

Open Meetings Act
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Closed Session Requirements

- * Very stringent and very limiting
- * Sec. 7(1) - Closed session are only called upon 2/3 roll-call vote of total membership of public body
- * Purpose of closed session must be stated in the public minutes - Separate set of minutes taken for the closed session
- * Minutes of closed session are secret, but must be kept for at least a year and a day after approval, contents may be disclosed in a civil suit under Sec. 10, 11 or 13
- * Sec. 7(2) - Closed meeting minutes are not subject to disclosure under the Freedom of Information Act

Closed Sessions - Permissible Purposes

- * OMA Sec. 8 lists ALL permissible purposes for holding closed sessions
- * Examples of reasons:
 - * In personnel disciplinary or evaluation-type cases, if requested by the employee
 - * For collective bargaining, if requested by either party
 - * To consider buying/leasing real estate
 - * To consult with attorney regarding trial strategy or case settlement
 - * To consider new employment applications, if the candidate asks



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Open Meetings Act - Definitions and Requirements for Meetings

Definitions

Public Body	Any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority or council, empowered to exercise governmental or proprietary authority or function.
Meeting	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.
Closed Session	A meeting or part of a meeting of a public body which is closed to the public.
Decision	A determination, action or vote on a motion, proposal, recommendation, resolution or ordinance, on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy.
Person	An individual, corporation, partnership, organization or association. This does not include an individual serving a sentence of imprisonment in a state or county correctional facility in this state or any other state, or in a federal correctional facility.

Requirements for Meetings

- All meetings of a public body shall be open to the public and shall be held in a place available to the general public. A person may tape record, video tape, broadcast live, and telecast live the proceedings. A public body may establish reasonable rules and regulations in order to minimize the possibility of disrupting the meeting.
- All decisions of a public body shall be made at a meeting open to the public.
- All deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public, except for closed sessions.
- A person shall be permitted to address a meeting of the public body under rules established by a public body; a person shall not be excluded from a public meeting except for breach of the peace at the meeting.
- The Act does not apply to a meeting which is a social or chance gathering or conference not designed to avoid the Act.
- Notice of regular meetings shall be posted within ten days after the first meeting in each calendar or fiscal year.
- Notice of special meetings shall be posted at least 18 hours before the meeting. (Special requirements for notice of zoning and budget committee meetings may also apply.)



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Calling Closed Meetings

Introduction

The Michigan Open Meetings Act (OMA) provides that all meetings of a public body shall be open to the public and be held in a place available to the general public. (MCL 15.261 et seq.) The OMA also provides, however, for those situations in which a public body may meet in closed or executive session. (MCL 15.268) The circumstances under which a public body may go into a closed session are specifically spelled out in the act, as is the procedure for going into a closed session.

When may closed sessions be held?

- To consider dismissal, suspension or disciplining of, or to hear complaints or charges brought against, or to consider a periodic personnel evaluation of, a public officer or employee if requested by the named person.
- For strategy and negotiation sessions connected with negotiation of collective bargaining agreement if requested by either negotiating party.
- To consider purchase or lease of real property up to the time an option to purchase or lease of that property is obtained.
- To consult with an attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have detrimental financial effect on municipality's litigating or settlement position.
- To review and consider contents of application for employment or appointment to public office if candidate requests that application remain confidential. Interviews by public body for employment or appointment to public office must be held in an open meeting. (Act does contain exception to this requirement for selection of college/university presidents under certain conditions.)
- To consider material exempt from discussion or disclosure by state or federal statute.

NOTE: Each of the purposes which allow a closed session, begin with the words "to consider" or "to consult" or "to review." Any actions must be taken in open session.

How do we call a closed session?

From an open meeting, a two-thirds roll call vote is required, except for closed sessions permitted under MCL 15.268(a) (discipline, personnel evaluation, etc. of official/employee) or MCL 15.268(c) (collective bargaining). A roll call vote and the purpose for calling a closed session shall be entered into minutes of the open meeting.

