City of Benson
City Council Communication

Worksession **January 11, 2016**

To: Mayor and Council Agenda Item # 1

From: Gary Cohen, City Attorney

Subject:

Open Meeting Law Training, including but not limited to review of video and materials from Ombudsman's Office

Discussion:

Tonight's Open Meeting Law training is being held as agreed between the City of Benson and the Arizona Attorney General's Office to complete the resolution of an complaint made to the Arizona Attorney General's office about an alleged prior Open Meeting Law violation.

Staff Recommendation:

Information only

Arizona's Open Meeting Law

Kathryn Marquoit
Assistant Ombudsman – Public Access

Role of the State Ombudsman

A.R.S. § 41-1376.01

- Investigate complaints relating to public access law.
- Train public officials and educate the public on the rights of the public under the public access laws.

Enforcement Authority

- Arizona Attorney General's Open Meeting Law Enforcement Team (OMLET)
  - Investigate complaints
  - Enforcement authority
  - Arizona Agency Handbook, Chapter 7 (Revised July 2010)
    - Available online: www.azag.gov
- County Attorney's Office
- The Courts

What is the open meeting law?

Set of laws that were intended to:

- Maximize public access to the governmental process.
- Open deliberations and proceedings to the public.
- Prevent public bodies from making decisions in secret.
  - Found at A.R.S. §§ 38-431 through -431.09.

Who Must comply?

- “Public Bodies” – A.R.S. § 38-431(6)
  - All councils, boards, commissions of the state or political subdivisions
  - Multimember governing bodies of departments, agencies, institutions and instrumentalities of the state or political subdivisions
  - Includes corporations or other instrumentalities whose boards of directors are appointed or elected by state or political subdivision

AG Opinion I07-001

- The entity's origin (whether it was created by government)
- Whether the entity's performs a function traditionally associated with government
- Whether the entity has the authority to make binding governmental decisions
- Nature of government financial involvement
- Nature and scope of government control over entity
- Whether officers and employees are government employees

The definition also includes…

Standing committees

Special committees

Advisory committees

Subcommittees

- of or appointed by the public body

Advisory committees and subcommittees are defined as…

- Any entity, **however designated**
- Officially established
  - on motion or order of the public body
  - **or** by presiding officer of the public body
- For purpose of <u>making a recommendation</u> concerning a decision to be made or a course of conduct to be taken by the public body

Statutory Requirements

- Secretary of State, Clerk of the County Board of Supervisors, and City/Town clerks must conspicuously post open meeting law materials prepared and approved by the Attorney General's Office on their website.
  - Chapter 7 of the Arizona Agency Handbook
  - Revised July 2010
- All persons elected or appointed to a public body must review the materials at least one day before taking office.

What Must a Public Body Do?

- Provide notice
- Have an agenda
- Meet in public
- Permit public to attend
  - Exception: authorized executive sessions
- Take all action in public
- Prepare meeting minutes

What is a Meeting?

- 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 public body – A.R.S. § 1-216(B)

- (unless specific statutory provision specifies a different number)

- 7 members /quorum =4
- 5 persons /quorum = 3
- 3 persons /quorum = 2

*That includes vacant seats unless otherwise specified by law.

Telephone Conferencing

- Approve this practice
- Board members and public must be able to hear
- Provide information in minutes

The “Initial” Notice (aka disclosure statement)

- A.R.S. § 38-431.02
- Tells public where individual meeting notices will be posted (must include both physical and electronic locations).
- Must be posted on public body’s website.
  - Cities and Town may use association of cities and towns website.
  - Special districts may file it with the County Clerk.

Form 7.1 - Disclosure Statement - Section 7.6.3.1

STATEMENT OF LOCATIONS WHERE ALL NOTICES OF THE MEETINGS OF THE [NAME OF PUBLIC BODY] WILL BE POSTED

Pursuant to A.R.S. § 38-431.02, the [name of public body] hereby states that all notices of the meetings of the [name of public body] and any of its committees and subcommittees will be posted [identify the location where notices will be posted and include the hours during which such locations are open to the public, for example, "in the lobby of the State Capitol located at 1700 West Washington, Phoenix, Arizona, and at the press room of the State Senate Building, 1700 West Washington, Phoenix, Arizona. Both locations are open to the public Monday through Friday from 8:00 a.m. to 5:00 p.m. except legal holidays."] Such notices will indicate the date, time, and place of the meeting and will include an agenda or information concerning the manner in which the public may obtain an agenda for the meeting.

