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MESSAGE FROM THE OMBUDSMAN

SIDEBAR:

- The Ombudsman for Public Access is Staff Attorney Danee Garone.
- Open meeting law and public records law materials and updates are [available on our website](#).
- [Click here](#) to view our open meeting law booklet.
- [Click here](#) to view our public records law booklet.
- Review past [Public Access Newsletters](#)
- [Upcoming Training/Outreach](#) -
- In-person trainings suspended.
- New online trainings will be posted soon. See website for details.
- Contact Danee Garone for more information.



From the Office of the Arizona Ombudsman — Citizens' Aide

The Public Record

State Ombudsman Dennis Wells

MARCH 2020

Public Attendance at Open Meetings During a Pandemic

In light of the ongoing Coronavirus pandemic, can public bodies prohibit in-person public attendance, limiting the public to viewing/listening to meetings remotely through technological means?

A.R.S. section 38-431.01(A) says, "All meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings." The open meeting law does not define "attend." Merriam-Webster defines "attend" as "to be present at : to go to." Does that mean to be literally present? Or can one be digitally present or present through some other remote means? The statutes do not say, and there are no Arizona court cases that specifically address this issue.

A.R.S. section 38-431 defines

meeting as "the gathering, in person or through technological devices, of a quorum of the members of a public body. . . ." Merriam-Webster defines "gathering," as "ASSEMBLY, MEETING." All of these words seem to imply being in-person simultaneously; however, the open meeting law specifically allows for meeting via remote means. If the public body can lawfully meet via remote means, why could the open meeting law not also be interpreted to be satisfied by offering attendance (exclusively) by remote means? As a practical matter, if all members of a public body were to meet remotely, how could members of the public even attend in-person if the city permitted it?

Admittedly, it is not entirely clear

that this practice is indeed permissible. A.R.S. section 38-431.09 says "any person or entity charged with the interpretations of this article shall construe this article in favor of open and public meetings."

On 3/13, the Attorney General's office issued an opinion discussing this issue in which it seems to conclude that a public body can limit attendance of public meetings to remote methods, provided the public is notified.

Bottom line: Public bodies can make a reasonable argument, in light of the unfolding pandemic, that it is lawful to temporarily suspend in-person, public attendance at its meetings, provided that it provides remote access options to the public, and especially if its members meet through remote means.

Open Meeting Notice Posting Locations During a Pandemic

In light of the Coronavirus pandemic, can public bodies forgo posting meeting notices in physical locations and only post notices online? Yes, as long as the online notice statement only lists electronic notice posting locations.

A.R.S. section 38-431.02 requires most public bodies to have a statement on their websites listing where they will post meeting notices. Each public body must post a notice for each meeting in all of the places listed in the statement. So, if a public body wanted only to post meeting notices electronically, it would have to make sure its web statement does not list any physical posting locations. The statute also requires most public bodies to "[p]ost all public meeting notices on their website and give additional public notice as is reasonable and practicable as to all meetings." Does that require at least one physical posting location? It is not clear. Most public bodies seem to post in at least one physical location just to be on the safe side. But, in light of current circumstances, it is reasonable to argue that there are no publicly available physical locations that are reasonable and practicable at which to post meeting notices.

Bottom line: It is reasonable for a public body to post meeting notices online only, particularly during a pandemic, as long as its online meeting notice statement says it will only post meeting notices online.

Pending Legislation - 54th Legislature, 2nd Session

In light of the ongoing pandemic, the Legislature adjourned on Monday March 23, 2020 until April 13 after passing a budget. It is unclear what this means for pending legislation or the remainder of the session.

- **HB 2048 and SB 1012** would each amend A.R.S. 38-431.03. HB 2048 and SB 1012 seem to be the same bill. They would essentially add an eighth type of permissible executive session, in which a public body could discuss or consider matters related to school safety operations, plans, or programs. SB 1012 was passed by the Senate 29-0 on 2/13 and received a due pass recommendation from the House Government Committee on 3/12.
- **HB 2053 and SB 1042** would each amend A.R.S. section 38-431.03. HB 2053 and SB 1042 are identical bills. They would essentially add an eighth type of permissible executive session in which a public body can discuss or consult with designated representatives to “DISCUSS SECURITY PLANS, PROCEDURES, ASSESSMENTS, MEASURES OR SYSTEMS RELATING TO, OR HAVING AN IMPACT ON, THE SECURITY OR SAFETY OF BUILDINGS OR FACILITIES AND INFORMATION TECHNOLOGY MAINTAINED BY THE PUBLIC BODY.” The bill would make the “RECORDS, DOCUMENTATION, NOTES, OR OTHER MATERIALS MADE BY, OR PROVIDED TO, THE REPRESENTATIVES” confidential and exempt from disclosure under the public records law. HB 2053 received due pass recommendations from House Government Committee on 1/30 and from House Technology Committee on 1/22. SB 1042 passed the Senate with a minor amendment on 2/13 and received a due pass recommendation from the House Government Committee on 3/12.
- **SB 1030** would add A.R.S. section 15-189.07 and amend A.R.S. section 15-341. The bill would allow the governing boards of charter schools and school districts to “DISCUSS OR CONSIDER AN EMERGENCY RESPONSE PLAN DEVELOPED PURSUANT TO THIS PARAGRAPH IN EXECUTIVE SESSION. AN EMERGENCY RESPONSE PLAN IS NOT SUBJECT TO INSPECTION PURSUANT TO TITLE 39, CHAPTER 1, ARTICLE 2.” The bill was passed by the Senate 30-0 on 2/13.
- **SB 1089** would amend A.R.S. section 39-121.01 so that a public record cannot be disclosed unless the requester “HAS FURNISHED THE PERSON’S NAME, ADDRESS, TELEPHONE NUMBER AND EMAIL ADDRESS, IF ANY, TO THE PUBLIC BODY.” The bill was passed by the Senate 18-12 on 2/13 and narrowly received a due pass recommendation from the House Government Committee on 3/12 by a vote of 6-5.

Arizona Ombudsman – Citizens’ Aide

Greetings!



In our winter newsletter, we take a look at a couple of public access issues that might arise due to the ongoing Coronavirus pandemic. We also take a look at pending public access legislation.

As always, our goal is to provide you with timely and informative information related to Arizona’s Public Record and Open Meeting Laws. If you have suggestions and ideas for an upcoming newsletter, or questions you want answered, please feel free to contact our office. In-person public records law and open meeting law training is suspended until further notice.

Sincerely,
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