How do we end a closed session?

Normally one of the members of the public body moves to return to open session. The body performs any action required as a result of the closed session in open session. The meeting then proceeds with other matters or adjourns in the normal fashion.

3. *Closed session* — means a meeting or part of a meeting which is closed to the public.
4. *Decision* — means 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.ⁱⁱⁱ

Although Michigan's universities would be included within the definition of "public body," the Supreme Court has ruled that because of the constitutional autonomy granted to Michigan's universities, the legislature does not have the power to regulate through the Open Meetings Act the presidential search processes of those institutions. *Federated Publications, Inc v Board of Trustees of Michigan State University*, 460 Mich 75, 594 NW2d 491(1999).

C. Notice Requirements

§12.5 All meetings of a public body must be held pursuant to notice. The notice must contain the name of the public body, its telephone number if one exists, and its address. The notice must be posted at its principal office and other locations considered appropriate by the public body. This could include public bulletin boards or cable television. Dates for regular meetings of the public body must be posted ten days after the first meeting of the public body in each calendar or fiscal year stating the dates, times and places of its regular meetings. If the public body changes its schedule of regular meetings, the notice stating the new dates, times and places must be posted within three days of the change.

Special meetings can be held only upon eighteen hours notice, except that requirement does not apply to special meetings of subcommittees of a public body. If any meeting is recessed for more than thirty-six hours it must post the eighteen-hour notice before beginning the recessed meeting. However, a public body is permitted to meet without notice in an emergency situation where there is a severe and imminent threat to the health, safety or welfare of the public. Two-thirds of the members serving must decide that the eighteen-hour delay would be detrimental to efforts to respond to the threat. MCLA 15.265, MSA 4.1800(15).

D. Conduct of Meetings

§12.6 Although there is little in the statute controlling the conduct of an open meeting, the act does require that the public have a chance to address the public meeting. MCLA 15.263(5), MSA 4.1800(13)(5). The courts have imposed at least one additional requirement. In *Esperance v*

Chesterfield Township of Macomb County, 89 Mich App 456, 280 NW2d 559 (1979), the court held that the Open Meetings Act prohibits secret balloting. While all votes do not have to be taken by roll call, votes must be by a method whereby the public is aware of how each public official voted. This can be by a show of hands, etc.

E. Minutes of Open Meetings

§12.7 The act requires that each public body keep minutes of each public meeting showing the date, time, place, members present, members absent, and any decisions made at a meeting open to the public and the purpose or purposes for which a closed session, if any, is held. The statute requires that the minutes of a meeting be available for public inspection eight business days after the meeting to which the minutes refer. Further, corrections in the minutes must be made not later than the next meeting after the meeting to which the minutes refer. The corrected minutes must thereafter be available at the next subsequent meeting after correction. The statute requires that the corrected minutes show both the original entry and the correction. The approved set of minutes must be made available for public inspection not later than five business days after the meeting at which they were approved. MCLA 15.269, MSA 4.1800(19).

In the case of public bodies which meet weekly, the clerk or recording secretary of the public body must prepare the minutes promptly in order to comply with the time requirements of the act.

F. Conflict with Local Requirements

§12.8 It is clear that the act preempts local law on minimum requirements for meetings to be open to the public. MCLA 15.261, MSA 4.1800(11). However, a public body may enact provisions providing for a greater degree of openness relative to the standards under the act. MCLA 15.261(3), MSA 4.1800(11)(3). Such local provisions are applicable only if enacted subsequent to March 31, 1977, the effective date of the act. Therefore, local requirements established prior to March 31, 1977 which require greater openness than is required by the act need to be reenacted to be effective.

III. Closed Sessions

A. Business in Closed Session

§12.9 The easiest way to avoid trouble with the Open Meetings Act is to conduct all business of a public body openly at public meetings. When business is conducted openly pursuant to the

requirements set forth above, the public body may safely deliberate and decide any matter within its authority. The difficulty arises when the public body desires to discuss a matter privately without violating the act.

