Arizona’s Open Meeting Law

Danee Garone
Assistant Ombudsman – Public Access
Role of the State Ombudsman

A.R.S. § 41-1376.01

- Investigate complaints relating to public access law.

- Train public officials and educate the public on the rights of the public under the public access laws.
Enforcement Authority

- Arizona Attorney General’s Open Meeting Law Enforcement Team (OMLET)
  - Investigate complaints
  - Enforcement authority
  - Arizona Agency Handbook, Chapter 7 (Revised July 2010)
    - Available online: [www.azag.gov](http://www.azag.gov)

- County Attorney’s Office
- The Courts
What is the open meeting law?

Set of laws that were intended to:

- Maximize public access to the governmental process.
- Open deliberations and proceedings to the public.
- Prevent public bodies from making decisions in secret.

- Found at A.R.S. §§ 38-431 through -431.09.
Who Must comply?

“Public Bodies” – A.R.S. § 38-431(6)

- All councils, boards, commissions of the state or political subdivisions
- Multimember governing bodies of departments, agencies, institutions and instrumentalities of the state or political subdivisions
- Includes corporations or other instrumentalities whose boards of directors are appointed or elected by state or political subdivision
The definition also includes...

Standing committees
Special committees
Advisory committees
Subcommittees

of or appointed by the public body
Advisory committees and subcommittees are defined as...

- Any entity, **however designated**
- Officially established
  - on motion or order of the public body
  - **or** by presiding officer of the public body
- For purpose of **making a recommendation** concerning a decision to be made or a course of conduct to be taken by the public body
Statutory Requirements

- Secretary of State, Clerk of the County Board of Supervisors, and City/Town clerks must conspicuously post open meeting law materials prepared and approved by the Attorney General’s Office on their website.
  - Chapter 7 of the Arizona Agency Handbook
  - Revised July 2010

- All persons elected or appointed to a public body must review the materials at least one day before taking office.
What Must a Public Body Do?

- Provide notice
- Have an agenda
- Meet in public
- Permit public to attend
  - Exception: authorized executive sessions
- Take all action in public
- Prepare meeting minutes
What is a Meeting?

- A.R.S. § 38-431(4)
- “Meeting” is a gathering, in person or through technological devices
- of a quorum of a public body
  - Discuss
  - Propose
  - Deliberate
  - Take legal action
The “Initial” Notice
(aka disclosure statement)

- A.R.S. § 38-431.02
- Tells public where individual meeting notices will be posted (must include both physical and electronic locations).
- Must be posted on public body’s website.
  - Cities and Town may use association of cities and towns website.
  - Special districts may file it with the County Clerk.
Notice of Meetings
A.R.S. § 38-431.02(C)

Provided 24 hours in advance of meeting
- To all members of the public body
- To the general public
- 24 hours may include Saturdays IF the public has access to the physical posting location. May not include Sundays or other legal holidays prescribed under A.R.S. § 1-301

Exceptions:
- Recess and resume
- Actual emergencies
Contents of Notice

- The name of the public body
- Date, Time, and Place
  - Address and room number
- Must include an agenda OR inform the public how to obtain a copy of the agenda
Posting the Notice

- Must be posted in all location identified in the initial notice (disclosure statement). This must be a location where the public has access.
- Must post it on website (see exception for special districts).
- Must give additional notice that is reasonable and practicable.
A few tips on posting notices

- Make sure it can’t be removed.
- Make sure front and back can be read.
- Document when the notice/agenda was posted
  - Need a regular, routine business practice
  - Clerk marks time of posting with initials
  - Date / time stamp at exact time of posting
Recess and Resume

- A public body may recess and resume a properly noticed meeting to a later time or date by making an announcement at the meeting what agenda items will be covered.
Emergency Meetings
A.R.S. § 38-431.02(D) and Agency Handbook section 7.7.9

- In case of “actual emergency,” law permits the board to meet, discuss and decide matters with less than 24 hours notice.

