

**8. Open Meetings Act**

Open Meetings Act – Act 267 of 1976 State of Emergency

OMA Adjustment - 3a analysis

Open Meetings Handbook



**OPEN MEETINGS ACT (EXCERPT)**  
**Act 267 of 1976**

*The People of the State of Michigan enact:*

**15.261 Short title; effect of act on certain charter provisions, ordinances, or resolutions.**

Sec. 1. (1) This act shall be known and may be cited as the "Open meetings act".

(2) This act shall supersede all local charter provisions, ordinances, or resolutions which relate to requirements for meetings of local public bodies to be open to the public.

(3) After the effective date of this act, nothing in this act shall prohibit a public body from adopting an ordinance, resolution, rule, or charter provision which would require a greater degree of openness relative to meetings of public bodies than the standards provided for in this act.

**History:** 1976, Act 267, Eff. Mar. 31, 1977 .

**15.262 Definitions.**

Sec. 2. As used in this act: (a) "Public body" means any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function; a lessee of such a body performing an essential public purpose and function pursuant to the lease agreement; or the board of a nonprofit corporation formed by a city under section 4o of the home rule city act, 1909 PA 279, MCL 117.4o.

(b) "Meeting" means 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, or any meeting of the board of a nonprofit corporation formed by a city under section 4o of the home rule city act, 1909 PA 279, MCL 117.4o.

(c) "Closed session" means a meeting or part of a meeting of a public body that is closed to the public.

(d) "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.

**History:** 1976, Act 267, Eff. Mar. 31, 1977 ;--Am. 2001, Act 38, Imd. Eff. July 11, 2001 .

**15.263 Meetings, decisions, and deliberations of public body; requirements; attending or addressing meeting of public body; tape-recording, videotaping, broadcasting, and telecasting proceedings; rules and regulations; exclusion from meeting; exemptions.**

Sec. 3. (1) All meetings of a public body shall be open to the public and shall be held in a place available to the general public. All persons shall be permitted to attend any meeting except as otherwise provided in this act. The right of a person to attend a meeting of a public body includes the right to tape-record, to videotape, to broadcast live on radio, and to telecast live on television the proceedings of a public body at a public meeting. The exercise of this right shall not be dependent upon the prior approval of the public body. However, a public body may establish reasonable rules and regulations in order to minimize the possibility of disrupting the meeting.

- (2) All decisions of a public body shall be made at a meeting open to the public.
- (3) All deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public except as provided in this section and sections 7 and 8.
- (4) A person shall not be required as a condition of attendance at a meeting of a public body to register or otherwise provide his or her name or other information or otherwise to fulfill a condition precedent to attendance.
- (5) A person shall be permitted to address a meeting of a public body under rules established and recorded by the public body. The legislature or a house of the legislature may provide by rule that the right to address may be limited to prescribed times at hearings and committee meetings only.
- (6) A person shall not be excluded from a meeting otherwise open to the public except for a breach of the peace actually committed at the meeting.
- (7) This act does not apply to the following public bodies only when deliberating the merits of a case: (a) The worker's compensation appeal board created under the worker's disability compensation act of 1969, Act No. 317 of the Public Acts of 1969, as amended, being sections 418.101 to 418.941 of the Michigan Compiled Laws.
- (b) The employment security board of review created under the Michigan employment security act, Act No. 1 of the Public Acts of the Extra Session of 1936, as amended, being sections 421.1 to 421.73 of the Michigan Compiled Laws.
- (c) The state tenure commission created under Act No. 4 of the Public Acts of the Extra Session of 1937, as amended, being sections 38.71 to 38.191 of the Michigan Compiled Laws, when acting as a board of review from the decision of a controlling board.
- (d) An arbitrator or arbitration panel appointed by the employment relations commission under the authority given the commission by Act No. 176 of the Public Acts of 1939, as amended, being sections 423.1 to 423.30 of the Michigan Compiled Laws.
- (e) An arbitration panel selected under chapter 50A of the revised judicature act of 1961, Act No. 236 of the Public Acts of 1961, being sections 600.5040 to 600.5065 of the Michigan Compiled Laws.
- (f) The Michigan public service commission created under Act No. 3 of the Public Acts of 1939, being sections 460.1 to 460.8 of the Michigan Compiled Laws.
- (8) This act does not apply to an association of insurers created under the insurance code of 1956, Act No. 218 of the Public Acts of 1956, being sections 500.100 to 500.8302 of the Michigan Compiled Laws, or other association or facility formed under Act No. 218 of the Public Acts of 1956 as a nonprofit organization of insurer members.
- (9) This act does not apply to a committee of a public body which adopts a nonpolicymaking resolution of tribute or memorial which resolution is not adopted at a meeting.
- (10) This act does not apply to a meeting which is a social or chance gathering or conference not designed to avoid this act.
- (11) This act shall not apply to the Michigan veterans' trust fund board of trustees or a county or district committee created under Act No. 9 of the Public Acts of the first extra session of 1946, being sections 35.601 to 35.610 of the Michigan Compiled Laws, when the board of trustees or county or district

committee is deliberating the merits of an emergent need. A decision of the board of trustees or county or district committee made under this subsection shall be reconsidered by the board or committee at its next regular or special meeting consistent with the requirements of this act. "Emergent need" means a situation which the board of trustees, by rules promulgated under the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.328 of the Michigan Compiled Laws, determines requires immediate action.

**History:** 1976, Act 267, Eff. Mar. 31, 1977 ;--Am. 1981, Act 161, Imd. Eff. Nov. 30, 1981 ;--Am. 1986, Act 269, Imd. Eff. Dec. 19, 1986 ;--Am. 1988, Act 158, Imd. Eff. June 14, 1988 ;--Am. 1988, Act 278, Imd. Eff. July 27, 1988 .

**Admin Rule:** R 35.621 of the Michigan Administrative Code.

### **15.264 Public notice of meetings generally; contents; places of posting.**

Sec. 4. The following provisions shall apply with respect to public notice of meetings: (a) A public notice shall always contain the name of the public body to which the notice applies, its telephone number if one exists, and its address.

(b) A public notice for a public body shall always be posted at its principal office and any other locations considered appropriate by the public body. Cable television may also be utilized for purposes of posting public notice.

(c) If a public body is a part of a state department, part of the legislative or judicial branch of state government, part of an institution of higher education, or part of a political subdivision or school district, a public notice shall also be posted in the respective principal office of the state department, the institution of higher education, clerk of the house of representatives, secretary of the state senate, clerk of the supreme court, or political subdivision or school district.

(d) If a public body does not have a principal office, the required public notice for a local public body shall be posted in the office of the county clerk in which the public body serves and the required public notice for a state public body shall be posted in the office of the secretary of state.

**History:** 1976, Act 267, Eff. Mar. 31, 1977 ;--Am. 1984, Act 87, Imd. Eff. Apr. 19, 1984 .

### **15.265 Public notice of regular meetings, change in schedule of regular meetings, rescheduled regular meetings, or special meetings; time for posting; statement of date, time, and place; applicability of subsection (4); recess or adjournment; emergency sessions; meeting in residential dwelling; notice.**

Sec. 5. (1) A meeting of a public body shall not be held unless public notice is given as provided in this section by a person designated by the public body.

(2) For regular meetings of a public body, there shall be posted within 10 days after the first meeting of the public body in each calendar or fiscal year a public notice stating the dates, times, and places of its regular meetings.

(3) If there is a change in the schedule of regular meetings of a public body, there shall be posted within 3 days after the meeting at which the change is made, a public notice stating the new dates, times, and places of its regular meetings.

