

Arizona's Open Meeting Law

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Role of the State Ombudsman

A.R.S. § 41-1376.01

- Investigate complaints relating to public access law.
- Train public officials and educate the public on the rights of the public under the public access laws.

What is the open meeting law?

Set of laws that were intended to:

- Maximize public access to the governmental process.
- Open deliberations and proceedings to the public.
- Prevent public bodies from making decisions in secret.
 - Found at A.R.S. §§ 38-431 through -431.09.

Who Must comply?

- “Public Bodies” – A.R.S. § 38-431(6)
 - All councils, boards, commissions of the state or political subdivisions
 - Multimember governing bodies of departments, agencies, institutions and instrumentalities of the state or political subdivisions
 - Includes corporations or other instrumentalities whose boards of directors are appointed or elected by state or political subdivision

AG Opinion I07-001

- The entity's origin (whether it was created by government)
- Whether the entity's performs a function traditionally associated with government
- Whether the entity has the authority to make binding governmental decisions
- Nature of government financial involvement
- Nature and scope of government control over entity
- Whether officers and employees are government employees

The definition also includes...

Standing committees

Special committees

Advisory committees

Subcommittees

- of or appointed by the public body

Advisory committees and subcommittees are defined as...

- Any entity, **however designated**
- Officially established
 - on motion or order of the public body
 - **or** by presiding officer of the public body
- For purpose of making a recommendation concerning a decision to be made or a course of conduct to be taken by the public body

Statutory Requirements

- Secretary of State, Clerk of the County Board of Supervisors, and City/Town clerks must conspicuously post open meeting law materials prepared and approved by the Attorney General's Office on their website.
 - Chapter 7 of the Arizona Agency Handbook
 - Revised 2018.
- All persons elected or appointed to a public body must review the materials at least one day before taking office.
- May be other requirements elsewhere in law or in a public body's governing documents. E.g., A.R.S. 48-803(H) for fire districts.

Enforcement Authority

- Arizona Attorney General's Open Meeting Law Enforcement Team (OMLET)
 - Investigate complaints
 - Enforcement authority
 - Arizona Agency Handbook, Chapter 7 (Revised 2018)
 - Available online: www.azag.gov
 - **Only entity that can commence suit against individual for open meeting law violations.**
- County Attorney's Office
- The Courts

What Must a Public Body Do?

- Provide standing and meetings notice
- Have an agenda
- Meet in public
- Permit public to attend
 - Exception: authorized executive sessions
- Take all action in public
- Create/ prepare meeting minutes or a recording.

What is a Meeting?

- A.R.S. § 38-431(4)
- “Meeting” is a **gathering**, in person or through technological devices
- of a **quorum** of a public body
 - Discuss
 - Propose
 - Deliberate
 - Take legal action

What is a meeting? (Cont'd)

- **A.R.S. § 38-431(4)(b) - Includes:**
 - **“(i) A one-way electronic communication by one member of a public body that is sent to a quorum of the members of a public body and that proposes legal action.”**
 - **“(ii) An exchange of electronic communications among a quorum of the members of a public body that involves a discussion, deliberation or the taking of legal action by the public body concerning a matter likely to come before the public body for action.”**

Quorum?

Majority of the public body – A.R.S. § 1-216(B)

- (unless specific statutory provision specifies a different number)
- 7 members /quorum =4
- 5 persons /quorum = 3
- 3 persons /quorum = 2

*That includes vacant seats unless otherwise specified by law.

Remote Meetings

- Permitted by the open meeting law
- Board members and public must be able to hear
- Provide information in minutes
- AG Opinion I20-002

The “Initial” Notice (aka disclosure statement)

- A.R.S. § 38-431.02
- Tells public where individual meeting notices will be posted (must include both physical and electronic locations).
- Must be posted on public body’s website.
 - Cities and Town may use association of cities and towns website.
 - Special districts may file it with the County Clerk.

