



**PIMA COUNTY ELECTION INTEGRITY COMMISSION
MEETING MINUTES FOR JUNE 20, 2014**

<http://www.pima.gov/commission/ElectionIntegrity.shtml>

The Pima County Election Integrity Commission met in regular session on June 20, 2014 at 9:00 a.m. in the Herbert K. Abrams Building, 1st Floor Conference Room #1104 at 3950 S. Country Club Road, Tucson, Arizona.

ITEM 1. ROLL CALL

Present: Bill Beard, Mickey Duniho, Pat Pecoraro, Benny White, Brad Nelson, Barbara Tellman, Arnie Urken, Tom Ryan (via telephone conference), Chris Cole.

Others in Attendance: Ellen Wheeler, County Administrator's Office

Absent: Matt Smith, Elaine Lim

ITEM 2. PLEDGE OF ALLEGIANCE

Those in attendance stood for the Pledge of Allegiance.

ITEM 3. OPEN MEETING LAW BRIEFING – Tobin Rosen, Deputy County Attorney

Tobin Rosen, Deputy County Attorney, gave an overview of Arizona's Open Meeting Law, using a reference guide created by the County Attorney's office. [A copy of this reference guide is incorporated into these minutes.]

ITEM 4. APPROVAL OF MINUTE SUMMARY – May 9, 2014

It was moved by Pat Pecoraro, seconded by Arnie Urken and carried unanimously to approve the Summary of the May 9, 2014 meeting.

ITEM 5. REVIEW OF MAY 20, 2014 ELECTION PROCESS

Barbara Tellman told the Commission that she and Benny had observed the entire process. The people that raised the objections [in the May 9th EIC meeting] appeared to be very satisfied with the way the process was handled. Brad Nelson was glad to oblige with their request to count all the ballots on election night, but he couldn't commit at the time of the meeting because he needed to confer with the County School Superintendent and his staff first.

Bill Beard asked about how things were handled with Apollo Middle School and whether observers were allowed. Benny White stated that observers were not allowed inside. When questions arose about the justification for that, Ellen Wheeler explained that she had spoken to Chris Roads in the Recorder's office, and the concerns he expressed about that location were that school was open that day and that they were in, as he explained, a room inside the school on a hallway that opens up to the rest of the school, and that he had to maintain security. Also, if each of the school board candidates wanted to have observers, there would have been quite a few people.

Mickey Duniho had a question about what the law requires. He understood there was the assumption that a voting device was in the location, and people were actually coming in and filling out ballots, in which case, it became a satellite voting center and then observers were required to be allowed. In Brad's discussion with various county recorders around the state, an early voting satellite is the equivalent of a polling place in some instances, and in other instances it's not. Benny White responded that there is no provision for curious observers to be inside the polling place. The only purpose for having a challenger is to challenge the qualification of the voter. The only other reason for being inside the polling place is to vote. There is a difference between "observer" and "challenger." The statute uses the term "challenger" when referring to an individual inside the actual polling location.

Barbara Tellman stated that an item should be placed on the July meeting agenda to discuss this, and Mickey requested that someone from the Recorder's office be present at that meeting to clarify this issue.

ITEM 6. REMOVAL OF POLLING PLACE SCANNERS –Brad Nelson

Brad provided an updated handout of the 25 Pima County precincts that will be part of the pilot program during the August 26th Primary Election for removing the ballot scanners, and using electronic poll books. This is in the Recorder's hands right now to see if she has any suggestions, comments or objections, and in discussion with Recorder's Office staff, it does not appear that the program will expand in the General Election to do an additional 25. The 25 precincts in the Primary Election will be the same 25 in the General Election assuming that the pilot in the Primary is successful. For the coming General Election there are some advantages to that, in that it is uniform all the way through for both the Primary and General for poll workers and the voters. The predominant reason these 25 were chosen was for the Wi-Fi capability for communication with the electronic poll books. [A copy of the updated list of pilot precincts is incorporated into these minutes.]

Mickey asked if there would be a way that voters could comment at these 25 precincts; Brad responded that it is a good idea, and he may be able to assign an extra Marshal to each precinct to collect comments.

Arnie Urken asked about the security of the electronic poll books, and whether something in writing could be provided that describes the security standards of the device and any testing that has been done on it. Brad responded that security is the number one priority of the Pima County Recorder; the best source to determine the integrity of the device would be the Apple Corporation, rather than the vendor.

Bill Beard inquired if the electronic poll books had actually been procured, and Brad responded that they had not, and he was hoping that would happen after a subsequent meeting on June 27th with the Recorder and presumably the vendor to discuss security of the devices and administration of the process. It is Brad's hope that an actual agreement can be reached between the County and the vendor after this meeting. When the e-poll books are procured, training will be given to the three poll workers in each precinct that will be handling the device; this training is in addition to the regular training all poll workers receive.

Brad presented two proposed educational outreaches to voters. He provided a proposed postcard that will go to households of these 25 pilot precincts informing them of the removal of the scanners and the financial theory behind the pilot project. [A copy of the proposed postcard is incorporated into these minutes.] There will be separate communication to all voters, probably via the sample

ballot, on the impact of over-voting their ballot, and on how to acquire a replacement ballot if this happens. This information may also be posted in each polling booth and on the ballot secrecy sleeve.

Benny asked Brad if one of the requirements of the electronic poll books is that the device generate a record at the end of Election Day that will show how many voters of each category cast a ballot. That is Brad's intention. His understanding is that each of these tablets will have attached via Bluetooth a printer that will do a number of things. This printer will be able to print out a receipt that shows the name of the voter and which ballot style they will get. That particular piece of paper goes to the ballot judge, and theoretically, the number of pieces of paper should equal the number of ballots issued at the polling place. These will be individual pieces of paper in addition to the electronic tally that is incrementing up from zero at the beginning of Election Day. At the end of Election Day, the printer should be able to print each variation of ballot issued and a total. The current paper rosters will be available as a backup, but voters will not sign the paper rosters. They will sign on the electronic pad, much the way one does in a commercial setting such as a department store.

