

OPEN MEETING LAW

REGIONAL WASTEWATER RECLAMATION
ADVISORY COMMITTEE

OCTOBER 22, 2020



PURPOSE

- Open government business to public scrutiny
- Prevent secret decision-making

Arizona Attorney General Opinion 75-7

BARE BASICS

A.R.S. § 38-431.01 Meetings shall be open to the public:

- Meetings of public bodies must be public
- Anyone can attend and listen to deliberations and proceedings
- All legal action (collective decision-making) must occur in a public meeting

BARE BASICS (CONT.)

A.R.S. § 38-431.02 Notice & Agenda:

- All meetings must be properly noticed
- Notice must include an agenda sufficient to convey what will occur at the meeting

A.R.S. § 38-431.09, INTERPRETING THE OPEN MEETING LAW (OML)

- “any person or entity charged with the interpretations (sic) of [the OML] shall construe [the OML] in favor of open and public meetings.”

WHO MUST COMPLY?

Multi-member public bodies:

- Legislature
- Boards and commissions of the State and political subdivisions
- Governing bodies of departments, agencies, institutions of State and political subdivisions
- Quasi-judicial bodies
- Committees of, or appointed by, public body
 - Standing committees
 - Special committees
 - **Advisory committees**
 - **Subcommittees**

ADVISORY COMMITTEES AND SUBCOMMITTEES

A.R.S. § 38-431(1) Advisory Committee or Subcommittee

- Officially established
 - on motion or order of public body; or
 - by presiding officer
- Specific purpose = make recommendation to public body for some action

WHAT IS A *MEETING*?

- A.R.S. § 38-431(4)
 - Any gathering of a quorum
 - In person *OR* through technological devices
 - At which legal action is:
 - Proposed
 - Discussed
 - Deliberated
 - Taken

WHAT IS A *MEETING*? (CONT.)

Quorum:

- A.R.S. § 1-216(B) Quorum means “a majority of a board or commission.”
- 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.

WHAT IS A *MEETING*? (CONT.)

Legal Action, A.R.S. § 38-431(3), means:

- “a collective decision, commitment or promise
- made by a public body
- pursuant to the constitution, the public body's charter, bylaws or specified scope of appointment and the laws of this state”

WHAT IS A *MEETING*? (CONT.)

Meeting includes an exchange of electronic communications:

- among a quorum of the members of a public body that involves
 - discussion,
 - deliberation,
 - or the taking of legal action
- by the public body
- regarding a matter likely to come before the public body for action.

WHAT IS A *MEETING*? (CONT.)

Meeting – includes a one-way electronic communication by one member:

- sent to a quorum of the members of a public body, and that
- *proposes* legal action.
- “I think we need to raise connection fees.”

EXCEPTION: COMMUNICATIONS WITH THE MEDIA

A.R.S. § 38-431.09(B): Not a violation of OML for member to personally express an opinion or discuss an issue with the public through the media, other form of public broadcast communication or through technological means IF:

- Not principally directed at or directly given to another member
- No concerted plan to engage in collective deliberation to take legal action

OML REQUIREMENTS

- Notice
- Agenda
- Public Attendance
- Meeting Minutes

NOTICE

Public body must:

- Conspicuously post a statement on its website stating where all public notices of their meetings will be posted, including:
 - physical location where public has reasonable access
 - electronic locations
- Post all public meeting notices on its website and give additional public notice as is reasonable and practicable as to all meetings.

NOTICE OF MEETINGS A.R.S. § 38-431.02(C)

- At least 24 hours prior to start of meeting
 - Includes Saturday -- IF building is accessible
- Given to:
 - Members of the public body
 - General public
- Except:
 - Recess and resume within 24 hours (at a time certain!)
 - Actual emergency: within 24 hours after the meeting
 - Ratification of past action: at least 72 hours prior to start of meeting

NOTICE OF MEETINGS

- Must include:
 - Name of Public Body
 - Date
 - Time
 - Place (Address & Room Number; Website for virtual meetings)
 - Agenda

NOTICE IN THE AGE OF COVID-19

ATT'Y GEN. 3-13-20 LETTER

Both the Statement of Posting and Notice of Meetings should

- Clearly state that a meeting will be held remotely through technological means (and not at the usual physical location)
- Provide the website location for the video conference and directions for accessing the meeting
- Provide a conference call number for telephonic participation
- Provide technical support for questions, concerns, or difficulty accessing a meeting

AGENDAS A.R.S. § 38-431.02(H)

Contents:

- List specific matters to be discussed, considered, or decided at the meeting
- Provide information reasonably necessary to inform the public and the members
- When in doubt, provide more detail

AGENDAS (CONT.)

