

Open Meeting Law: Beyond the Basics

Susan Segal

Gust Rosenfeld

Goal for this presentation

- Address frequently encountered situations, issues and problems.
- Go beyond the basics.
- Address how the Open Meeting Law has been misinterpreted and misunderstood.
- Discuss legal requirements of the Open Meeting Law vs. Best Practices.

An ah-ha moment . . .

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



A diagram consisting of seven red hexagons arranged in a circular pattern around a central hexagon. The central hexagon is a darker shade of red, while the surrounding six are a lighter shade. Each hexagon contains white text representing a legal topic.

Public Records

Board Governance

Open Meeting Law

Student Discipline and
Employment Hearings

Election Law (Overrides
and Bond Elections)

Attorney-Client
Privilege

Conflict of Interest
Laws

Who is subject to OML (Besides the Governing Board)?

- 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 Superintendent.

What if we direct the Superintendent to establish an advisory committee?

What if we direct who is on the committee?

What if Board members serve on the committee?



A quorum

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

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.
- AG says cannot require 3 votes.
- 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. That is what Section B of your Board policy says.
- 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.
- Lists of employees and vouchers.
 - Available at a public place at least twenty-four hours ahead of the meeting.

Agendas

Superintendent and Board Reports.

In the 1990s there were a series of open meeting law violations by school board members. The case of the “Nefarious Mrs. N” as coined by another school board member.

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.

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.

Lots of unanswered questions.

OML in the Age of Technology

Emails.



One member or Superintendent 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? Probably.

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.

OML in the Age of Technology

Looks like a duck . . .

“Unless anyone objects, I will send this out . . . “

Del Papa v. Nevada Board of Regents.

Call to the Public

- Reasonable time, place and manner.
- Crowd control.
 - Recess, recess, recess.
 - Give opportunity to register support or opposition without talking.
- Responding:

At the **conclusion** of an open call to the public, **individual members of the public body** may respond to criticism made by those who have addressed the public body, may ask staff to review a matter or may ask that a matter be put on a future agenda. **This does not mean a discussion.**

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)

Who may attend?

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

Executive Sessions

38-341.03(A)(1) Personnel

1. Does the employee have a right to attend? No. Just has a right to have matter discussed in public.
2. Does the employee have a right to minutes? Yes.
3. Can this paragraph be used to discuss reorganization? Not unless specific employees are discussed.
4. 24 hour notice to employee—does this also apply to non-employee applicants? Yes.

Executive Sessions

38-341.03(A)(2) Confidential Records

1. Student Records.
2. Particular Teacher Evaluations.

Executive Sessions

38-341.03(A)(3) Legal Advice.

Cannot be used as a ruse to talk to each other behind closed doors.

Remember legal advice means that the attorney is doing the talking.

“Once the members of the public body commence any discussion regarding the merits of enacting the legislation or what action to take based upon the attorneys' advice, the discussion moves beyond the realm of legal advice and must be open to the public.”

City of Prescott v. Town of Chino Valley

Executive Sessions

38-341.03(A)(4) Instructing your Attorney

- When is a vote not a vote?
- Applies to:
 - contracts that are the subject of negotiations.
 - pending or contemplated litigation.
 - settlement discussions conducted in order to avoid or resolve litigation.
- But you should also take the (silly?) step of voting in public. *Johnson v. Tempe Elementary*.
- Minutes should reflect instructions.

And speaking of legal advice . . .

- Of course, e-session discussions are confidential.
- But . . . What happens if attorney advice gets out?
- Only the Board may waive attorney-client privilege.

Questions?