# OPEN MEETING LAW

## I. PUBLIC POLICY

It is the public policy that meetings of public bodies be conducted openly and that notices and agendas be provided for such meetings which contain such information as is reasonably necessary to inform the public of the matters to be discussed or decided. (*See* A.R.S. § 38-431.09). The open meeting law ("OML") was first enacted in 1962 and its purpose is to open the conduct of the business of government to the scrutiny of the public and to ban decisions made in secret. (*See Karol v. Board of Education Trustees*, 122 Ariz. 95, 593 P.2d 649 (1979)). All meetings of a public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings. All legal action shall occur in public. (*See* A.R.S. § 38-431.01).

## II. WHY SHOULD ANYBODY CARE?

Potential consequences for violating the law include:

A) nullification of action taken/court issuance of writ of mandamus forcing OML compliance
B) investigative and enforcement actions by attorney general/county attorney with a penalty for those who knowingly violate the open meetings law and those who aid in the violation in an equitable amount a superior court deems appropriate, $500 for second and $2,500 for third and subsequent violations
C) personal liability for above violations, attorney fees and costs
D) removal from public office
E) recalls
F) embarrassment to city/elected officials/staff

## III. WHEN DOES THE OPEN MEETING LAW APPLY?

The open meeting law applies to meetings when there is a quorum present of a public body.

## IV. DEFINITIONS

A) "advisory committee" or "subcommittee": any entity that is officially established and whose members have been appointed for the 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 a public body.

B) "executive session": a gathering of a quorum of members of a public body from which the public is excluded for one or more of the reasons prescribed in A.R.S. § 38-431.03.

C) "legal action": a collective decision, commitment or promise made by a public body pursuant to the constitution, bylaws or specified scope of appointment and the laws of the state. (*See* A.R.S. § 38-431(3)).

D) "meeting": the gathering, in person or through technological devices, via internet or other online medium, of a quorum of members of a public body at which they discuss, propose, or take legal action including any discussions, deliberations or considerations, consultations that may foreseeably require final action or a final decision by the public body. (*See* A.R.S. § 38-431(4)). E-mail, social media communications, text messages, voicemail, telephone communications between members of the public body cannot be used to circumvent the OML. *See* Ariz. Atty. Gen. Opinion No. I05-004. CAVEAT: It is not a violation of the law if a member of a public body expresses an opinion or discusses an issue with the public either at a venue other than a meeting that is subject to Title 38, personally, through the media or other form of public broadcast communication or through technological means and social media if: 1) the opinion or discussion is not principally directed at or directly given to another member of the public body; and 2) there is no concerted plan to engage in collective deliberation to take legal action. (*See* A.R.S. § 38-431.09(B); AZ.Atty.Gen.Op. I07-013).

E) "public body": the legislature; political subdivisions including counties, schools, special districts, cities, towns and all boards and commissions of these entities; all quasi-judicial bodies, advisory committees and subcommittees (which are established by the public body or presiding officer tasked with making a recommendation to the public body about a decision or course or conduct).

## V. NOTICE, EMERGENCY MEETINGS, AGENDA AND MINUTES

### A) NOTICE

General Rule: Notices and agendas for such meetings shall contain information as is reasonably necessary to inform the public of the

matters which are being discussed or decided. (*See* A.R.S. § 38-431.09). Notice of a meeting to the public must be posted on the city's internet website and in hard copies in designated locations at least 24 hours in advance, excluding non-work days, Saturdays, Sundays and holidays, stating the name of the public body, the date, time and place of the meeting. Notice of the meeting to the members of the public body is also required. (*See* A.R.S. § 38-431.02). An extended delay in starting at the scheduled time of a meeting can cause any vote made at the meeting to be invalidated. *See Welch v. Cochise County, et als.*, Decided September 2, 2021 (Arizona Supreme Ct. No. CV-20-0322-PR).

B) EMERGENCY MEETINGS:

1) Emergency meetings may be conducted (less than 24 hour notice is permitted, except in a personnel matter, which still requires a minimum of a 24 hour notice). An "emergency" exists when, due to unforeseen circumstances, immediate action is necessary to avoid some serious consequence that would result from waiting until the required notice could be given.

2) Ratification of an action (must post notice of ratification of a prior action taken in violation of open meeting law at least 72 hours in advance of meeting).

3) Recessed meetings (less than 24 hours notice is permitted for a meeting, which will be recessed to a later date as long as the first meeting was properly noticed). (*See* A.R.S. § 38-431.02(E)).

C) AGENDAS

1) General Rule: In addition to the time, date, and place of the meeting set forth on the notice, the agenda must contain such information as is reasonably necessary to inform the public of the matters to be discussed or decided. (*See* A.R.S. §§ 38-431.01 and 38-431.09). The agenda may be made available to the public by including it as part of the public notice or by stating in the public notice how the public may obtain a copy of the agenda. (*See* A.R.S. § 38-431.02(G)).

2) Order of Agenda: As long as each item to be discussed is specifically described, the public body may dictate in which order

each item is to be considered, which may include: executive sessions, the consent agenda, awards, presentations, and current event summaries, city manager's or director's report, public hearings, old and new business, direction to staff, selection of times, locations and meetings, information and reports, and call to the public.

3) Call to the Public: Individuals may address the public body on any issue within its jurisdiction and if it is not, the chair may rule the speaker out of order and may order the speaker to stop speaking or be removed from the meeting should the speaker disregard the chair's ruling on jurisdiction.

