ARIZONA'S OPEN MEETING LAW BASICS FOR BOARD MEMBERS

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Legislative Intent: Openness in Government

- Arizona's public policy requires that official deliberations and proceedings be conducted openly
- Any uncertainty should be resolved in favor of open and public meetings

A.R.S. § 38-431.09

WHO is subject to the Open Meeting Law?

"Public Body"

- **"Public Body" means:**

  "The legislature, all boards and commissions of this state or political subdivisions, all multimember governing bodies of departments, agencies, institutions and instrumentalities of this state or political subdivisions, including without limitation all corporations and other instrumentalities whose boards of directors are appointed or elected by this state or a political subdivision."

- "All quasi-judicial bodies and all standing, special or advisory committees or subcommittees of, or appointed by, the public body."

- "All commissions and other public entities established by the Arizona Constitution or by way of ballot initiative, including the independent redistricting commission, and this article applies except and only to the extent that specific constitutional provisions supersede this article."

A.R.S. § 38-431(6) and Arizona Attorney General Opinion I70-001

Advisory Committees & Subcommittees

- **"Advisory Committee" or "Subcommittee" means:**
- Any entity, however designated;
- Officially established on motion or order of the public body or by the presiding officer;
- Appointed to make a recommendation concerning a decision to be made or a course of conduct to be taken or considered by the public body.

A.R.S. §38-431(1)

Advisory Committees & Subcommittees

- Must comply with all requirements of the Open Meeting Law, including agendas and minutes

WHEN does the Open Meeting Law apply?

What is a "meeting"?

- Gathering, in person
- Or through technological devices
  - Phone, email, fax
- Of a quorum, that
- Discusses, proposes or takes legal action
- Including deliberations by a quorum

A.R.S. § 38-431(4)

"Meeting" includes:

- (i) A one-way electronic communication by one member of a public body that is sent to a quorum of the members of a public body and that proposes legal action.
- (ii) An exchange of electronic communications among a quorum of the members of a public body that involves a discussion, deliberation or the taking of legal action by the public body concerning a matter likely to come before the public body for action.

A.R.S. § 38-431(4) and Arizona Attorney General Opinion 105-004

What is a quorum?

- Generally in Arizona, a quorum is a majority of a board or commission
- Look to your statutes and rules
- Vacancies **DO** count toward the number of members of a board unless your statutes/laws say otherwise

What if you don't have quorum?

- You don't have a "meeting" and you can't meet

BUT

- Beware of serial communications
- Beware of "wheel and spoke" communications
  - Meeting with individual members
  - Reporting what other members said
  - Polling the members

Discussing, Proposing or Taking Legal Action

- "Legal Action" 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.
- Proposing legal action = "put forward for consideration, discussion, or adoption," and includes deliberations, i.e. the discussion of facts and opinions regrading potential board business.
- RULE: If this occurs among a quorum of the Board IT IS A MEETING

A.R.S. § 38-431(3) and Arizona Attorney General Opinion 105-004

Proposing an Agenda Item?

- Proposing an item for the agenda via e-mail is allowed if you do not propose legal action
- Communicate the TOPIC only NOT the legal action you want the board to take
- Do not discuss, deliberate or take legal action regarding the proposed agenda item

Are these "proposing legal action"?

- "Councilperson Smith was admitted to the hospital last night"
- "We should install a crosswalk at First and Main"

One-Way E-mail from Staff

- Passive receipt of information from staff, without more, does not violate OML
- Staff may send e-mail to board members
- Staff may send agenda packets to board members, these must also be available to the public

Telephone Conferencing

- Allowed if the public body has approved this practice
- The notice and agenda should indicate telephone participation
- The public must be able to hear
- Minutes should identify telephonic participants and describe public access

What about social events or other occasions where a quorum is present?

- If more than a quorum may be present
  1. Post a "courtesy notice" announcing the event where a quorum may be present
  2. Include statement that no business of the public body will be discussed & no action will be taken
  3. Board members should avoid talking with each other - or have a witness!

HOW do you comply with the Open Meeting Law?

Find a good location

- Meetings must be accessible
- Discourage procedures that obstruct or inhibit public attendance such as:
  - Remote or inadequate location
  - Required sign in sheets
  - Unreasonable time

Location, location, location

- Can you move the meeting to another location close to the original location?
- ☐ YES ☐ NO
- Leave a someone to give directions
  - Post a large notice
  - Start the meeting a little later

Give them notice

Public bodies of the State are required to:

- Conspicuously post a statement on their website stating where all public notices of their meetings will be posted, and include physical and electronic locations
- Give additional public notice as is reasonable and practicable

A.R.S. §38-431.02(A)

Notice required at least 24 hours in advance of a meeting

- To all members of the public body and to the public

A.R.S. § 38-431.02(C)

Recessed & Resumed Meeting

- Can **recess and resume** a meeting with less than 24 hours notice if proper public notice of initial session of the meeting is given and, prior to recessing, notice is publicly given regarding the time and place of the resumed meeting or regarding the method by which notice shall be publicly given.

