

SNARING THE WELL- MEANING AND OTHER HAZARDS OF THE OPEN MEETINGS ACT

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OVERVIEW

- General Rule
- Policy
- Meeting
- Exceptions
- Notice
- Mistakes
- Examples

GENERAL RULE

Meet with four members or a majority
(whichever is less);

Talk about a subject upon which you're
empowered to act;

Then you must be in a public meeting; and

The Meeting must have been reasonably noticed.

Voting must be in public.

LOOK BEYOND THE LETTER OF THE LAW

Understand Underlying Policies / Goals.

Government should deliberate and act openly.

The people do not yield their sovereignty to the agencies that serve them.

The people do not give their public servants the right to decide what is good for them to know.

The people's right to remain informed must be protected so that they can control the instruments they have created.

Purpose of the OMA is to maximize “informed and principled decision-making in individual cases.” Better substantive decisions are made through public scrutiny.

OMA also has a remedial goal of deterrence.

Conservative Approach.

The right to open meetings should be liberally construed with exceptions narrowly construed in order to effectuate these policies and avoid exemptions and unnecessary executive sessions.

DOES THE LAW APPLY TO ME?

Rule applies to:

Governmental body.

Municipalities and School Districts
including home rule.

Decision or policy making body.

Advisory body.

It's what you do, not what you call it.

Committees, Subcommittees, Task Forces.

Is taking public money enough?

Exceptions:

Quasi Judicial bodies solely when meeting to make a decision.

Votes taken to organize a governmental body.

Attendance at member organizations/Training Sessions.

Employee meetings. OMA doesn't "apply to a group of state employees who have no power to take collective action by vote."

(Kila, Inc. v. State).

Administrative/Managerial meetings of service area boards.

Service Area **exception** is meant to allow day-to-day administrative decisions involving use of public funds previously approved in a public meeting such as:

When to plow the roads or perform other maintenance within approved annual plan.

To give direction to a contractor as contemplated within a properly awarded and funded contract.

Inspecting and approving work performed by contractor.

Approving an invoice for payment.

WHEN AM I IN A “MEETING”?

Basic Formula: Start with the numbers + discussion of subject within your authority = meeting.

Who is a member of the body? Who do I count?

Elected but not sworn?

Mayor?

What subjects are included?

Within your decision-making or advisory authority (e.g. public business).

Matters of Substance – not procedural or administrative matters.

In gray areas, purpose and effect matters - Don't Circumvent.

A true member of the public may make serial communications.

Teleconferences, e-mails, and serial meetings.

Alaska Supreme Court has already chosen to apply the OMA where meeting requirements were not literally satisfied in two cases.

1. ***Brookwood Area Homeowners Association, Inc. v. MOA***. Question not whether quorum present but whether activity has the effect of circumventing the OMA.

2. *Hickel v. Southeast Conference*—Upheld the lower court’s finding that the Board violated the OMA because:

The Board members had “one-on-one conversations with each other, in which they discussed reapportionment affairs and districting preferences, and solicited each other’s advice.”

The “dearth of substantive discussion on the record, combined with the manner of some Board members at trial, as well as other evidence presented at trial, convinces this court that important decision making and substantive discussion took place outside the public eye.”

Five Snares for the Unwary:

1. Doesn't have to be prearranged unless you're advisory.
2. Location only matters if you're buying a house.
3. Group signings.
4. Attendance at meetings held by others.
5. Decisions not required—all steps of the deliberative and decision-making process is covered. [*Brookwood Area Homeowners Association, Inc. v. MOA.*]

“a free-wheeling kind of conversation”

Fact-gathering – “general purpose was to obtain more information about the project and the rezoning application.”

“Only by embracing inquiry and discussion . . . can an open meeting regulation frustrate these evasive devices”

Proof of actual influence not required. Such private conferences are an evasion of the law because it may mean that the public is never “exposed to the actual controlling rationale of a government decision.”

The next mistake – acknowledgement of meeting but no public disclosure of details.

I WANT A MEETING – WHAT DO I NEED TO DO NOW?