(4) Except as provided in this subsection or in subsection (6), for a rescheduled regular or a special meeting of a public body, a public notice stating the date, time, and place of the meeting shall be posted

at least 18 hours before the meeting. The requirement of 18-hour notice shall not apply to special meetings of subcommittees of a public body or conference committees of the state legislature. A conference committee shall give a 6-hour notice. A second conference committee shall give a 1-hour notice. Notice of a conference committee meeting shall include written notice to each member of the conference committee and the majority and minority leader of each house indicating time and place of the meeting. This subsection does not apply to a public meeting held pursuant to section 4(2) to (5) of Act No. 239 of the Public Acts of 1955, as amended, being section 200.304 of the Michigan Compiled Laws.

(5) A meeting of a public body which is recessed for more than 36 hours shall be reconvened only after public notice, which is equivalent to that required under subsection (4), has been posted. If either house of the state legislature is adjourned or recessed for less than 18 hours, the notice provisions of subsection (4) are not applicable. Nothing in this section shall bar a public body from meeting in emergency session in the event of a severe and imminent threat to the health, safety, or welfare of the public when 2/3 of the members serving on the body decide that delay would be detrimental to efforts to lessen or respond to the threat.

(6) A meeting of a public body may only take place in a residential dwelling if a nonresidential building within the boundary of the local governmental unit or school system is not available without cost to the public body. For a meeting of a public body which is held in a residential dwelling, notice of the meeting shall be published as a display advertisement in a newspaper of general circulation in the city or township in which the meeting is to be held. The notice shall be published not less than 2 days before the day on which the meeting is held, and shall state the date, time, and place of the meeting. The notice, which shall be at the bottom of the display advertisement and which shall be set off in a conspicuous manner, shall include the following language: "This meeting is open to all members of the public under Michigan's open meetings act".

**History:** 1976, Act 267, Eff. Mar. 31, 1977 ;--Am. 1978, Act 256, Imd. Eff. June 21, 1978 ;--Am. 1982, Act 134, Imd. Eff. Apr. 22, 1982 ;--Am. 1984, Act 167, Imd. Eff. June 29, 1984 .

### **15.266 Providing copies of public notice on written request; fee.**

Sec. 6. (1) Upon the written request of an individual, organization, firm, or corporation, and upon the requesting party's payment of a yearly fee of not more than the reasonable estimated cost for printing and postage of such notices, a public body shall send to the requesting party by first class mail a copy of any notice required to be posted pursuant to section 5(2) to (5).

(2) Upon written request, a public body, at the same time a public notice of a meeting is posted pursuant to section 5, shall provide a copy of the public notice of that meeting to any newspaper published in the state and to any radio and television station located in the state, free of charge.

**History:** 1976, Act 267, Eff. Mar. 31, 1977 .

### **15.267 Closed sessions; roll call vote; separate set of minutes.**

Sec. 7. (1) A 2/3 roll call vote of members elected or appointed and serving is required to call a closed session, except for the closed sessions permitted under section 8(a), (b), (c), (g), (i), and (j). The roll call vote and the purpose or purposes for calling the closed session shall be entered into the minutes of the meeting at which the vote is taken.

(2) A separate set of minutes shall be taken by the clerk or the designated secretary of the public body at the closed session. These minutes shall be retained by the clerk of the public body, are not available to the public, and shall only be disclosed if required by a civil action filed under section 10, 11, or 13. These

minutes may be destroyed 1 year and 1 day after approval of the minutes of the regular meeting at which the closed session was approved.

**History:** 1976, Act 267, Eff. Mar. 31, 1977 ;--Am. 1993, Act 81, Eff. Apr. 1, 1994 ;--Am. 1996, Act 464, Imd. Eff. Dec. 26, 1996 .

### **15.268 Closed sessions; permissible purposes.**

Sec. 8. A public body may meet in a closed session only for the following purposes: (a) 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, if the named person requests a closed hearing. A person requesting a closed hearing may rescind the request at any time, in which case the matter at issue shall be considered after the rescission only in open sessions.

(b) To consider the dismissal, suspension, or disciplining of a student if the public body is part of the school district, intermediate school district, or institution of higher education that the student is attending, and if the student or the student's parent or guardian requests a closed hearing.

(c) For strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement if either negotiating party requests a closed hearing.

(d) To consider the purchase or lease of real property up to the time an option to purchase or lease that real property is obtained.

(e) To consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial effect on the litigating or settlement position of the public body.

(f) To review and consider the contents of an application for employment or appointment to a public office if the candidate requests that the application remain confidential. However, except as otherwise provided in this subdivision, all interviews by a public body for employment or appointment to a public office shall be held in an open meeting pursuant to this act. This subdivision does not apply to a public office described in subdivision (j).

(g) Partisan caucuses of members of the state legislature.

(h) To consider material exempt from discussion or disclosure by state or federal statute.

(i) For a compliance conference conducted by the department of commerce under section 16231 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.16231 of the Michigan Compiled Laws, before a complaint is issued.

(j) In the process of searching for and selecting a president of an institution of higher education established under section 4, 5, or 6 of article VIII of the state constitution of 1963, to review the specific contents of an application, to conduct an interview with a candidate, or to discuss the specific qualifications of a candidate if the particular process of searching for and selecting a president of an institution of higher education meets all of the following requirements: (i) The search committee in the process, appointed by the governing board, consists of at least 1 student of the institution, 1 faculty member of the institution, 1 administrator of the institution, 1 alumnus of the institution, and 1 representative of the general public. The search committee also may include 1 or more members of the governing board of the institution, but the number shall not constitute a quorum of the governing board.

However, the search committee shall not be constituted in such a way that any 1 of the groups described in this subparagraph constitutes a majority of the search committee.

(ii) After the search committee recommends the 5 final candidates, the governing board does not take a vote on a final selection for the president until at least 30 days after the 5 final candidates have been publicly identified by the search committee.

(iii) The deliberations and vote of the governing board of the institution on selecting the president take place in an open session of the governing board.

**History:** 1976, Act 267, Eff. Mar. 31, 1977 ;--Am. 1984, Act 202, Imd. Eff. July 3, 1984 ;--Am. 1993, Act 81, Eff. Apr. 1, 1994 ;--Am. 1996, Act 464, Imd. Eff. Dec. 26, 1996 .

### **15.269 Minutes generally.**

Sec. 9. (1) Each public body shall keep minutes of each meeting showing the date, time, place, members present, members absent, any decisions made at a meeting open to the public, and the purpose or purposes for which a closed session is held. The minutes shall include all roll call votes taken at the meeting. Corrections in the minutes shall be made not later than the next meeting after the meeting to which the minutes refer. Corrected minutes shall be available no later than the next subsequent meeting after correction. The corrected minutes shall show both the original entry and the correction.

(2) Minutes shall be public records open to public inspection and shall be available at the address designated on posted public notices pursuant to section 4. Copies of the minutes shall be available to the public at the reasonable estimated cost for printing and copying.

(3) Proposed minutes shall be available for public inspection not more than 8 business days after the meeting to which the minutes refer. Approved minutes shall be available for public inspection not later than 5 business days after the meeting at which the minutes are approved by the public body.

**History:** 1976, Act 267, Eff. Mar. 31, 1977 ;--Am. 1982, Act 130, Imd. Eff. Apr. 20, 1982 .

### **15.270 Decisions of public body; presumption; civil action to invalidate; jurisdiction; venue; reenactment of disputed decision.**

Sec. 10. (1) Decisions of a public body shall be presumed to have been adopted in compliance with the requirements of this act. The attorney general, the prosecuting attorney of the county in which the public body serves, or any person may commence a civil action in the circuit court to challenge the validity of a decision of a public body made in violation of this act.

