

TOWN OF PAYSON: OPEN MEETING, PUBLIC RECORDS, CONFLICTS OF INTEREST TRAINING



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TOWN OF PAYSON: OPEN MEETINGS LAW

➤ *Intent: Openness in Government*

➤ “Sunshine Laws”

➤ **Arizona’s public policy:**

Official deliberations & proceedings conducted openly

Maximize public access & participation

Any uncertainty resolved in favor of openness

WHAT IS A MEETING?



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- A.R.S. § 38-431(4)

- “Meeting” is a **gathering**, in person or through technological devices

- Of a **quorum** of a public body:
 - Discuss
 - Propose
 - Deliberate
 - Take legal action

QUORUM MAJORITY OF THE BOARD



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WHAT IF YOU DON'T HAVE A QUORUM?

- You don't have a "meeting"
- Discussions and presentations should be rescheduled

NOTICE AND AGENDA

A.R.S. §38-431.02



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MEETINGS MUST COMPLY WITH NOTICE, AGENDA, AND MINUTE REQUIREMENTS:

- Notice must inform when and where the Public Body will meet
- Agendas must contain adequate information to inform the public of the matters to be discussed or decided
- *May not use topics such as “Old Business” or “New Business” by itself as an agenda item*
- Prescott combines Notice and Agenda
- Minimum 24-hour public notice is required

NOTICE: EXCEPTIONS



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- Can recess and resume a properly noticed meeting to a later date by making an announcement at the meeting and describing what agenda items will be covered
- Actual emergencies

WHO MUST COMPLY?



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- “Public Bodies” – A.R.S. § 38-431(6)

- Any entity, however designated, officially established on motion or order of a public body **OR** presiding officer of a public body

- Whose members are appointed for 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
 - Standing Committee
 - Special Committee
 - Advisory Committee
 - Subcommittee

WHAT MUST A PUBLIC BODY DO?

- Meet and take legal action in properly noticed and agendized meetings.

EXCEPTION: May meet in authorized executive session

**PUBLIC
NOTICE**



HOW TO AVOID PITFALLS OF OPEN MEETING LAW



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- Don't poll other members on commission business
- Limit your discussions with other members to public meetings
- Don't send e-mails to each other
- Distribute information to the council through your staff liaison
- Disband meetings when a quorum is not in attendance

PROHIBITED ACTS/VIOLATIONS



- Polling individual commission members to reach a decision prior to a meeting
- Discussion/deliberation between less than a quorum for the purpose of circumventing the Open Meeting Law

CIRCUMVENTION



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Cannot use any device to circumvent the law

“Splintering the quorum”:

- Serial communications (verbal, written, electronic, etc.)
- Polling
- “Hub and Spokes” of a wheel analogy
- “Daisy Chaining”

PROHIBITED 2-WAY COMMUNICATIONS



- Discussing
- Deliberating
- Taking Legal Action
- Back and forth among a quorum
- On a matter that could foreseeably come before the board (board business)



ATTORNEY GENERAL HANDBOOK

7.5 ACTIONS AND ACTIVITIES COVERED BY THE OPEN MEETING LAW



- All discussions, deliberations, considerations, or consultations among a majority of the members of a public body regarding matters that may foreseeably require a final action or final decision by the governing body constitute “legal action” and therefore must be conducted in a public meeting or executive session in accordance with the Open Meeting Law. *The safest course of action is to assume the Open Meeting Law applies whenever a majority of the body discusses the business of the public body.*

PROHIBITED I-WAY COMMUNICATION



- Proposing legal action
- “Propose” means “to put forward for consideration, discussion, or adoption”
- It only takes 1 person to propose legal action
- **CANNOT** propose legal actions outside of a noticed meeting

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7.5 ACTIONS AND ACTIVITIES COVERED BY THE OPEN MEETING LAW



- If an electronic communication from one member of the public body proposes legal action and is sent to enough members of the public to form a quorum, a violation occurs even if no member of the public body responds to the electronic communication.