Notice, Notice, Notice.

General Requirements

Always date, time and place (including location of any teleconferencing).

Teleconferencing site should have materials.

Vote by roll call.

Must post notice at principal office.

Notice by print or broadcast media.

Timing of Notice. When notice must be posted depends on the circumstance:

Absent exigent circumstances 3 days appears to be minimum allowable reasonable notice and 3 days cannot include Saturday, Sunday or holidays. 1992 Op. (Inf.) Atty Gen. Alas. 271.

Complex, important v. pro-forma/ministerial.

At a minimum follow any specific rules you've adopted. (*Hickel v. Southeast Conf.* found violation because Bd. failed to follow its own 5 day guideline).

Tunley v. Municipality of Anchorage School District .

5 days notice not enough to prepare opposition.

Separate due process basis required notice.

Notice of Subject.

Hickel v. Southeast Conference.

Reasonable notice includes notice of the subject with some “specificity and clarity.”

Meeting information was “varied and confusing.” Unclear whether it was a meeting or a hearing. Notification discouraged citizen participation.

*Anchorage Independent Longshore Union Local
v. MOA.*

Specificity of reasonable notice is dependent upon the complexity and importance of the issue involved.

Question of whether permit was simple, pro-forma and ministerial – question of fact.

Did actual notice to Union the day before “cure” also question of fact.

Subject Matter Notice doesn't allow you to add substantive items to agenda.

Staff briefings.

Individual notice may be required.

Termination of a property right (employment or contract).

Quasi-judicial hearings.

Executive sessions held for the purpose of protecting someone's reputation or character.

Past practice, consistency required.

Cancellations.

Emergency Meetings.

Notice Can Be Less.

“Emergency” generally requires:

Unforeseeable Situation

Necessity of immediate action.

Agenda—Only Emergency Items.

Failure to act timely v. true emergency

Separate Law Addresses Opportunity To Be heard. AS 29.20.020

EXCEPTIONS TO PUBLIC MEETING RULE - EXECUTIVE SESSIONS

Exception to What?

Not public notice of at least the subject.

Any individual notice.

It is not a “secret” meeting.

Specific Statutory Exceptions - -
AS 44.62.310(c).

1. Matters which if immediately known would clearly have an adverse effect of the government's finances.

2. “subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion.”

Sensitive personnel matters including evaluations of strengths and weaknesses.

City of Kenai v. Kenai Peninsula Newspaper, Inc.

Experience, education and background discussion/comparisons v. personal characteristics.

Executive session permitted even though application public record.

Whether a professor should be granted tenure.
University of Alaska v. Geistauts.

3. “Matters which by law, municipal charter, or ordinance are required to be confidential.”
4. “matters involving consideration of government records that by law are not subject to public disclosure.”

Interaction with public records act.

Municipal ordinances requiring confidentiality.

Additions or deletions to statutory exceptions.

Even Home Rule can't delete exceptions(s) –
Walleri v. City of Fairbanks.

But court can add—Attorney-client communications (*Cool Homes, Inc. v. Fairbanks North Star Borough*).

Can't be mere presence of lawyer or lawsuit.

Can't be general legal advice.

Applies only when the revelation of the communication will injure the public interest or other need for confidential communications including:

Candid discussions of facts and litigation strategies.

Whether to appeal or settlement offers.

How you get to executive session is important.

Convene in a public meeting.

Specific public motion and vote required.

Recital of statutory language not enough.
Motion must “clearly and with specificity describe the subject of the proposed executive session without defeating the purpose of addressing the subject in private.”

BAD!!!

EXAMPLE:

MOTION is to convene in an executive session to discuss subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion; matters, the immediate knowledge of which, would clearly have an adverse effect upon the finances of the government unit; and matters which by law, municipal charter, or ordinance are required to be confidential.

Motion _____ Seconded by _____

Advisory Vote _____ Vote _____

Remember narrow construction!

Can I Come?

What can you do in executive session?