Notice of Meetings

A.R.S. § 38-431.02(C)

Provided 24 hours in advance of meeting

- To all members of the public body
- To the general public
- 24 hours may include Saturdays IF the public has access to the physical posting location. May not include Sundays or other legal holidays prescribed under A.R.S. § 1-301

Exceptions:

- Recess and resume
- Actual emergencies

Contents of Notice

- The name of the public body
- Date, Time, and Place
 - Address and room number
- Must include an agenda OR inform the public how to obtain a copy of the agenda



Posting the Notice



- Must be posted in all location identified in the initial notice (disclosure statement). This must be a location where the public has access.
- Must post it on website (see exception for special districts).
- Must give additional notice that is reasonable and practicable.

A few tips on posting notices

- Make sure it can't be removed.
- Make sure front and back can be read.
- Document when the notice/agenda was posted
 - Need a regular, routine business practice
 - Clerk marks time of posting with initials
 - Date / time stamp at exact time of posting

Recess and Resume

- A public body may recess and resume a properly noticed meeting to a later time or date by making an announcement at the meeting what agenda items will be covered.

Emergency Meetings

A.R.S. § 38-431.02(D) and Agency Handbook section 7.7.9

- In case of “actual emergency,” law permits the board to meet (including in executive session), discuss and decide matters with less than 24 hours notice.
- What constitutes an “actual emergency”?
 - Due to unforeseen circumstances, immediate board action is necessary to avoid a serious consequence that would result from waiting until proper notice could be provided.

Emergency Meeting Requirements

- Aside from the 24 hour notice requirement, all Open Meeting Law requirements still apply
- Provide notice as soon as possible
- Announce in public the reasons necessitating emergency action
- Include reasons in the meeting minutes
- Post a notice stating the emergency session occurred and providing the information required on a normal agenda within 24 hours after the meeting

Social Events & Seminars



- You might consider posting a “courtesy agenda” announcing event and explain that a quorum might be present
- Identify date, time, and purpose (location details will vary depending on event)
- State that no business of the public body will be discussed and no legal action will be proposed or taken
- Members must be scrupulous to avoid improper discussion

The Agenda

A.R.S. § 38-431.02(H)

- Must list the specific matters to be:
 - discussed,
 - considered or
 - decided
- Must include information reasonably necessary to inform the public
- All discussion must be reasonably related to an adequately described agenda item.
- **“Except for a meeting through technological devices, the agenda shall also include notice of the time that the public will have physical access to the meeting place.”**
 - In effect as of 9/24/2023.

Common Agenda Problems

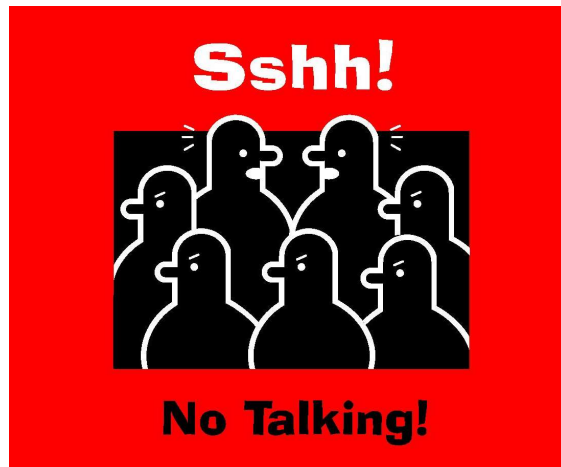
- Using language a regular person would not understand
 - Legalese
 - Acronyms (without first spelling it out)
 - Agency slang
- Using general categories without details
 - “New Business”
 - “Old Business”
 - “Personnel”
 - “Reports”

Current Events – A.R.S. § 38-431.02(K)

- 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
- **provided that**
- “Current Events” is an **agenda item**
- & public body does not propose, discuss, deliberate or take legal action

If it's not on the agenda...

- You cannot discuss it!
- New items must wait for a future meeting.



