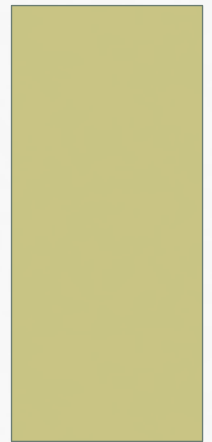


MICHIGAN'S OPEN MEETINGS ACT

PRESENTED BY: MATT NORDFJORD, SHAREHOLDER
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PURPOSE

- The Open Meetings Act (OMA) took effect in 1977 and created a new structure for transparency and accountability for governmental decision making. (1976 Public Act 267, MCL 15.261 et seq.)

APPLICATION

- The Act applies to any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority or council, which is empowered by state constitution, statute, charter, ordinance, resolution or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function.

MEETING

- “Meeting” is defined as “the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy.”

DELIBERATING & DECISION

- “Deliberating” is not statutorily defined, but has been otherwise defined as “the act of *carefully considering* issues and options before making a decision or taking some action,” or “discussing,” which in turn is defined as “the act of exchanging views on something.”
- The word “decision” is defined as “a determination, action, vote or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy.” MCL 15.262(d).
- To determine the applicability of the Act, one must take into consideration the definitions of “meeting,” “deliberating,” and “decision” stated above.

MEETING INFORMALLY

- A public body may not meet informally prior to a public meeting to determine what will be decided formally at the public meeting. [1977 OAG 5183.]
- Note that a meeting of a standing committee of a county board of commissioners, composed of less than a quorum of the full board, is subject to the OMA when the committee is effectively authorized to determine whether items of county business will or will not be referred for action by the full board. [See 1998 OAG 7000.]

E-MAIL, TEXTING

- The use of e-mail, texting or other electronic communications during a meeting among members of a public body may constitute deliberations or decisions in violation of the OMA.
- The use of electronic communications among the members of a public body outside of a meeting that constitutes “deliberations” or an “actual decision” among a quorum of the body could violate the OMA.

EXCLUSIONS

- The Act does not apply to a meeting which is a social or chance gathering or conference not designated to avoid the Act. MCL 15.263(10).
- The Act is not violated where a member of a public body conducts an informal poll of other members to determine how they would vote on a particular issue where no decision regarding the issue is made during the polling and the intent is not to circumvent the requirements of the Act.
- Training, conferences and seminars.

RIGHTS OF THE PUBLIC

- All meetings of a public body are required to be open to the public unless a closed meeting is held in accordance with the specific reasons permitted by the OMA.
- Meetings are required to be held in a place available to the general public.
- All persons shall be permitted to attend any meeting (except closed sessions).
- The right of a person to attend a meeting of a public body includes the right to tape-record, videotape, broadcast live on radio and telecast live on television the proceedings of a public body at a public meeting

CONDITIONS OF ATTENDANCE

- A person cannot be required, as a condition of attendance at a meeting, to register or otherwise provide his/her name or other information.
- A person shall be permitted to address a meeting of a public body. However, the public body may establish and record rules which regulate the conditions under which the public may address the meeting. These rules should include such conditions as the length of time any one person may be permitted to speak, the place on the agenda set aside for public address and a requirement that persons desiring to address the public body identify themselves. [1977 OAG 5183.]
- A person may be excluded from a public meeting only for a breach of peace actually committed at the meeting. MCL 15.263(6). The OMA is not violated by removing unruly and disruptive audience members. *Youkhanna v City of Sterling Heights*, 332 F Supp 3d 1058 (ED Mich, 2018).

ADDRESS THE CHAIR

- A public body's "address the chair" rule requiring citizens to direct commentary to the chair, rather than other attendees, does not violate a person's First Amendment right to petition the government.
- Expulsion from a meeting for violation of the "address the chair" rule does not violate a person's First or Fourteenth Amendment rights (but could violate the OMA). *Holeton v City of Livonia*, 2019 WL 2016252 (Mich App, May 7, 2019).

NOTICE OF MEETINGS AND LOCATION

- Public notice is required to contain the name of the public body, its telephone number and its address.
- Public notice is required to be posted in a prominent and conspicuous place at both the public body's principal office and, if applicable, on a website, together with any other locations considered appropriate by the public body.
- If a public body is part of a political subdivision (a county), a public notice shall also be posted in the principal office of the political subdivision (courthouse). Where the public body has its own principal office and is a component of another department of government, it is required to have two notices - - one at its own office and another at the office of its parent department. [1977 OAG 5183.]

