

Open Meetings Act COVID edition

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Policies/Goals of OMA

- ▶ Maximize informed and principled decision-making
- ▶ Better decisions are made through public scrutiny
- ▶ The right to open meetings should be liberally construed
- ▶ Conservative approach to exceptions and executive sessions

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Recall

- ▶ Allegations of OMA violations are a sufficient basis for a recall petition.
 - School board members allegedly participated in an executive session in which employees were discussed without being given notice or options to make the discussion public.
 - Three board members violated the OMA by not identifying the specific subject of executive session.

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Basic Formula

- ▶ Subject + Members=Public + Notice
- ▶ Subject: within body's authority or duties; includes all steps of deliberative process including inquiry and discussion
- ▶ Members=more than three or majority (includes committees)
- ▶ Public=everyone can attend
- ▶ Notice=date, time, and place, by print or broadcast media and posted at principal office

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Timing and Notice of Subject

- ▶ Timing depends on the circumstance.
 - Complex, important vs proforma/ministerial
 - Follow any specific rules you have adopted
- ▶ Reasonable Notice
 - Includes the subject with some "specificity and clarity"
 - Be consistent (not "varied and confusing")
 - Ask: does it encourage/discourage citizen participation?

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Exceptions

- ▶ Certain meetings are not included
 - Employee meetings
 - Managerial meetings of service area boards
 - Attendance at member organizations
 - Quasi-Judicial bodies in deliberations only
- ▶ Emergency Meetings
 - Give as much notice as possible. Is it actually an emergency?

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Social media, texting, blogs

- ▶ A meeting can include “one-on-one conversations” between elected officials about “substantive” issues that have the effect of circumventing the Open Meetings Act, regardless of whether a quorum was present at any given time.
- ▶ A court may treat Facebook messages, text messages, tweets, or similar conversational technologies the same as emails.

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Executive Sessions

- ▶ NOT a secret meeting
 - Still needs public notice, maybe individual notice
 - Requires a specific motion and vote
- ▶ Statutory exceptions
 - Adverse effect on finances
 - Prejudice reputation/character
 - Matters required to be confidential by law
 - Consideration of government records that are confidential by law
 - Attorney client communications
- ▶ Who can come? Do we record them?

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Discussion of Common Scenarios and Questions

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Who counts?

Who is a member of your body?

Elected but not sworn?

Mayor/Manager voting members?

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Scenario

Bob applies for a rezone the assembly/council will hear next week. Bob invites you to his property to take a tour and review his development plans. You arrive, and a small group (including 3 other members) is gathered.

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What do you do?

1. You head back to your car.
2. You stay because they are only talking about his development plans if the rezone passes.
3. You politely tell Bob you have to leave and request he call you later with details of what everyone said.

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Choice 2 - Violation

Brookwood Area Homeowners Association v Municipality of Anchorage.

Informal meeting of assembly members at a developer's office for a discussion of a proposed development when a rezone was scheduled a week later was subject to OMA.

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Choice 3 - Violation

A member of the public can effectuate a serial meeting.

Be aware of telephone polling and email communications.

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Scenario

You attend a properly noticed meeting. On the agenda is an item that you have emailed other members about and went to a site visit on. You are wondering whether you should tell anyone about the emails or your meeting(s) that may have been improper.

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What do you do?

1. You stay quiet, so as not to taint this meeting too.
2. You bring a copy of the email, read it into the record, and describe your site visit.
3. You tell the clerk the body can no longer act on the rezone because you messed up.

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Violation

Ok, I messed up. Can I get a do-over?

Voidable.
Conduct a substantial and public reconsideration.
Get to point of derailment and resume from there.

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Scenario

At the end of the meeting agenda, there is an opportunity for mayor and assembly/council member comments. The mayor gives a 20 minute report on changes that should happen to your code to prevent contentious rezones.

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What do you do?

