more than a simple announcement of the final decision in an open meeting.

We are now called upon to specifically set forth what is required by Section 5-6-17, supra. This is not a simple task, since as **Davis on Administrative Law** has *{*114}* pointed out (Vol. 1, Section 8.09):

"The question whether a party is legally entitled to a public hearing, as distinguished from a secret or private hearing, has been until very recent times so unimportant that no clear answer can be found in the case law."

While meetings and hearings are not always the same thing the word "meetings" in Section 5-6-17, supra, does encompass hearings.

In our view all requirements of substantive and procedural due process, as well as the requirements contained in Section 5-6-17, supra, are fully met if the governing body operates in a three-step manner, the second of which may be omitted at the board's option.

First, a "meeting open to the public" presupposes the right of the public freely to attend such meetings with the concurrent right to freely express their views on the matter being considered. City of Lexington v. Davis, Ky., 221 S.W. 2d 659. Such opportunity for full public participation is a definite protection against arbitrary action.

If the board or commission is conducting an actual hearing, as distinguished from an informal meeting with public discussion, this in its very essence demands that the persons entitled to the hearing shall have the right to support their position by argument, however brief, and if need be, by proof, however informal. **Londoner v. Denver,** 210 U.S. 373, 28 S. Ct. 708, 52 L. Ed. 1103. As the 1941 Report by the Attorney General's Committee on Administrative Procedure pointed out (p. 68): "Star chamber methods cannot thrive where hearings are open to the scrutiny of all." Such a public hearing is ample protection against the possible use of secret inquisitional techniques.

Second, there is not even an implication in Section 5-6-17, supra, that after listening to the viewpoints expressed in a meeting or the evidence adduced at a hearing, that the board or agency is precluded from then meeting privately for a discussion among the board members. Such a procedure can hardly be said to lend itself to partiality or arbitrary action since the highest courts in the land utilize basically this same approach.

Of course, the private discussion should be **after** the initial presentation of views and/or evidence at the public meeting. In the case of **Hardy v. Horst,** Ohio, 101 N.E. 2d 398, there was involved a statute requiring that meetings of the board be open to the public. Pursuant to a letter written by the chairman of the board, a private meeting was held **prior** to the public meeting "to discuss what the law is and any other factors which might come up." The court held that the private meeting **prior** to the public meeting was improper under the statute.

Third, the final decision and the reason or reasons therefor must be made at a meeting open to the public. While Section 5-6-17, supra, does not specifically require that any reasons for the decision be given, it would appear that such was the legislative intent. When this procedure is followed the public is fully apprised as to the "whys and wherefores" of the final decision, and if aggrieved parties appeal the decision to the court, the latter has a better opportunity to ascertain whether or not the board's action was arbitrary or capricious.

In our opinion the procedure *{*115}* outlined above insures to the fullest extent practicable that the decision - making process will be open to the public.

By: Oliver E. Payne

Assistant Attorney General