NOTICE STATEMENT

- In addition to the name of the public body, its telephone number and its address, the date time and place of the meeting is required.
- A “conspicuous” notice must be at the bottom of the display advertisement which states:
This meeting is open to all members of the public under Michigan's Open Meetings Act.
- Description of the topic(s)/purpose(s) of the meeting are not required in the public notice.

REGULAR MEETING POSTING REQUIREMENTS

- Public bodies which have a regular meeting schedule must post the schedule of their meetings for the following calendar or fiscal year within 10 days after the first meeting of the public body in that calendar year or fiscal year. The notice is required to state the dates, times and places of the regular meetings (in addition to address, phone number, name).
- If there is a change in the schedule of regular meetings of a public body made at a regular meeting, there is required to be posted within three days after the meeting at which the change is made, a public notice stating the new dates, times and places of its regular meetings.

RESCHEDULING AND SPECIAL MEETINGS

- When a regular meeting is rescheduled, outside of a regular meeting, or if a special meeting is called, a public notice stating the time, date and place of the meeting is required to be posted at least 18 hours before the meeting.
- The notice must be posted in an area that is available to the public for the full 18 hours. MCL 15.265(7).
- County boards of commissioners must adhere to MCL 46.10 when calling for a special board meeting.

NO NOTICE = NO MEETING

- The statute states that a meeting of a public body shall not be held unless public notice is given as provided by the OMA.
- The board of commissioners and other public bodies must formally designate a person to provide notice.
- Emergency sessions may be held without written notice if public health, safety or welfare is severely threatened and if 2/3 of the public body votes to hold the meeting.

BEST PRACTICES FOR PUBLIC COMMENT

- Allow all speakers the same or substantially similar opportunity (time) to speak. Even if a line of people get up and say the same thing, they each have a right to speak.
- No content based restrictions during the general opportunity for public comment.
- Refrain from stopping timely public comment for breach of peace or threat to safety that occurs at the meeting.
- Public comment required 1 time during every meeting, recommended before the business of the board occurs.

CLOSED SESSIONS

- Only for those specific purposes identified in the OMA.
- State the specific statutory reason when making a motion to enter closed session.
- 4 of 9 reasons require 2/3 roll call vote of the members of a public body elected or appointed and serving (err on the side of caution; 3 of the 5 that do not require 2/3 roll do not apply to counties).
- Even if there is a statutory basis, it is up to the public body whether to enter closed session.

REASONS REQUIRING 2/3 ROLL CALL

1. To consider the purchase or lease of real property up to the time an option to purchase or lease that real property is obtained. [Section 8(d)][not the sale of real estate owned by the public body.]
2. To consult with its attorneys regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial effect on the litigating or settlement position of the public body. [MCL 15.268(e). The attorney must be present in person or by telephone. **A public body must state on the record the name of the specific pending litigation that it would be discussing in closed session prior to commencing closed session.** *Vermilya v Delta College Board of Trustees*, 325 Mich App 416 (2018).
3. To review and consider the contents of an application for employment or appointment to a public office if the candidate requests that the application remain confidential. **All interviews of a public body for employment or appointment to a public office shall be held in an open meeting pursuant to this Act.** [MCL 15.268(f)]
4. To consider material exempt from discussion or disclosure by State or Federal statute. [MCL 15.268(h).] Section 8(h) has been interpreted to permit a public body to hold a closed session for consideration of a written legal opinion within the attorney-client privilege, but a closed session may not be held for consideration of an oral opinion. [*Booth Newspapers v Wyoming*, 168 Mich App 459, 468 (1988).] The attorney is not required to be present.

REASONS WITHOUT A 2/3 ROLL CALL VOTE

- To consider the dismissal, suspension, or disciplining of, or to hear complaints or charges brought against or to consider a periodic personnel evaluation of, a public officer, employee, staff member or individual agent, ***if the named person requests a closed hearing***. A person requesting a closed hearing may rescind the request at any time, in which case the matter at issue shall be considered thereafter only in open sessions. [MCL 15.268(a).]
- For strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement when either negotiating party requests a closed hearing. [MCL 15.268(c).]