1. You ask questions, and so do two other members.
2. You call a point of order, and ask that this be placed on the next agenda.
3. You suggest the agenda be amended to include the item so the discussion can continue.

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Choice 1 - Violation

Remember—you have to give notice of the specific subject matter. You can not add items to the agenda by calling them mayor or staff briefings.

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Choice 2 - Correct Choice

Put it on the next agenda. Brief updates are ok, but long reports should be noticed as should discussions with the body.

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Choice 3 - Violation/Correction

Remember—you have to give notice of the specific subject matter. You cannot add items to the agenda at the same meeting.

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Scenario

The mayor of your municipality confesses she was paid by a developer to advocate for his rezone. You file an ethics complaint, and the Ethics Board (which is the assembly in this case) convenes a meeting.

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What happens next?

1. The clerk provides the mayor notice of the meeting.
2. The meeting notice is kept secret until after it is done, to protect the mayor's privacy.
3. The clerk publishes notice of the meeting in the paper, and provides personal notice to the mayor.

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Choice 3

The notice requirements for a meeting apply to the Board.
Individual notice may be required in certain cases.

- Termination of a property right (employment or contract)
- Quasi-judicial hearings.
- Executive sessions held for the purpose of protecting someone's reputation or character.

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Scenario

After a properly noticed hearing, the Board decides it needs to convene in executive session to discuss the ethics allegations regarding the mayor before rendering a decision.

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What happens next?

1. The Board asks those in attendance to leave, and goes off record to talk more.
2. The Board makes a motion to convene in executive session for the purpose of discussing matters that could prejudice the reputation of the mayor, and passes it over the mayor's objection (she wants this to be in public to clear her name).
3. The Board asks the mayor if she wishes a public consideration, and honors her decision when she says yes.

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Choice 1 - Violation/Correction

Hold up! You are discussing a specific individual. Have you provided the mayor an opportunity to have public consideration of the allegations?

(note that executive sessions do not need to specifically noticed on an agenda)

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Choice 2 - Violation

Good job on making a motion before going into executive session, but the person that is the subject of the discussion has the opportunity to request a public consideration.

The Board, however, does not have to deliberate in front of the person. There is an exception in the OMA for deliberations of quasi-judicial bodies, solely when making a decision.

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Scenario

Your assembly/council decides everyone needs to go to NEO training at AML.

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What happens next?

1. The entire body can attend and does not need to notice a meeting (no business can be discussed).
2. The entire body can attend, provided you run an ad in the paper.
3. The entire body can attend, and if it runs an ad, can discuss municipal business.

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Choice 2 - Acceptable

This is an acceptable answer, but you do not need to publish notice if you are attending meetings of a membership organization.

Choice 3

Notice of a meeting that the public will have no opportunity to attend is not going to save you. Be aware that if it is a paid event or attendance is otherwise restricted it will not be deemed a public meeting.

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Social media best practices

- ▶ Post a disclaimer on your personal account identifying the account's purpose and stating that opinions expressed on it are your own and do not purport to reflect the opinions or views of the municipality;
- ▶ Limit the account to personal use;
- ▶ Understand and use privacy settings to manage the account;
- ▶ Have a plan in place for responding to or forwarding municipal-related comments to the municipality;
- ▶ As a part of this plan, understand how to preserve information on the account. For example, Facebook has a "Download Your Information" tool that can retrieve prior messages and an "Access Your Information" tool that can retrieve prior posts.

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Social media “don’ts”

- ▶ Don't use personal accounts to discuss substantive issues of municipal business with other elected officials;
- ▶ Don't write posts on personal accounts that could be interpreted as “within the scope of employment” or that address municipal business;
- ▶ Don't connect to private accounts from an official municipal account;
- ▶ Don't use municipal devices to maintain or access your private account.

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Q&A

- ▶ Please type your questions in the chat bar and we will get to as many as we can.
- ▶ We cannot provide legal advice on any specific matter.

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