While members of the public body may not answer questions or discuss comments during call to the public, the public body may do any of the following:

a) respond to criticism
b) ask staff to review the matter
c) ask staff to place the matter on a future agenda

The public body shall not discuss or take legal action on matters raised at call to the public unless the matters have been properly noticed for discussion and legal action. (*See* A.R.S. § 38-431.01(H)). There is a three (3) minute time limit per speaker at call to the public. (*See* A.J.C.C. § 2-4-6 (L)).

D) MINUTES

1) General Rule. Public bodies shall provide for the taking of written minutes or a recording of all their meetings. Minutes shall include: i) date, time, place of meeting; ii) present or absent notation of members of the public body; iii) a general description of the items considered (verbatim transcript is not required); and iv) an accurate description of all legal actions proposed, discussed or taken including a record of how each member voted, the names of the members who propose each motion, the names of the persons making statements or presenting material to the public body and a reference to the legal action about which they made statements or presented materials. (*See* A.R.S. § 38-431.01(B)).

2) Public Inspection. The minutes or recording of a council meeting shall be available for public inspection, three working days after the meeting, and a statement of legal action taken at the meeting shall be posted on the city's internet website within three working days after the meeting (ten working days for board and commission meetings). Within two working days following approval of the minutes, the city must post approved minutes of its council meetings on its internet website.

## VI. EXECUTIVE SESSIONS

### A) ARE ONLY FOR:

1) personnel matters including employment, assignment, appointment, promotion, demotion, dismissal, salaries, salary schedules, compensation, discipline and resignation
2) confidential records
3) legal advice
4) pending or contemplated litigation, including discussions involving contract negotiations and settlements
5) discussions and consultations with employee organizations on salaries, salary schedules, or compensation paid in the form of fringe benefits
6) discussions and consultations with Indian tribes and matters relating to international and interstate negotiations
7) negotiations on the sale, purchase, or lease of real property
8) school safety plans/programs
9) security plans, procedures, assessments, measures, or systems relating to or having an impact on public facilities or operations or critical infrastructure and information technology

### B) LEGAL ACTION, AGENDAS, MINUTES, AND CONFIDENTIALITY:

1) Final Legal Action. During the executive session, the public body may only discuss, consider and direct its attorney to take legal action; however, the public body must convene in public to vote for binding the public entity on the directed legal action.

2) Agendas and Minutes. The agenda for an executive session must provide more than just a recital of the statutory provisions authorizing the executive session; it 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, or compromise the attorney-client privilege.

The minutes of executive sessions need not be verbatim but must reflect an accurate description of all instructions given during the executive session to attorneys or labor and real estate representatives regarding the public body's position. (*See* A.R.S. § 38-431.01(C)).

3) Confidentiality. Minutes and all discussions in executive sessions may not be disclosed, except to the following persons:

a) any member of the public body that met in the executive session as well as members who did not attend, unless their absence was due to a declared conflict of interest
b) any officer, appointee, or employee who was the subject of discussion
c) staff personnel, to the extent necessary for them to prepare and maintain the minutes of the executive session
d) the attorney for the public body, to the extent necessary for the attorney to represent the public body
e) the auditor general involved in an audit of the public body
f) the attorney general or county attorney if requested during an official investigation
g) a court of law where a violation has been alleged

A knowing or intentional confidentiality leak is a class 6 felony and a reckless or negligent leak is a class 1 misdemeanor. *See* A.R.S. § 38-510(A). Either type of violation could also lead to forfeiture of office. (*See* A.R.S. § 38-510(B)).

4) Who may attend. Only those individuals whose presence is reasonably necessary to carry out executive session responsibilities. (*See* A.R.S. § 38-431(2)). The mayor or chairperson should remind all present that the business conducted in executive session is confidential pursuant to A.R.S. § 38-431.03(C).

## VII. CATAGORICAL EXEMPTIONS

This OML does not apply to the following:

A) any judicial proceeding or any political caucus of the state legislature
B) any conference committee of the state legislature, except that they shall be open to the public for observation
C) commissions on appellate and trial court appointments and the commission on judicial qualifications
D) state board of fingerprinting for central registry determinations and hearings
E) medical board discussions on findings and reports relating to physician complaints
F) social events where no business of the public body is discussed nor action being taken

## VIII. PUBLIC PARTICIPATION & ACCESS TO MEETINGS

A) While the public must be allowed to attend and listen to deliberations and proceedings taking place in all public meetings, there is no right of the public to participate in the discussion or in the ultimate decision of the public body. (*See* A.R.S. § 38-431.01(A); Ariz.Atty.Gen.Op. 78-1).

B) If a legal action is brought against public speakers to deter or prevent them from exercising their public participation/constitutional rights in a governmental proceeding including, but not limited to, a council, planning and zoning commission and board of adjustment public hearing and is determined by a court of law to have been brought for an improper purpose, including to harass or cause unnecessary delay or needless increase in cost of litigation, damages and attorney fees can be ordered. (*See* A.R.S. § 12-752) (Arizona's strategic lawsuits against public participation ("SLAPP") statute).

C) The public may record a meeting as long as such recordation does not interfere with the conduct of the meeting. (*See* A.R.S. § 38-431.01(F)). The notice and accommodations must conform to the Americans with Disabilities Act ("ADA") under 42 U.S.C. §§ 12101-12213.