

Overview of Open Meeting and Conflict of Interest Laws

Town of Jerome
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“A people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both.”

James Madison (drafter of the First Amendment)

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Purpose of Open Meeting Law

“It is the public policy of this state that meetings of public bodies be conducted openly and that notices and agendas for those meetings contain as such information as is reasonably necessary to inform the public of the matters to be discussed or decided.” A.R.S. § 38-431.09.

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What is a “Public Body”?

Definitions: A.R.S. § 38-431

All boards and commissions of political subdivisions, all multimember governing bodies of departments, agencies, institutions and instrumentalities of the political subdivisions, including without limitation all corporations and other instrumentalities whose boards of directors are appointed or elected by the state or political subdivision, including standing, special or advisory committees or subcommittees of, or appointed by, such public body.

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“Advisory Committee”

A committee that is officially established, upon motion and order of a public body or by the presiding officer of the public body, and whose members have been appointed for the specific purpose of making a recommendation concerning a decision to be made or considered or a course of conduct to be taken or considered by the public body.

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Exceptions

- Staff meetings
- Staff appointed committees that advise staff (not necessarily the public body)
- Single department head

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What is a “Meeting”?

The gathering, in person or through technological devices, of a quorum of members of a public body at which they discuss, propose or take legal action, including any deliberations by a quorum with respect to such action.

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Attending by Phone

- If there is a problem reaching a quorum, participation by telephone is OK, but:
 - The public must be able to hear the person on the phone;
 - The person on the phone must be able to hear everyone at the meeting; and
 - Participation on the phone must be noted on the agenda.

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The Agenda

- List the specific matters to be discussed, considered or decided at the meeting.
- Make agenda items understandable.
 - Do you understand this? “Consideration and action on plan of consolidation subcommittee.”
 - Or this? “Consideration and action on proposal of the consolidation subcommittee to close Emerson Elementary School and plan for relocation of students to other district elementary schools.”

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Executive Session Agendas

- Must only include a general description of the matters to be considered.
- 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.

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Public's Rights

- Public has the right to:
 - Attend.
 - Listen.
 - Tape record or videotape.
- Public has NO right to:
 - Speak.
 - Disrupt.

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Calls to the Public

- Not required – but if you have them, the only responses allowed are:
 - Response to criticism.
 - Ask staff to review a matter.
 - Ask that a matter be placed on a future agenda.
- Can limit time.
- May require speakers on same side with no new comments to select spokesperson.
- May set ground rules for civility, language and treat everyone the same.

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Current Events

- Current events must be current.
- 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 summary” is listed on the agenda; and
 - Public body does not propose, discuss, deliberate or take legal action.
- Other members of the public body should not get into a discussion about it.

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Who May Attend Executive Sessions

- Members of public body.
- Individuals whose presence is reasonably necessary in order for the public body to carry out its executive session responsibilities (i.e., the clerk to take minutes).

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Executive Session Pitfalls

- Failure to keep executive session discussion confidential.
- Failure to advise persons about the confidentiality requirement of A.R.S. § 38-431.03(C).
- Best practices for preserving confidentiality:
 - Do not fax backup materials to members.
 - Let staff destroy extra copies – members should not put them in the trash.

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Legal Advice in Executive Session

- Must be lawyers for the public body.
- Not lawyers for someone else.
- What is allowed under general legal advice exception:
 - Advice regarding the legal ramifications of facts.
 - Legal propriety, phrasing, drafting and validity of proposed legislation, including meanings, legal scope and possible legal challenges.
- What is not allowed under general legal advice exception:
 - Discussion regarding the merits of enacting the legislation or what action to take based upon the attorney's advice.
 - Debate over what action to take (i.e., pros and cons, policy implications).

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Holding an Executive Session

- Better to not solely rely on the general legal advice exception.
- Use specific exception
 - Claims
 - Contracts under negotiation
 - Purchase of real estate

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Splintering the Quorum

- E-Mail
- Telephones
- Polling
- Committing your vote to a member of the public.
- Staff
 - Cannot direct staff to communicate in violation of open meeting law.
- Social Events
 - If more than a quorum present:
 - Post a “courtesy agenda” announcing social event where a quorum may be present.
 - Include a statement that no business of the public body will be discussed and no action will be taken.

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Meeting Held in Violation of OML:

- All legal action is null and void.

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Complaints and Violations: What is OMLET?

- AG's Open Meeting Law Enforcement Team (OMLET) – Now done by attorneys on case by case basis
- Handles inquiries, conduct investigations, and enforcement proceedings relating to complaints of violations of the Open Meeting Law.
- Investigations conducted when receive a signed, written complaint that describes conduct that, if verified, would be a violation.