Mickey inquired about the poll lists that are currently issued to party representatives. Brad responded that for the 2014 elections the paper poll lists will continue to be used. It is his hope that in the future, the paper poll lists won't be necessary, as a list may be generated and printed from the electronic poll books. Hypothetically, the tablets could be in communication with Election Central while the polls are open, and someone can go to a central location, presumably the Recorder's office, during Election Day and find out about the voting at precinct "X."

Bill Beard asked if a Logic and Accuracy Test (L&A) is required and would one be conducted on the electronic poll books. Brad was not sure what tests other jurisdictions do on their devices, but since there is no vote tabulation occurring on the electronic poll books, an L&A is probably not mandated.

Brad did say he got notification recently that the L&A testing will be taking place on July 18th for the touchscreen equipment, and August 18th for the Secretary of State testing.

Brad recalled that during a prior meeting Mickey had asked for information on the fiscal impact of going scanner-less in the polling places. Brad looked at some other counties that have recently purchased what Pima County may purchase. A scanner, both the scanner and ballot box and peripherals are about \$6,600 per unit, so about \$1.8 million to purchase a scanner for each polling location plus have some in reserve for breakages or expansion; Mickey assumes these items would have a lifespan of eight or ten years.

Barbara Tellman asked how the touchscreen devices fit into the scanner-less environment. Brad responded that at the polls, nothing will be changing for accessible voting. The scanner-less precincts will still have the TSX equipment. Mickey asked if the TSX machines would be integrated into the new central count equipment. Brad responded that the current TSX machines are not compatible with the new system, and alternatives were offered at the ES&S presentation that Benny and Barbara attended. But new TSX equipment will not be needed until 2016. There may be devices coming up for certification in the next several months that might be compatible with the new central count equipment Pima County is proposing to purchase.

ITEM 7. ELECTION SYSTEM PROCUREMENT

- Update – Brad Nelson**
- Report on ranked voting and security in current RFP – Brad Nelson**
- EIC Recommendations – Barbara Tellman / Benny White**

Barbara Tellman prefaced this discussion by stating that the three of them that were involved with the Procurement Department were told they could not talk to each other or anybody else on the subject. They were told that once there was a demonstration and there was only one vendor, they could now discuss the subject.

Brad reported that on June 17th, ES&S demonstrated their hardware and software to the 6-member evaluation committee consisting of Barbara Tellman and Benny White from the Election Integrity Commission, Brad and Bryan Crane from the Elections Department, and Diana Anderson and Tim Chavez from Pima County's IT Department. The evaluation committee drafted a script of 50 questions; speaking for himself, Brad thought the 50 questions were fully answered by ES&S. The equipment had been used for ranked voting in Minneapolis recently. Brad provided a handout discussing three separate tests done on the equipment that addressed the security of the equipment. [A copy of this security handout is incorporated in these minutes.]

Benny White gave his impressions of the demonstration by ES&S on the Electronic Voting System (EVS) 5.0.0.0, consisting of a workstation that controls the server which uses a database built in SQL. There is a client workstation that controls the election management system, called Election Ware, and an election reporting manager. There were two DS850's which are the tabulator systems; these are networked into the server for download of results. They demonstrated the 5.2.0.0 that has the precinct polling place machine, designed to be handicapped accessible and HAVA compliant, although they are not part of the proposal being looked at right now. ES&S demonstrated these devices on request, knowing they would not be purchased right now, to test the expansion of the proposed system, and in light of the uncertainty of removing scanners from the polling place.

Benny felt the questions were answered, and he specifically pushed the issue of security. Modem capability is not built into the system the committee saw. The design is dependent on USB keys. He is concerned about this. One of the vulnerabilities of USB keys—and one reason the US Department of Defense does not allow the use of any USB keys near the secure server or any PC with classified information on it—is when the USB is inserted into the port a “handshake” occurs, and malicious software can be added into that “handshake.” On the ES&S system, there are features that ES&S is convinced provide adequate security. The USB keys themselves are proprietary devices that must be acquired through the vendor that makes them for ES&S. Three levels of passwords are required, and the key can only be used one time. The election would be recorded to the USB key at the client workstation; the USB would then be inserted into the DS850 or DS200, which is the current polling place machine. Those extract the information from the USB key. The design of the system is that the USB key would remain inserted in the DS850 or DS200 and then at the conclusion of the tabulation, that information would be loaded onto the USB key which would then be taken back to the server. Benny is satisfied that ES&S has taken a very serious look at the security of communication between the server, the workstations, the Election Ware report manager and the DS850 or the DS200 being dependent on this USB key transferal. To further answer the question of security, if this equipment is purchased, protocols will have to be developed and audits conducted through Logic and Accuracy testing on the devices.

Chris Cole inquired whether reports could be created on this system and shared. Benny said that, yes, reports can be run and all activities are on the log and those logs are audited. Once a batch of ballots is run on the DS850 tabulator the information is downloaded through the network to the server and

at that point the DS850 doesn't remember anything about that batch. For the hand-count audit, Benny was hopeful that the DS850 could be used to retrieve data on a certain batch of early ballots, but the system can't do that yet. The next version, 5.2.0.0 will be able to do that. The 5.2.0.0 is supposed to be certified in June 2014. If Pima County elects to purchase this system, as new software versions are certified, the system will be updated.

Bill Beard asked if the logs are for both the software on the server system and for the operating system software; Benny said yes. Bill then asked about the DS850 which is the ballot tabulator, or the DS200, which essentially is the precinct scanner, once the key is inserted into the either of those machines and then removed, the internal storage on those machines is gone, so whatever was previously tabulated is now only on that key. Benny concurred there is no internal storage once the key is removed. Bill also asked that if something happens to that USB key in the time between moving it from point A and point B, the only backup is the physical ballots themselves. Benny confirmed that if something happened to the key, the ballots would have to be counted again.

Arnie asked that if the data were to disappear and couldn't be examined except by replicating it, how could it be confirmed that the second replication is equivalent to the first? As part of the design and manufacturing of this system, are tests done for these kinds of scenarios? Benny's response was, that is why the hand-count audits are done. Also, the logs that are generated show every action, when and by whom. The system captures a PDF of every ballot, and these would be discoverable in the case of a judicial action. Mickey suggested that for the purposes of the hand-count audit, the PDF's might be able to be sorted by precinct, and also by district. Instead of looking at the actual ballots, the PDF's could be viewed.

