



# OPEN MEETINGS ACT



By: Michael Caulfield  
Jermain, Dunnagan, & Owens PC  
November 9, 2018

# OVERVIEW

- General Rule
- Policy
- Meeting
- Notice
- Exceptions and Executive Session
- Common Mistakes
- Remedies
- Examples

# AS 44.62.310 – Government Meetings Public

- **All meetings of a governmental body of a public entity of the state are open to the public except as otherwise provided by this section or another provision of law.** Attendance and participation at meetings by members of the public or by members of a governmental body may be by teleconferencing. Agency materials that are to be considered at the meeting shall be made available at teleconference locations if practicable. Except when voice votes are authorized, the vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote. The vote at a meeting held by teleconference shall be taken by roll call. This section does not apply to any votes required to be taken to organize a governmental body described in this subsection.

# DEFINITIONS

- “Governmental body” means an assembly, council, **board**, commission, committee, or other similar body of a public entity with the authority to establish policies or make decisions for the public entity or with the authority to advise or make recommendations to the public entity; **“governmental body” includes the members of a subcommittee or other subordinate unit of a governmental body if the subordinate unit consists of two or more members.**
  
- “Meeting” means a gathering of members of a governmental body when:
  - *more than three members or a majority of the members, whichever is less, are present, a matter upon which the governmental body **is empowered to act** is considered by the members collectively, and **the governmental body has the authority to establish policies or make decisions for a public entity,***  
or
  - *the gathering is prearranged for the purpose of considering a matter upon which the governmental body **is empowered to act** and the governmental body has only authority to advise or make recommendations for a public entity but has no authority to establish policies or make decisions for the public entity*

# GENERAL RULE

If you meet with four members or a majority (whichever is less); and

You talk about a subject upon which you're empowered to act;

**Then** you must be in a public meeting; and

The Meeting must have been reasonably noticed.

Voting must be in public.

# LOOK BEYOND THE LETTER OF THE LAW

Understand Underlying Policies / Goals.

Government should deliberate and act openly.

The people do not yield their sovereignty to the agencies that serve them.

The people have a right to know how and why the public agencies make the decisions they do.

Alaska courts have repeatedly erred on the side of openness for public meetings, with notice.

# DOES THE LAW APPLY TO ME?

## Rule applies to:

School District Boards, including committees and subcommittees.

## Exceptions:

Quasi Judicial bodies solely when meeting to make a decision.

Votes taken to organize a governmental body.

Attendance at member organizations/training sessions.

# WHEN AM I IN A “MEETING”?

Basic Formula: Required members + discussion of subject within your authority = meeting.

*Who is a member of the body? Who do I count?*

Elected but not sworn?

Superintendent?

*What subjects are included?*

Within your decision-making or advisory authority (e.g. public business).

Matters of Substance – not procedural or administrative matters.



In gray areas, purpose and effect matters - don't circumvent.

A true member of the public may make serial communications. Board members are more limited.

*Teleconferences, e-mails, and serial meetings.*

*Alaska Supreme Court has already chosen to apply the OMA where meeting requirements were not literally satisfied in two cases.*

1. *Brookwood Area Homeowners Association, Inc. v. MOA.* Question not whether quorum present but whether activity has the effect of circumventing the OMA.

2. *Hickel v. Southeast Conference*. Upheld the lower court's finding that the Board violated the OMA because:

The Board members had “one-on-one conversations with each other, in which they discussed reapportionment affairs and districting preferences, and solicited each other's advice.”

The “dearth of substantive discussion on the record, combined with the manner of some Board members at trial, as well as other evidence presented at trial, convinces this court that important decision making and substantive discussion took place outside the public eye.”

# BOARD COMMITTEE MEETINGS

- Meetings of Board committees and subcommittees are also covered by the Act.
  - *For the act to apply, the committee must have:*
    - 2 or more Board members;
    - With the authority to advise or make recommendations to the Board.
- A meeting occurs when three members or a majority of the committee, whichever is less, are gathered to consider a matter over which the committee has authority to advise or make recommendations.
- AS 44.62.310(h)(1) and (h)(2)(B).

# I WANT A MEETING – WHAT DO I NEED TO DO NOW?

Notice, Notice, Notice.