(2) A decision made by a public body may be invalidated if the public body has not complied with the requirements of section 3(1), (2), and (3) in making the decision or if failure to give notice in accordance with section 5 has interfered with substantial compliance with section 3(1), (2), and (3) and the court finds that the noncompliance or failure has impaired the rights of the public under this act.

(3) The circuit court shall not have jurisdiction to invalidate a decision of a public body for a violation of this act unless an action is commenced pursuant to this section within the following specified period of time: (a) Within 60 days after the approved minutes are made available to the public by the public body except as otherwise provided in subdivision (b).



(b) If the decision involves the approval of contracts, the receipt or acceptance of bids, the making of assessments, the procedures pertaining to the issuance of bonds or other evidences of indebtedness, or the submission of a borrowing proposal to the electors, within 30 days after the approved minutes are made available to the public pursuant to that decision.

(4) Venue for an action under this section shall be any county in which a local public body serves or, if the decision of a state public body is at issue, in Ingham county.

(5) In any case where an action has been initiated to invalidate a decision of a public body on the ground that it was not taken in conformity with the requirements of this act, the public body may, without being deemed to make any admission contrary to its interest, reenact the disputed decision in conformity with this act. A decision reenacted in this manner shall be effective from the date of reenactment and shall not be declared invalid by reason of a deficiency in the procedure used for its initial enactment.

**History:** 1976, Act 267, Eff. Mar. 31, 1977 .

**15.271 Civil action to compel compliance or enjoin noncompliance; commencement; venue; security not required; commencement of action for mandamus; court costs and attorney fees.**

Sec. 11. (1) If a public body is not complying with this act, the attorney general, prosecuting attorney of the county in which the public body serves, or a person may commence a civil action to compel compliance or to enjoin further noncompliance with this act.

(2) An action for injunctive relief against a local public body shall be commenced in the circuit court, and venue is proper in any county in which the public body serves. An action for an injunction against a state public body shall be commenced in the circuit court and venue is proper in any county in which the public body has its principal office, or in Ingham county. If a person commences an action for injunctive relief, that person shall not be required to post security as a condition for obtaining a preliminary injunction or a temporary restraining order.

(3) An action for mandamus against a public body under this act shall be commenced in the court of appeals.

(4) If a public body is not complying with this act, and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, the person shall recover court costs and actual attorney fees for the action.

**History:** 1976, Act 267, Eff. Mar. 31, 1977 .

**15.272 Violation as misdemeanor; penalty.**

Sec. 12. (1) A public official who intentionally violates this act is guilty of a misdemeanor punishable by a fine of not more than \$1,000.00.

(2) A public official who is convicted of intentionally violating a provision of this act for a second time within the same term shall be guilty of a misdemeanor and shall be fined not more than \$2,000.00, or imprisoned for not more than 1 year, or both.

**History:** 1976, Act 267, Eff. Mar. 31, 1977 .

**15.273 Violation; liability.**

Sec. 13. (1) A public official who intentionally violates this act shall be personally liable in a civil action for actual and exemplary damages of not more than \$500.00 total, plus court costs and actual attorney fees to a person or group of persons bringing the action.

(2) Not more than 1 action under this section shall be brought against a public official for a single meeting. An action under this section shall be commenced within 180 days after the date of the violation which gives rise to the cause of action.

(3) An action for damages under this section may be joined with an action for injunctive or exemplary relief under section 11.

**History:** 1976, Act 267, Eff. Mar. 31, 1977.

## ELECTRONIC MEETINGS OF PUBLIC BODIES

Phone: (517) 373-8080  
<http://www.house.mi.gov/hfa>

**Senate Bill 1108 (H-1) as reported from House committee**

**Sponsor: Sen. Lana Theis**

**House Committee: Ways and Means**

**Senate Committee: Local Government**

**Complete to 10-13-20**

Analysis available at  
<http://www.legislature.mi.gov>

### SUMMARY:

Senate Bill 1108 would amend the Open Meetings Act to allow meetings of a public body to be held electronically or with remote participation under certain circumstances and to provide procedures and requirements for a meeting held that way.

#### **Absence of a public body member under the act**

The Open Meetings Act generally requires all meetings of a public body to be open to the public and held in a place available to the general public, and all decisions of a public body must be made at a meeting open to the public.

Except for meetings of a state legislative body, a public body has to establish procedures to accommodate the absence due to military duty of any member of the body. The procedures have to allow the absent member to participate in, and vote on, business before the public body, including, if feasible, ensuring two-way communication. The procedures also must provide a way to notify the public of the member's absence and let them know how to contact that member before the meeting to give input on anything that will come before the public body.

#### **Absence of a member under the bill**

The bill would revise these provisions, subject to conditions described below, to require the public body to establish procedures to accommodate the absence of a member of the public body due to any of the following reasons:

- Military duty.
- A *medical condition*.
- A statewide or local state of emergency or state of disaster declared by the governor or by a local official or governing body that would risk the personal health or safety of members of the public or the public body if the meeting were held in person.

*Medical condition* would mean an illness, injury, disability, or other health-related condition.

The procedures would have to provide for two-way communication ("if feasible" would be deleted). In addition, each member of the public body attending the meeting remotely would have to make a public announcement at the outset of the meeting, to be included in the minutes, that he or she is doing so. A member attending remotely for a reason other than military duty would have to further specify the county, city, township, or village and state where he or she was physically located.

The bill would still require the procedures to provide a way to notify the public of the member's absence and let them know how to contact that member before the meeting to give input on anything that will come before the public body.

In addition, the bill would revise the exception for a state legislative body so that only a meeting of a state legislative body at which a *formal vote* is taken would be excepted.

*Formal vote* would mean a vote on a bill, amendment, resolution, motion, proposal, recommendation, or any other measure on which a vote by members of a state legislative body is required and by which the state legislative body effectuates or formulates public policy.

### **Requirements for electronic public meetings**

Under the bill, a meeting of a public body that was held wholly or partly electronically by telephonic or video conferencing in compliance with the provisions described below, and that was otherwise in compliance with compatible provisions of the act applicable to a nonelectronic meeting, would be permitted in the following circumstances:

- Before January 1, 2021, and retroactive to March 18, 2020, any circumstances, including those requiring accommodation of absent members described above.
- On and after January 1, 2021, through December 31, 2021, only those circumstances requiring accommodation of members absent due to military duty, a medical condition, or a statewide or local state of emergency or disaster.
- After December 31, 2021, only in the circumstances requiring accommodation of members absent due to military duty as described above.

From January 1, 2021, through December 31, 2021, a meeting could be held electronically due to a state of emergency or disaster only to allow the electronic attendance of a member who lives in the affected area or to allow the electronic meeting of a public body that regularly holds its meetings in the affected area.

At a meeting held electronically to accommodate members absent due to military duty or a medical condition, only those members could participate remotely. The other members would have to be physically present to participate.

A meeting held electronically would have to be conducted in a way that allows two-way communication so that the members of the public body can all hear one another. During a public comment period, public participants would have to be able to hear the public body members and be heard by the members and other participants. A public body could use technology that allows members of the public to submit typed comments that can be shared with all the meeting participants to satisfy the requirements that members of the public must be allowed to address the meeting and be able to be heard by others.

Except as otherwise specified, a physical place would not be required for an electronic meeting. Members of a public body and members of the public participating electronically in a meeting held under these provisions that occurs in a physical place would be considered present and in attendance at the meeting for all purposes.

In addition to any other notices required under the act, a public body with an official internet presence would have to post advance notice of an electronic meeting on its website where the public can access it, either on or linked from its homepage, at least 18 hours before the start of the meeting. It would have to clearly explain all of the following:

- Why the public body is meeting electronically.
- How members of the public can participate in the meeting, including any phone number or internet address needed to do so.
- How members of the public can contact members of the public body to ask or give input about any business that will come before the public body at the meeting.
- How persons with disabilities can participate.