Meeting Location Pitfalls

- Inaccessible
 - A board member's house
- Inaudible
- Not enough room – Recent legislation
 - **“Schools, school boards, executive boards and municipalities shall provide for an amount of seating sufficient to accommodate the reasonably anticipated attendance of all persons desiring to attend the deliberations and proceedings, when feasible. This section does not require a public body to relocate a meeting outside of the largest regular meeting room.”**
A.R.S. §38-431.01.
 - In effect as of 9/24/2023.
- Unreasonable times (very subjective)

Public's Rights

- Attend
- Listen
- Tape record
- Videotape



Public has NO Right to:

- Speak
- Disrupt



Practical Pointer:

- make a good record of warnings

Calls to the Public

A.R.S. § 38-431.01(H)

- Optional (unless required by other laws)
- Time, manner, place restrictions
 - Can limit time (egg timer)
 - Ban Repetition
 - May require speakers on the same side with no new comments to select spokesperson
 - prohibit disruptive behavior



Common Pitfall of Calls to the Public

- Discussing matters not listed on the agenda.
- If it's not an agenda item, public body's response is limited to:
 - Direct staff to study the matter
 - Ask that a matter be placed on a future agenda
 - Respond to criticism

Note: These three responses must take place at the **conclusion** of the call to the public!

Meeting Etiquette

- Asking for trouble:
 - Passing notes, texting, e-mailing (even if it's about when to order lunch)
 - Whispering to fellow board members
 - Quorum talking with individuals before the meeting officially starts or after the meeting officially ends.

Executive Sessions

- Public excluded
- Only permitted for specific matters
 - A.R.S. §§ 38-431.03(A)(1) through (9)
- Must include possibility of executive session in the meeting notice and agenda
- Must vote to enter executive session
- Discussion is confidential
- No action permitted!
- Must have minutes or recording

Executive Sessions

- Just because you CAN have one, should you?
- Public suspicion vs. actual need



Executive Session Notice/Agenda

- Notice must include the statutory section authorizing the executive session
- Agenda must provide a general description of the matters to be discussed or considered
 - Needs to be more than a statutory citation
 - Need not contain information that would:
 - Defeat the purpose of the executive session
 - Compromise the legitimate privacy interests of a public officer, appointee, or employee
 - Compromise the attorney-client privilege

Who may attend executive sessions - A.R.S. § 38-431(2)

- Members of public body
- Persons subject to a personnel discussion
- Auditor general
- Individuals **whose presence is reasonably necessary** in order for the public body to carry out its executive session responsibilities
 - Clerk to take minutes/run tape
 - Attorney to give legal advice

Tip: Put on the record why individuals attending are reasonably necessary.

Executive Session Pitfalls

- Inappropriate disclosure
 - What happens in executive session stays in executive session!
 - Chair must remind members about the confidentiality requirement every time.
 - A.R.S. § 38-431.03(C)
- Taking legal action.
 - All votes must take place in public!



Personnel Matters

- May discuss and consider employment, assignment, appointment, promotion, demotion, dismissal, salaries, discipline or resignation
- Of an officer, appointee, or employee of the Board
 - Must be able to identify a specific individual

More considerations regarding Personnel Matters

- If the matter is noticed for a possible executive session, separate written notice to employee at least 24 hours before meeting.
- Employee may require meeting be held in public (does not include individual salary discussions).
- Employee does not have the right to attend executive session, but may. (Regardless, employee has access to portion of executive session meeting minutes.)

Common Questions

Q: *May you conduct personnel evaluations in executive session?*

A: Yes. See Ariz. Att'y Gen. Op. 196-012

Q: *May a board interview applicants in executive session?*

A: Yes, if position is one appointed by the board.
See Ariz. Att'y Gen. Op. 183-050.

Note: Must vote for appointment in public session

Confidential Information

- Discussion or consideration of records exempt by law from public inspection
- Can receive and discuss information and testimony that state or federal law requires to be maintained as confidential
- Discussion may occur in open session when confidential information is adequately safeguarded (i.e. use initial for medical patients)

Legal Advice



- Discussion or consultation for legal advice with attorneys **for the public body**
- Exchange of communication between lawyer and client
- Members may not discuss among themselves the merits or what action to take:
 - **Debate** over what action to take,
 - **pros and cons, or**
 - **policy implications** of competing alternative courses of action.