Duplication of ballots would still need to be done by hand with this system, rather than manipulating the ballot electronically, as can be done with other systems. From an election administration viewpoint, electronic adjudication could create problems with discrepancies in the case of a recount. Benny explained that this system does do some analysis of markings and makes some corrections, such as shadowing created by white-out, or printer smudges. The early ballot boards may need some retraining on which ballots really do need to be duplicated. Benny anticipates that this system will only require a small fraction of ballots to be duplicated compared to those that are currently being duplicated.

The one thing that Benny didn't see that he wanted to was how the system handles the precinct split issue and how the information is reported.

Tom Ryan asked Benny if he received a response from the vendor as to what they consider proprietary; his greatest concern is for the imagery and database. Benny had commented to them about discoverability, and their response indicated that they do not consider the database or the images to be proprietary. However, the database requires their software to interpret it because it is an accumulation of scripts, not a text file or an Access database, etc. If someone wanted to review the database they would have to have Election Ware software and all the various keys and passwords required to look at it. Benny had posed the question in the framework of discoverability: Is there at least one method that a plaintiff could use to read the database? The answer was yes, but the Election Ware software is required to do it. And the court could order that the machines and software be produced. The proprietary agreement does not rule out an independent third party from using the software and software licensing would not necessarily be violated. Tom noted that the GEMS software has two different types of databases; one that could only be read by the GEMS system, and one format that could be read by Microsoft Access.

Benny's overall conclusion is that this is a "full-up" election system and ES&S has covered every aspect of election administration.

Bill asked if there was anything about the system that would require a change in state law. He noted that technology has leap-frogged, where the law hasn't and doesn't even address some things. Benny's answer was no. There may be things that they anticipate being able to do in the future, and then the answer would probably be yes.

Barbara Tellman mentioned that the server operates on Linux, and the rest of the system (workstations and client) operates on Windows 7; all software and system updates are included. The ES&S representatives discussed sending someone here to physically install any updates, and give any required training on the updates.

Another of Benny's concerns is that the system is delivered with an anti-virus application. When making an audio file for the accessible devices, there is the transport of information out of the system for a third party to create the audio file. That audio file comes from outside the system, and bringing it into the system is his concern. The anti-virus application is on this system for that purpose. But if the server is not hooked up to the internet, how can the anti-virus application be updated? ES&S did concur that is a problem, but their customers want to have the anti-virus application on the system. Any anti-virus executable updates would have access to the operating system, and would need to be certified. Benny asserts that when any media of any type is inserted in the system, it must be anti-virus checked prior to insertion into any of the election system computers.

The bottom line is, said Mickey, this is the reason hand-count audits are necessary. There are so many ways that malicious software can be introduced into a system, and there is no way to guarantee that it isn't there until you have added up all the ballots. Arnie added that it isn't just the maliciousness, but internal errors in the software.

Arnie wanted to go back to the questions of security and ranked voting that Brad addressed with the vendor. Did they present a description of who did the penetration test, and what the testing involved? Benny noted that a name was given but it was during a quick discussion. They said in their initial attempt, they found vulnerabilities which were addressed and corrected. Arnie asked if they could find out the name of the company that did the testing, and whether they are used by other firms that value high security. Also, did they describe the protocol for testing the Linux software? Benny said there is a report on the EAC website that describes all of the testing that has been done on this system. Arnie also wanted more information on ranked voting. There are two issues: What type of ranked voting and what is the protocol, since there are different forms of ranked voting. He would like to see something in writing on how the scoring is done. The second issue is, when the representative of Unisyn was here there was a discussion of ranked voting and how it was tested. Regardless of what method is used, there is a lot of manipulation of data going on in the machine. There are possibilities for not just maliciousness but inadvertent errors to occur. He would like to know what ES&S does in the way of testing for the ranked voting they use. Benny's response is that ranked voting is not authorized in Arizona, and an acquisition decision is not based on whether this system can do ranked voting or not. Arnie asserted that if the system is presented as having the ranked voting capability, testing protocols should be made known as well. Arizona could make a change to ranked voting at any time, and it would be good to know these things.

Barbara said that there are several choices for a recommendation: 1. Don't buy anything and wait until other systems are certified; 2. Buy the system; or, 3. Lease the system for 3 to 5 years.

Mickey asked why Unisyn did not get state certification. Brad explained that the accessible device and the precinct scanner and associated software did get state certification, but the central count system did not. It is his understanding that the state certification committee did not certify the central count system because it is a commercial, off-the-shelf scanner and as exceptions are detected on a ballot—write-ins, over-votes, marks in the channel—the system continues to scan ballots and gives an error message, essentially saying that ten ballots back, an exception was detected. Everything since that tenth ballot back has not been tabulated and has to be rescanned. During the certification demonstrations by Dominion and Unisyn, this is what occurred. It is unknown how these systems performed during federal testing.

Arnie asked Brad what he would be most comfortable with doing, buying versus leasing. Brad responded that he is hesitant about leasing. From his perspective, with the prospect of having elections every quarter, at the end of the three-year lease, having the possibility of losing the system and having to go to something brand new with only 90 days before an election is a problem.

Bill asked about the current timeframes for the Commission to make a recommendation to the Board of Supervisors. Brad believed that the summer Board meeting schedule is much lighter—perhaps one meeting in July and one in August.

Mickey moved that the Commission recommend to the Board of Supervisors that they wait six months and then issue another RFP.

Arnie would second the motion if the Commission puts on the table the issue of what the vendor can and cannot do with any County data that might be collected from the system. We want a potential vendor to specifically state that no data would be collected and sold commercially.

Mickey has no problem with Arnie's amendment to the motion, and in fact this Commission should consider that and other items that weren't included in the last RFP that should be included in the next one.