Dated this _____day of _____, 20__.

[name of public body]

By [authorized signature]

Notice of Meetings

A.R.S. § 38-431.02(C)

Provided 24 hours in advance of meeting

- To all members of the public body
- To the general public
- 24 hours may include Saturdays IF the public has access to the physical posting location. May not include Sundays or other legal holidays prescribed under A.R.S. § 1-301

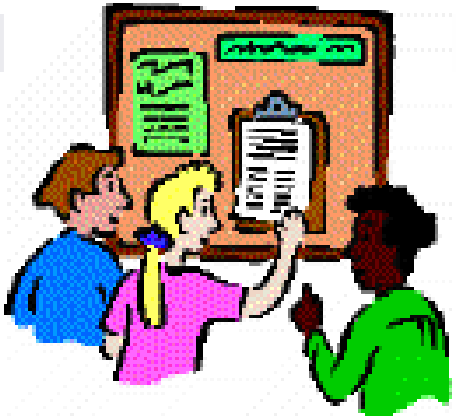
Exceptions:

- Recess and resume
- Actual emergencies

Contents of Notice

- The name of the public body
- Date, Time, and Place
  - Address and room number
- Must include an agenda OR inform the public how to obtain a copy of the agenda

Posting the Notice



- Must be posted in all location identified in the initial notice (disclosure statement). This must be a location where the public has access.
- Must post it on website (see exception for special districts).
- Must give additional notice that is reasonable and practicable.

A.R.S. § 38-431.02 – Notice of Meetings

- **The public bodies of this state, charter schools board, public bodies of counties and school districts, shall**:

(a) Conspicuously post a statement on their website stating where all public notices of their meetings will be posted, including the physical and electronic locations, and shall give additional public notice as is reasonable and practicable as to all meetings.

(b) Post all public meeting notices on their website and give additional public notice as is reasonable and practicable as to all meetings. A technological problem or failure that either prevents the posting of public notices on a website or that temporarily or permanently prevents the use of all or part of the website does not preclude the holding of the meeting for which the notice was posted if the public body complies with all other public notice requirements required by this section.

A.R.S. § 38-431.02 continued…

- **Special districts that are formed pursuant to title 48**:

(a) May conspicuously post a statement on their website stating where all public notices of their meetings will be posted, including the physical and electronic locations, and shall give additional public notice as is reasonable and practicable as to all meetings.

(b) May post all public meeting notices on their website and shall give additional public notice as is reasonable and practicable as to all meetings. A technological problem or failure that either prevents the posting of public notices on a website or that temporarily or permanently prevents the use of all or part of the website does not preclude the holding of the meeting for which the notice was posted if the public body complies with all other public notice requirements required by this section.

(c) If a statement or notice is not posted pursuant to subdivision (a) or (b) of this paragraph, shall file a statement with the clerk of the board of supervisors stating where all public notices of their meetings will be posted and shall give additional public notice as is reasonable and practicable as to all meetings.

- **The public bodies of the cities and towns shall**:

(a) Conspicuously post a statement on their website or on a website of an association of cities and towns stating where all public notices of their meetings will be posted, including the physical and electronic locations, and shall give additional public notice as is reasonable and practicable as to all meetings.

(b) Post all public meeting notices on their website or on a website of an association of cities and towns and give additional public notice as is reasonable and practicable as to all meetings. A technological problem or failure that either prevents the posting of public notices on a website or that temporarily or permanently prevents the use of all or part of the website does not preclude the holding of the meeting for which the notice was posted if the public body complies with all other public notice requirements required by this section.

A few tips on posting notices

- Make sure it can’t be removed.
- Make sure front and back can be read.
- Document when the notice/agenda was posted
  - Need a regular, routine business practice
  - Clerk marks time of posting with initials
  - Date / time stamp at exact time of posting

Recess and Resume

- A public body may recess and resume a properly noticed meeting to a later time or date by making an announcement at the meeting what agenda items will be covered.

