

**THE OPEN MEETING LAW,
EXECUTIVE SESSIONS AND
PUBLIC RECORDS**

TUCSON UNIFIED SCHOOL DISTRICT

JANUARY 31, 2017

JULIA Z. SMOCK, ESQ.

OPEN MEETING LAW

- **ALLOWS THE PUBLIC TO OBSERVE AND TO LISTEN**
- **“IT IS THE PUBLIC POLICY OF THIS STATE THAT MEETINGS OF PUBLIC BODIES BE CONDUCTED OPENLY AND THAT NOTICES AND AGENDAS BE PROVIDED...WHICH CONTAIN SUCH INFORMATION AS IS REASONABLY NECESSARY TO INFORM THE PUBLIC OF THE MATTERS TO BE DISCUSSED OR DECIDED.”**

OPEN MEETING LAW

- **“TOWARD THIS END, ANY PERSON OR ENTITY CHARGED WITH THE INTERPRETATION OF THIS ARTICLE SHALL CONSTRUE ANY PROVISION OF THIS ARTICLE IN FAVOR OF OPEN AND PUBLIC MEETINGS.”**

A.R.S. § 38-341.09

WHAT IS A MEETING?

- **“THE GATHERING, IN PERSON OR THROUGH TECHNOLOGICAL DEVICES, OF A QUORUM OF MEMBERS OF A PUBLIC BODY AT WHICH THEY DISCUSS, PROPOSE OR TAKE LEGAL ACTION, INCLUDING ANY DELIBERATIONS BY A QUORUM WITH RESPECT TO SUCH ACTION.”**

A.R.S. § 38-431 (4)

WHAT IS A MEETING?

- **REGULAR MEETING REGARDLESS OF WHAT IT IS CALLED – STUDY SESSION, WORKSHOP, ETC.**
- **CHANCE OR PLANNED MEETING OUTSIDE OF BOARD ROOM AT WHICH BUSINESS IS DISCUSSED BY A QUORUM**
- **E-MAIL**
- **VIRTUAL MEETING**

WHAT IS A MEETING?

- **IF IT IS A MEETING, THEN THE NOTICE, AGENDA AND MINUTE REQUIREMENTS OF THE OML MUST BE FOLLOWED**
- **SUBTERFUGE, SCHEME, FRAUD OR DEVICE TO CIRCUMVENT THE OML WILL RESULT IN SERIOUS CONSEQUENCES**

THE E-MAIL OPINION

- **105-004**
- **USE OF E-MAIL BY A QUORUM OF A BOARD CAN CONSTITUTE A MEETING, EVEN IF THE QUORUM DOES NOT “TALK” TOGETHER IN THE SAME ROOM AT THE SAME TIME**
- **HYPOTHETICALS IN THE OPINION ARE VERY INSTRUCTIVE**

THE E-MAIL OPINION

- **DISCUSSION BETWEEN LESS THAN A QUORUM FORWARDED TO A QUORUM BY A BOARD MEMBER OR AT A BOARD MEMBER'S DIRECTION VIOLATES THE OML**
- **IF A STAFF MEMBER OR BOARD MEMBER E-MAILS A QUORUM AND THERE ARE NO FURTHER E-MAILS AMONG THE MEMBERS, THERE IS NO VIOLATION**

THE E-MAIL OPINION

- **A BOARD MEMBER MAY E-MAIL STAFF AND A QUORUM OF THE BOARD ASKING THAT A MATTER BE PLACED ON A FUTURE AGENDA**
- **WITHOUT MORE, THIS DOES NOT “PROPOSE LEGAL ACTION”**
- **BUT NO DISCUSSION BACK AND FORTH ABOUT THE MERITS OF THE PROPOSAL ITEMS IS PERMISSIBLE**

THE E-MAIL OPINION

- **E-MAIL FROM SUPERINTENDENT OR STAFF TO QUORUM OF BOARD IS OKAY**
- **IF A BOARD MEMBER REPLIES TO THE SUPERINTENDENT, THAT'S OKAY**
- **IF A BOARD MEMBER REPLIES TO ALL OR A QUORUM, THAT'S A VIOLATION**
- **IF THE SUPERINTENDENT FORWARDS A BOARD MEMBER'S RESPONSE TO A QUORUM, THAT'S A VIOLATION**

