ARIZONA’S OPEN MEETING LAW

Presented by:
Michelle G. Marshall
General Counsel
Scottsdale Unified School District
Governing Board Meeting
January 5, 2021
Why Open Meeting Law Training?

• 1998 Consent Decree as a result of alleged Open Meeting Law (“OML”) violations
  – Voluntary resolution

• Good reminder/refresher for all
Consent Decree Remedies

• Annual Training each January

  – Must cover “all aspects” of OML and emphasize the strict requirements regarding executive sessions
Consent Decree Remedies

• Annual Training

  – “[M]ust emphasize that just because an attorney is present does not absolve the public body of its responsibilities or give its members carte blanche to discuss anything under the broad umbrella of “legal advice.””
Purpose of the OML

“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.”

A.R.S. §38-431.09(A) (emphasis added).
Meetings shall be open to the public

- 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. All legal action of public bodies shall occur during a public meeting.

A.R.S. §38-431.01(A) (emphasis added).
What is a Meeting?

• “Meeting” means the gathering, in person or through technological devices, of a quorum of the members of a public body at which they discuss, propose or take legal action, including any deliberations by a quorum with respect to that action.

A.R.S. §38-431(4).
What is a Meeting?

• “Meeting” includes:

  – A one-way electronic communication by one member of a public body that is sent to a quorum of the members of a public body and that proposes legal action.

  – An exchange of electronic communications among a quorum of the members of a public body that involves a discussion, deliberation or the taking of legal action by the public body concerning a matter likely to come before the public body for action.

  A.R.S. §38-431(4).
What is “legal action”?

- “Legal action” means a collective decision, commitment or promise made by a public body.

A.R.S. §38-431 (3).
What is “legal action”?

- “All discussions, deliberations, considerations, or consultations among a majority of the members of a public body regarding matters that may foreseeably require final action or a final decision by the governing body, constitute "legal action" and, therefore, must be conducted in a public meeting or executive session in accordance with the Open Meeting Law.”

Arizona Attorney General Agency Handbook, §7.5.1, p. 7-6 (citations omitted).
Who is Covered?

The definition of public body encompasses five basic categories of public bodies:

1) boards, commissions, and other multimember governing bodies (including school boards);
2) quasi-governmental corporations;
3) quasi-judicial bodies;
4) advisory committees; and
5) standing and special committees and subcommittees of any of the above.

See A.R.S. §38-431(6).
Advisory Committees

“Advisory committee” or “subcommittee” means any entity, however designated, that is officially established, on motion and order of a public body or by the presiding officer of the public body, and whose members have been appointed for the specific purpose of making a recommendation concerning a decision to be made or considered or a course of conduct to be taken or considered by the public body.

A.R.S. §38-431(1) (emphasis added).
Curriculum Adoption Committees

• “Before the approval of any basic textbook for high schools, the governing board shall do all of the following: . . .

  – Require that all meetings of committees authorized for the purposes of textbook review and selection be open to the public pursuant to title 38, chapter 3, article 3.1 [the OML].”

A.R.S. §15-722(B)(2).
Exception for Student Matters

Actions concerning:

- Discipline,
- Suspension or
- Expulsion of a pupil

are NOT subject to the Open Meeting Law, but we must post regular notice and take minutes of any hearing held by the Board concerning such matters. A.R.S. §15-843(A).
Meeting Notices

• Notice of meetings must be posted at least twenty-four (24) hours in advance to members of the public body and to the general public.

• The twenty-four (24) hour period includes Saturdays if the public has access to the physical posted location in addition to any website posting. Sundays and other holidays are excluded.
Meeting Notices

• Notice of the topics to be addressed at open meetings must be specific and should be easy for a member of the public to understand.

• Generally, it is a violation of the Open Meeting Law for Board Members to discuss any item that is not specifically noticed.
Meetings and Notices Must be Accessible to Persons with Disabilities

- A public body should include a statement such as the following in any notice it issues: "Persons with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting [name of designated agency contact person] at [telephone number and TDD telephone number]. Requests should be made as early as possible to allow time to arrange the accommodation."
Executive Session

• "Executive session" is a gathering of a quorum of members of a public body from which the public is excluded for one or more of the reasons prescribed in section 38-431.03.

A.R.S. §38-431(2) (emphasis added).

– A “quorum” is the minimum number of board members that must be present at a meeting to make the proceedings of that meeting valid.
Executive Session

“In addition to the members of the public body, officers, appointees and employees as provided in § 38-431.03 and the auditor general as provided in § 41-1279.04, only individuals whose presence is reasonably necessary in order for the public body to carry out its executive session responsibilities may attend the executive session.”