“PROPOSE”

EXAMPLES



“Councilperson Smith was admitted to the hospital last night”

✓ Does NOT propose legal action

“We should install a crosswalk at First and Main”

✓ Does propose legal action

✓ It’s more than a topic for the agenda because it urges or suggests an outcome

PROPOSING LEGAL ACTION



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“Here’s the recipe for the lemon bars I brought to the last meeting”

“I hope I can count on all of you to vote in favor of agenda item 5”

PROPOSING LEGAL ACTION



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“Here’s an article on a program the State of Oregon has put in place”

“We need to adopt a program like the one discussed in the attached article”

PROPOSING LEGAL ACTION: MORE EXAMPLES



Does this propose legal action or only an agenda item?

“I think we should consider firing the City Manager at our next meeting”

“I would like to discuss the City Manager’s performance at our next meeting”

When in doubt.....?

SERIAL COMMUNICATIONS: MAY VIOLATE OML



Verbal serial communications – going from one person to the next, sharing communications among a quorum would violate OML

Arizona Agency Handbook § 7.5.2



NON-VERBAL SERIAL COMMUNICATIONS



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- Letters – Series of **letters** from one member to the next would violate OML
- E-mail – Occurring at different times will still constitute a “meeting” in violation of the OML

Simultaneity is not required for there to be a “meeting”



E-MAIL

- Cannot use e-mail to circumvent the OML

- Cannot use e-mail among a quorum to:
 - Propose legal action

 - Discuss legal action

 - Deliberate on legal action

 - Take legal action



E-MAIL

- E-mail and other communications
- E-mail (or “electronic”) communications may constitute a meeting
- The use of e-mail among a quorum of members to discuss public matters is prohibited by the Open Meeting Law
- E-mails regarding commission business are a public record - *Does not matter whose computer is used*
- Staff liaison may not communicate the positions of various commissioners

E-MAIL COMMUNICATIONS



- E-mail communications are treated the same as any other form of communication between board members
- E-mails exchanged among a quorum of the Board that involve discussion, deliberations, or taking legal action on matters that may come before the Board constitute a meeting and thus violate the open meeting law

FACTS vs. OPINIONS?



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- There is **no distinction** between discussing facts vs. discussing opinions among a quorum
- Deliberation = “collective acquisition and exchange of facts preliminary to a final decision”
- Therefore, a 2-way discussion of facts (among quorum) regarding potential board business

Violation

STAFF E-MAIL



- Staff may send e-mail to board members
- Passive receipt of information from staff, without more, does not violate the open meeting law

Example: Board packets

- Staff may NOT send opinion or substantive communication about board business from a board member to enough other board members to constitute a quorum

INTERNET SOCIAL NETWORKING

- Blogs and Social Media like Twitter and Facebook can present the same issues as e-mail among board members
- If a quorum of members is discussing board business using any technological means, a meeting may result



INTERNET SOCIAL NETWORKING

- Like e-mail, this type of communication does not have to occur among a quorum of members simultaneously to be considered a meeting
- Like e-mail, this type of communication can occur on a personal computer, smart phone and still be “board business”



INTERNET SOCIAL NETWORKING



- This type of communication may be considered a virtual meeting, requiring notice and access to technological equipment as it was discussed in the virtual meeting opinion
- This type of communication results in the creation of electronic public records which must be maintained, preserved and produced upon request



STAFF & OTHER PERSONS



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- Cannot direct staff to communicate in violation of the open meeting law – A.R.S. § 38-431.01(I)
- Sanctions may be imposed upon any person who knowingly aids, agrees to aid or attempts to aid another person in violating this article – A.R.S. § 38-431.07(A)

EXECUTIVE SESSIONS

A.R.S. § 38-431.03



- Executive Sessions require prior consent of City Attorney
- Seven legal reasons for convening into Executive Session.
Most common are:
 - Personnel Matters
 - Discussion of Confidential Information
 - Legal Advice from the City's attorneys
 - Discussion of settlement, contract or property negotiations

WHO MAY ATTEND EXECUTIVE SESSIONS A.R.S. § 38-431(2)



- Members of public body
- Persons subject to a personnel discussion
- Auditor general
- Individuals **whose presence is reasonably necessary** in order for the public body to carry out its executive session responsibilities

EXECUTIVE SESSION PITFALLS



- What happens in executive session stays in executive session!!
- Failure to advise persons about the confidentiality requirement A.R.S. § 38-431.03(C) - Mandatory
- Taking legal action. All votes must take place in public!