Emergency Meetings

A.R.S. § 38-431.02(D) and Agency Handbook section 7.7.9

- In case of “actual emergency,” law permits the board to meet, discuss and decide matters with less than 24 hours notice.
- What constitutes an “actual emergency”?
  - Due to unforeseen circumstances, <u>immediate board action</u> is necessary to avoid a serious consequence that would result from waiting until proper notice could be provided.

Emergency Meeting Requirements

- Aside from the 24 hour notice requirement, all Open Meeting Law requirements still apply
- Provide notice as soon as possible
- Announce in public the reasons necessitating emergency action
- Include reasons in the meeting minutes
- Post a notice stating the emergency session occurred and providing the information required on a normal agenda within 24 hours after the meeting

Social Events & Seminars

- You might consider posting a “courtesy agenda” announcing event and explain that a quorum might be present
- Identify date, time, and purpose (location details will vary depending on event)
- State that no business of the public body will be discussed and no legal action will be proposed or taken
- Members must be scrupulous to avoid improper discussion

The Agenda
A.R.S. § 38-431.02(H)

- Must list the specific matters to be:
  - discussed,
  - considered or
  - decided
- Must include information reasonably necessary to inform the public
- All discussion must be reasonably related to an adequately described agenda item.

Common Agenda Problems

- Using language a regular person would not understand
  - Legalese
  - Acronyms (without first spelling it out)
  - Agency slang
- Using general categories without details
  - “New Business”
  - “Old Business”
  - “Personnel”
  - “Reports”

Current Events – A.R.S. § 38-431.02(K)

- Chief administrator, presiding officer or a member of a public body may present a **<u>brief</u>** summary of **current events** without listing in the agenda the specific matters to be summarized
- **<u>provided that</u>**
- "Current Events" is an **agenda item**
- & public body does not propose, discuss, deliberate or take legal action

If it’s not on the agenda…

- You cannot discuss it!
- New items must wait for a future meeting.

Meeting Location Pitfalls

- Inaccessible
  - A board member’s house
  - Remote location
- Inaudible
- Not enough room
- Unreasonable times (very subjective)

Public's Rights

- Attend
- Listen
- Tape record
- Videotape

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

Public has NO Right to:

- Speak
- Disrupt

<u>Practical Pointer</u>:

- make a good record of warnings

Calls to the Public

A.R.S. § 38-431.01(H)

- Optional (unless required by other laws)
- Time, manner, place restrictions
  - Can limit time (egg timer)
  - Ban Repetition
    - May require speakers on the same side with no new comments to select spokesperson
  - prohibit disruptive behavior

Common Pitfall of Calls to the Public

- Discussing matters not listed on the agenda.
- If it's <u>not</u> an agenda item, public body's response is limited to:
  - Direct staff to study the matter
  - Ask that a matter be placed on a future agenda
  - Respond to criticism

  <u>Note</u>: These three responses must take place at the **conclusion** of the call to the public!

Meeting Etiquette

- Asking for trouble:
  - Passing notes, texting, e-mailing (even if it's about when to order lunch)
  - Whispering to fellow board members
  - Quorum talking with individuals before the meeting officially starts or after the meeting officially ends.

Executive Sessions

- Public excluded
- Only permitted for specific matters
  - A.R.S. §§ 38-431.03(A)(1) through (7)
- Must include possibility of executive session in the meeting notice and agenda
- Must vote to enter executive session
- Discussion is confidential
- No action permitted!
- Must have minutes or recording

Executive Sessions

- Just because you CAN have one, should you?
- Public suspicion vs. actual need

Executive Session Notice/Agenda

- Notice must include the statutory section authorizing the executive session
- Agenda must provide a general description of the matters to be discussed or considered
  - Needs to be more than a statutory citation
  - Need not contain information that would:
    - Defeat the purpose of the executive session
    - Compromise the legitimate privacy interests of a public officer, appointee, or employee
    - Compromise the attorney-client privilege

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
  - Clerk to take minutes/run tape
  - Attorney to give legal advice

Tip: Put on the record why individuals attending are reasonably necessary.

Executive Session Pitfalls

- Inappropriate disclosure
  - What happens in executive session stays in executive session!
  - Chair must remind members about the confidentiality requirement every time.
    - A.R.S. § 38-431.03(C)
- Taking legal action.
  - All votes must take place in public!