IN CLOSED SESSION

- During the closed session, a separate set of minutes is required to be taken.
- The minutes are required to be retained by the clerk of the public body. However, they are not to be made available to the public and shall only be disclosed as required by a civil action.
- The minutes are permitted to be destroyed one year and one day after approval of the minutes of the regular meeting at which the closed session was approved. A public body may call a second closed meeting to approve the minutes of a closed session to ensure they are not disseminated to the public. [1986 OAG 6365.]

DECISION AFTER CLOSED SESSION

- Following a discussion in closed session any final action or decision must be made in open sessions.
- For example, “I move we accept the recommendation of our attorney regarding Case No. 1234-CZ.”
- Other discussions may involve direction during closed session (e.g. without objection we will authorize the county’s bargaining team to offer a wage increase not to exceed 2.5% to the general unit). Here, the final decision will be made when the board ratifies a tentative agreement consistent with these parameters.

MINUTES

- Minutes must be kept of all meetings. Minutes are public records and must be available for review and copying (except minutes of closed sessions).
- Draft minutes must be available for public inspection within 8 business days of the meeting.
- Approved minutes must be available within 5 business days after the meeting at which they were approved.
- Corrections must be made no later than the next meeting after the meeting to which they refer.
- Corrected minutes must be available not later than the next meeting after the correction and must show both the original entry and the correction.

AGENDAS

- Agendas are not required as part of a public notice or otherwise required in a certain format under the OMA.
- Most public bodies use an agenda and have conditions specifying its format, creation and changes in their respective board rules.

PARTICIPATION BY VIDEO OR PHONE

- Recent amendment to the Open Meetings Act (OMA) effective March 29, 2019.
 - All decisions of a public body shall be made at a meeting open to the public. For purposes of any meeting subject to this subsection, except a meeting of any state legislative body, **the public body shall establish the following procedures to accommodate the absence of any member of the public body due to military duty:**
 - (a) Procedures by which the absent member may participate in, and vote on, business before the public body, including, if feasible, procedures that ensure 2-way communication.
 - (b) **Procedures by which the public is provided notice of the absence of the member and information about how to contact that member sufficiently in advance of a meeting of the public body to provide input on any business that will come before the public body.**
(Emphasis added)

IMPLEMENTING REMOTE PARTICIPATION

- A Board member who participates by telephone or video conference could be paid or denied payment by Board policy. There could also be maximum per diems per year for participating by telephone or video conference. Whatever decision is made should be included in the Board rules and applied uniformly.
- There is a strong legal argument that a “physical” presence is required for a quorum.
- No Michigan case law addresses this, but generally “present” means a physical presence. Thus, a member who participates by telephone or video conference while on military duty should not be counted to determine if a quorum is present.

ENFORCEMENT

- There are provisions in the Act dealing with the right of the public to challenge the validity of a decision of a public body made in violation of the Act.
- If a public body is not complying with the Act, any person may commence a civil action against a public body to invalidate a decision, or seek injunctive relief to compel compliance with the OMA or to prevent further OMA violations.
- A person seeking injunctive relief is entitled to recover court costs and attorney fees for the action if they prevail.

PENALTIES FOR VIOLATIONS

- A public official who intentionally violates the Act is guilty of a misdemeanor. In addition, a public official who intentionally violates the Act is held personally liable in a civil action for actual and exemplary damages (not more than \$500 per meeting), as well as court costs and actual attorney fees.

FIXING PROBLEMS

- Public bodies can correct non-conforming decisions without being considered an admission of a violation of the OMA via reenactment.
- A decision that is reenacted to resolve a disputed decision that, this time, is in conformity with the OMA will be effective from the date of reenactment.
- The reenactment is a reset on the issue. If acted upon quickly, this can avoid litigation.

QUESTIONS ?

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IMPORTANT CLIENT UPDATE

GOVERNOR EXECUTIVE ORDER 2020-38 **ON FREEDOM OF INFORMATION ACT**

Governor Whitmer's Executive Order No. 2020-38 (4/5/20) temporarily extends the deadlines for a public body to respond to written requests for public records under the Freedom of Information Act (FOIA). The Executive Order is effective through June 4, 2020, and applies notwithstanding any contrary policy adopted by a public body.