A public body may meet in closed session only for the reasons expressed in MCLA 15.268, MSA 4.1800(18). There are seven exceptions to the prohibition on closed meetings which are applicable to local governmental units:

1. 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. The named person must request the closed hearing and may at any time rescind that request, which ends the closed session and with the matter at issue then to only be considered in open sessions. MCLA 15.268(a), MSA 4.1800(18)(a).
2. To consider the dismissal, suspension or disciplining of a student if the student or the student's parent or guardian requests a closed hearing. This section is silent as to what happens if a student or the student's parent or guardian later rescinds its request for the closed hearing. MCLA 15.268(b), MSA 4.1800(18)(b).
3. For strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement if either negotiating party requests a closed hearing. MCLA 15.268(c), MSA 4.1800(18)(c).
4. To consider the purchase or lease of real property up to the time an option to purchase or lease that real property is obtained. MCLA 15.268(d), MSA 4.1800(18)(d).
5. To consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if the open meeting would have a detrimental financial effect on the litigating or settlement position of the public body. MCLA 15.268(e), MSA 4.1800(18)(e).
6. 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. However, all interviews by the public body must be held in an open meeting pursuant to the act. MCLA 15.268(f), MSA 4.1800(18)(f).
7. To consider material exempt from discussion or disclosure by state or federal statute. MCLA 15.268(h), MSA 4.1800(18)(h).

Not surprisingly, the major portion of litigation involving the act deals with attempts by public bodies to meet in closed session. A subject of some litigation has been whether a public body may meet in closed

session for the purpose of considering its attorney's legal opinions. As indicated in (5) above, closed session consultation with an attorney regarding specific pending litigation is explicitly permitted by the act. Also, the court of appeals has said that the written opinion of counsel may be a permissible subject of closed sessions. *Booth Newspapers v Board of Regents of University of Michigan*, 93 Mich App 100, 106-107, 286 NW2d 55 (1979). Furthermore, section 8(h) of the act allows for closed session consideration of material exempt from discussion or disclosure under state law. Since the Freedom of Information Act (FOIA), 1976 PA 442 (MCLA 15.231 et seq., MSA 4.1801 et seq.) exempts from disclosure information or records subject to the attorney-client privilege (MCLA 15.243(1)(h), MSA 4.1801(13)(1)(h)), the act allows a public body to go into closed session to discuss with its lawyer a privileged written opinion of the lawyer. Care must be taken that the opinion is not circulated to non-clients and the privilege lost before the meeting. Additionally, great care must be exercised to discuss only the legal matters associated with the opinion and "... not bargaining, economics or other tangential nonlegal matters." *Booth Newspapers v Wyoming City Council*, 168 Mich App at 468.

The Freedom of Information Act exemption can also be used to permit closed session discussion of material that under FOIA would not be subject to release as a clearly unwarranted invasion of a person's privacy. *Ridenour v Board of Education of the City of Dearborn School District*, 111 Mich App 798, 314 NW2d 760 (1981). However, in *Ridenour* the court determined that a performance evaluation of a public employee (the president of a community college and the superintendent of the school district) was too important to the public and that this outweighed the privacy concern of the employee. The court held that an open session was required to evaluate the performance of those employees. The statute has since been amended to permit a closed session for employee evaluations when requested by the employee. See MCLA 15.268(a), MSA 4.1800(18)(a).

B. Calling a Closed Session; Minutes

§12.10 The act provides that the method used to permit a public body to go into closed session shall be a roll call vote with two-thirds of the members elected or appointed and serving voting in favor of the closed session. Only a majority vote for a closed session is necessary to consider charges against a public officer, employee, etc. or to consider a periodic personnel evaluation, to consider the suspension of a student, or for strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement if either negotiating party requests a closed session. MCLA 15.267, MSA 4.1800(17).

