

OPEN MEETING LAW

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

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A.R.S. § 38-431.09(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 (A.R.S. § 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 advance 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 an 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 needs of persons with disabilities.

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 discovering the violation 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.*



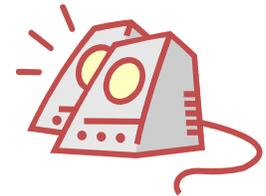
*At the conclusion of the open call to the public, individual members may **ONLY**:*

- 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).

¹ See A.G. Opinion I08-008.

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.



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

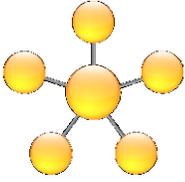
Such e-mails constitute a meeting and are subject to all of the provisions of the Open Meeting Law.²

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.

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.

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.



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

The open meeting law statutes (§38-431 through §38-431.09) are also available on the "Open Meeting Law" page.