Barbara asked Brad if he could work within a potential eight month wait for a new RFP process to proceed. Brad responded that there is a high probability there will be a County-wide election in November 2015, and isn't at this time aware of other elections that may take place in 2015. If there is the County-wide election, it is likely the City of Tucson will be on our ballot, or we on theirs. He does not want to count the 2015 County-wide bond election, and the City mayoral and council election ballots on the equipment he has now. He does not want to go any further with this equipment than the 2014 cycle. Brad is pretty certain that if any vendors want to come forward for state certification it won't happen now till January 2015. The Secretary of State's office is in the middle of a state-wide election.

A vote was called on the motion with the amendment; Arnie, Tom, Bill and Mickey voted in favor of the motion, and Benny, Pat, Chris and Barbara voted against the motion. The motion was not carried by a majority.

Barbara asked if procurement of the election system is contingent upon the recommendation made by the evaluation committee. Brad said that Ana Wilber from Procurement would send an e-mail about the recommendation on this system. This would include a form on which Brad would make his recommendation to purchase the system or not.

Chris Cole made a motion to recommend purchase of the equipment, and that a formal letter be provided to the Board of Supervisors detailing the discussions on this matter and the previous vote on the motion to wait six months. The motion died for lack of second.

Pat Pecoraro made a motion to defer this item to the next meeting, and Bill Beard seconded the motion.

Barbara asked if waiting till the next meeting would fit into the timeline in the procurement process. Brad's guess is that if the Commission makes a recommendation at the July meeting, there would be time to put it on the agenda for the August Board of Supervisors meeting.

A vote was called on the motion to defer the item to the next meeting; the motion was carried unanimously in favor of deferring this item till the next meeting.

ITEM 8. BIFURCATED BALLOT – Brad Nelson

It was moved by Benny White, seconded by Bill Beard and carried unanimously to defer all remaining agenda items till the next meeting.

ITEM 9. COST OF ELECTIONS

It was moved by Benny White, seconded by Bill Beard and carried unanimously to defer all remaining agenda items till the next meeting.

ITEM 10. NEXT MEETING DATE

The next meeting date was set for July 11, 2014.

ITEM 11. CALL TO PUBLIC

There were no members of the public present.

ITEM 12. ADJOURNMENT

It was moved by Benny White and seconded by Barbara Tellman and unanimously carried to adjourn the meeting. The meeting adjourned at 12:16 p.m.

OPEN MEETING LAW

A Reference Guide to A.R.S. § 38-431 through 38-431.09 for 2011-2012

Prepared by the Pima County Attorney's Office Civil Division
Karen S. Friar, Deputy County Attorney



A.R.S. § 38-43109(A) provides:

It is the public policy of this state that meetings of public bodies be conducted openly and that notices and agendas be provided for such meetings which contain such information as is reasonably necessary to inform the public of the matters to be discussed or decided. Toward this end, any person or entity charged with the interpretations of this article shall construe this article in favor of open and public meetings.

The Open Meeting Law is specifically intended to *maximize the public access to the governmental process*. Therefore, official proceedings and deliberations by any public body must, with very limited exceptions, be conducted openly. Uncertainty in whether or not the Open Meeting Law should apply should always be resolved in favor of openness.

Public Bodies covered by the Open Meeting Law (ARS § 38-431):

- 1) Boards, commissions, and other multi-member governing bodies;
- 2) Corporations and other instrumentalities whose boards are appointed or elected by the State or political subdivision;
- 3) Quasi-judicial bodies (such as the Arizona Board of Tax Appeals);
- 4) Advisory committees*;
- 5) Standing and special committees; and,
- 6) Subcommittees* of any of the above.

*An advisory committee or a subcommittee is a group “officially established, on motion and order of a public body or by the presiding officer of the public body whose members [are] appointed for the specific purpose of making a recommendation concerning” a decision or course of conduct to be made or considered by the public body. A.R.S. § 38-431(1).

With few exceptions, the Open Meeting Law (“OML”) applies to multi-member bodies created by law or an official act pursuant to some legal authority.

Actions and Activities covered by the Open Meeting Law:

- 1) Any gathering of a quorum, *in person or through technological devices*, at which they discuss, propose or take *legal action*, including deliberations on the topic (or action); and,

- 2) Contested case proceedings or quasi-judicial or adjudicatory proceedings by the public body.

Arizona law defines a **quorum** as “*a majority of a board or commission.*” A.R.S. § 1-216(B). This has been interpreted to mean a *majority of the total number of members set forth in law or in the board or commission’s by-laws*. Thus, if the law or by-laws require that there be seven (7) members on the commission, but there are only five (5) currently appointed and serving, a quorum is still based on the seven members that should be on the board and would be four (4). The quorum would not be based on the five sitting members (where the quorum would be three (3)).

Legal action is a collective decision, commitment or promise. A.R.S. § 38-431(3). All legal action must take place during a public meeting. A.R.S. § 38-431.01(A). The requirements of OML must be followed regarding ***any matters which might foreseeably require final action or a decision by the quorum.*** Therefore, meeting of a quorum must be open to the public whenever members:

- a) **Discuss** (speak together about) a legal action;
- b) **Propose** (suggestion of a member) a legal action;
- c) **Take** (a collective decision, commitment or promise by a majority) a legal action; or,
- d) **Deliberate** (exchange of facts or opinions) with respect to a legal action.

Every “legal action” must be conducted in either a public meeting or, when allowed by law, an executive session. Consequently, ***all meetings where there is a gathering of a quorum either in person or through technological devices (such as conference phones, e-mail and facsimiles) must, pursuant to A.R.S. § 38-431.01(A), be public.***

The safest course of action is to comply with the Open Meeting requirements ANY TIME a majority of the public body discusses the business of the body.

