

Open Meeting Law: Primer and Best Practices

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Goals for this presentation

- Introduction to the Open Meeting Law
- Address frequently encountered situations, issues, and problems.
- Address how the Open Meeting Law has been misinterpreted and misunderstood.
- Discuss legal requirements of the Open Meeting Law and best practices.

DISCLAIMER

This presentation is solely for information and education purposes. Nothing presented in these materials or presented today constitutes legal advice.

Why Do We Have This Law?

- To allow the public to observe the process of governing
- To give the public prior notice when the government is about to make policy choices that could affect them
- To allow the public to react to those choices and let their representatives know how they feel

Who Is "The Public"?

- Parents
- Students
- Employees
- Taxpayers
- Residents and non-residents
- Even other board members
- Remember: the Public is "there" even if they aren't there

Why You Should Take It Seriously

- Because public service matters
- Because there are substantial penalties for non-compliance
- Who can complain?
 - Any person affected by an alleged violation
- Who enforces it?
 - Arizona Attorney General's Office
 - County Attorney
 - Citizen lawsuits

Penalties

- Knowing violation or who knowingly aids, agrees to aid or attempts to aid violation
- \$500 for second offense; \$2500 for third and subsequent offenses
 - Money must come from offender – public entity or insurance cannot pay
- Reasonable attorney's fees upon court award or settlement (likely much more expensive than fine)
- Court can remove officer if it finds knowing intent to deprive the public of information

Public Policy of the State of Arizona

- When in doubt, the law favors openness in government
- This directive will be used in interpreting the law by the Attorney General or a court

When Does The Open Meeting Law Apply?

The OML is mostly enforced by defining what a meeting is – if this occurs, all the provisions of the law apply

An “Ah-ha” moment . . .

OML does not stand alone. It interfaces with other laws that affect how you operate:

Public Records

Board Governance

Election Law (Overrides
and Bond Elections)

Open Meeting Law

Student Discipline and
Employment Hearings

Attorney-Client
Privilege

Conflict of Interest
Laws

Who is subject to the OML (Besides the Public Body)?

- All standing , special, or advisory committees or subcommittees of, or appointed by the Board.
- “Advisory Committee”
 - Officially established by motion or order of the public body or by the presiding officer.
 - Appointed to make a recommendation concerning a decision to be made or considered by the public body.

Does not include a committee established by the Chief Executive. BUT ...

What if we direct the Chief Executive to establish an advisory committee?

What if we direct who is on the committee?

What if Board members serve on the committee?



What is a meeting? Two elements are required

1. A gathering, in person or through technological devices, of a quorum of the members of the Board

+

2. At which they discuss, propose or take legal action, including any deliberations by a quorum with respect to that action

A Quorum

- Majority.
- Vacancies count in determining what your quorum is.

Other ways to trigger a “meeting”

- Includes one-way communications proposing legal action by one member of the public body sent to a quorum of the Board (including the person proposing the action)
- Exchange of electronic communications – emails, texts, IMs, social media – among a quorum of the members of the public body that involves discussion, deliberation or the taking of legal action by the Board about a matter likely to come before the Board for action

- If you have these two elements – quorum + discussion about board business you have a meeting under the OML
- **The Question Is...is it a legal one?**

Watch for the non-meeting, meeting

- Before and after the gavel, parking lot, etc.
- "Soft posting" for training, other non-board business = good practice

- It doesn't matter if the board will also have a public discussion or decision later
- Discussion among a quorum without complying with the notice and agenda requirements will always be a violation even if it will be the subject to further discussion and action later.

Physical Proximity Is Not Required to Make a Quorum

- The "Walking" Quorum Problem
 - Serial Conversations Among the Board
- The "Hub and Spoke" Problem
 - Conversations with Ex-Officios and Other Employees
 - Chairs or employees "polling the board" before board decisions
- Other employees can violate law and be subject to the law's penalties as well as board member

No matter what you call your meeting, the OML applies if a quorum is present

- Special meetings? Yes
- Work study sessions? Yes
- Board retreats? Yes
- "Drop-by" visits to the District Office? Yes

Location

- Regular meetings should be in a public facility
 - Accessible to the public, including the disabled
 - Adequate to allow public to attend and listen

What does it take to pass a motion?

- Vote of a majority of those present.
- If there are three members there including me and I abstain, is there still a quorum? Yes.
- If I abstain, does that count as a “no” vote? No.
- If I recuse myself, is there a quorum? Yes, unless you leave the room. (You don’t have to leave room, but you cannot participate in discussion.)

Is there any time we can require more than a simple majority to pass an item?

- No.
- Boards only have the power that the legislature has given them.
- No power to require anything other than a simple majority.
- But what about Roberts Rules that require 2/3 vote for some motions? No.