EXECUTIVE SESSIONS

- **A.R.S. § 38-431.03 PROVIDES EXCEPTIONS TO THE REQUIREMENT THAT MEETINGS MUST BE HELD IN PUBLIC, INCLUDING:**
 - **PERSONNEL**
 - **REAL ESTATE**
 - **CONFIDENTIAL INFORMATION**
 - **PENDING/CONTEMPLATED LITIGATION**
 - **LEGAL ADVICE**

EXECUTIVE SESSIONS

- **REQUIRES NOTICE ON PUBLIC MEETING AGENDA AS WELL AS A MOTION AND A VOTE BY THE BOARD**
- **BOARD PRESIDENT MAY NOT JUST ANNOUNCE THAT THE BOARD IS GOING INTO EXECUTIVE SESSION**
- **SPECIFIC REASON(S) FOR EXECUTIVE SESSION MUST BE INCLUDED ON THE AGENDA BY STATUTORY SUBSECTION**

EXECUTIVE SESSIONS

- **INDIVIDUAL BEING DISCUSSED MUST BE ADVISED IN WRITING MORE THAN 24 HOURS BEFORE THE MEETING THAT S/HE IS BEING DISCUSSED**
- **INDIVIDUAL BEING DISCUSSED MUST BE GIVEN OPPORTUNITY TO HAVE DISCUSSION HELD IN PUBLIC**

EXECUTIVE SESSIONS

- **INDIVIDUAL BEING DISCUSSED IS NOT REQUIRED TO BE PERMITTED IN EXECUTIVE SESSION**
- **INDIVIDUAL BEING DISCUSSED IN EXECUTIVE SESSION HAS ACCESS TO EXECUTIVE SESSION MINUTES WHETHER OR NOT S/HE WAS PERMITTED TO ATTEND**

EXECUTIVE SESSIONS

- **NOT EVERY EMPLOYMENT ISSUE CAN TAKE PLACE IN EXECUTIVE SESSION**
 - **DISCUSSION OF ISSUES APPLICABLE TO ALL EMPLOYEES IS NOT EXECUTIVE SESSION MATERIAL**
 - **DISCUSSION OF ISSUES RELATED TO SPECIFIC GROUPS OF EMPLOYEES IS NOT EXECUTIVE SESSION MATERIAL**
- **EVALUATION ISSUES THAT ARE PROSPECTIVE – SUCH AS GOALS – SHOULD NOT BE DISCUSSED IN EXECUTIVE SESSION; THOSE THAT ARE RETROSPECTIVE – HAVE THE GOALS BEEN MET? – ARE APPROPRIATE FOR DISCUSSION IN EXECUTIVE SESSION**

EXECUTIVE SESSION PITFALLS

- **CONFIDENTIALITY**
 - **LAW REQUIRES WHAT IS SAID IN EXECUTIVE SESSION TO BE KEPT IN EXECUTIVE SESSION**
 - **THE FACT THAT AN EXECUTIVE SESSION IS BEING OR HAS BEEN HELD IS NOT CONFIDENTIAL SINCE THE FACT OF ITS OCCURRENCE IS PUBLIC – REQUIRES ITEM TO APPEAR ON PUBLIC SESSION AGENDA AS WELL AS BOARD VOTE TO GO INTO EXECUTIVE SESSION**
 - **THE DISCUSSION THAT OCCURS IN EXECUTIVE SESSION IS CONFIDENTIAL**

EXECUTIVE SESSION

- **AS ASSISTANT ATTORNEY GENERAL SMITH STATED IN HIS LETTER TO YOU DATED AUGUST 12, 2016, “MAKING ANY STATEMENT ABOUT EXECUTIVE SESSIONS POSES RISKS. AS A ‘BEST PRACTICE’ THE AGO RECOMMENDS THAT BOARD MEMBERS AVOID MAKING ANY STATEMENTS ABOUT AN EXECUTIVE SESSION OTHER THAN THE FACT THAT ONE WAS HELD AND THE BASIS FOR HOLDING SUCH AN EXECUTIVE SESSION, BOTH OF WHICH ARE PUBLIC KNOWLEDGE AS THEY HAVE TO BE POSTED ON AN AGENDA.”**

