

The OMA and FOIA

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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.
- The Americans with Disabilities Act requires the public body to provide disabled individuals with a reasonable opportunity to request necessary, reasonable auxiliary aides and services to participate at public meetings.

Open Meetings Act – Definition of Public Body

- “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.
- Applies to Library Board and certain committee meetings.
- Committees and Subcommittees that have only advisory authority may not fit the definition of Public Body, since they have no decision-making authority.

Open Meetings Act

What is a 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.
- 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

What is a Meeting?

- Generally, two members of a board (unless they are considered a quorum of a subcommittee or other "public body") are not prohibited from discussing board issues with one another;
- If a quorum of the public body discusses matters via e-mail, then the public body may be in violation of the OMA.
- By way of example, if an e-mail was sent to several board members regarding an issue and board members replied to all recipients of that e-mail, there may be a tendency for a "discussion" to take place.

Open Meetings Act

What is a Meeting?

- Even if only one or two members responded, messages and responses from other board members may be forwarded to other members so that a "round robin" type of discussion is occurring.
- The OMA requires that all decisions of public bodies be made in the open. Since there is no notice and no opportunity for the public to participate in e-mail discussion, this type of "meeting" does not comply with the OMA.

Open Meetings Act – General Rules of Meetings

- A public body may not place conditions on attendance at the meeting such as requiring visitors to sign in or provide names. *This is different from rules of public comment.*
- This is true for hybrid virtual meetings (only public attend electronically) as well; there should not be requirements to sign in.
- People should be able to sit anonymously in the audience.

Open Meetings Act

Public Comment

- **All persons** in attendance at a public meeting have the right to address the public body. This means a public body may not limit the total time of public comment.
- Have the Board develop a policy on public comment that covers:
 - Time limits
 - Whether the speaker must give his/her name and address
- Cannot rely on “unwritten rules” (*Cusumano v Dunn*)

Open Meetings Act Breach of Peace

- A public body may only remove a member for a “breach of the peace.” *Cusumono v Dunn* (August 27, 2020) addressed what was a breach of the peace
 - A “breach of the peace” constitutes seriously disruptive conduct involving abusive, disorderly, dangerous, aggressive, or provocative speech and behaviors tending to threaten or incite violence. These cases clarify that under Michigan law a “breach of the peace” goes well beyond behavior acceptable in a civil society.
 - More than just a rule or decorum violation

Open Meetings Act

Right to Record

- 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 the Library prevents videotaping generally in the building where the open meetings are held.
- Right to tape and rebroadcast.

Open Meetings Act Electronic Participation

- *After December 31, 2021*, the Library may only allow virtual attendance by a member to accommodate that member's absence due to military duty.
- Potentially ADA issues.

Open Meetings Act Notice

- *Notice of Regular Meeting.* 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.
- *Content Required on all Notices.* A public notice shall always contain the name of the public body, its telephone number if one exists, and its address.
- *Posting.* 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. Also, the new law may require a website posting if applicable.
- *Hearings.* Also, there may be other applicable laws. For example, public hearing notices regarding the budget may have special requirements.

Open Meetings Act

Notice – Rescheduled Regular

Rescheduled Regular Meetings Must be Properly Noticed.

- 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 ***in a prominent and conspicuous place***
 - ***at both the public body's principal office and;***
 - ***if the public body directly or indirectly maintains an official internet presence that includes monthly or more frequent updates of public meeting agendas or minutes, on a portion of the website that is fully accessible to the public.***

Open Meetings Act Notice

Special Meetings and Meetings Recessed more than 36 hours Must be Properly Noticed

- Special meetings and meetings recessed more than 36 hours require that the meeting be posted 18 hours in advance of the meeting *in a prominent and conspicuous place*
 - *at both the public body's principal office and;*
 - *if the public body directly or indirectly maintains an official internet presence that includes monthly or more frequent updates of public meeting agendas or minutes, on a portion of the website that is fully accessible to the public.*

Open Meetings Act Notice

Public Meetings Must be Properly Noticed on the Website.

- PA 528 of 2012 added requirements for the website notice below. This website notice applies to rescheduled regular meetings, special meetings or meetings recessed more than 36 hours.
- ***The public notice on the website shall be included on either the homepage or on a separate webpage dedicated to public notices for nonregularly scheduled public meetings and accessible via a prominent and conspicuous link on the website's homepage that clearly describes its purpose for public notification of those nonregularly scheduled public meetings***

Open Meetings Act Closed Sessions

- A closed session must be preceded by a vote in an open session.
- The 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, vote must be taken to close the closed session and re-open the open session before the meeting may be adjourned.

Open Meetings Act

Closed Sessions

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

Closed Sessions

- 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
 - There has been proposed legislation in the past about adding the “sale” of property – not law yet!

Open Meetings Act

Closed Sessions

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

Closed Sessions

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.
 - Can not be used to compare candidates in closed session.
 - Very limited exemption.

Open Meetings Act

Closed Sessions

2/3 Roll Call Vote

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

Open Meetings Act Minutes

II 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 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 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 Remedies

- If a public official is found to have intentionally violated the Act, the official may be held personally liable in a civil action 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.

The FOIA

Requests

- || Who may request?
- || What must the request include?
 - The FOIA does not define a "request" or provide specific requirements that must be contained in a request. The requester does not have to specifically state that the request is made pursuant to the FOIA.
 - The FOIA states that the person has the right to inspect, copy or receive public documents upon providing a written request that describes a public record sufficiently to find the public record.