It may be possible to conduct discussions and/or deliberations between less than a quorum of members, but it is a violation of the Open Meeting Law to do so when the meeting of less than a quorum is used to circumvent the purposes of the Open Meeting Law. ***Discussion of business by a quorum of the public body may take place ONLY in a public meeting or an executive session convened pursuant to law.***

Topics which may be discussed in executive session:

- 1) Personnel matters (A.R.S. § 38-431.03(A)(1));
- 2) Confidential records (exempt by law from public inspection)(A.R.S. § 38-431.03(A)(2));
- 3) Legal advice (with the attorney FOR the public body) (A.R.S. § 38-431.03(A)(3));
- 4) Instruction on contract negotiations, litigation, or settlement to avoid or resolve litigation (with the attorney FOR the public body) (A.R.S. § 38-431.03(A)(4));
- 5) Employee salary (A.R.S. § 38-431.03(A)(5));



- 6) International and interstate negotiations (applies to cities and towns) (A.R.S. § 38-431.03(A)(6)); and,
- 7) Instruction to public body's representative regarding the purchase, sale or lease of real property (NOT with the party with whom the public body is negotiating) (A.R.S. § 38-431.03(A)(7)).

Executive session allows for the private *discussion* of matters in categories specified above. ***No final action, no debate over what action to take, and no straw poll may take place in executive session.*** If the proposed discussion does not plainly fall within one of the above mentioned categories, it should take place only in a public meeting. A quorum must vote to hold an executive session, and such vote must be public. All public notice provisions apply.

Personnel matters are confined to the discussion or consideration of employment, assignment, appointment, promotion, demotion, salary, discipline, resignation, or dismissal of a *specific* public officer, appointee, or employee. The affected individual must receive a minimum of 24 hour advanced notice of the executive session (no emergency exception) with sufficient content. The individual may request that the discussion be held in public and such request must be honored. The individual may be permitted to attend the executive session. It is unclear whether there is a right to attend.

Confidential Records are those which are exempt from public inspection either expressly or by implication.

Legal advice may be discussed with the attorney for the public body. The attorney must represent the public body either as a full time employee, as a contract hire, or as provided by an insurance company. The discussions are limited to advice on the legal ramifications of facts and situations. ***Debate and discussion on what actions to take based on the advice must be conducted in open public session!*** The mere presence of an attorney in the room does not justify an executive session.

Litigation, either pending or contemplated, may be discussed with the attorney for the public body. The discussion or consultation is to consider the public body's position and instruct the attorney on how to proceed.

Contract under negotiation may be discussed with the attorney for the public body. The discussion or consultation is to consider the public body's position and instruct the attorney on how to proceed.

Employee salary discussions and consultations may be held to consider the position of the public body on negotiating salaries and/or benefits and instruct representatives on how to deal with employee organizations. Meetings with the employees' representatives are to be held in public, as are any negotiations conducted by the public body.

International and interstate negotiations permit a city or town to conduct an executive session with members of a tribal council, or its representatives, of a reservation within or adjacent to the city or town.

Purchase or lease of real property negotiations may be discussed in executive session. Instructions may be given to the representative (for example, authorizing negotiations to a certain dollar amount). Any meeting with the seller, or lessor, or representative of the seller or lessor is to be held in public and the contract must be approved in a public meeting.

Discussion and considerations are strictly limited in executive session to the seven categories authorized. Once the session is concluded, the public body must reconvene in a public meeting to take the final vote or make a final decision.



Notice of meetings:

Notice must be given at least 24 hours prior to the start of the meeting. The 24 hours includes Saturdays, if the public has access to the physical location where notice is posted or if notice is available on the internet. Excluded from the 24 hour notice period are Sundays and the fifteen holidays established under A.R.S. § 1-301(A).

Notice **MUST** be given to:

- 1) Each member of the public body; and,
- 2) The public.

It is sufficient to mail a copy of the notice to each member of the public body. Notice must be made available to the general public.

The public is informed of meetings of the County's public bodies (including special districts) in a two-step process:

- 1) A disclosure statement is filed on the public body's website or, in the case of special districts, on the district's website or with the Clerk of the Board of Supervisors. The statement identifies where public notices of meetings will be displayed both physically AND electronically. A.R.S. § 38-431.02(A). The physical location should have regular business hours and be easy to find and access; and,
- 2) A notice of each meeting is then posted on the public body's website AND at the physical location identified in the disclosure statement. The public body should also provide such additional notice which is reasonable and practicable. A.R.S. § 38-431.02(A). Additional notice includes: news releases, mailings to persons requesting they be informed, and newsletters or other publications. Notice must also comply with the Americans with Disabilities Act for accommodation of disabled persons needs.

When the public body meets for a specified calendar period on a regular day or date, in a regular place, at a regular time notice need only be posted at the beginning of the calendar period. However, the agenda requirements discussed below must still be met, unless the notice contains a clear statement that the agenda for each meeting will be available at least 24 hours in advance and provides directions on where and how to obtain a copy.

Notice must contain the following:

- 1) Identification of the public body;
- 2) The date, time and place of the meeting -- specify the street address and specific room number or other identifying information;
- 3) Either the agenda for the meeting and any executive session or information on how the public may acquire a copy of the agenda; and
- 4) A statement regarding accommodations for persons with disabilities.

If an action is taken in violation of the Open Meeting Law, it is null and void. A meeting may be convened within 30 days of the void action to ratify that action. The ***notice to ratify an action must also contain:***

- 1) A description of the action to be ratified;
- 2) A clear statement that the public body proposes to ratify a prior action; and,
- 3) Information on how the public may obtain a written description of the action to be ratified.

Notice must be given at least 24 hours in advance of the meeting unless one of three situations exists:

- 1) An **actual emergency exists** when, due to unforeseen circumstances, immediate action is necessary to avoid the serious consequences which would result from delaying 24 hours. (This does not apply to notice to an employee to be discussed in executive session);
- 2) The meeting is for the **ratification** of a prior act taken in violation of the Open Meeting Law. In such an instance, **72 hours** notice is required; and,
- 3) A properly noticed meeting is **recessed and resumed within less than 24 hours**. Before recessing, notice must be given publicly on the time and place for the resumption. (If an executive session is recessed and resumed within less than 24 hours, the public body should reconvene to provide public notice of the place where and time when the meeting will be resumed.)



Additionally, a meeting may still be held when there has been a temporary technical problem preventing notice of a meeting on the public body's website, but only if the posted notice and other additional notice requirements have been met. A.R.S. § 38-431.02(A).