Once in closed session, the statute requires that a separate set of minutes be taken by the clerk or a designated secretary of the public body at the closed session. These minutes are required to be kept confidential and may only be disclosed if required by a civil action. The minutes may be destroyed one year and one day after the approval of the minutes of the regular meeting at which the closed session was approved. A public body may meet in closed session to approve the minutes of a closed session of the public body. OAG, 1985-1986, No 6365, p 288 (June 2, 1986).

C. Subquorum Committee

1. Single Subquorum Committee

§12.11 Without going into closed session and being limited to the subjects set forth in section 8 of the act (MCLA 15.268, MSA 4.1800(18)), a public body may meet privately in a committee constituting less than a quorum under some circumstances. Such a subquorum committee may not meet, however, for the purpose of avoiding the Open Meetings Act. A subquorum committee must only have advisory powers to the public body to lawfully meet in private. A subquorum committee may not be delegated any decision making powers since all decisions of a public body, unless otherwise permitted by the statute, must be made at an open meeting. Such advisory boards and committees have been approved by the Attorney General. OAG, 1981-1982, No 6053, p 616 (April 13, 1982).

Recently the courts have begun to suggest that when a subquorum committee is appointed to make a recommendation to the main body, the group operates with the delegation of authority to perform a governmental function and so is a "public body" in and of itself. This requires the committee to meet in public. *Schmiedicke v Clare School Bd*, 228 Mich App 259, 577 NW2d 706 (1998). There is some reason to think, however, that the court may have been more forgiving if the school board had actually voted on the committee recommendation rather than letting it stand as a decision of the school board.

Although a subquorum committee of a public body may be subject to the act, the Michigan Supreme Court has held that a committee established by an administrator such as a city manager is not subject to the act if the committee or administrator is exercising administrative authority which is vested exclusively in the administrator, as opposed to the public body. See *Herald Company v City of Bay City*, ___ Mich ___, ___ NW2d ___ (July 27, 2000).

2. Multiple Subquorum Committee

§12.12 Some public bodies have tried to make use of subcommittees that would “advise” the public body after meeting in private sessions to discuss or deliberate on matters not permitted, by the act, to be discussed or deliberated in closed session. These attempts have ranged from negotiation of water rights to the hiring of the president of the University of Michigan. The courts have held these meetings violate the act under the “theory of constructive quorum.” When a public body divides into two or more subcommittees and meets to deliberate the filling of a public office or to instruct special counsel on economic negotiations, it runs afoul of the Open Meetings Act and has, in fact, created a constructive quorum. OAG, 1979-1980, No 5788, p 1015 (September 23, 1980); *Booth Newspapers v Wyoming City Council*; *Booth Newspapers v Board of Regents*.

The lack of success of public bodies in using subquorum groups in an attempt to circumvent the quorum provisions of the act should alert the practitioner to advise public bodies to avoid the practice. The practical effect of various interpretations by the courts of the act is that most activities of subquorum groups are violations of the act. Illegal subquorum group activities include meeting to deliberate on public issues, using interlocking memberships on separate committees, circulating reports between committees, or using telephone polls to coordinate among a quorum of the public body. But see *Saint Aubin v Ishpeming City Council*, 197 Mich App 100, 494 NW2d 803 (1993) involving informal polling by one member of a public body 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. To comply with the law, these deliberations must take place pursuant to notice and attendance by the public.

D. Scope of Action in Closed Session

§12.13 The general rule is that all deliberations and decisions of public bodies are to take place in open meetings. The exceptions found in MCLA 15.268, MSA 4.1800(18), however, suggest that certain deliberations and decisions may be made in closed session. When a public body considers material exempt from disclosure by state or federal statute, deliberations may be undertaken in closed session. A public body may meet in closed session for strategy and negotiation in connection with negotiation of a collective bargaining agreement, and may establish consensus relative to its negotiation strategy. *Moore v Fennville Public Schools Board of Education*, 223 Mich App 196, 566 NW2d 31 (1997). In closed session, a public body may consider the