No straying allowed. Stick to the subject/auxiliary subjects that don't go beyond the authorized reason.

Don't make a decision except:

To give instructions to your attorney or a labor negotiator.

Record, or not?

Shhhhh - - Confidentiality.

OOOPS, IT WAS ME - - WHAT HAPPENS WHEN...

A. Policy Making Bodies.

Voidable.

Must be filed within 180 days.

Subject to a public interest analysis.

Cures and Redos. Intent is not to serve as a vehicle for displeased individuals to get reversals of substantive decisions. Instead law intended to right nonconforming procedures close to the point of derailment and resume from there. *Hickel v. Southeast Conf.*

Make sure you conduct a “substantial and public reconsideration.”

**B. Different rule for advisory boards –
voidable language doesn't apply. But?**

What role did recommendation play in final decision?

Independent v. significant role.

Extent of public input.

C. Damages/Actual Attorney Fees. *Revelle v. Marston.*

Remedy may depend on nexus of violation and damage.

Remedial goal of deterrence can justify award of costs and full attorney fees incurred in remedying the violation.

D. Subject of Recall.

Allegations of violations of OMA sufficient for recall. *Meiners v. Bering Strait School District*. Violation of the OMA constitutes a prima facie showing of:

1. misconduct in office;
2. and/or failure to perform prescribed duties sufficient to justify recall for cause.

Allegation that school board members participated in an illegal executive session in which employees were discussed without being given notice or options to make the discussion public. Sufficient for recall.

Allegation that three board members violated the Open Meetings Act by not identifying the specific subject of executive session. Held sufficient.

FACT SCENARIO #1:

Lawrence and Smith talk.

Lawrence emails Smith, Jones and Payne and says, Smith and I talked we need to get a meeting we think “Contractor A” is it and no need to interview anyone else. Lets get going and get a meeting on Monday.

Jones replies all and indicates he invited contractor to a Monday meeting and will get a meeting scheduled.

- A meeting was properly noticed and held on that Monday.
- “The issues relating to the proposed water project and the engineers to hire for it were discussed openly and fully.”

FACT SCENARIO #2:

Assembly Member Smith was invited by the local Chamber of Commerce to participate in a panel discussion concerning local economic development issues. Other Assembly Members regularly attend Chamber of Commerce meetings and most were in attendance the day of Smith's panel discussion. At the end of the panel discussion the audience was permitted to ask questions. An audience member asked Smith to comment on Target's recent application to rezone their property. Smith spoke at length about his opposition to the application and the reasons for it. Other panel members then weighed in with their facts and opinions concerning the Target rezone request.

- Has the Open Meetings Act been violated?
- Does it matter whether the other assembly members participated in the discussion or asked questions?

FACT SCENARIO #3:

The City Council met at a properly noticed public meeting. During citizens' comments about 20 members of the community demanded that the Council take immediate action to rename a local park from John Smith Park to Winter Parkland due to the recent arrest for child pornography of John Smith.

At the conclusion of the public testimony City Council Member Jones moved to add the renaming of the park to the agenda.

- Is this motion consistent with the open meetings act?

- Assume the motion is denied but the Chair announces that the issue will be added to next months agenda. At the conclusion of the meeting a Council Member, during “Council Member’s comments” which is included in the public notice of the agenda, urges the Council not to grant the renaming request when it comes before them at the next meeting arguing that an arrest is not a conviction and Smith should be presumed innocent.
- Is this consistent with the Open Meetings Act?

FACT SCENARIO #4:

A governmental body met at a publicly noticed meeting to review the performance of the local police chief and determine whether they wanted to renew her contract. The public notice did not advise the public that they would go into executive session to discuss this subject. The police chief showed up at the meeting and demanded that if they wanted to talk bad about her then they should do it in a public meeting. She also complained that she had not been specifically notified of the meeting.

TAKEAWAYS

Well-meaning people can violate the OMA.

Don't count on the benefit of the doubt.

Only punishment awaits cleverness and game playing.

Don't act in a way that circumvents a discussion of public business at an open meeting.