Personnel Matters

- May discuss and consider employment, assignment, appointment, promotion, demotion, dismissal, salaries, discipline or resignation
- Of an officer, appointee, or employee of the Board
  - Must be able to identify a specific individual

More considerations regarding Personnel Matters

- If the matter is noticed for a possible executive session, separate written notice to employee at least 24 hours before meeting.
- Employee may require meeting be held in public (does not include individual salary discussions).
- Employee does not have the right to attend executive session, but may. (Regardless, employee has access to portion of executive session meeting minutes.)

Common Questions

Q: *May you conduct personnel evaluations in executive session?*

A: Yes. See Ariz. Att'y Gen. Op. I96-012

Q: *May a board interview applicants in executive session?*

A: Yes, if position is one appointed by the board. See Ariz. Att'y Gen. Op. I83-050.

Note: Must vote for appointment in public session

Confidential Information

- Discussion or consideration of records exempt by law from public inspection
- Can receive and discuss information and testimony that state or federal law requires to be maintained as confidential
- Discussion may occur in open session when confidential information is adequately safeguarded (i.e. use initial for medical patients)

Legal Advice

- Discussion or consultation for legal advice with attorneys **for the public body**
- Exchange of communication between lawyer and client
- Members may not discuss among themselves the merits or what action to take:
  - **Debate** over what action to take,
  - **pros and cons, or**
  - **policy implications** of competing alternative courses of action.

Other Possible Reasons for Executive Session

- Discuss and consult with attorneys to consider litigation, contract negotiations, and settlement
- Discussion regarding negotiation with employee organizations about salary.
- International, Interstate, and Tribal Negotiations.
- Discussion regarding negotiations for the purchase, sale, or lease of real property.

Minutes
A.R.S. § 38-431.01(B)

- Minutes **<u>or</u>** recording required
  - <u>Caution</u>: Pursuant to A.R.S. § 39-101, permanent records must be on paper.
  - Tape recordings – must be retained for at least 3 months after minutes are completed and approved

Content of Public Meeting Minutes

1. Date, time and place of meeting
2. Members present & absent
3. General description of matters considered
4. Accurate description of legal action
5. Names of members who propose each motion
6. Names of persons, as given, making statements or presenting material to the public body; and
7. A reference to the legal action about which they made statements or presented material

Access to Public Meeting Minutes

- Minutes or a recording shall be open to public inspection **3 working days** after <u>the meeting</u>
- NOT AFTER APPROVAL

Meeting Minutes: cities and towns

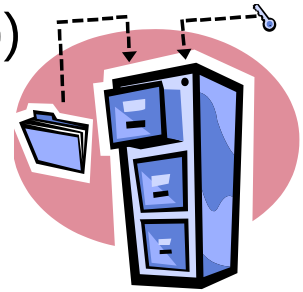
- A.R.S. § 38-431.01(E)
- Cities and towns with population of more than 2,500 shall:
  - Post legal actions taken or any recording on its website within 3 working days
  - Post approved meeting minutes from city or town council meetings on its website within two working days following approval
- Posting must remain on website for one year

Subcommittees and Advisory Committees

- A.R.S. §§ 38-431(6), 38-431.01(B) and (E)(3)
- Subcommittees and advisory committees must:
  - Take written minutes or record all meetings, including executive sessions
  - Within 10 working days of the meeting, **subcommittee or advisory committee of a city or town with a population of 2,500 or more** must:
    - Post a statement describing any legal action or
    - Post any recording of a public meeting

Executive Session Meeting Minutes

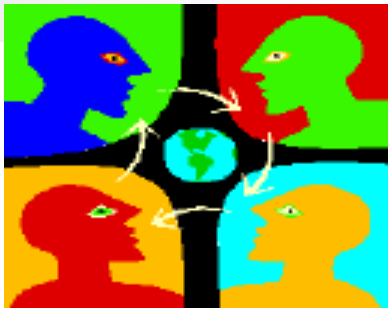
- Shall have written minutes or a recording
  - Burden of proof – *Fisher* case
- Shall include the following:
  - Date, time and place of meeting
  - Members present & absent
  - General description of matters considered
  - An accurate description of all instructions given
  - Such other matters as deemed appropriate by the public body
- Shall be kept confidential (A.R.S. § 38-431.03(B))