WHAT CONSTITUTES LEGAL ADVICE?



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- “Legal advice” encompasses advice given to the public body regarding the legal ramifications of the facts and information given to him and the legality of the proposed action
- *City of Prescott v. Town of Chino Valley*, 166 Ariz. 480, 485, 803 P.2d 891, 896 (1990)

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7.9.4 CONFIDENTIALITY OF EXECUTIVE SESSIONS



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- A public officer or employee shall not disclose or use, without appropriate authorization, any information that is acquired by the officer or employee in the course of the officer's or employee's official duties and that is declared confidential by law.
 - Members of a public body and others attending the executive session must ensure that the information remains confidential. In addition to violating the Open Meeting Law, criminal charges may arise from a release of confidential information.

MEETING ETIQUETTE



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- Asking for trouble:
 - Passing notes (even if it's about when to order lunch)
 - Whispering to fellow board members
 - Privately using modern technology
 - Quorum talking to individuals before the meeting officially starts or after the meeting officially ends

SOCIAL EVENTS

- If a quorum might be present:
- “Courtesy Agenda” to be posted
- Include statement that no business of public body will be discussed and no action taken



PUBLIC FORUMS, SPEECHES AND COMMUNITY EVENTS



- If a quorum might be present when one or more council members plan on speaking or discussing City business with those in attendance:
 - Special Meeting Agenda must be posted
 - Agenda must include a description of the general topic or topics to be discussed and that no action will be taken
 - City Attorney should review all agendas for accuracy

COMMUNICATIONS WITH THE MEDIA



The open meeting law does not prohibit a member of a public body from speaking to the media regarding matters that may come before the public body

A.R.S. § 38-431.09(B) added by 2008 Sessions Laws,
Ch. 135, § 1 (effective 09/26/08)

Attorney General Opinion 107-013



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7.5 ACTIONS AND ACTIVITIES COVERED BY THE OPEN MEETING LAW



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- Open Meeting Law does not prohibit a member of the public body from voicing an opinion or discussing an issue with the public either at a venue other than a public meeting of the body, or through media outlets or other public broadcast communications or technological means, so long as the "opinion or discussion is not principally directed at or directly given to another member of the public body," and "there is no concerted plan to engage in collective deliberation to take legal action."

COMMUNICATIONS WITH THE MEDIA



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HOWEVER ...



"Don't believe everything you read on the Internet just because there's a picture with a quote next to it."

—Abraham Lincoln



PUBLIC'S RIGHTS



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- Attend
- Listen
- Tape Record
- Videotape



- **Note:** Public body cannot require attendees to identify themselves or sign in (unless they are making a presentation)

PUBLIC'S RIGHTS



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Public has **NO** right to:

- Speak
- Disrupt



WHEN IN DOUBT?

RESOLVE ALL DOUBTS IN FAVOR OF OPENNESS

- Remember: Legal action taken during a meeting held in violation of any provision of the open meeting law is null and void unless ratified

PUBLIC RECORDS



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- Arizona imposes a presumption in favor of disclosure of public records.
- Exception: When public disclosure and access is outweighed by confidentiality, privacy, or the best interests of the state.

PUBLIC RECORDS



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- Records reasonably necessary to provide an accurate accounting of their official activities and of any government-funded activities
- “Other matters” include documents held by the public officer in his or her official capacity and in which the public’s interest in disclosure outweighs the governmental interest in confidentiality

PUBLIC RECORDS



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- All records made or received by public officials or employees in the course of their public duties are the property of the city. All public officers are responsible for preserving, maintaining, and caring for the public records within their offices.
- A public officer or other person having custody or possession of any record for any purpose, “who steals, or knowingly and without lawful authority destroys, mutilates, defaces, alters, falsifies, removes or secretes” all or part of public record, or permits any other person to do so, is guilty of a class 4 felony. A.R.S. § 38-421; see *also* A.R.S. § 13-2407 (making it a class 6 felony to tamper with a public record).

PUBLIC RECORDS



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- Best interests of the State permits a public body to designate a record as confidential when “release of information would have an important and harmful effect on the duties of the officials or agency in question.” Public officers must balance the possible adverse impact on the operation of the public body if the information in question is disclosed against the public’s right to be informed about the operations of its government.
- The cloak of confidentiality may not be used to save an officer or public body from inconvenience or embarrassment.