Agendas must inform the public of matters to be discussed:

The agenda for any meeting of the public body is the road map for the conduct of the meeting. ***Carefully crafting and following the agenda promotes public confidence and provides protection to the members of the public body.***

The agenda must be **available 24 hours before** the meeting, unless one of the exceptions noted above applies. The agenda **must be sufficiently detailed** to advise the public of the specific matters to be discussed, considered, or decided at the meeting. Use of **generic or broad terms**, such as: "staff reports", "personnel", "new business", "old business", or "other matters", is **not**

permitted. The degree of specificity depends upon the circumstances. *When in doubt, resolve in favor of more detail.*

An **agenda for an executive session** must contain a **general description** of the matter to be considered, but should not contain information that would defeat the purpose of the session. Weight the legislative policy to favor public disclosure with the legitimate confidentiality concerns of the Executive Session in determining the agenda content. Remember that the **specific legal authority** for the executive session from A.R.S. § 38-431.03(A) must be included on the agenda.

If there are any changes in an agenda after it has been posted and distributed, a new agenda must be prepared, posted and distributed at least 24 hours in advance of the meeting.

There is one general term which may now be placed on the agenda. It is the “summary of current events.” This summary may only be presented by **the chief administrator, presiding officer, or member of the public body** and then only if:

- 1) The summary is listed on the agenda; and,
- 2) No discussions, deliberations, proposals or legal actions may take place regarding the current event presented.

The agenda may provide for a “**call to the public**” (but not a “call to members”). The purpose of the “call to the public” is to allow citizens to address the public body. As there is no way to know specifically what topics the public will address, this broad heading is acceptable. However, *if a matter is raised by the public that is not on the agenda, the public body shall not discuss it at that meeting.*



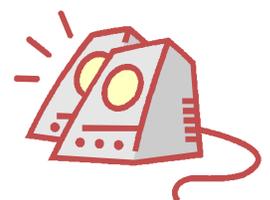
*At the conclusion of the open call to the public, individual members may **ONLY**:*

- 1) *Respond to criticism made;*
- 2) *Ask staff to review a matter raised; or,*
- 3) *Ask to include the matter on a future agenda* (if discussion of the matter is desired).

Discussions and decisions at a meeting are limited to matters specified on the agenda and “other matters related thereto”. Extreme caution should be exercised in utilizing the “other matters related” provision; such matters must be, in some reasonable manner, related to the specified agenda item. The better course of action is to defer discussion and decision until a later meeting, when the matter can be specifically listed as an agenda item.

The public must be allowed to attend and listen to deliberations:

Under the Open Meeting Law the public has a right to attend and listen to the meetings of the public body. But, there is no public right to participate in the discussion or decision-making activities of the public body.



Because the right to attend and listen is paramount, nothing should be done which in

any way obstructs or inhibits public attendance. Reasonable efforts must be made to accommodate persons with disabilities. Access requirements are not met when things occur such as:

- 1) Requiring the public to sign an attendance sheet (except a member of the public who wishes to speak at the meeting may be required to register, as it complies with minute-taking requirements);
- 2) Using remote locations or ones where public access is prohibited;
- 3) Using small rooms; or,
- 4) Conducting the meeting at unreasonable times.

The public must be allowed to record the public meeting as long as there is no active interference in the conduct of the meeting. Audio recording and video recording are allowed.

Keep in mind that some public bodies must follow other statutes, rules or regulations which may require public participation or public hearings. In such instances, the public must be provided an opportunity to be heard.

Minutes must be kept and made available to the public:



All public meetings and executive sessions must have minutes. Minutes may either be **written or recorded** (audiotape or video) and must be available for public inspection **within three (3) working days** of the meeting. Minutes must be reduced to a **form readily accessible** to the public. Thus, access to the recording would meet the accessibility requirement, but shorthand notes would not.

Executive session minutes are confidential and may only be disclosed to authorized persons which are: members of the public body; the officer, appointee, or employee who was the subject of the session; staff personnel as necessary to prepare and maintain the minutes; the attorney; the auditor general; the court; and the Attorney General or County Attorney in response to an investigative request.



Minutes for a public meeting must contain:

- 1) The date, time, and place of the meeting;
- 2) The members present or absent;
- 3) A general description of the matters discussed or considered (even where no formal vote is taken);
- 4) An accurate description of the legal actions proposed, discussed, or taken. This must include the name of the person making each motion. It is wise to also include how the body voted and the numerical breakdown of the vote;
- 5) The names of each member of the public addressing the public body and the specific legal action to which the comments are related;

- 6) Sufficient information to allow the public to investigate the background or specific facts involved in a decision, when the subject matter is not adequately disclosed in public session (i.e. consent agenda items);
- 7) A full description of the nature of the emergency that precipitated an emergency discussion of items not on the agenda; and,
- 8) A copy of the required disclosure statement, when a prior act is ratified.

Minutes for an executive session (which are confidential) must contain:

- 1) The date, time, and place of the meeting;
- 2) The members present or absent;
- 3) A general description of the matters considered;
- 4) An accurate description of instructions given under A.R.S. § 431.03(4), (5) and (6);
- 5) A statement of reasons for emergency consideration, when appropriate; and,
- 6) Other information deemed appropriate.

Meetings may occur by means other than in person:

Remember that *any gathering of a quorum* of members of the public body, in person *or through technological devices*, at which the members discuss, propose or take legal action, must be held in public. A *legal action does not require a vote*; discussions about or deliberations on a possible action is a meeting subject to the provisions of the Open Meeting Law. *A quorum of the public body need not be at the same location or at the same time in order to have a meeting under the Open Meeting Law. Meetings may occur serially.* With the advances of technology, hyper-vigilance is required to avoid unwittingly conducting a meeting without complying with the Open Meeting Law requirements. Conference calls, video conferences, facsimiles and e-mails all pose a risk.

A member may attend a meeting via telephone or other conferencing device:

Members of the public body may participate in a meeting by telephone or video conference, if such attendance is approved by the public body and not prohibited by statutes. This should be used, however, only when no other reasonable alternative to personal attendance exists. If the public body wishes to allow such appearances in certain circumstances, the body should adopt rules or procedures which specify when telephonic (or video conference) attendance will be allowed and how those appearances will be handled.