If an electronic meeting had an agenda, a public body with an official internet presence that included regular updates of posted meeting agenda or minutes would have to make the agenda available to the public on the internet at least two hours before the start of the meeting. This agenda could be amended at the meeting.

A public body could not require a person to register or provide his or her name or other information as a condition of participating in an electronic meeting, or require a person to otherwise fulfill a condition for attendance, except for mechanisms the public body requires that are necessary to allow the person to participate in a meeting's public comment period.

If during an electronic meeting a closed session of the public body were held electronically in compliance with applicable provisions of the act, members of the public otherwise participating in the meeting would have to be excluded from participating in the closed session.

MCL 15.263 and proposed MCL 15.263a

## **BACKGROUND:**

On October 2, 2020, in a 4–3 opinion, the Michigan Supreme Court ruled that the governor did not have the authority to declare a state of emergency or issue emergency orders after April 30, 2020.<sup>1</sup>

The governor's declarations of a state of emergency, and the executive orders issued under them, were primarily based on two acts: 1945 PA 302 (commonly known as the emergency powers of the governor act) and the Emergency Management Act (1976 PA 390).

Each act authorizes the governor to proclaim a state of emergency and issue orders responding to the emergency. 1945 PA 302 provides that these orders are effective until the state of emergency ends. Under the Emergency Management Act, a state of emergency or disaster must be terminated after 28 days unless the legislature approves an extension.

In its opinion, the Supreme Court ruled 1945 PA 302 to be an unconstitutional delegation of legislative power. Because the legislature had extended the state of emergency under the Emergency Management Act to April 30 but did not extend it past that time, the court also

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<sup>1</sup> <https://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/Documents/2020-2021/161492/In%20re%20Certified%20Questions-OP.pdf>

ruled that the governor had no authority to declare a state of emergency or issue emergency orders under that act after that date.

Although some COVID-19-related orders can be effective under other authority (the Public Health Code, for example), the governor's orders issued after April 30 have no continuing legal effect. In a court filing, the governor said that over 30 executive orders in effect on October 2 were based on authority granted under 1945 PA 302.

This bill would address the same issues as the provisions of EO 2020-154 that dealt with public meetings conducted under the Open Meetings Act.<sup>2</sup>

### **FISCAL IMPACT:**

The bill could result in indeterminate cost increases to the state and to local units of government. The bill would require public bodies to conduct meetings with absent members that “permits 2-way communication so that members of the public body can hear and be heard by other members of the public body, and so that public participants can hear members of the public body and can be heard by members of the public body and other participants during a public comment period.” Potential costs to public bodies would depend on the extent to which each body possesses the technology capable of providing two-way communication as described in the bill and whether the body would be required to purchase equipment or software capable of providing the required technology. The bill's requirement for two-way communication technology would codify a substantially similar requirement first included in March 2020 under Executive Order 2020-15 and subsequently under Executive Orders 2020-48, 2020-75, 2020-129, and 2020-154.

### **POSITIONS:**

The following organizations indicated support for the bill (10-13-20):

- Michigan Association of Counties
- Michigan Association of School Boards
- Michigan Municipal League

Legislative Analyst: Rick Yuille  
Fiscal Analyst: Michael Cnossen

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

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<sup>2</sup> Executive Order 2020-154, issued July 17, 2020 (<https://www.legislature.mi.gov/documents/2019-2020/executiveorder/pdf/2020-EO-154.pdf>).

# **OPEN MEETINGS ACT HANDBOOK**



**Attorney General Bill Schuette**

The Handbook is intended to be a quick reference guide. It is not intended to be encyclopedic on every subject or resolve every situation that may be encountered.

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## OPEN MEETINGS ACT

### THE BASICS

**The Act** – the [Open Meetings Act \(OMA\) is 1976 PA 267, MCL 15.261 through 15.275](#). The OMA took effect January 1, 1977. In enacting the OMA, the Legislature promoted a new era in governmental accountability and fostered openness in government to enhance responsible decision making.<sup>1</sup>

Nothing in the OMA prohibits a public body from adopting an ordinance, resolution, rule, or charter provision that requires a greater degree of openness relative to public body meetings than the standards provided for in the [OMA](#).<sup>2</sup>

**What bodies are covered?** – the OMA applies to all meetings of a [public body](#).<sup>3</sup> A "public body" is broadly defined as:

[A]ny state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to *exercise governmental or proprietary authority or perform a governmental or proprietary function*; a lessee of such a body performing an essential public purpose and function pursuant to the [lease agreement](#).<sup>4</sup> [Emphasis added.]

As used in the OMA, the term "[public body](#)" connotes a collective entity and does not include an individual government official.<sup>5</sup> The OMA does not apply to [private, nonprofit corporations](#).<sup>6</sup>

**Public notice requirements** – a meeting of a public body cannot be held unless public notice is given consistent with the [OMA](#).<sup>7</sup> A [public notice](#) must contain the public body's name, telephone number, and address, and must be posted at its principal office and any other locations

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<sup>1</sup> *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 222-223; 507 NW2d 422 (1993).

<sup>2</sup> MCL 15.261.

<sup>3</sup> MCL 15.263. When the Handbook refers to a "board," the term encompasses all boards, commissions, councils, authorities, committees, subcommittees, panels, and any other public body.

<sup>4</sup> MCL 15.262(a). The provision in the OMA that includes a lessee of a public body performing an essential public purpose is unconstitutional because the title of the act does not refer to organizations other than "public bodies." OAG, 1977-1978, No 5207, p 157 (June 24, 1977). Certain boards are excluded "when deliberating the merits of a case." MCL 15.263(7). See also MCL 15.263(8) and (10).

<sup>5</sup> *Herald Co v Bay City*, 463 Mich 111, 129-133; 614 NW2d 873 (2000) – a city manager is not subject to the OMA. *Craig v Detroit Public Schools Chief Executive Officer*, 265 Mich App 572, 579; 697 NW2d 529 (2005). OAG, 1977-1978, No 5183A, p 97 (April 18, 1977).

<sup>6</sup> OAG, 1985-1986, No 6352, p 252 (April 8, 1986) – the Michigan High School Athletic Association is not subject to the OMA. See also *Perlango v Iron River Cooperative TV Antenna Corp*, 122 Mich App 433; 332 NW2d 502 (1983).

<sup>7</sup> MCL 15.265(1). *Nicholas v Meridian Charter Twp*, 239 Mich App 525, 531; 609 NW2d 574 (2000).

the public body considers appropriate.<sup>8</sup> If a public body is a part of a state department, a [public notice](#) must also be posted in the principal office of the state department.<sup>9</sup>

Public notice requirements are specific to the type of meeting:

- (1) For regular meetings of a public body, there shall be posted within 10 days after the first meeting of the public body in each calendar or fiscal year a public notice stating the dates, times, and places of its regular meetings.
- (2) For a change in schedule of regular meetings of a public body, there shall be posted within three days after the meeting at which the change is made, a public notice stating the new dates, times, and places of its regular meetings.
- (3) For a rescheduled regular or a special meeting of a public body, a public notice stating the date, time, and place of the meeting shall be posted at least 18 hours before the meeting.
- (4) A meeting of a public body which is recessed for more than 36 hours shall be reconvened only after [public notice](#) has been posted at least 18 hours before the reconvened meeting.<sup>10</sup>

At their first meeting of the calendar or fiscal year, each board must set the dates, times, and places of the board's regular meetings for the coming year. The OMA does not require any particular number of meetings. The board's schedule of regular meetings is not, of course, set in stone. The board is free to cancel or reschedule its meetings.