Other Possible Reasons for Executive Session

- Discuss and consult with attorneys to consider litigation, contract negotiations, and settlement. Can instruct attorney regarding public body's position.
- Discussion or consultation with designated representatives regarding negotiation with employee organizations about salary. Can instruct representatives regarding public body's position.
- International, Interstate, and Tribal Negotiations.
- Discussion or consultations with designated representatives regarding negotiations for the purchase, sale, or lease of real property. Can instruct representatives about public body's position.

Two New Possible Reasons for Executive Session

- “Discussion or consideration of matters relating to school safety operations or school safety plans or programs.”
- “Discussions or consultations with designated representatives of the public body in order to discuss security plans, procedures, assessments, measures or systems relating to, or having an impact on, the security or safety of buildings, facilities, operations, critical infrastructure information and information technology maintained by the public body. Records, documentation, notes, or other materials made by, or provided to, the representatives pursuant to this paragraph are confidential and exempt from public disclosure under this chapter and title 39, chapter 1.”
- Both added by Legislature in 2020.

Minutes

A.R.S. § 38-431.01(B)

- Minutes or recording required
 - Tape recordings – if created/used to transcribe minutes, must be retained for at least 3 months “[a]fter date of meeting and after minutes transcribed or summarized and approved.”

Content of Public Meeting Minutes

- A.R.S. § 38–431.01(B)
 1. Date, time and place of meeting
 2. Members present & absent
 3. General description of matters considered
 4. Accurate description of “all legal actions proposed, discussed or taken”
 5. A record of how each member voted
 6. Names of members who propose each motion
 7. Names of persons, as given, making statements or presenting material to the public body; and
 8. A reference to the legal action about which they made statements or presented material

Access to Public Meeting Minutes

- Minutes or a recording shall be open to public inspection **3 working days** after the meeting
- NOT AFTER APPROVAL

Meeting Minutes: cities and towns

- A.R.S. § 38-431.01(E)
- Cities and towns with population of more than 2,500 shall:
 - Post legal actions taken or any recording on its website within 3 working days
 - Post approved meeting minutes from city or town council meetings on its website within two working days following approval
- Posting must remain on website for one year

Subcommittees and Advisory Committees

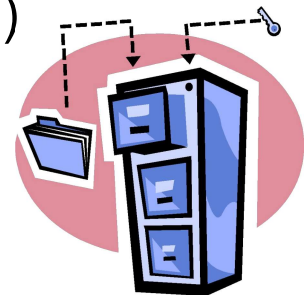
- A.R.S. §§ 38-431(6), 38-431.01(B) and (E)(3)
- Subcommittees and advisory committees must:
 - Take written minutes or record all meetings, including executive sessions
 - Within 10 working days of the meeting, **subcommittee or advisory committee of a city or town with a population of 2,500 or more** must:
 - Post a statement describing any legal action or
 - Post any recording of a public meeting

Licensing Authority Recordings

- A.R.S. § 32-4801 – Additional meeting-related requirements for licensing authorities BUT located outside of Open Meeting Law.
 - Passed in 2018 after veto and late session bill substitution.
Effective as of January 2019.
- Each “licensing authority,” as defined in A.R.S. § 31-4701, must comply with open meeting law requirements *and* make a “digital recording” of all public licensing authority meetings.
 - Not executive sessions.
- Must post digital records on its website no later than five days after meeting and keep it there for “at least” three years.
- “Except as prescribed by sections 32-3214 and 41-1092.09, post on its website all final decisions, orders and actions the licensing authority takes not later than five days after the meeting and retain this information on its website for at least three years.”