Request

- The requesting party may submit a continuing request for public records created, issued or disseminated on a regular basis. A continuing request for future records is valid for up to six months and may be renewed.
- The request does not have to be a formal written letter. The request can be made in the form of an e-mail or fax.

Request – New Requirement

- Section 3 of the FOIA now requires that a requester must include that person's complete name, address, and contact information in the FOIA request.
- If the request is made by a person other than an individual, the requester must include the complete name, address, and contact information of the person's agent who is an individual.
- An address must be written in compliance with United States Postal Service addressing standards. Contact information must include a valid telephone number or electronic mail address.

Request – New Requirement

- This new requirement does not apply to an individual who qualifies as indigent under Section 4(2)(a) of the FOIA.
- Essentially, the amendment prevents an anonymous FOIA or a FOIA that does not fully identify the person making the request.

What Documents Can Be Requested?

“Public record” means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. Public record does not include computer software.

Public Records

- Michigan Courts found that “public records” does not include private e-mail correspondence, even if the e-mail was sent or received on a public computer or phone.
- However, there may be “public records” on a personal computer, phone, tablet or other device.
- Keep your record retention policies in mind.

Public Records

- The FOIA does not require the public body to make or prepare any particular records that it has not already created.
- The FOIA does not require the public body to create a compilation, summary or report for a requesting party.
- If requested, the public body is required to provide a certified copy.

FOIA Coordinator

- The FOIA Coordinator is responsible for accepting and processing requests for the public body and responsible for approving a denial under Sections 5(4) and 5(5) of the Act. Those sections relate to a written notice denying a request or a part of a request. The FOIA Coordinator may designate another individual to act on his or her behalf in accepting and processing the requests.

FOIA Responses

- The time frame for initial responses is 5 business days and for extensions is 10 business days.
- However, if a written request is sent by electronic mail and delivered to the public body's spam or junk-mail folder, the request is not received until 1 **day** after the public body first becomes aware of the written request.
- The public body shall **note in its records** both the time a written request is delivered to its spam or junk-mail folder and the time the public body first becomes aware of that request.
 - Note: This is a new mandatory record retention issue.

Deposit

- The public body may require a good-faith if the entire fee estimate exceeds \$50.00.
- The response **shall** also contain a best efforts estimate regarding the time frame it will take to provide the public records.
- Under Act 523 of 2018, if the deposit is not received by the public body within 45 days from receipt of the notice of deposit, and if the requesting person has not filed an appeal of the deposit amount, the request shall be considered abandoned by the requesting person.

Denial

- *The Documents do not Exist.* If the document does not exist or cannot be reasonably identified, then the public body can deny the request on that basis. But must provide a “certificate” that the record does not exist as specifically provided in the FOIA.
 - New Case: If the requester provides a list of documents such as all e-mails, videos, audio recordings, reports, notes and other public records, make sure to inform the requester if you don’t have any part of that request.
- *No “Public Records” as Defined by the FOIA.* Not every document in the public body’s possession will be considered a “public record” under the FOIA.

Denial

- *Not Required to Create Documents.* If the request for information requires the public body to create a new document, then the request can be denied.
 - This can be a difficult issue when dealing with electronic databases.
 - Consult your attorney to determine whether a particular request for electronic records would require the public body to create a public record.

Exemptions

- All records are subject to disclosure unless specifically exempted. A list of 27 types of documents that are exempt from disclosure are set forth in Section 13 under the FOIA.
 - Certain private information
 - Attorney-client privilege
 - Medical facts
 - Social Security Numbers

Response

- The Denial Letter Must State the Reason that the Document is Exempt
 - The Act states an “Explanation” must be given.
 - If the public body separates or deletes exempt material from the response, it must provide the requesting party with a description of the public record or information on a public record that is separated or deleted.
 - The written notice should also notify the requesting party of the right to an administrative appeal, the right to seek judicial review, and the right to recover attorney fees and damages if the requesting party prevails in court.

How Much Can the Public Body Charge?

- Subject to provisions in the amended FOIA, the fee shall be limited to actual mailing costs, and to the actual incremental cost of duplication or publication including labor, the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information.
- The fee is broken down into separate categories.

Appeals of Denials

- Within 10 **business** days after receiving a written appeal, the head of a public body must respond.
 - Reverse the denial
 - Issue a written notice upholding the denial, or
 - Reverse the denial in part and issue a written notice upholding the denial in part
- The written appeal must specifically state the word "appeal" and identify the reason for reversal of the disclosure denial.

Challenging Fees

- If a public body requires a fee that exceeds the amount permitted under its publicly available procedures and guidelines or section 4 of the FOIA, the requesting person may do any of the following:
 - Appeal
 - File a circuit court action within 45 days after receiving notice of appeal (after appeal if the policy calls for an appeal)
- Fee appeal should be in your policy and is substantially similar to the substantive appeals.

Civil Action – Arbitrary and Capricious

- If the court determines that the public body has arbitrarily and capriciously violated this Act by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of \$1,000.00, which shall be deposited into the general fund of the state treasury.
- The new Act increased punitive damages from \$500.00 to \$1,000.00 to the person seeking the right to inspect or receive a copy of a public record.

Penalty for Willful, Intentional or Bad Faith

- If the court determines, in an action commenced under this Act, that a public body willfully and intentionally failed to comply with this Act or otherwise acted in bad faith, the court shall order the public body to pay, in addition to any other award or sanction, a civil fine of not less than \$2,500.00 or more than \$7,500.00 for each occurrence.
- In determining the amount of the civil fine, the court shall consider the budget of the public body and whether the public body has previously been assessed penalties for violations of this Act.
- The civil fine shall be deposited in the general fund of the state treasury.

Questions?

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