The minimum 18-hour notice requirement is not fulfilled if the public is denied access to the notice of the meeting for any part of the [18 hours](#).<sup>11</sup> The requirement may be met by posting at least 18 hours in advance of the meeting using a method designed to assure access to the notice. For example, the public body can post the [notice](#) at the main entrance visible on the outside of the building that houses the principal office of the public body.<sup>12</sup>

A public body must send copies of the public notices by first class mail to a requesting party, upon the party's payment of a yearly fee of not more than the reasonable estimated cost of printing and postage. Upon written request, a public body, at the same time a public notice of a meeting is posted, must provide a copy of the public notice to any newspaper published in the state or any radio or television station located in the state, [free of charge](#).<sup>13</sup>

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<sup>8</sup> MCL 15.264(a)-(c).

<sup>9</sup> MCL 15.264(c).

<sup>10</sup> MCL 15.265(2)-(5).

<sup>11</sup> OAG, 1979-1980, No 5724, p 840 (June 20, 1980).

<sup>12</sup> OAG No 5724.

<sup>13</sup> MCL 15.266.

**Agendas and the OMA** – while the OMA requires a public body to give public notice when it meets, it has no requirement that the [public notice](#) include an agenda or a specific statement as to the purpose of a meeting.<sup>14</sup> No agenda format is required by the OMA.<sup>15</sup>

**Penalties for OMA violations** – a public official who "intentionally violates" the OMA may be found guilty of a [misdemeanor](#)<sup>16</sup> and may be [personally liable](#) for actual and exemplary damages of not more than \$500 for a single meeting.<sup>17</sup> The exemptions in the OMA must be strictly construed. The "rule of lenity" (i.e., courts should mitigate punishment when the punishment in the criminal statute is unclear) does not apply to construction of the OMA's exemptions.<sup>18</sup>

A decision made by a public body may be invalidated by a court, if the public body has not complied with the requirements of [MCL 15.263\(1\), \(2\), and \(3\)](#) [i.e., making decisions at a public meeting] or if failure to give notice in accordance with section 5 has interfered with substantial compliance with [MCL 15.263\(1\), \(2\), and \(3\)](#) and the court finds that the noncompliance has impaired the rights of the public under the OMA.

**Lawsuits to compel compliance** – actions must be brought within [60 days](#) after the public body's approved minutes involving the challenged decision are made publicly available.<sup>19</sup> If the decision involves the approval of contracts, the receipt or acceptance of bids, or the procedures pertaining to the issuance of bonds or other evidences of indebtedness, the action must be brought within [30 days](#) after the approved minutes are made publicly available.<sup>20</sup> If the decision of a state public body is challenged, venue is in [Ingham County](#).<sup>21</sup>

**Correcting non-conforming decisions** – in any case where a lawsuit has been initiated to invalidate a public body's decision on the ground that it was not made in conformity with the OMA, the public body may, without being deemed to make any admission contrary to its interest, reenact the disputed decision in conformity with the OMA. A decision reenacted in this manner shall be effective from the [date of reenactment](#) and is not rendered invalid by any deficiency in its initial enactment.<sup>22</sup> If the board acts quickly, the reenactment may defeat a claim for attorney's fees, since plaintiffs would not be successful in "obtaining relief in the action" within the meaning of the OMA.<sup>23</sup>

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<sup>14</sup> OAG, 1993-1994, No 6821, p 199 (October 18, 1994). But, as discussed in OAG No 6821, other statutes may require a public body to state in its notice the business to be transacted at the meeting.

<sup>15</sup> *Lysogorski v Bridgeport Charter Twp*, 256 Mich App 297, 299; 662 NW2d 108 (2003).

<sup>16</sup> MCL 15.272.

<sup>17</sup> MCL 15.273.

<sup>18</sup> *People v Whitney*, 228 Mich App 230, 244; 578 NW2d 329 (1998).

<sup>19</sup> MCL 15.270(3)(a).

<sup>20</sup> MCL 15.270(3)(b).

<sup>21</sup> MCL 15.270(4).

<sup>22</sup> MCL 15.270(5).

<sup>23</sup> *Leemreis v Sherman Twp*, 273 Mich App 691, 700; 731 NW2d 787 (2007). *Felice v Cheboygan County Zoning Comm*, 103 Mich App 742, 746; 304 NW2d 1 (1981).

## DECISIONS MUST BE MADE IN PUBLIC MEETINGS

**All decisions must be made at a meeting open to the public** – the OMA defines "decision" to mean "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."<sup>24</sup> The OMA provides that "[a]ll decisions of a public body shall be made at a meeting open to the public," and that, with limited exceptions, "[a]ll deliberations of a public body constituting a quorum of its members shall take place at a meeting [open to the public](#)."<sup>25</sup>

The OMA does not contain a "voting requirement" or any form of "formal voting requirement." A "consensus building process" that equates to decision-making would fall under the act.<sup>26</sup> For example, where board members use telephone calls or sub-quorum meetings to achieve the same intercommunication that could have been achieved in a full board or commission meeting, the members' conduct is susceptible to "round-the-horn" decision-making, which achieves the same effect as if the entire board had met publicly and formally cast its votes. A "round-the-horn" process violates the OMA.<sup>27</sup>

**Meeting "informally" to discuss matters** – while the OMA "does not apply to a meeting which is a [social or chance gathering or conference](#) not designed to avoid this act,"<sup>28</sup> a meeting of a public body must be open to the public. The OMA does not define the terms "social or chance gathering" or "conference," and provides little direct guidance as to the precise scope of this [exemption](#).<sup>29</sup> To promote openness in government, however, the OMA is entitled to a broad interpretation and exceptions to conduct closed sessions must be construed strictly.<sup>30</sup> Thus, the [closed session exception](#) does not apply to a quorum of a public body that meets to discuss matters of public policy, even if there is no intention that the deliberations will lead to a decision on that occasion.<sup>31</sup>

**Canvassing board members on how they might vote** – an informal canvas by one member of a public body to find out where the votes would be on a particular issue does not violate the OMA,

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<sup>24</sup> MCL 15.262(d).

<sup>25</sup> MCL 15.263(2) and (3).

<sup>26</sup> *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich at 229.

<sup>27</sup> *Booth Newspapers, Inc*, 444 Mich at 229 – "any alleged distinction between the [public body's] consensus building and a determination or action, as advanced in the OMA's definition of 'decision,' is a distinction without a difference."

<sup>28</sup> MCL 15.263(10).

<sup>29</sup> OAG, 1981-1982, No 6074, p 662, 663 (June 11, 1982).

<sup>30</sup> *Wexford County Prosecutor v Pranger*, 83 Mich App 197, 201, 204; 268 NW2d 344 (1978).