## General Requirements

Always date, time and place (including location of any teleconferencing).

Teleconferencing site should have materials.

Vote by roll call.

Must post notice at principal office.

Notice by print or broadcast media.

**Timing of Notice.** When notice must be posted depends on the circumstance:

Absent exigent circumstances 3 days appears to be minimum allowable reasonable notice and 3 days cannot include Saturday, Sunday or holidays. 1992 Op. (Inf.) Atty Gen. Alas. 271.

If exigent circumstances, notice should be at least 1 day before meeting.

Follow your Board's own rules.

At a minimum follow any specific rules you've adopted. (*Hickel v. Southeast Conf.* found violation because the Board failed to follow its own 5 day guideline).

Notice of subject.

*Hickel v. Southeast Conference.*

Reasonable notice includes notice of the subject with some “specificity and clarity.”

Meeting information was “varied and confusing.” Unclear whether it was a meeting or a hearing. Notification discouraged citizen participation.

Specificity of reasonable notice is dependent upon the complexity and importance of the issue involved.

# EXCEPTIONS TO PUBLIC MEETING RULE - EXECUTIVE SESSIONS

## Exception to What?

Not public notice of at least the subject.

Any individual notice.

It is not a “secret” meeting.



*Specific Statutory Exceptions - - AS 44.62.310( c).*

1. “Matters which if immediately known would clearly have an adverse effect of the government’s finances.”

- 2. “subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion.”**

Sensitive personnel matters including evaluations of strengths and weaknesses.

*City of Kenai v. Kenai Peninsula Newspaper, Inc.*

Experience, education and background discussion/comparisons v. personal characteristics.

Executive session permitted to discuss hire even though application was public record.

3. **“Matters which by law, municipal charter, or ordinance are required to be confidential.”**
4. **“matters involving consideration of government records that by law are not subject to public disclosure.”**

Remember the interaction with public records act.

District policies requiring confidentiality.

## How you get to executive session is important.

Convene in a public meeting.

Specific public motion and vote required.

Recital of statutory language not enough. Motion must “clearly and with specificity describe the subject of the proposed executive session without defeating the purpose of addressing the subject in private.”

# OTHER LIMITED EXCEPTIONS

- Constituent communications are okay.
- Informal communications between Board members are okay if not engaged in for deliberation, give and take, or commitments on votes.
- One-on-one discussions on matters coming before the Board for action do not violate the OMA.
  - *However, be wary of serial communications.*
- Social gatherings of Board members are okay provided:
  - *No business discussed.*
  - *Event not given under circumstances in which it could be reasonably inferred that it is intended to influence board members.*

## Five Common Issues to Watch For:

1. Doesn't have to be prearranged unless you're advisory.
2. Location only matters if you're buying a house. It does not for meetings.
3. Group signings – are decisions.
4. Attendance at meetings held by others.
5. Decisions not required – all steps of the deliberative and decision-making process is covered. [**Brookwood Area Homeowners Association, Inc. v. MOA.**]

# REMEDIES

- Action is voidable if challenged within 180 days by filing lawsuit in State Superior Court.
- The Board may cure a violation by conducting a substantial and public reconsideration of the matter. The reconsideration must occur in another, properly noticed, meeting.
- The OMA addresses factors the court will consider in determining whether or not to void the action, including: the degree to which the violations were willful, flagrant, or obvious; and the degree to which the body failed to adhere to the legislative policy of the Act.
  - AS 44.62.310(f)(1)-(9).

# FACT SCENARIOS:

- Members gather at the regularly scheduled Board meeting
- A majority of the Board members appear at your school's "Family Fun Night"
- Those same members go to a local restaurant to have dinner but do not discuss Board business
- While at dinner, they do discuss a matter coming before the Board for action, but do not go so far as to indicate how they will vote
- One Board member emails another and expresses views on a matter coming before the Board
- The Board member receiving the email adds a comment in reply and also copies two other members, who similarly provide their input on the issue.



# TAKEAWAYS

Well-meaning people can violate the OMA.

Don't count on the benefit of the doubt.

Cleverness and game playing will get you in trouble.

Don't act in a way that circumvents a discussion of public business at an open meeting.