



Open Meetings Act: What Every Municipality Should Know

Anne M. Seurnyck

Foster, Swift, Collins & Smith, PC
1700 East Beltline Ave., N.E., Suite 200
Grand Rapids, MI 49525
(616) 726-2200

aseurnyck@fosterswift.com

mhomier@fosterswift.com



Open Meetings Act

OPEN MEETINGS ACT

- The Open Meetings Act was expressly enacted for the purpose of requiring certain meetings of public bodies to be open to the public, to require notice and the keeping of minutes of the meetings, to provide enforcement of the Act, to provide invalidation of decisions under certain circumstances and to provide penalties for non-compliance.
- All meetings subject to the Open Meetings Act must be open to the public and held in a place available to the general public.



Open Meetings Act

- The Americans with Disabilities Act requires the Library to provide disabled individuals with a reasonable opportunity to request necessary, reasonable auxiliary aides and services to participate at public meetings.
- A public body may not place conditions on attendance such as requiring visitors to sign in or provide names.



Open Meetings Act

- All persons in attendance at a public meeting have the right to address the public body.



Open Meetings Act: Common Mistake

- **Mistake:** Having a policy that limits the total time for public comment. For example, a policy that provides that the total time for public comment will last ½ hour maximum will likely violate the OMA.
- **Remedy:** Avoid the mistake by limiting the time per speaker and not limiting the total time or the substance of the speech.



Open Meetings Act

- The right to attend a meeting of a public body includes the right to tape record, videotape and broadcast the public proceedings via live radio and television.
- Keep this rule in mind if your municipality prevents videotaping generally in the building where the open meetings are held.



Open Meetings Act: Common Mistake

- **Mistake:** Making people who attend the meeting turn off a video camera or turn off a tape recorder.
- **Remedy:** Allow people to record, even if the person is a stenographer.



Open Meetings Act

- “Public body” means any state or local legislative or governing body, including a **board, commission, committee, subcommittee**, authority, or council, that is **empowered by** state constitution, **statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority** or perform a governmental or proprietary function; a lessee of such a body performing an essential public purpose and function pursuant to the lease agreement; or the board of a nonprofit corporation formed by a city under section 4o of the home rule city act, 1909 PA 279, MCL 117.4o.



Open Meetings Act

- Applies to City and Village Council, Township Board, Planning Commission, and ZBA meetings.
- Committees and Subcommittees that have only advisory authority may not fit the definition of Public Body, since they have no decision-making authority. However, “advisory” committees are very narrowly construed. OAG, 1997, No. 6935 (April 2, 1997).



Open Meetings Act: Common Mistake

- **Mistake:** Not applying the provisions of the OMA to certain committees. If the committee is making decisions for the public body or even narrowing down options, that committee will likely be subject to the OMA.
- **Remedy:** Consult with the attorney regarding whether a particular committee must be open to the public.



Open Meetings Act

Definition of Meeting

- “Meeting” means the convening of a public body (1) at which a quorum is present (2) for the purpose of deliberating toward or rendering a decision (3) on a public policy.



Open Meetings Act

What is not Considered a “Meeting” under the Open Meetings Act?

- The Open Meetings Act does not apply to a conference or informational gathering, provided that the meeting does not involve deliberation and is not designed to circumvent the Act. OAG, 1982, No. 6074.
- A public body may convene to listen to the concerns of a neighborhood group or board of directors without complying with the Open Meetings Act, provided that the body does not deliberate toward or render a decision. OAG, 1978, No. 5364.



Open Meetings Act: Common Mistake

- **Mistake:** Discussing business with a quorum of council or board members outside of an open meeting. Some lawsuits are filed because the public body makes a decision at a meeting with absolutely no discussion. When it appears there was or should have been discussion, plaintiffs often make the assumption that a meeting was held in private.
- **Remedy:** Make sure all discussions take place at an open meeting. Consider taking extra effort to discuss topics on the record so there is no appearance of an unlawful meeting.



Open Meetings Act

- Implications of new technology such as telephone conference, videoconferencing, Skype, or chat rooms.
- Impact of e-mail.



