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Open Meeting Law and Conflicts of Interest Issues

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Open Meeting Law

- “It is the public policy of this state 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. Toward this end, any person or entity charged with the interpretations of this article shall construe this article in favor of open and public meetings.”

Application of Open Meeting Law

- ARS § 38-431 et seq.
- OML applies to any *meeting* of a *quorum* of members of a *public body*.
 - Meeting:
 - in person or by technological devices; and
 - proposing or taking legal action.
 - Legal action includes all discussions and deliberations.

Application of Open Meeting Law (cont'd)

- Quorum:
 - majority of the members, but watch out for:
 - discussion between 3 members of 7 member board could be a quorum if only 5 members are present/eligible to vote at the meeting where the issue is discussed;
 - social events or where majority appears at other meetings; or
 - "spokes of the wheel"

Application of Open Meeting Law (cont'd)

– Public Body:

- Board of Directors of District;
- all Board established (directly or indirectly) committees or groups.
 - Board and any sub-committee of it.

Requirements of Public Notice

- Notice of meeting date, time and location and the agenda shall be given at least 24 hours before meeting.
- Agenda shall list specific items to be discussed.
 - Shall contain such information reasonably necessary to inform the public of the substance of the matters to be discussed.
 - Call to the Public: respond to criticism, ask staff to review or put on future agenda.
- Minutes

Requirements of Public Meeting (cont'd)

- Open Meeting law requires opportunity for notice, confers a right to “attend and listen” - ARS § 38-431.01(A).
- Public hearings – people have right to speak.
- Regular, non-public hearing items – no “right” to speak, however, Chair’s discretion to take input from public.

Requirements of Public Meeting (cont'd)

- Meeting Conduct:
 - Roberts Rules of Order is a guide only. Helps with orderly flow of meeting and for clarity of minutes.
 - Chair has discretion to conduct and allow discussion as appropriate.

Open Meeting Law Focus Points

- E-Mail
- Executive Sessions
- Text messaging
- Social Media

E-Mail

- Law is clear that a "meeting" can occur using technological devices.
- Cannot communicate with a quorum of the members individually or as a group on any issue that may be the subject of "legal action."

E-Mail (cont'd)

- Do Not:
 - announce your position to the members;
 - ask for others' thoughts on an issue; or
 - ask staff to collect opinions of other members.
- Communications may be "linked" together by the Attorney General.
- E-Mail communications dealing with public business are public records subject to disclosure to anyone making the request.

Texting/Social Media

- New media creates great opportunity to communicate with the public, however...
- Remember! Meetings can be held via technological means.
 - Facebook page/Facebook IM
 - Twitter
 - Tumblr/LinkedIn/Instagram/Pinterest/Snapchat
 - Simple texting (SMS group, or forwarded texts)

Open Meeting Law (continued)

- Selected AG opinions
 - Unilateral email that proposes legal action = BAD
 - Communicating through media = generally OK, however....
 - “Blog” meeting = Careful

Executive Sessions

- Most OML complaints involve executive sessions.
- Executive sessions can only be held for the seven reasons listed in the statute.
 - Cannot use executive session simply for issues that are embarrassing, uncomfortable or messy.
 - Discussion must be confined to the specific agenda matter.
 - higher level of scrutiny on the scope of executive session conversations, e.g. "legal advice" – must have attorney present and giving advice – questions on advice ok.
 - Only those parties necessary for the executive session may attend.
 - Private, NOT secret.

Procedural Requirements

- Before an executive session:
 - Board must call its public meeting to order and then vote to go into executive session.
 - Notice and Agenda of executive session must cite the statute section authorizing the executive session and specific information to inform the public of the substance of the issue, without compromising the privacy reasons for the executive session.

Procedural Requirements (cont'd)

- During an executive session:
 - Only persons reasonably necessary may attend and all participants must be reminded that discussions are confidential.
 - May not take a "straw poll" or preliminary vote.
- After an executive session:
 - Adjourn the executive session and reconvene regular meeting.
 - A final vote or decision to take legal action related to the executive session must occur in the open meeting.
 - Minutes, with an accurate description of discussions or instructions must be prepared.