During the COVID-19 states of emergency and disaster, public bodies must continue to respond to requests for public records as expeditiously as possible and, to the extent practicable, using electronic means. However, if the FOIA response requires in-person efforts to search, inspect, examine, prepare or produce the records, the response may be deferred to that extent until the expiration of the Executive Order (June 4, 2020) or any further Order that follows from it.

A response to a FOIA request or appeal received by mail, hand delivery or fax must be provided within 10 business days after actual receipt. Actual receipt occurs when an employee physically opens the envelope or removes the fax from the fax machine. A public body is not required to have an employee physically present to receive FOIA requests if the employee is not otherwise required to report to work.

If COVID-19 emergency response efforts, compliance with emergency orders, or other mitigation recommendations relating to COVID-19 interfere with the timely grant or denial of a request, or timely reversal or upholding of an appeal, the public body may issue a notice extending the period of time for a response for as long as the public body deems necessary, but no longer than the expiration of the Executive Order (June 4, 2020) or any further Order that follows from it.

Any deferral of a FOIA request or appeal must contain an explanation of the reason for the deferral, and must notify the requester that the request may be amended to exclude the deferred portion of the request. The requester may amend the request in writing.

Should you have questions concerning this Executive Order, please do not hesitate to contact our Office.

<http://www.legislature.mi.gov/documents/2019-2020/executiveorder/pdf/2020-EO-38.pdf>

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IMPORTANT CLIENT UPDATE

GOVERNOR EXECUTIVE ORDER 2020-48 (rescinded and replaced EO 2020-15) ON OPEN MEETINGS ACT

As some of you may now know, many Michigan local governmental associations, including MAC and MML, have been working with Governor Whitmer's office to provide relief from the strict requirements of the Open Meetings Act considering the highly contagious nature of the COVID-19 pandemic. Executive Order 2020-15 was issued by the Governor on March 18, 2020 which was rescinded and replaced on April 15, 2020 in Executive Order 2020-48 (set to expire on May 12, 2020).

The current executive order permits public bodies and other governmental entities in Michigan to hold "electronic" public meeting using phone or video conferencing.

Executive Order No. 2020-48 Overview:

As previously permitted starting on March 18, 2020 and now continuing through May 12, 2020 (this date may be extended further), the rules of the Open Meetings Act (OMA) are suspended to the extent they require a meeting of a public body to be in a physical building open to the public and to the extent the OMA requires the physical presence of one or more members of the public body.

Instead, a meeting of a public body can be held electronically provided the following conditions are met:

- (1) The meeting can be held electronically (including tele-conferencing and video conferencing) if a means are available for both the public and the members of the public body to participate.
- (2) There must be 2-way communication so that (1) the members of the public body can hear each other, (2) the members of the public can hear the members of the public body, and each other, and the public body can hear all of the public during the public comment portion of the meeting.
- (3) It appears to be optional for the public body to use technology for typed public comments to be submitted and read or shared with the public body and participants.

- (4) Members of the public body and members of the public participating electronically will be considered present at the meeting and may participate as if physically present at the meeting.
- (5) All persons wanting to participate must be permitted to participate. The time limits for public comment can still be enforced.
- (6) In addition to the meeting notice requirements of the OMA, the public body must post advance notice of an electronic meeting on the home page of its website. The Notice must include:
 - (a) an explanation of why the meeting is being held electronically,
 - (b) detailed procedures on how the public may participate electronically, including a telephone number, internet address or both, and
 - (c) an explanation of procedures by which persons with disabilities may participate.

The Order does not mandate remote meetings, and likely some public entities could hold “hybrid” meetings where some members might participate in person and others electronically, but the meeting chambers would not be open for the public by operation of Executive Order 2020-42, Temporary requirement to suspend activities that are not necessary to sustain or protect life, expiring on April 30, 2020 (with the possibility of further extension). Therefore, any meeting of a public entity must allow a mechanism for the public to listen and participate electronically for the duration of EO 2020-42 and any successor order. If such hybrid meetings are needed, care should be taken to assure compliance with federal, state, and local health guidance and requirements relating to maximum numbers of persons within a specific confined area and social distancing between individuals.

Should you have questions concerning this new option, please do not hesitate to contact our Office.

Link to EO 2020-48:

https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-525888--,00.html

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