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Failure to Comply with AG

- Possible filing of action in superior court for an order to enforce
- Failure to comply with court:
 - Contempt of court
 - Injunctive order against conduct that is subject of investigation

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Consequences of Violation

- Any person affected by alleged violation may commence suit in superior court to force compliance with OML.
- *Each* violation: civil penalty up to \$2,500.
- Removal from office.
- Generally, no public monies for legal fees incurred by public body or officer as a result of violation.

See A.R.S. 38-431.07

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Hot Topics – Open Meeting Law

- You may speak as a member of the public.
- Be careful about proposing legal action.
- But don't stop all communication with your colleagues.
- Don't let Robert's Rules be a sword.

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Public Service Ethics Laws

- No Self-Dealing
 - No Conflicts of Interests
 - No Extra Compensation, Bribery, or Extortion
 - No Inappropriate Gifts, Entertainment, or Travel
 - No Discrimination, Favoritism, or Nepotism
 - No Retaliation Against Whistleblowers

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Conflicts of Interest

- Conflicts of interest are okay
- But:
 - Identify
 - Disclose
 - Disqualify

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Identify a Conflict of Interest

“Any public officer or employee who has, or whose relative has, a *substantial interest* in any decision of a public agency shall make known such interest in the official records of such public agency and shall refrain from participating in any manner as an officer or employee in such decision.”

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Who is subject?

- All public officers and employees.
- Includes family: spouse, child, grandchild, parent, grandparent, siblings and in-laws.

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Remote Interests

- Non-salaried officer of nonprofit corporation.
- Landlord/tenant of a contracting party.
- Attorney of a contracting party.
- Member of a nonprofit corporate association.
- Owner of less than 3% of a corporation.
- Reimbursement of expenses incurred when performing official duties.

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Remote Interests

- Receiving municipal services on comparable terms.
- Officer/employee of another political subdivision – unless direct economic benefit.
- A member of a class of persons of at least 10 members.
- Relative is who an employee of another entity with at least 25 employees.
- Ownership of publicly traded investments managed by others and invested with others.

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What happens if there is a conflict?

- If not “remote,” then substantial.
- If receive direct or indirect pecuniary or proprietary interest, you must declare a conflict.

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Then what?

- Refrain from participating in any manner – including attempting to influence a decision.
- Record conflict in official records of the City.

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No Bribes or Extortion

- A public servant who knowingly asks for **or** receives any gratuity or reward (or promise thereof) for doing any official act is guilty of a class 6 felony.
- Public servants may not use or attempt to use their official positions to secure any valuable thing or benefit that would not ordinarily accrue to them if the thing or benefit is of such character as to manifest a substantial and improper influence.

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Bribery

Public servants who solicit, accept or agree to accept any benefit upon an agreement or understanding that it may influence their official conduct (including their vote, opinion, judgment, exercise of discretion, or other action) commit bribery, which is a class 4 felony.

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Extortion

A public servant commits theft by extortion – a class 4 felony – by knowingly obtaining or seeking to obtain property or services by means of a threat to take or withhold action as a public servant in the future.

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Trading in Public Office

A public servant commits trading in public office – a class 6 felony – if with corrupt intent the public servant solicits, accepts or agrees to accept any benefit from another upon an agreement or understanding that the other will or may be appointed to a public office or designated or nominated as a candidate for public office.

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Sale of Public Office

“A public officer, who for a gratuity or reward, appoints another person to a public office, or permits another person to exercise or discharge any duties of his office, is guilty of a class 6 felony and shall forfeit his office and is forever disqualified from holding any office in this state.”

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Ban on Extra Compensation

“No public officer or employee may receive or agree to receive directly or indirectly compensation other than as provided by law for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter which is pending before the public agency of which he is a public officer or employee.”

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Ban on Incompatible Employment

Both during and for twelve months following a public official's service, Arizona law prohibits the official from representing another person for compensation before a public agency for which the official serves (or served) in connection with any matter in which the official was directly concerned and personally participated by a substantial and material exercise of administrative discretion.

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Entertainment

- A compensated lobbyist may not offer you entertainment or a gift.
- To influence the passage or defeat of legislation.

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Whistleblower Protection

- Arizona law prohibits public employees and officials from taking an adverse personnel action in retaliation against a public employee who disclosed to a public body allegedly wrongful conduct that the disclosing employee reasonably believed evidenced a violation of law, mismanagement, a gross waste of monies, or an abuse of authority.

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Nepotism

- Public officials may not appoint relatives to positions paid with public funds.
- “Relatives” include: spouse, brother, sister, parent, child, grandparents, great-grandparents, grandchildren, uncles, aunts, nephew and nieces.

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