- What constitutes an “actual emergency”?  
  - Due to unforeseen circumstances, immediate board action is necessary to avoid a serious consequence that would result from waiting until proper notice could be provided.
Emergency Meeting Requirements

- Aside from the 24 hour notice requirement, all Open Meeting Law requirements still apply
- Provide notice as soon as possible
- Announce in public the reasons necessitating emergency action
- Include reasons in the meeting minutes
- Post a notice stating the emergency session occurred and providing the information required on a normal agenda within 24 hours after the meeting
Social Events & Seminars

- You might consider posting a “courtesy agenda” announcing event and explain that a quorum might be present
- Identify date, time, and purpose (location details will vary depending on event)
- State that no business of the public body will be discussed and no legal action will be proposed or taken
- Members must be scrupulous to avoid improper discussion
The Agenda
A.R.S. § 38-431.02(H)

- Must list the specific matters to be:
  - discussed,
  - considered or
  - decided

- Must include information reasonably necessary to inform the public

- All discussion must be reasonably related to an adequately described agenda item.
Common Agenda Problems

- Using language a regular person would not understand
  - Legalese
  - Acronyms (without first spelling it out)
  - Agency slang

- Using general categories without details
  - “New Business”
  - “Old Business”
  - “Personnel”
  - “Reports”
Current Events – A.R.S. § 38-431.02(K)

- Chief administrator, presiding officer or a member of a public body may present a brief summary of current events without listing in the agenda the specific matters to be summarized

- provided that

- “Current Events” is an agenda item

- & public body does not propose, discuss, deliberate or take legal action
Public’s Rights

- Attend
- Listen
- Tape record
- Videotape
Public has NO Right to:

- Speak
- Disrupt

Practical Pointer:
- make a good record of warnings
Calls to the Public
A.R.S. § 38-431.01(H)

- Optional (unless required by other laws)
- Time, manner, place restrictions
  - Can limit time (egg timer)
  - Ban Repetition
    - May require speakers on the same side with no new comments to select spokesperson
  - Prohibit disruptive behavior
Common Pitfall of Calls to the Public

- Discussing matters not listed on the agenda.
- If it’s not an agenda item, public body’s response is limited to:
  - Direct staff to study the matter
  - Ask that a matter be placed on a future agenda
  - Respond to criticism

**Note:** These three responses must take place at the **conclusion** of the call to the public!
Executive Sessions

- Public excluded
- Only permitted for specific matters
  - A.R.S. §§ 38-431.03(A)(1) through (7)
- Must include possibility of executive session in the meeting notice and agenda
- Must vote to enter executive session
- Discussion is confidential
- No action permitted!
- Must have minutes or recording
Executive Session Notice/Agenda

- Notice must include the statutory section authorizing the executive session
- Agenda must provide a general description of the matters to be discussed or considered
  - Needs to be more than a statutory citation
  - Need not contain information that would:
    - Defeat the purpose of the executive session
    - Compromise the legitimate privacy interests of a public officer, appointee, or employee
    - Compromise the attorney-client privilege
Who may attend executive sessions - A.R.S. § 38-431(2)

- Members of public body
- Persons subject to a personnel discussion
- Auditor general
- Individuals whose presence is reasonably necessary in order for the public body to carry out its executive session responsibilities
  - Clerk to take minutes/run tape
  - Attorney to give legal advice

Tip: Put on the record why individuals attending are reasonably necessary.
Executive Session Pitfalls

- Inappropriate disclosure
  - What happens in executive session stays in executive session!
  - Chair must remind members about the confidentiality requirement every time.
    - A.R.S. § 38-431.03(C)

- Taking legal action.
  - All votes must take place in public!
Personnel Matters

- May discuss and consider employment, assignment, appointment, promotion, demotion, dismissal, salaries, discipline or resignation
- Of an officer, appointee, or employee of the Board
  - Must be able to identify a specific individual
More considerations regarding Personnel Matters

- If the matter is noticed for a possible executive session, separate written notice to employee at least 24 hours before meeting.

- Employee may require meeting be held in public (does not include individual salary discussions).

- Employee does not have the right to attend executive session, but may. (Regardless, employee has access to portion of executive session meeting minutes.)
Minutes
A.R.S. § 38-431.01(B)

- Minutes or recording required
  - Tape recordings – if created/used to transcribe minutes, must be retained for at least 3 months “[a]fter date of meeting and after minutes transcribed or summarized and approved.”
Content of Public Meeting Minutes

1. Date, time and place of meeting
2. Members present & absent
3. General description of matters considered
4. Accurate description of legal action
5. Names of members who propose each motion
6. Names of persons, as given, making statements or presenting material to the public body; and
7. A reference to the legal action about which they made statements or presented material
Access to Public Meeting Minutes

- Minutes or a recording shall be open to public inspection **3 working days after the meeting**
- **NOT AFTER APPROVAL**
Meeting Minutes: cities and towns

- A.R.S. § 38-431.01(E)

- Cities and towns with population of more than 2,500 shall:
  - Post legal actions taken or any recording on its website within 3 working days
  - Post approved meeting minutes from city or town council meetings on its website within two working days following approval

