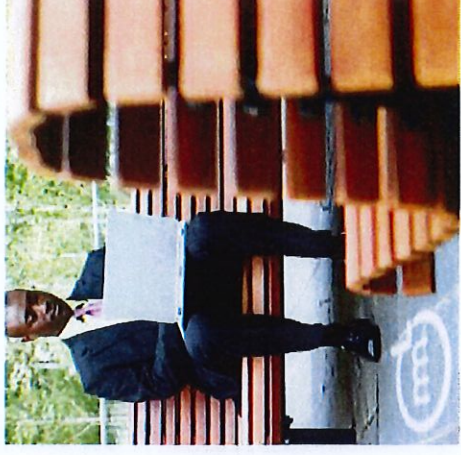


Michigan's Sunshine Laws

OMA

Basics of Michigan's Open Meetings Act



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▶ **The basic intent of the Act is to strengthen the right of all Michigan citizens to know what goes on in government by requiring public bodies to conduct nearly all business at open meetings.**

► An overview of:

- 1) the basics -- the requirements of an open meeting
- 2) the key areas of dispute -- when a local government might be found to violate the OMA.

When must an open meeting be held?

When does an exception apply?



- ▶ All meetings of a public body shall be open to the public
- ▶ All decisions of a public body shall be made at a meeting open to the public
- ▶ All deliberations of a public body constituting a quorum of its members shall take place at a meeting of a public body, except for closed sessions

Meeting is subject to the Open Meetings Act if . . .

- 1) a public body (including committee, subcommittee)
- 2) meets with a quorum present (or constructive quorum)
- 3) to deliberate toward or render a decision
- 4) on something on which a vote by the public body is required and by which a public body effectuates/formulates public policy



▶ A legislative or governing body including a board, commission, committee, subcommittee, authority or council performing governmental or proprietary function.



▶ The convening of a public body **at which a quorum is present** for the purpose of deliberating toward or rendering a decision on a public policy

▶ **NOTE!** Beware of “constructive quorums” or “subquorums”

▶ A determination, action or vote on a motion, proposal, recommendation, resolution or ordinance, on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy.



Notice Requirements

- ▶ Post a list of regular meetings (dates, times, places) within 10 days of first meeting of the new calendar or fiscal year.
- ▶ If there is a change in the schedule, must post a new schedule within 3 days of the meeting when changed.
- ▶ For special or irregular meetings, must give 18 hours notice.

- ▶ “The OMA controls the conduct of the members of public bodies when a quorum, and sometimes less than a quorum, gather to deliberate or vote on issues. Generally, the statute requires that all meetings of public bodies be conducted in public pursuant to notice, so that the public may attend and take part.” (Local Government Law and Practice, 12-3)

- ▶ Public meetings shall be open to the public and held in a place available to the general public. They do not have to be held in the municipality, but can't be so far away that they are inconvenient.



- ▶ Persons attending the meeting may tape record it, video tape it, broadcast it live . . . but governing body may have rules to minimize the possibility of disruption of the meeting.
- ▶ Citizens have the right to address the meeting, but governing body may limit this to a public comment portion of the meeting and restrict the amount of time an individual may speak. They can be required to identify themselves.



- ▶ Post a list of regular meetings (dates, times, places) within 10 days of first meeting of the new calendar or fiscal year.
- ▶ If there is a change in the schedule, must post a new schedule within 3 days of the meeting when the change is made.
- ▶ For special or irregular meetings, must give 18 hours notice. Per the AG, if the public is denied access to the notice for any part of the 18 hours, the notice is not valid. If a regular meeting is recessed for more than 36 hours, can't reconvene without an 18 hour notice posting.

- ▶ Citizens can request that the public body put them on a mailing list so that they are notified in advance of all meetings. Governing body can charge a reasonable fee for this. Newspapers, radio and TV stations may request notices without cost.
- ▶ Emergency sessions may be held without written notice if public health, safety or welfare is severely threatened and if 2/3 of the public body votes to hold the meeting.

- ▶ Minutes must be kept of all meetings. Minutes are public records and must be available for review and copying (except minutes of closed sessions).
- ▶ Draft minutes must be available for public inspection within 8 business days of the meeting. Approved minutes must be available within 5 business days after the meeting at which they were approved. Corrections must be made no later than the next meeting after the meeting to which they refer. Corrected minutes must be available no later than the next meeting after the correction and must show both the original entry and the correction.

- ▶ If all the conditions exist making the meeting subject to the Open Meetings Act, there are a limited number of circumstances in which the public body may meet in a “closed session.”

Closed Sessions:

- ▶ With 6 exceptions related to local governments, all meetings must be held in open session. The easiest way to avoid running afoul of the OMA is to conduct all meetings in open session.
- ▶ Note that even where closed sessions are allowed, the particular action must be taken in open session.

The 6 Reasons for a Closed Session:

- 1) If requested by the named person, to consider dismissal, suspension or disciplining of, or to hear complaints or charges brought against, or to consider a periodic personnel evaluation of, a public officer or employee.
- 2) For strategy and negotiation sessions connected with negotiation of a collective bargaining agreement if requested by either negotiating party.
- 3) To consider purchase or lease of real property up to the time an option to purchase or lease of that property is obtained.

Closed Sessions – When Permitted

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- ▶ To consult with an attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial affect on the municipality's litigation or settlement position.
- ▶ To review and consider contents of an application for employment or appointment to public office if candidate requests that the application remain confidential. Interviews by a public body for employment or appointment to public office must be held in an open meeting.
- ▶ To consider material exempt from discussion or disclosure by state or federal statute.