Open Meetings Act: Common Mistake

- **Mistake:** Violating the OMA by using the “reply to all” feature on e-mail. A Council or Board member may be intentionally violating the OMA by “deliberating” over e-mail. Any time a quorum of the public body discusses business by e-mail, there is a risk the OMA can be violated. To make matters worse, a simple FOIA request could prove the violation.
- **Remedy:** Enact a policy addressing this issue. Often, the policy provides that e-mail should be used for the distribution of material. Even when the e-mail is for distribution only, members should be blind copied so the “reply to all” function is not readily available.



Open Meetings Act

Public Meetings Must be Properly Noticed.

- Within ten (10) days after the public body's first regular meeting of the calendar or fiscal year, it must post a notice at its principal office stating the dates, times and places of its regular meetings.
- If a public body changes its regular meeting schedule, it must post a new notice stating the changes within three (3) days after the meeting at which the change was made and at least 18 hours before the rescheduled meeting.
- If the public body chooses to recess a meeting for more than 36 hours, it may only reconvene the meeting after posting a public notice stating the date, time and place where the meeting will be reconvened.



Open Meetings Act

Notice

- Upon written request, the secretary must furnish a copy of the notice to any newspaper or radio or television station located within the state free of charge.
- Special meetings require that the meeting be posted 18 hours in advance of the meeting.



Open Meetings Act

Notice

- A public notice shall always contain the name of the public body, its telephone number if one exists, and its address.
- A public notice for a public body shall always be posted at its principal office and any other locations considered appropriate by the public body. Cable television may also be utilized for purposes of posting public notice.
- For special meetings, a public notice stating the date, time, and place of the meeting shall be posted at least 18 hours before the meeting.



Open Meetings Act

Notice

- Also consider any special charter provisions that contain notice requirements.
- Also, there may be other applicable laws. For example, public hearing notices may have special requirements.
- Further, townships have requirements for special meeting notices.



Open Meetings Act: Common Mistake

- **Mistake:** Not allowing 18 hours notice for a special meeting, posting a notice that does not comply with the OMA or posting a notice with incorrect information.
- **Remedy:** Hold the meeting again with proper notice.



Open Meetings Act

Closed Sessions

- A closed session may be called by a majority vote of the members:
 - To consider the dismissal, suspension, discipline, complaints, charges or periodic personnel evaluations of a public officer or employee, if the named person requests a closed hearing; or
 - For strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement, if either party requests a closed session.



Open Meetings Act

- Discussion of “Employee Discipline or Evaluation” exemption recommendations:
 - Enter the request for the closed session in the minutes if the employee requests the closed session. If the employee is not present at the meeting, make sure to obtain the consent in writing prior to the meeting.
 - Do not promise complete confidentiality of evaluations or complaints. For example, even if the public body moves into closed session to discuss a periodic personnel evaluation, the evaluation itself and personnel files are still subject to disclosure under the FOIA.
 - The public body may decide whether the named employee or any other person attends the closed session.



Open Meetings Act: Common Mistake

- **Mistake:** Believing that a public body may move into closed session to discuss any employment related issues, even employment contracts. Also, believing that there is a general “contract” exemption to the OMA.
- **Remedy:** Follow the strict requirements of the statute, including obtaining permission from the employee at issue.



Open Meetings Act

- A closed session may be called by a two-thirds roll call vote of the members:
 - To consider the purchase or lease of real property up until the time an option to purchase or lease is acquired;
 - This is only the purchase of property
 - Does not include the sale



Open Meetings Act

2/3 Roll Call Vote

- To consult with the municipal attorney regarding trial or settlement strategy in connection with specific pending litigation, if an open meeting would have a detrimental financial effect on the public body;
 - Threat of litigation not enough.
 - If a consent judgment has been entered or a settlement agreement reached, public body may not use this exemption to discuss the execution of the judgment or agreement; there have to be specific unresolved issues in the litigation. *Detroit News, Inc v City of Detroit*, 185 Mich App 296; 460 NW2d 312 (1990).
 - The attorney representing public body in the closed session does not have to be the actual attorney litigating the matter; any attorney who has an attorney-client relationship with the public body would suffice. *Manning v East Tawas*, 234 Mich App 244; 593 NW2d 649 (1999).



Open Meetings Act

2/3 Roll Call Vote

- To review the specific contents of an application for employment or appointment to a public office, if the candidate requests that the application remain confidential. All interviews by a public body for a public office must be open, however.