Access to Executive Session Meeting Minutes

- Meeting minutes of executive session shall only be released to:
  - Members of the public body
  - Officers, appointees, or employees who were the subject of discussion or consideration (only that portion)
  - Auditor general in connection with an audit
  - County attorney, attorney general or ombudsman when investigating alleged violations

Circumvention



- Cannot use any device to circumvent the law.
- "Splintering the quorum":
  - Serial communications (verbal, written, electronic, etc.)
    - Meeting with individual members and then reporting what others said with enough to constitute a quorum
  - Polling the members

Non-verbal Serial Communications

- 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”

Attorney General Opinion I05-004: E-mail

- Attorney General's website www.azag.gov
- Board members 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

Electronic Communications

- Electronic communications are treated the same as any other form of communication between board members.
- Electronic communications 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.

For example:

- You have a 5 member board
- One member sends an e-mail to 2 members and there’s a response shared among all 3
- You now have a discussion among three members = a quorum
- Violation

Facts vs. Opinion?

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

Board might consider…

- a statement on e-mail that provides:

  "To ensure compliance with the Open Meeting Law, recipients of this message should not forward it to other members of the Board. Members of the Board may reply to this message, but they should not send a copy of their reply to other members."

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 members to constitute a quorum.

Prohibited 1-Way Communication

- A single board member may violate the OML if they propose legal action among a quorum outside a properly noticed meeting
- “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

Proposing an Agenda Item?

- Proposing an item for the agenda does not propose legal action
- **“without more”**
- Be cautious:
  - communicate the TOPIC only
  - NOT the legal action you want the board to take

“Propose” – EXAMPLES in the Opinion

- “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

More Examples:

- “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.”

Now, you try these:

- A board member sends an email to a quorum stating that the board should implement a program like the one described in the attached article.
- A board member sends an article to the quorum with no additional comments.

More Examples:

- A board member sends an article to the quorum and another board member responds with an opposing article.
- Three board members exchange emails discussing a topic that will be voted on at a future meeting. The quorum is four.

Staff & Other Persons

- 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).

Communications with the Public

- Members may express opinions and discuss issues with the public at a venue other than a public meeting, personally, through the media or other public broadcast so long as it is not intended to circumvent the open meeting law

What does that mean?

- Discussion or opinion must not be principally directed at or directly given to other board members
- There is no plan to engage in collective deliberation to take legal action.
- Review these resources:
  - A.R.S. § 38-431.09(B) added by 2008 Session Laws, Ch. 135, § 1 (effective 9/26/08)
  - Attorney General Opinion I07-013

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.

What to do when you learn that a potential OML violation has occurred.

- If in the thick of things = Recess/Assess
- Can you resolve the issue and continue?
- Does the particular OML violation taint your whole meeting? Maybe not – AG Opinion I08-001

After the meeting…

- Determine if you need to ratify any actions
- Provide refresher training to staff involved
- If you receive a complaint: Be candid; respond promptly
- Provide materials that help you: minutes, ratification materials, videotapes, etc.

Ratification – A.R.S. § 38-431.05

- Within 30 days after discovery of the violation or when should have been discovered with reasonable diligence
  - ***Tanque Verde Unified School Dist. v. Bernini,*** 206 Ariz. 200, 76 P.3d 874 (App. 2003) (30 days after court ruling OK)

Ratification Continued…

- Notice 72 hours before the meeting
  - Description of action to be ratified
  - Clear statement that the body proposes to ratify a prior action
  - Information on how to obtain detailed written description of the action
    - Written description includes:
      - Action to be ratified
      - All of the preceding deliberations, consultations and decisions that preceded and related to the action
      - Must be included in minutes

Penalties - A.R.S. § 38-431.07(A)

- Members and any persons who aid, attempt, or agree to aid -
  - Civil penalty up to $500 for each violation
  - Such equitable relief as the court deems appropriate
  - Reasonable attorneys' fees
- If intent to deprive the public of information –
  - Court may remove public officer from office and
  - Charge officer and any person that aided, agreed to aid, or attempted to aid, all the costs and attorney's fees

Key Resources

- Arizona Agency Handbook, Chapter 7, www.azag.gov
- Ombudsman Publications
- Ombudsman website www.azoca.gov
- Department of Library, Archives, and Public Records www.lib.az.us
- Case law
- Attorney General Opinions www.azag.gov or http://azmemory.lib.az.us/