Public body may discuss, consider, or make decisions only on:

- Matters listed on the agenda
- Other matters related “thereto”

AGENDA PITFALLS

- Incomprehensible:
 - Legalese
 - Acronyms
 - Technical Terms
- General “non-descriptive” categories
 - New business
 - Old business
 - Personnel
 - Announcements
 - Reports
 - Open Discussion

ONE GENERAL CATEGORY -- CURRENT EVENTS

A.R.S. § 38-431.02(K)

- Specificity on agenda not required
 - Presentation by:
 - Chief administrator
 - Presiding officer
 - Member
 - About current events
- Provided:
 - “Current events” is an agenda item
 - Public body does not propose, discuss, deliberate or take legal action

PUBLIC ATTENDANCE

A.R.S. § 38-431.01(A), (F), AND (H)

- Public's rights:
 - Attend
 - Listen
 - Tape record
 - Videotape
- No right to speak except if allowed/required by statute
- "Call to the Public" is optional
- May not disrupt proceedings

PUBLIC ATTENDANCE (CONT.)

The public body cannot:

- 1) Require 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) Hold meetings in remote locations or places where public access is prohibited;
- 3) Hold meetings in rooms that are too small to accommodate the public that wishes to attend; or,
- 4) Conduct meetings at unreasonable times.

CALL TO THE PUBLIC

A.R.S. § 38-431.01(H)

- Optional, not mandatory
- Time, place, and manner restrictions allowed:
 - Limit speakers' time
 - Ban repetition – one speaker per group
 - Prohibit disruptive behavior

CALL TO THE PUBLIC (CONT.)

- If issue not on agenda, members cannot:
 - Discuss
 - Enter into dialogue with speaker
- At end of call to audience, members may:
 - Instruct staff to study the matter raised
 - Place the matter on a future agenda
 - Respond to criticism

EXECUTIVE SESSIONS

A.R.S. § 38-431.03(A)

- Exception to conducting business in public
- Limited to seven statutory topics:
 - 1) Personnel matters
 - 2) Confidential Records
 - 3) Legal Advice
 - 4) Litigation, contract negotiations, and settlement discussions
 - 5) Employer salary discussions
 - 6) International, interstate, and tribal negotiations
 - 7) Purchase, sale, or lease of real property

EXECUTIVE SESSION LIMITATIONS

- A.R.S. § 38-431(2) -- Only people allowed:
 - Members of the public body
 - Person subject to the personnel discussion
 - Auditor General
 - Person “whose presence is reasonably necessary”
 - Clerk to take minutes
 - Attorney for the public body for legal advice or instruction
- Minutes required – but confidential (A.R.S. § 38-431.03(B))

PUBLIC PARTICIPATION IN THE AGE OF COVID-19

ATT'Y GEN. 03-13-20 LETTER

To ensure meaningful attendance at virtual meetings:

- Ask members of the public body, staff, presenters, and public to identify themselves when speaking
- Ask all participants to mute microphones/phones when not speaking
- Include copies of presentations, documents, etc. that will be discussed at a meeting with the agenda, and post any information relevant to the meeting on the website
- Record the meeting.

MINUTES

Minutes must be kept and made available to the public:

- May either be written or recorded (audiotape or video);
- Must be available for public inspection within three (3) working days of the meeting;
- Must be reduced to a form readily accessible to the public. For example, making the recording available to the public on its website would meet the accessibility requirement, but shorthand notes would not.

MINUTES (CONT.)

Minutes must include:

- 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.
 - a. The names of the members making and seconding each motion;
and
 - b. How each member voted;

MINUTES (CONT.)

- 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) The identity of the member(s) in attendance via telephone or other electronic medium,
- 7) the identify of other persons participating by telephone and a description of the procedures followed to assure public access to all communications during the meeting;
- 8) A full description of the nature of the emergency that precipitated an emergency discussion of items not on the agenda; and,
- 9) A copy of the required disclosure statement, when a prior act is ratified.