A.R.S. §38-431(2) (emphasis added).
Reasons for Holding an Executive Session

- Employment matters:

  “Discussion or consideration of employment, assignment, appointment, promotion, demotion, dismissal, salaries, disciplining or resignation of a public officer, appointee or employee of any public body, except that, with the exception of salary discussions, an officer, appointee or employee may demand that the discussion or consideration occur at a public meeting. The public body shall provide the officer, appointee or employee with written notice of the executive session as is appropriate but not less than twenty-four hours for the officer, appointee or employee to determine whether the discussion or consideration should occur at a public meeting.”

ARS §38-431.03(A)(1).
Reasons for Holding an Executive Session

• Legal advice:

“Discussion or consultation for legal advice with the attorney or attorneys of the public body.

ARS §38-431.03(A)(3).

– An attorney’s mere presence in the meeting does not convert the conversation into “legal advice.” The session must be limited to legal advice.
Reasons for Holding an Executive Session

• “Meet and confer:”

“Discussions or consultations with designated representatives of the public body in order to consider its position and instruct its representatives regarding negotiations with employee organizations regarding the salaries, salary schedules or compensation paid in the form of fringe benefits of employees of the public body.”

ARS §38-431.03(A)(5).
Reasons for Holding an Executive Session

• Purchase, sale or lease of property:

“Discussions or consultations with designated representatives of the public body in order to consider its position and instruct its representatives regarding negotiations for the purchase, sale or lease of real property.”

A.R.S. §38-431.03(A)(7).
New Reason for Holding an Executive Session

• Security plans:

“Discussions or consultations with designated representatives of the public body in order to discuss security plans, procedures, assessments, measures or systems relating to, or having an impact on, the security or safety of buildings, facilities, operations, critical infrastructure information and information technology maintained by the public body.”

A.R.S. §38-431.03(A)(9).
Executive Session Notice

Notice of an executive session must state the exact subsection of the provision allowing for the executive session—a blanket notice of all the possible subsections is not sufficient.
“Standing” Executive Session Notice for Legal Advice

• Agendas may include the following language:

• “The Board may vote to hold an executive session for the purpose of obtaining legal advice from the Board’s attorney on any matter listed on the agenda pursuant to A.R.S. §38-431.03(A)(3).”
Calls to the Public (Public Comment)

• The public has the right to attend and listen to Board meetings, **not** the right to speak at the Board meeting.

• If a board decides to include a call to the public, the Board may limit the amount of time given to each speaker.
Calls to the Public

• Members of the Board may not discuss or take action on matters raised during the call to the public that are not specifically identified on the agenda.

• Board members may, however, respond to criticism made by those who have addressed the public body, ask staff to review a matter, or ask that a matter be put on a future agenda.
Electronic Communications

• E-mails and texts among Board members can easily become an unintentional violation of the Open Meeting Law.

• When Board members communicate by e-mail or text with District personnel, best practice is not to forward those communications to other members of the Board.

• Replies should be sent individually to staff, without copying other Board members.
• "Discussions and deliberations (in person or otherwise) between less than a majority of the members of a governing body, violate the Open Meeting Law when used to circumvent the purposes of the Open Meeting Law."

Serial Discussions

• “Public officials may not circumvent public discussion by splintering the quorum and having separate or serial discussions with a majority of the public body members.

• Splintering the quorum can be done by meeting in person, by telephone, electronically, or through other means to discuss a topic that has been or later may be presented to the public body for a decision.

• Public officials should refrain from any activities that may undermine public confidence in the public decision making process established in the Open Meeting Law, including actions that may appear to remove discussions and decisions from public view.”

Serial Discussions

- Series of one-on-one discussions intended to lead to an agreement among a quorum of members may violate the OML.
- Superintendents can give board members information about management decisions, but cannot secure approval for a proposed decision outside of a public meeting (“polling”).
If the Open Meeting Law is Violated

A court may:

- Impose a civil penalty against each person who knowingly violates the OML, or who knowingly aids, agrees to aid, or attempts to aid in violating it.
  - Civil penalties currently are not to exceed $2500 per person, per violation.
  - If the court imposes a civil penalty against an individual member of the public body who knowingly violates this article, the public body may not pay the civil penalty on behalf of, or otherwise reimburse, the individual against whom the civil penalty has been imposed.
If the Open Meeting Law is Violated

- All legal action taken is null and void unless subsequently ratified by the Board at a properly noticed meeting.
If the Open Meeting Law is Violated

A court may:

• Order equitable relief as the court deems appropriate in the circumstances.

• Upon a finding that a public officer violated the OML knowingly, and with the intent to deprive the public of information,
  – Remove the public officer from office and assess the public officer or a person who knowingly aided, agreed to aid or attempted to aid the public officer in violating this article, or both, with all of the costs and attorney fees awarded to the plaintiff pursuant to the law.
Discussion