CONFLICT OF INTEREST LAW



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- A.R.S. § 38-501 through 511
- Applicability
- Involvement in decisions; substantial and remote interests
- Prohibited acts
- Remedies and penalties
- Guidelines

CONFLICT OF INTEREST LAW: APPLICABILITY



➤ Applies to:

➤ All Public Officers
(Including Board and Commission Members)

➤ All Public Employees



CONFLICT OF INTEREST LAW: INVOLVEMENT IN DECISIONS



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A public officer who has, or whose relative has, a substantial interest in a decision of the public agency or in any contract, sale, purchase or service to such public agency must disclose that interest in the official record and not vote on or participate in the decision or transaction.

CONFLICT OF INTEREST LAW: SUBSTANTIAL INTERESTS



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- **Substantial Interest:** “any pecuniary or proprietary interest, either direct or indirect, other than a remote interest”. A.R.S. § 38-502.11
- Generally, any interest that affects your financial (pecuniary) or property (proprietary) interests.



CONFLICT OF INTEREST LAW: IDENTIFYING CONFLICTS



- **Three Questions To Identify A Conflict Of Interest:**
- Will my decision have a positive or negative impact on my interests or that of my relatives?
- Do I have a monetary or ownership interest in the matter?
- Is my interest other than one of the designated remotes interests?



CONFLICT OF INTEREST LAW: WHAT TO DO

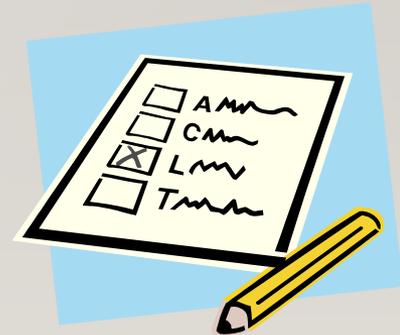
- **What If You Have A Substantial Conflict?**
 - Refrain from voting on or participating in the decision
 - Make the conflict of interest known in the official record
 - Leave the table or the room



CONFLICT OF INTEREST LAW: REMOTE INTERESTS



- Remote interests are financial and property interests deemed to be so minor as not to trigger the reporting and non-participation requirements
- May still vote and participate in discussions



CONFLICT OF INTEREST LAW: REMOTE INTERESTS - EXAMPLES

- **Remote Interests – Examples:**
 - Non-compensated officer of a non-profit corporation
 - Landlord or tenant of contracting party
 - Attorney whose client is contracting party
 - Member of a non-profit marketing association
 - Owner of less than 3% of the shares of a corporation, unless the income from this ownership exceeds 5% of the officer's income

CONFLICT OF INTEREST LAW: REMOTE INTERESTS - EXAMPLES

- **Remote Interests – More Examples:**
 - Reimbursement for actual and necessary expenses in performance of official duties
 - Receipt of municipal services under same terms and conditions as general public
 - Officer/employee of another public agency, unless a direct economic benefit or detriment to officer/employee or relative involved
 - Member of a group/class of at least 10 with an interest no greater than that of another

CONFLICT OF INTEREST LAW: OTHER PROHIBITIONS

- **Gifts and Bribes:** Never use official position to secure, and never accept, any valuable thing or benefit that would not ordinarily accrue in the performance of official duties.



- **Additional Income:** A public officer or employee may not receive any additional compensation in matters before agency.

CONFLICT OF INTEREST LAW: SEEKING HELP

- **What If You Aren't Sure?:**
 - Ask for an opinion from the City Attorney
 - Opinions by the City Attorney regarding Conflicts of Interest are matters of public record and filed with the City Clerk



CONFLICT OF INTEREST LAW: REMEDIES

- Contracts are voidable
- Affected person may sue
- Court may assess attorneys' fees and costs

CONFLICT OF INTEREST LAW: PENALTIES

- Forfeiture of Office

- Felony

- A knowing or intentional violation of the Conflict Of Interest Law

- Misdemeanor

- A negligent or reckless violation of the Conflict of Interest Law

QUESTIONS?



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