<sup>31</sup> OAG, 1977-1978, No 5298, p 434, 435 (May 2, 1978). See also OAG, 1979-1980, No 5444, p 55, 56 (February 21, 1979) – anytime a quorum of a public body meets and considers a matter of public policy, the meeting must comply with the OMA's requirements. Compare OAG, 1979-1980, No 5437, p 36, 37 (February 2, 1979), where members of a public body constituting a quorum come together by chance, the gathering is exempt from the OMA; however, even at a chance meeting, matters of public policy may not be discussed by the members with each other.

so long as no decisions are made during the discussions and the discussions are not a deliberate attempt to the avoid the OMA.<sup>32</sup>

**May a quorum of a board gather outside an open meeting without violating the OMA?** – yes, in some instances. In addition to a purely [social gathering or chance gathering](#)<sup>33</sup> that does not involve discussions of public policy among the members of the board, a quorum may accept an invitation to address a [civic organization](#),<sup>34</sup> listen to the concerns of a neighborhood organization, or observe demonstrations, if the board doesn't deliberate toward, or make, a [decision](#).<sup>35</sup>

A board quorum also may meet for a workshop, seminar, informational gathering, or professional conference designed to convey, to the conference participants, information about areas of [professional interest](#) common to all conference participants.<sup>36</sup> These kinds of meetings involve a conference designed primarily to provide training or background information and involve a relatively broad focus upon issues of general concern, rather than a more limited focus on matters or issues of [particular interest](#) to a single public body.<sup>37</sup> However, when gatherings are designed to receive input from officers or employees of the public body, the OMA requires that the gathering be held at a [public meeting](#).<sup>38</sup>

The OMA was not violated when several members of the board of county commissioners attended a public meeting of the county planning committee (which had more than fifty members, two who were county commissioners), which resulted in a quorum of the board being present at the meeting (without the meeting also being noticed as a county commission meeting), so long as the nonmember commissioners did not engage in deliberations or render [decisions](#).<sup>39</sup>

**Advisory committees and the OMA** – the OMA does not apply to committees and subcommittees composed of less than a quorum of the full public body if they "are merely [advisory](#) or only capable of making 'recommendations concerning the exercise of governmental authority.'"<sup>40</sup>

Where, on the other hand, a committee or subcommittee is empowered to act on matters in such a fashion as to deprive the full public body of the opportunity to consider a matter, a decision of the committee or subcommittee "is an exercise of governmental authority which effectuates

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<sup>32</sup> *St Aubin v Ishpeming City Council*, 197 Mich App 100, 103; 494 NW2d 803 (1992).

<sup>33</sup> OAG, 1979-1980, No 5437, p 36 (February 2, 1979).

<sup>34</sup> OAG, 1977-1978, No 5183, p 21, 35 (March 8, 1977).

<sup>35</sup> OAG, 1977-1978, No 5364, p 606, 607 (September 7, 1978).

<sup>36</sup> OAG, 1979-1980, No 5433, p 29, 31 (January 31, 1979).

<sup>37</sup> OAG, 1981-1982, No 6074, at p 664.

<sup>38</sup> OAG No 5433 at p 31.

<sup>39</sup> OAG, 1989-1990, No 6636, p 253 (October 23, 1989), cited with approval in *Ryant v Cleveland Twp*, 239 Mich App 430, 434-435; 608 NW2d 101 (2000) and *Nicholas v Meridian Charter Twp*, 239 Mich App at 531-532. If, however, the noncommittee board members participate in committee deliberations, the OMA would be violated. *Nicholas*, 239 Mich App at 532.

<sup>40</sup> OAG, 1997-1998, No 6935, p 18 (April 2, 1997); OAG No 5183 at p 40.

public policy" and the committee or subcommittee proceedings are, therefore, subject to the [OMA](#).<sup>41</sup>

If a joint meeting of two committees of a board (each with less than a quorum of the board) results in the presence of a quorum of the board, the board must comply in all respects with the OMA and notice of the joint meeting must include the fact that a [quorum](#) of the board will be present.<sup>42</sup>

**Use of e-mail or other electronic communications among board members during an open meeting** – e-mail, texting, or other forms of electronic communications among members of a board or commission during the course of an open meeting that constitutes deliberations toward decision-making or actual decisions violates the OMA, since it is in effect a "closed" session. While the OMA does not require that all votes by a public body must be by roll call, voting requirements under the act are met when a vote is taken by roll call, show of hands, or other method that informs the public of the public official's decision rendered by his or her vote. Thus, the OMA bars the use of e-mail or other electronic communications to conduct a secret ballot at a public meeting, since it would prevent citizens from knowing how members of the public body have [voted](#).<sup>43</sup>

Moreover, the use of electronic communications for discussions or deliberations, which are not, at a minimum, able to be heard by the public in attendance at an open meeting are contrary to the OMA's core purpose – the promotion of openness in government.<sup>44</sup>

Using e-mail to distribute handouts, agenda items, statistical information, or other such material during an open meeting should be permissible under the OMA, particularly when copies of that information are also made available to the public before or during the meeting.

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<sup>41</sup> *Schmiedicke v Clare School Bd*, 228 Mich App 259, 261, 263-264; 577 NW2d 706 (1998); *Morrison v East Lansing*, 255 Mich App 505; 660 NW2d 395 (2003); and OAG, 1997-1998, No 7000, p 197 (December 1, 1998) – a committee composed of less than a quorum of a full board is subject to the OMA, if the committee is effectively authorized to determine whether items will or will not be referred for action by the full board, citing OAG, 1977-1978, No 5222, p 216 (September 1, 1977).

<sup>42</sup> OAG, 1989-1990, No 6636, at p 254.

<sup>43</sup> See *Esperance v Chesterfield Twp*, 89 Mich App 456, 464; 280 NW2d 559 (1979) and OAG, 1977-1978, No 5262, p 338 (January 31, 1978).

<sup>44</sup> See *Booth Newspapers, Inc*, 444 Mich at 229; *Schmiedicke*, 228 Mich App at 263, 264; and *Wexford County Prosecutor*, 83 Mich App at 204.



## CLOSED SESSIONS

**Meeting in closed session** – a public body may meet in a [closed session](#) *only* for one or more of the permitted purposes specified in section 8 of the OMA.<sup>45</sup> The [limited purposes](#) for which closed sessions are permitted include, among others<sup>46</sup>:

- (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, *if the named person requests a [closed hearing](#)*.<sup>47</sup>
- (2) For strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement *if either negotiating party requests a [closed hearing](#)*.<sup>48</sup>
- (3) To consider the purchase or lease of real property up to the time an option to purchase or lease that [real property](#) is obtained.<sup>49</sup>
- (4) To consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, *but only if an [open meeting](#) would have a detrimental financial effect on the litigating or settlement position of the public body*.<sup>50</sup>
- (5) To review and consider the 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 a public body for employment or appointment to a public office shall be held in an open meeting pursuant to this act.<sup>51</sup>
- (6) To consider material [exempt](#) from discussion or disclosure by state or federal statute.<sup>52</sup> But note – a board is not permitted to go into closed session to discuss an attorney's oral opinion, as opposed to a written legal memorandum.<sup>53</sup>

**A closed session must be conducted during the course of an open meeting** – section 2(c) of the OMA defines "[closed session](#)" as "a meeting or part of a meeting of a public body that is

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<sup>45</sup> MCL 15.268. OAG, 1977-1978, No 5183, at p 37.

<sup>46</sup> The other permissible purposes deal with public primary, secondary, and post-secondary student disciplinary hearings – section 8(b); state legislature party caucuses – section 8(g); compliance conferences conducted by the Michigan Department of Community Health – section 8(i); and public university presidential search committee discussions – section 8(j).

<sup>47</sup> MCL 15.268(a) (Emphasis added.)

<sup>48</sup> MCL 15.268(c) (Emphasis added.)

<sup>49</sup> MCL 15.268(d).

<sup>50</sup> MCL 15.268(e) (Emphasis added.)

<sup>51</sup> MCL 15.268(f) (Emphasis added.)

<sup>52</sup> MCL 15.268(h).