- Posting must remain on website for one year
Subcommittees and Advisory Committees

- A.R.S. §§ 38-431(6), 38-431.01(B) and (E)(3)

- Subcommittees and advisory committees must:
  - Take written minutes or record all meetings, including executive sessions
  - Within 10 working days of the meeting, subcommittee or advisory committee of a city or town with a population of 2,500 or more must:
    - Post a statement describing any legal action or
    - Post any recording of a public meeting
Executive Session Meeting Minutes

- Shall have written minutes or a recording
  - Burden of proof – *Fisher* case
- Shall include the following:
  - Date, time and place of meeting
  - Members present & absent
  - General description of matters considered
  - An accurate description of all instructions given
  - Such other matters as deemed appropriate by the public body
- Shall be kept confidential (A.R.S. § 38-431.03(B))
Access to Executive Session
Meeting Minutes

Meeting minutes of executive session shall only be released to:

- Members of the public body
- Officers, appointees, or employees who were the subject of discussion or consideration (only that portion)
- Auditor general in connection with an audit
- County attorney, attorney general or ombudsman when investigating alleged violations
Circumvention

- Cannot use any device to circumvent the law.

- “Splintering the quorum”:  
  - Serial communications (verbal, written, electronic, etc.)  
    - Meeting with individual members and then reporting what others said with enough to constitute a quorum  
  - Polling the members
Staff E-mail

- Staff may send e-mail to board members.
- Passive receipt of information from staff, without more, does not violate the open meeting law.
  Example: board packets
Proposing an Agenda Item?

- Proposing an item for the agenda does not propose legal action

- “without more”

- Be cautious:
  - communicate the TOPIC only
  - NOT the legal action you want the board to take
“Propose” – EXAMPLES in the Opinion

- “We should discuss safety at First and Main”
  - Does NOT propose legal action

- “We should install a crosswalk at First and Main”
  - Does propose legal action
  - It’s more than a topic for the agenda because it urges or suggests an outcome
More Examples:

- “I think we should consider firing the City Manager at our next meeting.”

- “I would like to discuss the City Manager’s performance at our next meeting.”
Staff & Other Persons

- Cannot direct staff to communicate in violation of the open meeting law – A.R.S. § 38-431.01(I)

- Sanctions may be imposed upon any person who knowingly aids, agrees to aid or attempts to aid another person in violating this article – A.R.S. § 38-431.07(A).
When in Doubt?

- RESOLVE ALL DOUBTS IN FAVOR OF OPENNESS.

- Remember: legal action taken during a meeting held in violation of any provision of the open meeting law is null and void unless ratified.
What to do when you learn that a potential OML violation has occurred.

- If in the thick of things = Recess/Assess
- Can you resolve the issue and continue?
- Does the particular OML violation taint your whole meeting? Maybe not – AG Opinion I08-001
After the meeting…

- Determine if you need to ratify any actions
- Provide refresher training to staff involved
- If you receive a complaint: Be candid; respond promptly
- Provide materials that help you: minutes, ratification materials, videotapes, etc.
Ratification – A.R.S. § 38-431.05

- Within 30 days after discovery of the violation or when should have been discovered with reasonable diligence
Ratification Continued…

- Notice 72 hours before the meeting
  - Description of action to be ratified
  - Clear statement that the body proposes to ratify a prior action
  - Information on how to obtain detailed written description of the action
    - Written description includes:
      - Action to be ratified
      - All of the preceding deliberations, consultations and decisions that preceded and related to the action
      - Must be included in minutes
Penalties - A.R.S. § 38-431.07(A)

- Members and any persons who aid, attempt, or agree to aid -
  - Civil penalty up to $500 for each violation
  - Such equitable relief as the court deems appropriate
  - Reasonable attorneys’ fees

- If intent to deprive the public of information –
  - Court may remove public officer from office and
  - Charge officer and any person that aided, agreed to aid, or attempted to aid, all the costs and attorney’s fees
HB 2583 – FAILED – Would amend A.R.S. § 38-431.01 to require all public bodies to provide a complete audiovisual recording of all meetings except for executive sessions. The bill failed on third read in the House. It was reconsidered the same day after an amendment was made to exempt special taxing districts from the requirement. This time, the bill narrowly failed 31-28.
Key Resources

- Ombudsman Publications
- Ombudsman website www.azoca.gov
- Department of Library, Archives, and Public Records https://www.azlibrary.gov/
- Case law
- Attorney General Opinions www.azag.gov or http://azmemory.lib.az.us/