Executive Session Meeting Minutes

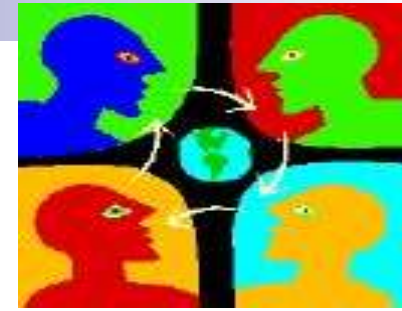
- Shall have written minutes or a recording
 - Burden of proof – *Fisher* case
- Shall include the following:
 - Date, time and place of meeting
 - Members present & absent
 - General description of matters considered
 - An accurate description of all instructions given
 - Such other matters as deemed appropriate by the public body
- Shall be kept confidential (A.R.S. § 38-431.03(B))



Access to Executive Session Meeting Minutes

- Meeting minutes of executive session shall only be released to:
 - Members of the public body
 - Officers, appointees, or employees who were the subject of discussion or consideration (only that portion)
 - Auditor general in connection with an audit
 - County attorney, attorney general or ombudsman when investigating alleged violations

Circumvention



- Cannot use any device to circumvent the law.
- “Splintering the quorum”:
 - Serial communications (verbal, written, electronic, etc.)
 - Meeting with individual members and then reporting what others said with enough to constitute a quorum
 - Polling the members

Non-verbal Serial Communications

- Letters - series of **letters** from one member to the next would violate OML
- E-mail – occurring at different times will still constitute a “meeting” in violation of the OML
 - Simultaneity is not required for there to be a “meeting”

Attorney General Opinion I05-004: E-mail

- Attorney General's website www.azag.gov
- Board members cannot use e-mail to circumvent the OML
- Cannot use e-mail among a quorum to:
 - Propose legal action
 - Discuss legal action
 - Deliberate on legal action
 - Take legal action

Electronic Communications

- Electronic communications are treated the same as any other form of communication between board members.
- Electronic communications exchanged among a quorum of the Board that involve discussion, deliberations, or taking legal action on matters that may come before the Board constitute a meeting and thus violate the open meeting law.

For example:

- You have a 5 member board
- One member sends an e-mail to 2 members and there's a response shared among all 3
- You now have a discussion among three members = a quorum
- Violation

Facts vs. Opinion?

- There is **no distinction** between discussing facts vs. discussing opinions among a quorum
- Deliberation = “collective acquisition and exchange of facts preliminary to a final decision”
- Therefore, 2-way discussion of facts (among quorum) regarding potential board business = violation

Board might consider...

- a statement on e-mail that provides:
“To ensure compliance with the Open Meeting Law, recipients of this message should not forward it to other members of the Board. Members of the Board may reply to this message, but they should not send a copy of their reply to other members.”

Staff E-mail

- Staff may send e-mail to board members.
- Passive receipt of information from staff, without more, does not violate the open meeting law.
Example: board packets

Prohibited 1-Way Communication

- A single board member may violate the OML if they propose legal action among a quorum outside a properly noticed meeting
- “Propose” – means “to put forward for consideration, discussion, or adoption.”
- It only takes 1 person to propose legal action
- CANNOT propose legal actions outside of a noticed meeting

Proposing an Agenda Item?

- Proposing an item for the agenda does not propose legal action
- **“without more”**
- Be cautious:
 - communicate the TOPIC only
 - NOT the legal action you want the board to take

“Propose” – EXAMPLES in the Opinion

- “We should discuss safety at First and Main”
 - Does NOT propose legal action

- “We should install a crosswalk at First and Main”
 - Does propose legal action
 - It’s more than a topic for the agenda because it urges or suggests an outcome

More Examples:

- “I think we should consider firing the City Manager at our next meeting.”
- “I would like to discuss the City Manager’s performance at our next meeting.”

Now, you try these:

- A board member sends an email to a quorum stating that the board should implement a program like the one described in the attached article.
- A board member sends an article to the quorum with no additional comments.

More Examples:

- A board member sends an article to the quorum and another board member responds with an opposing article.
- Three board members exchange emails discussing a topic that will be voted on at a future meeting. The quorum is four.

Staff & Other Persons

- Cannot knowingly direct staff to communicate in violation of the open meeting law – A.R.S. § 38-431.01(I)
- Sanctions may be imposed upon any person who knowingly aids, agrees to aid or attempts to aid another person in violating this article – A.R.S. § 38-431.07(A).

Communications with the Public

- Members may express opinions and discuss issues with the public at a venue other than a public meeting, personally, through the media or other public broadcast so long as it is not intended to circumvent the open meeting law

What does that mean?