<sup>53</sup> *Booth Newspapers, Inc v Wyoming City Council*, 168 Mich App 459, 467, 469-470; 425 NW2d 695 (1988).



closed to the public."<sup>54</sup> Section 9(1) of the OMA provides that the [minutes](#) of an open meeting must include "the purpose or purposes for which a closed session is held."<sup>55</sup>

**Going into closed session** – section 7(1) of the [OMA](#)<sup>56</sup> sets out the procedure for calling a closed session:

A 2/3 roll call vote of members elected or appointed and serving is required to call a closed session, except for the closed sessions permitted under section 8(a), (b), (c), (g), (i), and (j). The roll call vote and the purpose or purposes for calling the closed session shall be entered into the minutes of the meeting at which the vote is taken.

Thus, a public body may go into closed session only upon a motion duly made, seconded, and adopted by a [2/3 roll call vote](#) of the members appointed and serving<sup>57</sup> during an open meeting for the purpose of (1) considering the purchase or lease of real property, (2) consulting with their attorney, (3) considering an employment application, or (4) considering material exempt from disclosure under state or federal law. A majority vote is sufficient for going into closed session for the other OMA permitted purposes.

We suggest that every motion to go into closed session should cite one or more of the permissible purposes listed in section 8 of the [OMA](#).<sup>58</sup> An example of a motion to go into closed session is:

I move that the Board meet in closed session under section 8(e) of the Open Meetings Act, to consult with our attorney regarding trial or settlement strategy in connection with [the name of the specific lawsuit].

Another example is the need to privately discuss with the public body's attorney a memorandum of advice as permitted under section 8(h) of the OMA – "to consider material [exempt](#) from discussion or disclosure by state or federal statute."<sup>59</sup> The motion should cite section 8(h) of the OMA and the statutory basis for the closed session, such as section 13(1)(g) of the [Freedom of Information Act](#), which exempts from public disclosure "[i]nformation or records subject to the attorney-client privilege."<sup>60</sup>

**Leaving a closed session** – the OMA is silent as to how to leave a closed session. We suggest that you recommend a motion be made to end the closed session with a majority vote needed for

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<sup>54</sup> MCL 15.262(c).

<sup>55</sup> MCL 15.269(1).

<sup>56</sup> MCL 15.267(1).

<sup>57</sup> And not just those attending the meeting. OAG No 5183 at p 37.

<sup>58</sup> MCL 15.268.

<sup>59</sup> MCL 15.268(h). Proper discussion of a written legal opinion at a closed meeting is, with regard to the attorney-client privilege exemption to the OMA, limited to the meaning of any strictly legal advice presented in the written opinion. *People v Whitney*, 228 Mich App at 245-248.

<sup>60</sup> MCL 15.243(1)(g).

approval. Admittedly, this is a decision made in a closed session, but it certainly isn't a decision that "effectuates or formulates public policy."

When the public body has concluded its closed session, the open meeting minutes should state the time the public body reconvened in open session and, of course, any votes on matters discussed in the closed session must occur in an open meeting.

**Decisions must be made during an open meeting, not the closed session** – section 3(2) of the OMA requires that "[a]ll decisions of a public body shall be made at a meeting [open to the public](#)."<sup>61</sup> Section 2(d) of the OMA defines "[decision](#)" to mean "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."<sup>62</sup>

**Avoid using the terms "closed session" and "executive session" interchangeably** – we suggest that a public body not use the term "executive session" to refer to a "closed session." The term "executive session" does not appear in the OMA, but "closed session" does. "Executive session" is more of a private sector term and is often used to describe a private session of a board of directors, which is not limited as to purpose, where actions can be taken, and no minutes are recorded.

**Staff and others may join the board in a closed session** – a public body may rely upon its officers and employees for [assistance](#) when considering matters in a closed session. A public body may also request private citizens to assist, as appropriate, in its considerations.<sup>63</sup>

**Forcibly excluding persons from a closed session** – a public body may, if necessary, exclude an [unauthorized individual](#) who intrudes upon a closed session by either (1) having the individual forcibly removed by a law enforcement officer, or (2) by recessing and removing the closed session to a new location.<sup>64</sup>

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<sup>61</sup> MCL 15.263(2). *St Aubin v Ishpeming City Council*, 197 Mich App at 103. See also, OAG, 1977-1978, No 5262, at p 338-339 – the OMA prohibits a voting procedure at a public meeting which prevents citizens from knowing how members of the public body have voted and OAG, 1979-1980, No 5445, p 57 (February 22, 1979) – a public body may not take final action on any matter during a closed meeting.

<sup>62</sup> MCL 15.262(d).

<sup>63</sup> OAG, 1979-1980, No 5532, p 324 (August 7, 1979).

<sup>64</sup> OAG, 1985-1986, No 6358, p 268 (April 29, 1986), citing *Regents of the Univ of Michigan v Washtenaw County Coalition Against Apartheid*, 97 Mich App 532; 296 NW2d 94 (1980).

## PUBLIC ATTENDING OPEN MEETINGS

**Excluding individuals** – no one may be excluded from a meeting otherwise open to the public except for a [breach of the peace](#) actually committed at the meeting.<sup>65</sup>

**Identifying public attendees** – no one may be required to register or otherwise provide his or her name or other information or otherwise to fulfill a [condition](#) precedent to attend a public meeting.<sup>66</sup>

Building security at the meeting site may cause issues. Members of the public might object, based on the [OMA](#), to signing in to gain access to the building where a public meeting is being held.<sup>67</sup> We, therefore, recommend that public bodies meet in facilities or areas not subject to public access restrictions.

If the public body wishes the members of the public to identify themselves at the meeting, we suggest the board chair announce something like this:

The Board would appreciate having the members of the public attending the meeting today identify themselves and mention if they would like the opportunity to speak during the public comment period. However, you do not need to give your name to attend this meeting. When the time comes to introduce yourself and you do not want to do so, just say pass.

Since speaking at the meeting is a step beyond "attending" the public meeting and the OMA provides that a person may address the public body "under rules established and recorded by the public body," the board may establish a [rule](#) requiring individuals to identify themselves if they wish to speak at a meeting.<sup>68</sup>

**Limiting public comment** – a public body may adopt a [rule](#) imposing individual time limits for members of the public addressing the public body.<sup>69</sup> In order to carry out its responsibilities, the board can also consider establishing rules allowing the chairperson to encourage groups to designate one or more individuals to speak on their behalf to avoid cumulative comments. But a [rule](#) limiting the period of public comment may not be applied in a manner that denies a person the right to address the public body, such as by limiting all public comment to a half-hour period.<sup>70</sup>

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<sup>65</sup> MCL 15.263(6).

<sup>66</sup> MCL 15.263(4).

<sup>67</sup> In addition, "[a]ll meetings of a public body . . . shall be held in a place available to the general public." MCL 15.263(1).

<sup>68</sup> MCL 15.263(5). OAG, 1977-1978, No 5183, at p 34.

<sup>69</sup> OAG, 1977-1978, No 5332, p 536 (July 13, 1978). The rule must be duly adopted and recorded. OAG, 1977-1978, No 5183, at p 34.

<sup>70</sup> OAG No 5332 at p 538.

**Meeting location** – the [OMA](#) only requires that a meeting be held "in a place available to the general public;" it does not dictate that the meeting be held within the geographical limits of the public body's jurisdiction.<sup>71</sup> However, if a meeting is held so far from the public which it serves that it would be difficult or inconvenient for its citizens to attend, the meeting may not be considered as being held at a place available to the general public. Whenever possible, the meeting should be held within the public body's geographical boundaries.