EXECUTIVE SESSION

- **IF I WERE ADVISING YOU, I WOULD TELL YOU NOT TO TALK ABOUT EXECUTIVE SESSIONS AT ALL, EXCEPT TO MAKE APPROPRIATE REFERENCES TO HAVING BEEN IN EXECUTIVE SESSION IN THE FORM OF ANY MOTION THAT MIGHT OCCUR AFTERWARD IN PUBLIC SESSION.**

EXECUTIVE SESSION

- REASONS FOR EXECUTIVE SESSION ARE LARGELY PERMISSIVE RATHER THAN MANDATORY
- WITH THE EXCEPTION STUDENT DISCIPLINE MATTERS AND A FEW STATE AND FEDERAL REGULATORY REQUIREMENTS, YOU COULD CONDUCT ALL OF YOUR BUSINESS IN PUBLIC
- THAT DOES NOT MAKE SENSE IF YOU WANT TO, FOR EXAMPLE, PRESERVE THE ATTORNEY-CLIENT PRIVILEGE OR ALLOW FOR TRUE NEGOTIATIONS WITH EMPLOYEE GROUPS OR GET THE BEST PRICE FOR REAL ESTATE

EXECUTIVE SESSIONS

- **BUT JUST BECAUSE YOU CAN, IT DOESN'T NECESSARILY MEAN YOU SHOULD**
- **THE CLEARLY STATED POLICY IN THE LAW IS TO FAVOR OPENNESS; IF IT IS UNCLEAR THAT THE LAW PERMITS GOING INTO EXECUTIVE SESSION, YOU SHOULD RESOLVE ANY DOUBTS IN FAVOR OF DISCUSSION OF THE ITEM IN PUBLIC SESSION**
- **THE BUZZ WORD OF TODAY FOR GOVERNMENT ENTITIES IS TRANSPARENCY**

MINUTES

- **THE OPEN MEETING LAW REQUIRES MINUTES TO BE KEPT**
- **MINUTES HAVE NO “SHELF LIFE;” THEY ARE TO BE KEPT FOREVER**
- **THE LAW ONLY REQUIRES THAT THE NAME OF THE MEMBER MAKING A MOTION BE INCLUDED IN THE MINUTES, BUT INCLUDING THE MEMBER SECONDING THE MOTION AS WELL AS THOSE WHO VOTED FOR AND AGAINST MAKES SENSE – THE MINUTES PROVIDE THE HISTORICAL RECORD OF YOUR MEETINGS**

CAUTIONARY TALES

- **DURING THE 2015 LEGISLATIVE SESSION, LEGISLATION WAS INTRODUCED TO “RELAX” THE OPEN MEETING LAW BY DEFINING LEGAL ACTION AS THE FINAL VOTE ONLY. SENATOR SYLVIA ALLEN WAS QUOTED AS STATING THAT “[T]HERE’S BETTER GOVERNMENT IF ELECTED OFFICIALS, THE ONES THAT ARE RESPONSIBLE AND ACCOUNTABLE, CAN HAVE THE FREEDOM TO BE ABLE TO TALK.”**

THE ARIZONA REPUBLIC, 02.02.15

CAUTIONARY TALES

- **AN EDITORIAL IN THE SAME PAPER THREE DAYS LATER BEGAN,**
 - **“PUT TOTO ON A LEASH. IF A BIPARTISAN GROUP OF LAWMAKERS GET THEIR WAY, YOU WILL NO LONGER BE ABLE TO PULL BACK THE CURTAIN AND SEE WHAT THE WIZARD OF GOVERNMENT IS UP TO.”**

TOTO IS NOT ON A LEASH IN ARIZONA!