- ▶ From an open meeting, a 2/3 roll call vote is required, except for closed sessions permitted under MCL 15.268(a) (discipline, personnel evaluation, etc. of official/employee) or MCL 15.268(c) (collective bargaining) which require a majority vote.
- ▶ The roll call vote and the purpose for calling a closed session shall be entered into minutes of the open meeting.
- ▶ Normally one of the members of the public body moves to return to open session. The body performs **any action** required as a result of the closed session **in open session**. The meeting then proceeds with other matters or adjourns in the normal fashion.

Closed Sessions – Minutes



- ▶ The OMA requires that a separate set of minutes shall be taken at the closed session. According to an opinion of the Michigan AG, the minutes must reflect the date, time, place, members present and absent, and purpose of the closed session. (OAG No. 6817)
- ▶ The clerk or designated secretary of the public body takes the minutes.
- ▶ The minutes may only be disclosed if required by court order in a civil action filed in accordance with MCL 15.270, 15.271 or 15.273. OAG No. 6353 provides that disclosure may not be made even if the person requesting the closed session subsequently waives or withdraws the request and consents to disclosure.

Minutes of a Closed Session (cont):

- ▶ The public body may meet in closed session to approve the minutes of a closed session -- if that decision is made in an open session of the public body.
- ▶ The minutes may be destroyed **one year and one day** after approval of the minutes of the regular meeting at which the closed session was approved.
- ▶ The minutes of a closed session are exempt from disclosure under the Michigan FOIA unless required by court order in accordance with the OMA.

Communications Technology – Is it a “Meeting”?

- ▶ If e-mail is used by members of a public body to for substantive discussions about matters pending before that unit of government, this may be viewed as a “meeting” under the OMA . . . not addressed by a Michigan court . . . yet.
- ▶ Keep the intent of the Act in mind . . . did the members of the public body just passively receive some e-mails, or did they actively exchange e-mails showing an intent to deliberate.
- ▶ At the very least, be careful if you hit “reply to all”
- ▶ Blog / is everyone “in” the chat room at the same time?

Is it a Meeting ? Committees

- ▶ **Keep in mind that committees and subcommittees are subject to the OMA, except those which adopt a non-policy making resolution of tribute or memorial. Committees that include no members of the public body itself can be subject to the OMA.**
- ▶ **A sub quorum committee of the council that is appointed to “only make a recommendation” to the public body can be subject to the OMA.**



- ▶ In some instances public bodies have divided into multiple subcommittees, met in private and then provided advice to the public body. Michigan courts have used the theory of “constructive quorum” to hold that this violates the OMA.
- ▶ “The practical effect of various interpretations by the courts of the Act is that most activities of sub quorum groups are violations of the Act. Illegal sub quorum group activities include meeting to deliberate on public issues, using interlocking memberships on separate committees, circulating reports between committees, or using telephone polls to coordinate among a quorum of the public body.” (Local Government Law and Practice, 12-10)

Is it a Meeting ? Committees

- ▶ **Key:** Is the committee operating with the delegation of authority to perform a governmental function – if so, in effect, it becomes the public body.
- ▶ In Standish School case, COA held that since the Superintendent and Hiring Committee got authority from the Board - - did not have it independently - - that it was a “public body” where finalist selections and interviews were conducted privately with two Board members present.

- ▶ An informal poll taken by a mayor as to how the council members would vote on an issue was held to be permissible . . . where the intent was not to circumvent the OMA.
- ▶ Recently, court of appeals held it was a violation of OMA where 2 commission members openly stated that they were going to discuss a matter in sub quorum groups, that they were trying to not violate OMA by discussing a matter in a sub-quorum setting, where there was no delegation by the full commission, and where the commission took the ultimate action in open session.
- ▶ Even though “constructive quorum” is NOT in the OMA, it now has been effectively created by decisions of the COA and Supreme Court.

- ▶ In that second case, the 2 commissioners met separately and individually with 3 other commissioners - - with the publically stated intent to not have a meeting of more than 3 at any one time.
- ▶ Ironically, the 3 commissioners ultimately did not vote the way the 2 wanted them to vote. Yet the COA still held the 2 intentionally violated the OMA. Plus it also affirmed the decision to invalidate the action taken by the full commission - - but noted it could be reenacted.

Consequences of a Violation:

- ▶ The action in question may be invalidated. Under the OMA, the AG, county prosecutor, or any person (which includes a newspaper) may bring a civil action in circuit court to challenge the validity of the action taken by the public body.
- ▶ Suit must be brought within 60 days of approved minutes being available; 30 days for actions re contracts, bids, bonds, etc.
- ▶ The court can invalidate the action, but generally there must be an actual impairment of a public right. An invalidated action may be reenacted if done properly.

Consequences of a Violation (cont.):

- ▶ A public body is subject to an injunction to compel compliance with the OMA or to prohibit further noncompliance. *Persons who bring these suits may be awarded court costs and actual attorney fees.*
- ▶ The OMA also provides for criminal misdemeanor penalties against any public official who intentionally violates the act. (90 days and \$1,000 for the first offense; up to 1 year and \$2,000 for the second)
- ▶ Public officials who intentionally violate the OMA can also be subject to personal liability, up to \$500 and court costs and *actual attorney fees of the person or group that brings suit.*

When in doubt, please keep in mind the basic intent of the Act

to strengthen the right of all Michigan citizens to know what goes on in government by requiring public bodies to conduct nearly all business at open meetings.

When in doubt, courts will keep the basic intent in mind!

Resource materials include MML One-Pager *Plus* publications that reference OMA. Go to www.mml.org. Click on “Resources,” then “Publications,” and then “One-Pager *Plus*.”