And, Speaking of Robert's Rules

- A.R.S. §15-321 says you shall establish your rules of order.
- In many ways, Robert's rules conflict with Arizona law:
 - 2/3 vote;
 - Censure-no can do (*Berry v. Foster*);
 - Agenda setting (24 hours);
 - Executive Sessions.

Agendas

- How specific does it have to be? Be as specific as possible, but if it is for executive session, don't defeat the purpose.
- Timing of posting matters.
 - Available at a public place at least twenty-four hours ahead of the meeting.

Notice

- **Post statement on website stating where public notices of meetings will be posted**
 - **Physical and Electronic Locations**
 - **Physical: accessible maximum amount of time (24 hours a day access if possible)**
 - **Electronic: on home page or in place that is easily navigable**
 - **Won't have defective notice if there is a technological problem in posting as long as physical posting is accomplished**
 - **Can post in additional places to inform public in manner that is "reasonable and practicable" but be careful: you don't want to make notice requirement hard to comply with**
 - **Examples: post offices, school newsletters, school sites, local newspapers, District Facebook pages**
- **Check to make sure you have the statement posted at least annually**

Each Meeting Notice Posting

- Post in physical and electronic locations at least 24 hours before the meeting
- Deliver notice to board members at least 24 hours in advance
 - Physical delivery OR e-mail if agreed upon by Board policy or practice
- Inform public in manner that is "reasonable and practicable"

Agendas

- Posted/distributed with the Notice, though legally distinct
- Lists specific items to be addressed at meeting
 - "Discussed, considered or decided" at meeting
 - Each item should contain "such information as is reasonably necessary to inform the public of the matters or be discussed or decided"
- Limited to those topics on the agenda and "other matters thereto"
 - Must be directly related to stated agenda item
 - Watch "birdwalking" into other topics

Agenda Pitfalls to Avoid

- Legalese, acronyms, terms the public would not understand
- The Attorney General will use the "person off the street" standard
 - Don't assume people know about on-going issues – it might be the first time they are paying attention
- Do not add items inside of the 24-hour window
 - You can add or change items if outside of the 24 hour notice and a revised agenda can be posted with 24 hour notice
- Board presidents – and others – must police the agenda
 - Points of order on OML concerns are always in order

Agendas

Executive and Board Reports.

Misuse of Board reports.

- Let's revisit the language of the statute:
 - Notwithstanding subsection H of this section, the chief administrator, presiding officer or a member of a public body **may present a brief summary of current events** without listing in the agenda the specific matters to be summarized, if:
 1. The summary is listed on the agenda.
 2. The public body does not propose, discuss, deliberate or take legal action at that meeting on any matter in the summary unless the specific matter is properly noticed for legal action.

**Written minutes or recording of
minutes required, including
executive sessions**

Minutes Requirements

- Date/time/place
- Members present or absent or arriving late
- General description of matters considered
- Accurate description of legal action proposed, discussed or taken including names or members that made motions
- A record of how each person voted (roll call vote may be needed to ascertain this)
- Names of persons who make statements or present material to the governing board

Minutes

- No legal requirement for public body to approve minutes though most do to ensure accuracy
- Minutes must be made available to the public
 - in writing or recording – within 3 working days of the meeting
 - Once recording has been converted into written minutes, the recording must be kept according to state retention schedule

Public Rights

- Right to Expect Board to follow Open Meeting Law and Board policies
- Right to Attend and Listen
- Right to Record by video and/or audio so long as in an unobtrusive manner
- Right to Address the public body IF provided on agenda
 - Board can choose to have no public comment for all meetings or some meetings

**Easy to violate law when using
electronic communications – e-
mail, group text chats,
social media**

OML in the Age of Technology

Does not make a difference whether it is on your own computer or phone.

Public record? Only thing that is for certain is that matters that have nothing to do with your job/office are okay.

OML in the Age of Technology

Emails.



One member or employee to all Board members generally a bad idea but okay if:

- you stop there;
- one member replies to you personally without sharing;
- But NOT okay if Board member proposes legal action.

OML in the Age of Technology

Text Messages.



Public record or no? Yes.

Sending and receiving them during the meeting—bad idea.

- Public thinks you are up to something.

REALLY bad idea if texting is between board members during a meeting.

OML in the Age of Technology

Twitter, Facebook, and Statements to the press.

Public statement on a position you are going to take is not a violation.

BUT commenting between a quorum would be a violation.

Best Practices

- Don't "reply all" to emails – set up system where this is impossible
- Include disclaimer not to "reply all" or forward with instructions about the OML
 - Emails from staff: "To ensure compliance with the Open Meeting Law, recipients of this message should not forward it to other members of the public body. Members of the public body may reply to this message, but they should not send a copy of the reply to other members."
 - E-mails from board members: "To ensure compliance with the Open Meeting Law, recipients of this message should not forward it to other board members and board members should not reply to this message."