Open Meetings Act

2/3 Roll Call Vote

- To consider material exempt from discussion or disclosure by state or federal statute.
 - Documents exempt under FOIA (except the “frank communication” exemption)
 - Attorney-Client Privilege
 - HIPAA or medical issues
 - Michigan Library Privacy Act – “library records”
 - Closed session minutes



Open Meetings Act

Procedure for Closed Session

- A closed session must be preceded by a vote in an open session.
- The roll call vote and the purpose of the closed session must be stated and included in the minutes of the open session.
- At the conclusion of the closed session a roll call vote must be taken to close the closed session and re-open the open session before the meeting may be adjourned.



Open Meetings Act: Common Mistake

- **Mistake:** Not having the proper number of votes for a closed session. For certain exceptions, the public body may only move into closed session if there are 2/3 of the members **appointed and serving** that approve the closed session. With a 6 member board, 4 members must approve the closed session. If only 4 board members are present at the meeting and only 3 approve the closed session with one member voting no, the closed session is not proper.
- **Remedy:** Keep the requirement in mind every time you hold a closed session. Do not hold the closed session if you do not have sufficient votes.



Open Meetings Act

- All decisions of the public body must be made in an open meeting. As a result, no decisions may be rendered in a closed session. Any decision resulting from discussions in a closed session may be made in a manner that does not disclose information regarding discussions or deliberations of a closed session, however.
- The only topic of discussion in a closed session is one which is authorized under the Open Meetings Act as a legitimate basis for calling a closed session and for which the closed session was called.



Open Meetings Act: Common Mistake

- **Mistake:** Taking improper action in closed session.
- **Remedy:** The public body may not vote in closed session. All votes must be accounted for in the open session portion of the meeting.



Open Meetings Act

Open Session Minutes

- Minutes of each meeting must be kept showing the time, date and place of the meeting. The minutes must also state the names of all members present and absent, any decisions made, all roll call votes taken at the meeting and the reason for any closed sessions held.
- Proposed minutes must be made available for public inspection within eight (8) business days after the meeting at which the minutes were taken.
- Any corrections to the minutes must be made at the next meeting, and the corrected minutes must show the original entry and the correction.
- Approved minutes must be available for public inspection within five (5) business days after the meeting at which the minutes were approved.



Open Meetings Act: Common Mistake

- **Mistake:** Not recording or not accurately recording motions or other actions taken by council. If in litigation, the Court will look to the minutes, not to the verbal representation of board members.
- **Remedy:** Prepare the minutes timely and approve them at the next meeting to avoid any problems.



Open Meetings Act

Closed Session Minutes

- During the closed session, a separate set of minutes must be taken by the clerk or designated secretary of the public body. The closed session minutes must be retained by the clerk and are not available to the public.
- The closed session minutes can only be disclosed if required by a civil action filed under the Open Meetings Act.
- Closed session minutes must be retained by the public body for at least one year and one day after approval of the minutes of the meeting at which the closed session was held.
- Discussion of closed session minutes before approval of the minutes may also be made in closed session.



Open Meetings Act: Common Mistake

- **Mistake:** Council/Board members revealing what happened or what was said during a closed session.
- **Remedy:** Educating members that revealing the contents of the closed session minutes without a court order violates the OMA.



Open Meetings Act

Remedies

- A decision made by a public body may be invalidated if the public body has not complied with the Open Meetings Act.
- In any case where a public body discovers it has failed to comply with the Act or is charged with failing to comply, the public body may re-enact the disputed decision in conformity with the Act. A decision re-enacted in this manner shall be effective from the date of re-enactment and shall not be declared invalid by reason of the deficiency in the procedure used in its initial enactment.
- If a public body violates the Open Meetings Act, a person may commence a civil action to compel compliance or to enjoin further non-compliance with the Act.



Open Meetings Act

- If a public official is found to have intentionally violated the Act, the official may be held personally liable for court costs and actual attorney fees as well as up to \$500 in damages.
- A public official who intentionally violates the Act is guilty of a misdemeanor punishable by a fine of up to \$1000. For a second offense during the same term of office, the maximum fine increases to \$2000 and the public official may be imprisoned for up to one (1) year.



Questions?

Anne M. Seuryrnck

616.726.2240 | aseuryrnck@fosterswift.com