ANOTHER CAUTIONARY TALE

- **IN MAY 2015, MARICOPA COUNTY BOARD OF SUPERVISORS WENT INTO EXECUTIVE SESSION TO DISCUSS WHETHER TO WEIGH IN ON SHERIFF ARPAIO'S ATTEMPT TO REMOVE JUDGE SNOW FROM HIS COURT CASE. WHEN THE BOARD RETURNED TO PUBLIC SESSION, A MOTION WAS MADE TO "TAKE ACTION CONSISTENT WITH THE EXECUTIVE SESSION DISCUSSION." SOME OF THE MEMBERS MADE LIGHT OF THE MOTION, SUGGESTING THAT THE PRESS COULD "READ BETWEEN THE LINES."**

ANOTHER CAUTIONARY TALE

- **ARIZONA REPUBLIC COLUMNIST PAT FLANNERY, SENIOR EDITOR FOR GOVERNMENT ACCOUNTABILITY WROTE:**

“THE BOARD’S ACTION IS SYMPTOMATIC OF A DEEPER PROBLEM: GOVERNMENT AT EVERY LEVEL AND ITS DECISION MAKERS ROUTINELY DISREGARD LAWS INTENDED TO KEEP PUBLIC RECORDS ACCESSIBLE, GOVERNMENT ACTIVITIES OPEN AND CITIZENS INFORMED.”

THE ARIZONA REPUBLIC, 05.31.15

A LITTLE BIT ABOUT PUBLIC RECORDS...

- **“PUBLIC RECORDS AND OTHER MATTERS IN THE CUSTODY OF ANY OFFICER SHALL BE OPEN TO INSPECTION BY ANY PERSON AT ALL OFFICE HOURS.” A.R.S. § 39-121**

PUBLIC RECORDS

“ANY PERSON MAY REQUEST TO EXAMINE OR BE FURNISHED COPIES, PRINTOUTS OR PHOTOGRAPHS OF ANY PUBLIC RECORD DURING REGULAR OFFICE HOURS OR MAY REQUEST THAT THE CUSTODIAN MAIL A COPY OF ANY PUBLIC RECORD NOT OTHERWISE AVAILABLE ON THE PUBLIC BODY’S WEBSITE TO THE REQUESTING PERSON.”

A.R.S. § 39-121.01(D)(1)

PUBLIC RECORDS

***GRIFFIS V. PINAL COUNTY*, 215 ARIZ. 1, 156 P.3D418 (2007) (QUOTING *SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY V. ROGERS*, 168 ARIZ. 531, 815 P.2D 900 (1991)) SAYS A PUBLIC RECORD IS ONE:**

“MADE BY A PUBLIC OFFICER IN PURSUANCE OF A DUTY, THE IMMEDIATE PURPOSE OF WHICH IS TO DISSEMINATE INFORMATION TO THE PUBLIC, OR TO SERVE AS A MEMORIAL OF OFFICIAL TRANSACTIONS FOR PUBLIC REFERENCE”;

PUBLIC RECORDS

- **GOVERNING BOARD RELATED E-MAILS, TEXT MESSAGES, AND ANY OTHER FORM OF ELECTRONIC COMMUNICATION ARE PUBLIC RECORDS, EVEN IF YOU USE YOUR PERSONAL EQUIPMENT AT HOME OR IN YOUR CAR**
- **AND THOSE ELECTRONIC RECORDS CAN BECOME THE BASIS OF A MEETING OF A QUORUM OF THE BOARD EVEN THOUGH YOU ARE NOT ALL TOGETHER IN THE SAME PLACE AT THE SAME TIME**

TEXT MESSAGING DURING MEETINGS

- NO CONCERN RE: OML IF NOT TEXTING TO A QUORUM**
- BUT...BE MINDFUL OF THE APPEARANCE OF IMPROPRIETY/DOING BUSINESS OUT OF THE PUBLIC EYE AND PERCEIVED LACK OF ATTENTION TO MEETING AT HAND BY MEMBERS OF PUBLIC PRESENT AT MEETING**

TEXT MESSAGING DURING MEETINGS

- **PEORIA CITY COUNCIL ADOPTED POLICY WHICH “BANS MEMBERS FROM USING ANY ELECTRONIC DEVICE CAPABLE OF SENDING MESSAGES DURING EXECUTIVE SESSION OR A PUBLIC MEETING.” *THE ARIZONA REPUBLIC, COMMUNITY NEWS, 01.10.14* (ARTICLE WRITTEN BY JACKEE COE)**

ANOTHER CAUTIONARY TALE...