Best Practices

- Don't talk board business over social media
- Don't join Facebook groups where board business is discussed or don't participate in any discussions, including "liking" posts
Don't forget that public records law applies as well (retention and disclosure req's)

Call to the Public

- Type of Call to the Public should be defined by the Board in policy and on agenda
- Limited Call to the Public
 - Public can speak about any item on the agenda
- Open Call to Public
 - Public can speak about any item on agenda or any issue within the jurisdiction of the Board subject to reasonable time, place and manner restrictions
 - Call to the Public must be on the agenda
 - Board is prohibited from discussing with the speaker or among themselves or with staff any item not appearing on the agenda

At the Conclusion of the Call to the Public Individual Members Can...

- Ask for the item to be placed on a future agenda
- Ask the staff to address speaker's concerns after the meeting
- Respond to criticism made by those who have addressed the public body

Board Should Adopt Rules for Public Comment

- Rules should be posted in room or on speaker cards
- Rules can be read before the Call to the Public
- Board CANNOT block comment because of speaker's viewpoint
- Board CAN adopt time, place, manner restrictions
 - Examples: time limit, no obscenity, relevancy to jurisdiction/authority of District/Board
- Should be consistent about enforcement of rules

Executive or Board Member Current Event Summaries

Executive and Board Member "Reports"

- Executives or board members can give a summary of current events without listing on the agenda what is in the summary IF
 - It is stated on the agenda that a summary will be given
 - The Board does not discuss or take any legal action with regard to the summary
- Special "carve out" provision of OML for Executives or Board Members
 - Others giving summaries or reports must list out on agenda what will be discussed – example: transportation report, principal's report, etc.
- Should not be for significant items of information
 - Examples: school events attended, staff/student recognitions

**Best practice is always to put it on
the agenda if it is an issue you
know the Board will want to talk
about**

Executive Sessions

- Definition: An Executive Session is a meeting of a quorum of members of a Board from which the public is excluded
- Must be for one of the authorized purposes in law (10 for public bodies)
- Only individuals whose presence is reasonably necessary in order for the Board to carry out its executive session responsibilities may attend the Executive Session
 - Who decides who these people are? The Board
- All discussions in Executive Session are confidential
 - Participants must be advised each time of session's confidentiality

Executive Sessions

- Notice/Agenda Requirements
 - Notice that the Board may go into Executive Session must be on the agenda, with the specific legal basis to do so
 - Motions to move into Executive Session needed and a vote by the Board
- No legal action can be taken in Executive Session and no straw polls prior to deciding the matter in open session
 - No Motion to Adjourn – no motions at all
- Board can instruct a third party on:
 - Litigation or settlement discussions
 - Negotiations with employee organizations
 - Negotiations for the purchase, sale or lease of real property

Authorized Purposes for Executive Sessions

Executive Sessions

38-341.03(A)

(A)(1) Personnel.

(A)(2) Confidential records.

(A)(3) Legal advice.

(A)(4) Instruct your attorney(s).

(A)(5) Instruct your representatives regarding negotiations with employee organizations regarding salaries, salary schedules or compensation.

(A)(6) international and interstate negotiations.

(A)(7) Instruct your representatives regarding negotiations for the purchase, sale or lease of real property.

Executive Sessions

38-341.03(A)

(A)(8) School safety.

(A)(9) Security plans.

(A)(10) Student discipline.

Executive Sessions

38-341.03(A)

Who may attend?

—only those persons “whose presence is reasonable necessary in order for the public body to carry out its executive responsibilities.”

Executive Session Minutes

- Date/time/location
- Persons present or absent
- General description of matters considered including accurate description of all instructions given
- Kept confidential – kept separately from regular minutes
- Review of Executive Session Minutes limited to Board members, employee subject of discussion, Auditor General for audits, or Attorney General or county attorney for OML investigation

Emergency Sessions

- Board can meet in an emergency session without 24 hour notice only IF:
 - Emergency that was unforeseeable exists that demands immediate action
 - Must post notice and agenda as soon as possible
 - Discuss the details of the emergency at meeting
 - Put those details in minutes
 - Post details of emergency within 24 hours

Virtual Meetings – A Few Tips

- Must provide real time access
- Provide advance tech support if possible
- Must post links to meeting at least 24 hours in advance
- Should disable chat features
- Should have someone to monitor to ensure streaming is working
- Public comment is difficult – many choose not to have public comment or to allow for comments to be submitted and read into the record (subject to limitation)

Voidable Actions - Ratification

- Legal action taken in violation of the OML is void, but the Board can invalidate voided actions due to OML violation IF
 - Ratification is done within 30 days after violation occurs or should have been discovered
 - Post and detail in the minutes action that will be ratified
 - Detail matter to be ratified posted with notice including all deliberations and decisions made on matter to date

Questions?