OPEN MEETING PITFALLS

- Serial Meetings
- Splintering of the Quorum
- Spoke & Wheel Meetings
- Email Meetings
- Social Gatherings

SERIAL COMMUNICATIONS AMONG A QUORUM

- Statements communicated by one member to another, who in turn communicates the statement to another member, and so on.
- If the total number of members involved is \geq quorum, there has been “meeting”
- If the communications were not on an agenda of a noticed public meeting = violation of the OML

SPLINTERING & POLLING

- 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.
- Avoid even the appearance of impropriety in this regard.

SPOKE & WHEEL: COMMUNICATIONS THROUGH STAFF & OTHERS

- Member cannot use staff to circumvent law (A.R.S. § 38-431.01(I))
- Staff or other person who knowingly helps evade compliance – subject to sanctions [A.R.S. § 38-431.07(A)]

BOTTOM LINE:

It is a violation of the Open Meeting Law to conduct discussions and/or deliberations even between less than a quorum of members if the purpose of the discussion is to circumvent the purposes of the Open Meeting Law.

E-MAIL

Ariz. Attorney Gen. Op. 105-004, codified in 2018 in A.R.S. § 38-431(4)(b):

- Cannot use email or other electronic communication platforms to:
 - Propose legal action
 - Discuss legal action
 - Deliberate legal action
 - Take legal action

E-MAIL (CONT.)

- E-mail among a quorum = “meeting” & potential violation
- Passive receipt of e-mail from staff OK
 - IF a member’s response limited to the staff person
 - “Reply All” is problematic
 - May not use staff to evade compliance
 - Include a reminder to members in email communications:
 - “To ensure compliance with the OML, recipients of this message should not forward it to other members of the Committee. Members of the Committee may reply to this message, but they should not send a copy of their reply to other members.”

SOCIAL GATHERINGS

Events or social gatherings could become a meeting:

- If a quorum of members of the public body are at the same event or 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.

RATIFICATION

A.R.S. § 38-431.05

Action taken in violation of OML = null and void

- Must ratify to make valid
- Ratify within 30 days of discovery or when violation should have been discovered

RATIFICATION

A.R.S. § 38-431.05

Notice 72 hours prior to meeting:

- Describe action to be ratified
- State intent to ratify prior action
- Where public can obtain detailed written description
- All deliberations, consultations and decisions by members of the public body that preceded and related to such action

PENALTIES FOR OML VIOLATIONS

- Unless timely ratified, any actions taken in a meeting which was conducted in violation of the provisions of the Open Meeting Law are null and void.
- The Court may order that a meeting be open to the public.
- A member of the public, the attorney general or the county attorney may bring suit and the court may order compliance or prevent a violation from occurring.

PENALTIES FOR VIOLATIONS

Civil Penalties:

- The court may impose a civil penalty against a member who knowingly violates the open meeting law and anyone that aids, agrees to aid or attempts to aid in the violation.
- There is no monetary penalty for the first offense.
- The Court may impose a penalty of up to **\$500** for the second offense and up to **\$2,500** for the third and any subsequent offense.

PENALTIES FOR OML VIOLATIONS

Attorney's Fees:

- The Court may award a successful plaintiff reasonable attorney's fees. The appropriate political subdivision will pay the fees, except as set forth below.

Removal from Office:

- If the court determines that an individual violated the law with the intent of depriving the public either of information or opportunity to be heard the Court may remove the person from office and must assess the person with all costs and attorney's fees awarded to the plaintiff.

PENALTIES FOR OML VIOLATIONS

The public body *may not*:

- Pay a fine assessed against a member or other individual; or
- Hire counsel or expend monies for legal services to defend against OML 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.

BOTTOM LINE:

- Focusing on transparency keeps you out of trouble
- It also builds trust in what you do

OML RESOURCES

- Clerk of the Board's website
[http://webcms.pima.gov/government/clerk of the board.](http://webcms.pima.gov/government/clerk%20of%20the%20board)
- Arizona Attorney General Agency Handbook
<https://www.azag.gov/outreach/publications/agency-handbook>