Telephonic attendance requires compliance with the following:

- 1) Notice and agenda indicate one or more members will participate via telephone;
- 2) The meeting place adequately provides for the public to observe and hear all telephone communications;
- 3) Procedures are developed to clearly identify the member(s) participating telephonically; and,

- 4) The minutes identify the member(s) participating by telephone and describe the procedures followed to assure public access to all communications during the meeting.



A meeting may be conducted online (BUT, only with very special attention to details):

The Arizona Attorney General opined in September 2008¹ that a public body may conduct an online meeting for the purpose of *deliberation and discussion*. *Final action (motion and vote) must take place in a traditional face-to-face public meeting*. The online meeting would only be legal, however, if all requirements of the Open Meeting Law are met.

This includes:

- 1) Proper notice and an agenda;
- 2) The taking and preservation of minutes; and
- 3) Public access to the entire course of deliberation and discussion (the public must be able to identify which member contributed which edits and which comment);

Notice must provide:

- 1) A specific beginning and end time;
- 2) Clear instructions on how to access the meeting and operate any software used by the public body to host the online meeting;
- 3) An indication of how the public body will facilitate public access to the meeting (including the location of any free Internet access);
- 4) A proposed date and time for the meeting at which the final action of adoption will take place; and
- 5) Reasonable accommodations for any member of the public with a disability that requests an accommodation (there will be technological obstacles to access for some disabled citizens).

Additionally, a policy must be developed for the retention of records created during the course of the online meeting.

An online meeting, while potentially convenient for many members and the public, is fraught with the potential for abuse. Scrupulous compliance with the provision of the law and the recommendations of the Attorney General are imperative.



¹ See A.G. Opinion I08-008.

WATCH OUT FOR THESE OPEN MEETING LAW PITFALLS:

REMEMBER: *A quorum of the public body need not be at the same location or at the same time in order to have a meeting under the Open Meeting Law. Any communication between at least a quorum about a topic that might foreseeably come before the group is a meeting!*

Care must be taken to avoid the unintended serial meeting and, consequently, a violation of the Open Meeting Law.

E-mail communications can be a meeting:



E-mail communications constitute a meeting when the e-mail has the equivalent components of a meeting:

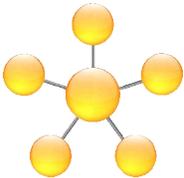
- Between a quorum
- Via technological device; and
- Discussions, deliberations, proposals or take legal actions

Such e-mails constitute a meeting and are subject to all of the provisions of the Open Meeting Law.²

E-mails between a quorum of members that concern matters that have come before the public body or might foreseeably come before the public body, including the exchange of facts regarding these matters, may be a legal action which must take place in public. (It is irrelevant if the materials shared in the e-mails (such as a newspaper article) are part of the public domain.)²

Because the original sender of an e-mail cannot control its dissemination once it has been sent the risks of using e-mail are great. E-mails can be copied and forwarded and exchanged from one member to another, then forwarded or printed and shown to other members and a communication between a quorum of members has suddenly occurred. It is better to avoid using e-mail to discuss the business of the public body.

Splintering the Quorum or Polling:



As mentioned previously, it may be possible to conduct discussions and/or deliberations between less than a quorum of members, but it is a violation of the Open Meeting Law to do so when the meeting of less than a quorum is used to circumvent the purposes of the Open Meeting Law.

“Splintering the quorum” or “polling” is not allowed. These practices occur when individual members have separate or serial discussions with a majority of the members and tell the information received from each member to the other members or when a non-member is used as a spokesperson in the same manner. It is advisable to always avoid even the appearance of impropriety in this regard.



² A.G. Opinion 105-004 (“When members of the public body are parties to an exchange of e-mail communications that involve discussions, deliberations or taking action by a quorum of the public body concerning a matter that may foreseeably come before the public body for action, the communications constitute a meeting through technological devices under the OML.” See, also the attached Exhibit A.

Social gatherings can be a meeting:



When a quorum of members of the public body are at the same social gathering, they must be very careful not to discuss anything that is even remotely (or tangentially) related to the business of the public body.

A FAX transmission can be a meeting:

Facsimile transmissions pose the same threats as e-mail.



Penalties exist for violations of the Open Meeting Law:



As the consequences for violating Open Meeting Law provisions can be serious, it is incumbent upon every member of a public body to be fully informed of the requirements of the law and to further investigate the penalties which may be assessed. Every effort should be made to avoid technical violations (those which would seem to have no demonstrated prejudicial effect on a complainant).

Any actions taken in a meeting which was conducted in violation of the provisions of the Open Meeting Law are null and void. The actions may be resurrected and given force through a properly noticed ratification held within 30 days of discovery of the void action.

Additional penalties include:

- 1) The issuance of a writ of mandamus in which the court compels compliance or prevents a violation from occurring;
- 2) A civil penalty up to **\$500.00 against the individual** who violates the provision(s) of the Open Meeting Law or against anyone who knowingly aids, agrees to aid, or attempts to aid another person in violating the law (*the public body may not pay the fine which is deposited in the public body's general fund*);
- 3) Reasonable attorney's fees to the successful plaintiff (these are normally paid by the political subdivision, but the court must assess such fees against the individual if it determines he or she violated the law with the intent of depriving the public either of information or opportunity to be heard); and,
- 4) Removal from office.

The public body may not hire counsel or expend monies for legal services to defend against Open Meeting Law challenges, unless it has specific legal authority to do so. If so authorized, the retention rate and expenditure must be approved in a properly noticed open meeting, before any obligation is incurred.



An excellent detailed resource and guide for the conduct of meetings by public bodies is the Arizona Agency Handbook prepared by the Attorney General's Office. The handbook may be accessed through the Attorney General's website:

www.azag.gov

Type "**Arizona Agency Handbook**" in the search box located under "AZ.GOV" in the upper right. A list will appear on the left hand side. Click "Open Meeting Law" and then **Arizona Agency Handbook: Chapter 7: Open Meetings**" for the full text..

The open meeting law statutes (§38-431 through §38-439.09) are also available on the "Open Meeting Law" page.