- **GLENDALE CITY COUNCIL WAS UNDER INVESTIGATION BECAUSE OF AN OML COMPLAINT FROM THE MAYOR WHO BELIEVED A MAJORITY OF COUNCIL MEMBERS VIOLATED THE LAW BY DISCUSSING THE DEAL THAT KEPT THE COYOTES HOCKEY TEAM IN GLENDALE. COUNCIL MEMBER A SENT AN E-MAIL TO D STATING THAT A, B AND C HAD BEEN DISCUSSING THE DEAL THE NIGHT BEFORE AND THEY WERE ALL “ON BOARD.” DEAL WITH COYOTES WOULD HAVE BEEN DEEMED VOID AND REQUIRE A RE-VOTE IF A.G.’S OFFICE FOUND A VIOLATION OF THE OML**

AND ANOTHER CAUTIONARY

TALE

- **FAILURE BY FORMER CORPORATION COMMISSIONER TO PRODUCE TEXT MESSAGES; REASONS FOR FAILURE TO PRODUCE THE MESSAGES INCLUDED THAT THEY WERE NOT AVAILABLE THROUGH VERIZON AND THE PHONE WAS THROWN OUT**
- **ON 06.27.15, AZ REPUBLIC COLUMNIST LAURIE ROBERTS SAID:
“A STATE REGULATOR REGULARLY SENDS TEXT MESSAGES TO A UTILITY EXECUTIVE, A PAIR OF UTILITY-FRIENDLY COMMISSION CANDIDATES AND THE HEAD OF A DARK-MONEY GROUP SUSPECTED OF FRONTING FOR THE UTILITY DURING ELECTION SEASON. HE THEN ROUTINELY DELETES THE TEXTS. THEN HE DELETES HIS STATE-SUPPLIED PHONE BY THROWING IT AWAY. HMMMM.”**

AND ANOTHER CAUTIONARY

TALE

- **A MEMBER OF THE CORPORATION COMMISSION LATER SUGGESTED THAT PUBLIC RECORDS REQUESTS SHOULD REQUIRE A COURT ORDER**
- **LAURIE ROBERTS AGAIN:**
 - **“DARN THOSE PESKY LAWS THAT ALLOW THE PUBLIC TO SEE WHAT THE HECK OUR LEADERS ARE UP TO...QUOTING COMMISSIONER BURNS, ‘THE POLICE DON’T COME INTO YOUR HOME WITHOUT A WARRANT...THERE’S LIMITATIONS AND REQUIREMENTS TO BE MET.’ ROBERTS’ RESPONSE: “THE CORPORATION COMMISSION ISN’T YOUR HOME. I BELIEVE, TECHNICALLY SPEAKING, IT IS OURS.”**

AZ REPUBLIC, 08.17.15

Final Thought

- **REMEMBER – THERE IS ALWAYS A TOTO WILLING TO WORK HARD TO PULL THE CURTAIN BACK TO EXPOSE THE WIZARD IF LACK OF TRANSPARENCY IS SUSPECTED!**

RESOURCES

- OML - A.R.S. §§ 38-431–439; PUBLIC RECORDS A.R.S. §§ 39-101-161
WWW.AZLEG.GOV/ARIZONAREVISEDSTATUTES
- ARIZONA AGENCY HANDBOOK, CHAPTERS 6 AND 7
WWW.AZAG.GOV (“AGENCY HANDBOOK” IN SEARCH BAR)
- OPEN MEETING LAW A.G. OPINIONS WWW.AZAG.GOV (“OPEN MEETING LAW” IN SEARCH BAR)
- ARIZONA OMBUDSMAN’S OFFICE
WWW.AZLEG.GOV/OMBUDSMAN
- ARIZONA STATE LIBRARY, ARCHIVES AND PUBLIC RECORDS - WWW.AZLIBRARY.GOV

THANK YOU!

JULIA Z. SMOCK

LEADERSHIP CONSULTANT

JZSMOCK@AOL.COM