- Discussion or opinion must not be principally directed at or directly given to other board members
- There is no plan to engage in collective deliberation to take legal action.
- Review these resources:
 - A.R.S. § 38-431.09(B) added by 2008 Session Laws, Ch. 135, § 1 (effective 9/26/08)
 - Attorney General Opinion I07-013

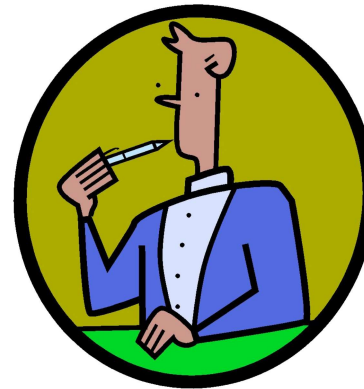
When in Doubt?



- RESOLVE ALL DOUBTS IN FAVOR OF OPENNESS. A.R.S. § 38-431.09.
- Legal action taken during a meeting held in violation of any provision of the open meeting law may be null and void unless ratified.

What to do when you learn that a potential OML violation has occurred.

- If in the thick of things = Recess/Assess
- Can you resolve the issue and continue?
- Does the particular OML violation taint your whole meeting? Maybe not – AG Opinion 108-001



After the meeting...



- Determine if you need to ratify any actions
- Provide refresher training to staff involved
- If you receive a complaint: Be candid; respond promptly
- Provide materials that help you: minutes, ratification materials, videotapes, etc.

Ratification – A.R.S. § 38-431.05

- Within 30 days after discovery of the violation or when should have been discovered with reasonable diligence
 - ▣ ***Tanque Verde Unified School Dist. v. Bernini***, 206 Ariz. 200, 76 P.3d 874 (App. 2003) (30 days after court ruling OK)

Ratification Continued...

- Notice 72 hours before the meeting. Includes:
 - Description of action to be ratified
 - Clear statement that the body proposes to ratify a prior action
 - Information on how to obtain detailed written description of the action.
- Written description must also be available 72 hours in advance. Must include:
 - Action to be ratified
 - All of the preceding deliberations, consultations and decisions that preceded and related to the action
 - Must be included in minutes of ratification meeting

Penalties - A.R.S. § 38-431.07(A)

- Individual members who violate and any persons who aid, attempt, or agree to aid – must be “knowingly”
 - **Civil penalty (paid by individual) up to \$500 second violation.**
 - **Up to \$2,500 penalty for third violation and on.**
 - Such equitable relief as the court deems appropriate
 - Reasonable attorneys’ fee
- Public body may not pay or reimburse for penalty imposed on individual
- **Only AG can commence suit against individual.**
- **If person who is otherwise liable “objected to the action of the public body and the objection is noted on a public record, the court may choose not to impose a civil penalty on that person.”**

Penalties - A.R.S. § 38-431.07(A)

- If “knowingly” violated “with intent to deprive the public of information” –
 - Court may remove public officer from office and
 - Charge officer and any person that aided, agreed to aid, or attempted to aid, all the costs and attorney’s fees

Legislation

- **SB1270 – This bill requires “schools, school boards, executive boards and municipalities” provide seating at meetings for “reasonably anticipated attendance” and require that meeting agendas note the time that the public can physically access the meeting location, with an exception for meetings held through technological means. This bill has not advanced beyond being introduced. This bill was signed into law on 4/6**
- SB 1318 – This bill would make many entities associated with charter schools, including some private entities, subject to the open meeting (and public records law). This bill has been second read and assigned to the Senate Education Committee.

Key Resources

- Arizona Agency Handbook, Chapter 7, <https://www.azag.gov/outreach/publications/agency-handbook>
- Ombudsman Publications <https://www.azoca.gov/about/publications/>
- Ombudsman website www.azoca.gov
- Department of Library, Archives, and Public Records <https://www.azlibrary.gov/>
- Case law
- Attorney General Opinions www.azag.gov Attorney General Opinions www.azag.gov or <http://azmemory.lib.az.us/>