A.R.S. §38-431.02(E)

Have a good agenda

- Agendas must include matters to be
  - Discussed,
  - Considered or
  - Decided
  - At the meeting
- Must contain information reasonably necessary to inform the public

A.R.S.§ 38-431.02(H)

Agendas must be understandable

- No acronyms
- Statutory cite is not enough without explanation
- No legalese
- No agency slang

Agenda Items

- Needs to include "specific" items to be discussed, considered or decided
- **NOT** GOOD ENOUGH without details:
  - "New business"
  - "Old business"
  - "Personnel"
  - "Announcements"

If it's not on the agenda

- You **Cannot** discuss
- All discussion must be **reasonably related to** an adequately-described agenda item
- Add new items to the agenda for future meeting

What if there is an emergency?

- In the case of an actual emergency, a meeting may be held with such notice as is appropriate
- May be either an open session, or executive session, or both
- Must post a notice within 24 hours declaring that an emergency session has been held and what was discussed

ARS § 38-431.02(D), (H), and (I)

Changes in Agenda

- Post and distribute same as original
- 24 hour rule still applies

Minutes

Must have them

- In writing or
- Recorded - audio or video tape

A.R.S. §38-431.01(B)

Contents of Minutes

- Date, time, place
- Members present/absent
- General description of matters discussed or considered
- Accurate description of legal actions proposed, discussed or taken
- Name of members who propose each motion and how each member voted
- Name of each person making statements or presenting material (as given) and a reference to the legal action addressed

Public Access to Minutes

- Minutes or a recording shall be available for public inspection 3 working days after the meeting
- Make tape available
- Can stamp as "draft"
- Additional requirements for other types of public bodies

A.R.S. § 38-431.01(D)

Public's Rights

- Must be permitted to attend meeting
- Cannot require them to sign in, but you can require security measures
- Not permitted to speak, unless public body allows it
- If they make presentation, must identify themselves (required for the minutes)
- Cannot disrupt proceedings (but make a good record before removing someone)
- Can limit speaking time of each speaker

Meeting Etiquette

Discourage the Following:

- Whispering to other Board members
- Passing notes between Board members
- Letting members of the public talk to each member before the meeting starts with their hands over the microphone
- If it's about business of the public body, this could become a violation
- In any event, it looks like a violation

Calls to the Public

- Optional
- Be fair
- Avoid getting into a discussion of matters not on the agenda
- Public body's response is limited:
  - Direct staff to study the matter
  - Respond to criticism
  - Schedule matter for future meeting

A.R.S. §38-431.01(H)

Public's Recording of Proceedings

- Public may record on tape, camera or video
- May restrict only if it truly interferes with conduct of the meeting

A.R.S. § 38-431.01(F)

Executive Sessions

"gathering…from which the public is excluded…" (A.R.S § 38-431)

- Must include in the notice that you may go into executive session if you plan to do so (cite specific statutory provision and subject matter)
- Executive Session is only allowed for specific types of items
- Consult with Legal Division prior – many additional requirements

Executive Session Categories

- Personnel matters
- Confidential records
- Legal advice
- Litigation, contracts and settlement discussions involving attorney consultation
- Employee salary discussions
- International, interstate and tribal negotiations
- Purchase, sale or lease of real property

A.R.S. §38-431.03(A)(1)-(7)

WHAT happens if there is a problem?

What to do if you know you have a violation

- Ratify (A.R.S. § 38-431.05(B))
- Consider self-reporting
- Cooperate with County Attorney, AG, or Ombudsman's Office and move early to remedy the problem
- Consider training and changes to policy to prevent violations in the future
- Think about the public perception

Ratification

- Must take place within 30 days after discovery of the violation or after discovery should have been made
- Clear indication in agenda and notice of ratification
- Detailed written description of violation and all associated deliberations, consultations and decisions available to the public
- Notice a written description available 72 hours before the meeting

A.R.S. § 38-431.05(B)

Penalties

Action is null and void

A.R.S. § 38-431.05

Fines imposed ($500-$2,500) for each violation

- Against anyone who commits a violation
- Against anyone who knowingly aids, agrees to aid or attempts to aid another in committing a violation
- Individual, not public body, pays penalty

A.R.S. § 38-431.07

May include attorney's fees and costs

Removal from Office

If violation is knowing

- Court may remove the public officer from office
- Assess attorneys fees and costs

A.R.S. § 38-431.07

Additional Resources

- A.R.S. §§ 38-431 through 38-431.09 (note 2018 changes!)
- Arizona Agency Handbook
  - www.azag.gov
  - Chapter 7 (Open Meetings)
- Arizona Attorney General Opinions
  - www.azag.gov

Questions?