Open Meeting Law Violations

- Civil Penalty of \$500 for each violation.
- If intentional violation – removal from office and all costs and attorney fees to plaintiff.
- All legal action taken by body at meeting held in violation is null and void.
 - Ratification possible if in compliance with statutory steps

Conflicts of Interest

- ARS § 38-503(A).
- Any public officer or employee of a public agency who has, or whose relative has, a substantial interest in any contract, sale, purchase or service to such public agency shall make known that interest in the official records of such public agency and shall refrain from voting upon or otherwise participating in any manner as an officer or employee in such contract, sale or purchase.

Conflicts of Interest

- ARS § 38-503(B).

“Any public officer or employee of a public agency who has, or whose relative has, a substantial interest in any decision of a public agency shall make known such interest in the official records of such public agency and shall refrain from participating in any manner as an officer or employee in such decision.”

Conflicts of Interest (cont'd)

- "Public Officer" = appointed officer of a public agency established by ordinance or statute, such as Board members.
- "Public Agency" = incorporated cities, towns, statutorily created public entities (like the District)
- "Relative" = spouse, child, child's parent, parent, grandparent, brother or sister of the whole or half blood and their spouses and the parent, brother, sister or child of a spouse.

Conflicts of Interest (cont'd)

- “Substantial interest” = any pecuniary (money) or proprietary (ownership) interest, either direct or indirect, other than a remote interest.
- “Make known” = in writing to the clerk, or in the minutes of the meeting, which must be filed in a “conflict of interest” file.
- “Participating” = no discussion, no voting, no nodding in agreement, nothing.

Conflicts of Interest (cont'd)

- "Remote interest" = Interest of a non-salaried officer of a non-profit corporation.
- = Interest of landlord or tenant of the contracting party.
- = Interest of an attorney of a contracting party.
- = Interest of a non-profit cooperative marketing association.
- = Recipient of public services generally provided by the incorporated city or town, political subdivision or state department, commission, agency, body or board of which he is a public officer or employee, on the same terms and conditions as if he were not an officer or employee.

Conflicts of Interest (cont'd)

- "Remote interest" = Ownership of less than 3% of the shares of a corporation for profit, provided the total annual income from dividends, including the value of stock dividends, from the corporation does not exceed 5% of the total annual income of such officer and any other payments made to him by the corporation do not exceed 5% of total annual income.
- = Interest of an officer in being reimbursed for actual and necessary expenses.

Conflicts of Interest (cont'd)

- “Remote interest” = That of a public officer, or that of a relative of a public officer unless the contract or decision involved would confer a direct economic benefit or detriment upon the officer, employee, or his relative, of any of the following:
- another political subdivision;
 - public agency except if it is the same governing entity; or
 - a public agency of another political subdivision.

Conflicts of Interest (cont'd)

“Remote interest” = That of a member of a trade, business, occupation, profession or class of persons consisting of at least ten members which is no greater than the interest of the other members of that trade, business, occupancy, profession or class of persons.

Conflicts of Interest (cont'd)

- **Headline Test/Red Flag:**
 - If an item has possible personal/relative interest, pause to assess and discuss with staff – public official's decision.
 - Procedure to request formal opinion – ARS § 38-507 – rare.
 - Key point: keep your radar up at all times

Conflicts of Interest (cont'd)

- I or a relative has a “substantial interest.”
Now what?
 - Must “make known” that interest in the official records – in writing prior to meeting AND at meeting prior to the item on the agenda.
 - Must “refrain from voting” or “otherwise participating in any manner” in such a decision – suggest leaving the room to avoid nods, smiles or any reaction.

Conflicts of Interest (cont'd)

- Penalties:
 - Intentionally or knowingly violate – class 6 felony (up to 2 years in prison) and forfeit office.
 - Recklessly or negligently violate – class 1 misdemeanor (up to 6 months in prison).
 - Contracts in violation voidable
 - Civil action by “person affected” – costs and fees possible

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Questions?

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Thank You!