PIMA COUNTY ELECTIONS
2014 Proposd Scanner-less E Poll Book Precincts

PCT	Precinct Name	Precinct Address
010	EAST SOCIAL CENTER	7 S ABREGO DRIVE
014	WHEELER TAFT ABBETT SR LIBRARY	7800 N SCHISLER DRIVE
020	MISSION BRANCH PUBLIC LIBRARY	3770 S MISSION ROAD
048	HOLIDAY INN & SUITES	4550 S PALO VERDE ROAD
052	VALENCIA BRANCH PUBLIC LIBRARY	202 W VALENCIA ROAD
063	TEMPLE EMANU-EL	225 N COUNTRY CLUB ROAD
074	DESERT HILLS SOCIAL CENTER	2980 S CAMINO DEL SOL
078	HIMMEL PARK BRANCH LIBRARY	1035 N TREAT AVENUE
082	SABBAR SHRINE TEMPLE	450 S TUCSON BOULEVARD
085	TUCSON CHINESE CULTURAL CENTER	1288 W RIVER ROAD
093	MARTHA COOPER LIBRARY-MTG RM A OR B	1377 N CATALINA AVENUE
098	ECKSTROM-COLUMBUS LIBRARY	4350 E 22ND ST
106	COMFORT SUITES HOTEL	7007 E TANQUE VERDE ROAD
132	MILLER - GOLF LINKS LIBRARY	9640 E GOLF LINKS ROAD
146	NANINI BRANCH PUBLIC LIBRARY	7300 N SHANNON ROAD
156	TUCSON MEADOWS MOBILE HOME PARK	2121 S PANTANO ROAD
158	EMBASSY SUITES TUCSON PALOMA VILLAGE	3110 E SKYLINE DRIVE
170	TUCSON JCC	3800 E RIVER ROAD
178	KIRK-BEAR CANYON LIBRARY	8959 E TANQUE VERDE ROAD
193	SANTA RITA SPRINGS RECREATION CENTER	921 W VIA RIO FUERTE
207	ST. FRANCIS IN THE VALLEY EPISCOPAL	600 S LA CAÑADA DRIVE
210	ST. PHILIP'S IN THE HILLS EPISCOPAL CHURCH	4440 N CAMPBELL AVENUE
214	DUSENBERRY-RIVER BRANCH LIBRARY	5605 E RIVER ROAD #105
222	MARANA HIGH SCHOOL	12000 W EMIGH ROAD
246	SANTA ROSA BRANCH LIBRARY	1075 S 10TH AVENUE

Dear Pima County Voter:

As residents of Pima County, we have all seen tremendous growth in our county over the years. And along with the good—an expanding economy and more customer amenities—comes a higher demand for services provided by our local governments. As residents, we have also felt that demand where it hits us the hardest, with higher sales and property taxes.

Pima County is in the early stages of planning and procuring new election equipment, as the current equipment used in polling places on Election Day is old, outdated and breaking down at a high rate. The Elections Department is taking into consideration a number of things in this procurement process, not the least of which is the potential cost to taxpayers for replacing this equipment.

Before making a decision, Pima County will conduct a pilot program in a number of polling locations. Your precinct has been chosen for this pilot. On Primary Election Day, August 26, 2014, the electronic scanner that you may be accustomed to will not be present, and in its place will be a secure ballot box for voters to deposit their ballots. The ballots will all be counted at the end of the evening in the Elections Department. The same may be done again for General Election Day, November 4, 2014. If this pilot program is successful, the estimated \$1.8 million that would have been needed to replace the aging scanners will be saved.

And although dollars may be saved, please rest assured there will be no skimping on security of your ballot and the electoral process. Protecting your right to vote is the number one priority.

If you have any questions about this issue, please feel free to contact the Pima County Elections Department at Elections@pima.gov.

Estimado Elector del Condado de Pima:

Como residentes del Condado de Pima, todos hemos visto un tremendo crecimiento en nuestro condado a través de los años. Y junto con lo bueno – una economía en expansión y más amenidades para los clientes – viene una mayor demanda de los servicios proporcionados por nuestros gobiernos locales. Como residentes, también hemos sentido esa demanda donde más nos afecta, con impuestos de ventas y de la propiedad más altos.

El Condado de Pima está en las etapas iniciales de planificar y adquirir nuevo equipo para las elecciones, ya que el actual equipo usado en los centros de votación en Día de la Elección es viejo, está desactualizado y se está estropeando con más frecuencia. El Departamento de Elecciones está tomando en consideración un número de cosas en este proceso de adquisición, no siendo la menos importante de ellas el posible coste a los contribuyentes de reemplazar este equipo.

Antes de tomar una decisión, el Condado de Pima llevará a cabo un programa piloto en un número de ubicaciones de votación. Su precinto ha sido elegido para esta programa piloto. El Día de la Elección Primaria del 26 de agosto del 2014, el escáner electrónico al que es posible que usted esté acostumbrado no estará presente y en su lugar habrá un buzón de boletas seguro para que los electores depositen sus boletas. Las boletas serán contadas al final de la tarde en el Departamento de Elecciones. Lo mismo puede ser hecho de nuevo para el Día de la Elección General del 4 de noviembre del 2014. Si este programa piloto tiene éxito, se ahorrarían los estimados \$1.8 millones que hubieran sido necesarios para reemplazar los viejos escáner.

Y a pesar de que se podrían ahorrar dólares, quede usted seguro de que no se escatimarán en la seguridad de su boleta y el proceso electoral. Proteger su derecho a votar es la prioridad número uno.

Si tiene usted alguna pregunta sobre este asunto, siéntase libre de ponerse en contacto con el Departamento de Elecciones del Condado de Pima en Elections@pima.gov.

Hand out from the EIC meeting of June 20 – with some slight modification

Security tests performed on the EVS 5.0.0.0 (the tabulation hardware/software the county is considering)

Code Analysis – Professional Security Consultants (December 2012)

Penetration Test – Continuum Security Solutions (May 2102)

Security Testing by the VSTL during Certification (2012)

The source code review identified a few items that were fixed in early 2012.

The penetration test consisted of an attempt to access the EVS system including a special focus on the results transmission network.

The security testing was overseen by Wyle Labs as part of the initial federal certification.