**Timing of public comment** – a public body has discretion under the OMA when to schedule [public comment](#) during the meeting.<sup>72</sup> Thus, scheduling public comment at the beginning<sup>73</sup> or the [end](#)<sup>74</sup> of the meeting agenda does not violate the OMA. The public has no right to address the [commission](#) during its deliberations on a particular matter.<sup>75</sup>

**Taping and broadcasting** – the [right](#) to attend a public meeting includes the right to tape-record, videotape, broadcast live on radio, and telecast live on television the proceedings of a public body at the public meeting.<sup>76</sup> A board may establish reasonable [regulations](#) governing the televising or filming by the electronic media of a hearing open to the public in order to minimize any disruption to the hearing, but it may not prohibit such coverage.<sup>77</sup> And the exercise of the [right](#) to tape-record, videotape, and broadcast public meetings may not be dependent upon the prior approval of the public body.<sup>78</sup>

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<sup>71</sup> OAG, 1979-1980, No 5560, p 386 (September 13, 1979). Of course, local charter provisions or ordinances may impose geographical limits on public body meetings.

<sup>72</sup> MCL 15.263(5).

<sup>73</sup> *Lysogorski v. Bridgeport Charter Twp*, 256 Mich App at 302.

<sup>74</sup> OAG, 1979-1980, No 5716, p 812 (June 4, 1980).

<sup>75</sup> OAG, 1977-1978, No 5310, p 465, 468 (June 7, 1978).

<sup>76</sup> MCL 15.263(1).

<sup>77</sup> OAG, 1987-1988, No 6499, p 280 (February 24, 1988).

<sup>78</sup> MCL 15.263(1).

## MINUTES

**What must be in the minutes** – at a minimum, the minutes must show the date, time, place, members present, members absent, any decisions made at a meeting open to the public, and the purpose or purposes for which a closed session is held. The [minutes](#) must include all roll call votes taken at the meeting.<sup>79</sup> The OMA does not prohibit a public body from preparing a more detailed set of minutes of its public meetings if it chooses to do so.<sup>80</sup>

**When must the minutes be available** – proposed minutes must be made available for public inspection within eight days after the applicable meeting. Approved [minutes](#) must be made available for public inspection within five days after the public body's approval.<sup>81</sup>

**When must the minutes be approved** – at the board's [next meeting](#).<sup>82</sup> Corrected minutes must show both the original entry and the correction (for example, using a "strikethrough" word processing feature).

**Closed session minutes** – a separate set of minutes must be taken for closed sessions. While closed session minutes must be approved in an open meeting (with contents of the minutes kept confidential), the board may meet in [closed session](#) to consider approving the minutes.<sup>83</sup>

Closed session minutes shall only be disclosed if required by a civil action filed under sections 10, 11, or 13 of the [OMA](#).<sup>84</sup> The board secretary may furnish the minutes of a closed session of the body to a board member. A member's [dissemination](#) of closed session minutes to the public, however, is a violation of the OMA, and the member risks criminal prosecution and civil penalties.<sup>85</sup> An audiotape of a closed session meeting of a public body is part of the minutes of the session meeting and, thus, must be filed with the clerk of the public body for retention under the OMA.<sup>86</sup>

Closed session minutes may be [destroyed](#) one year and one day *after approval of the minutes of the regular meeting at which the closed session occurred*.<sup>87</sup>

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<sup>79</sup> MCL 15.269(1).

<sup>80</sup> Informational letter to Representative Jack Brandenburg from Chief Deputy Attorney General Carol Isaacs dated May 8, 2003.

<sup>81</sup> MCL 15.269(3).

<sup>82</sup> MCL 15.269(1)

<sup>83</sup> OAG, 1985-1986, No 6365, p 288 (June 2, 1986). This, of course, triggers the need for more closed session minutes.

<sup>84</sup> MCL 15.270, 15.271, and 15.273; *Local Area Watch v Grand Rapids*, 262 Mich App 136, 143; 683 NW2d 745 (2004); OAG, 1985-1986 No 6353, p 255 (April 11, 1986).

<sup>85</sup> OAG, 1999-2000, No 7061, p 144 (August 31, 2000).

<sup>86</sup> *Kitchen v Ferndale City Council*, 253 Mich App 115; 654 NW2d 918 (2002).

<sup>87</sup> MCL 15.267(2).

**Inadvertent omissions from the minutes** – the OMA does not invalidate a decision due to a simple error in the minutes, such as inadvertently omitting the vote to go into closed session from a meeting's minutes.<sup>88</sup>

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<sup>88</sup> *Willis v Deerfield Twp*, 257 Mich App 541, 554; 669 NW2d 279 (2003).

## PARLIAMENTARY PROCEDURES

**Core principle** – for the actions of a public body to be valid, they must be approved by a [majority vote](#) of a quorum, absent a controlling provision to the contrary, at a lawfully convened meeting.<sup>89</sup>

### QUORUM

**Quorum** – is the minimum number of members who must be present for a board to act. Any substantive action taken in the absence of a quorum is invalid. If a public body properly notices the meeting under OMA, but lacks a quorum when it actually convenes, the board members in attendance may receive reports and comments from the public or staff, ask questions, and comment on matters of interest.<sup>90</sup>

**What is the quorum?** – look to the statute, charter provision, or ordinance creating the board. On the state level, the Legislature in recent years has taken care to set the board quorum in the statute itself. The statute will often provide that "a majority of the board appointed and serving shall constitute a quorum." For a 15-member board, that means eight would be the quorum, assuming you have 15 members appointed and serving. Without more in the statute, as few as five board members could then decide an issue, since they would be a majority of a [quorum](#).<sup>91</sup> But, be careful, recent statutes often provide that "voting upon action taken by the board shall be conducted by [majority vote](#) of the members appointed and serving." In that instance, the board needs at least eight favorable votes to act.<sup>92</sup> The Legislature has a backstop statute, which provides that any provision that gives "joint authority to 3 or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority."<sup>93</sup>

**Disqualified members** – a member of a public body who is disqualified due to a [conflict of interest](#) may not be counted to establish a quorum to consider that matter.<sup>94</sup>

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<sup>89</sup> OAG, 1979-1980, No 5808, p 1060 (October 30, 1980). Robert's Rules of Order Newly Revised (RRONR) (10<sup>th</sup> ed.), p 4. We cite to Robert's Rules in this Handbook as a leading guide on parliamentary procedures. This is not to imply that public bodies are, as a general rule, bound by Robert's Rules.

<sup>90</sup> OAG, 2009-2010, No 7235, p \_\_ (October 9, 2009).

<sup>91</sup> See OAG, 1977-1978, No 5238, p 261 (November 2, 1977).

<sup>92</sup> See OAG, 1979-1980, No 5808, at p 1061.

<sup>93</sup> MCL 8.3c. *Wood v Bd of Trustees of the Policemen and Firemen Retirement System of Detroit*, 108 Mich App 38, 43; 310 NW2d 39 (1981).

<sup>94</sup> OAG, 1981-1982, No 5916, p 218 (June 8, 1981). But see MCL 15.342a, which provides a procedure for disqualified public officials to vote in some limited circumstances where a quorum is otherwise lacking for a public body to conduct business.

**Losing a quorum** – even if a meeting begins with a quorum present, the board loses its right to conduct substantive action whenever the attendance of its members falls below the necessary quorum.<sup>95</sup>

**Resigned members** – the common law rule in Michigan is that a public officer's resignation is not effective until it has been accepted by the appointing authority (who, at the state level, is usually the governor). Acceptance of the [resignation](#) may be manifested by formal acceptance or by the appointment of a successor.<sup>96</sup> Thus, until a resignation is formally accepted or a successor appointed, the resigning member must be considered "appointed and serving," be counted for quorum purposes, and be permitted to vote.

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<sup>95</sup> RRONR (10<sup>th</sup> ed.), p 337-338.

<sup>96</sup> OAG, 1985-1986, No 6405, p 429, 430 (December 9, 1986), citing *Clark v Detroit Bd of Education*, 112 Mich 656; 71 NW 177 (1897).



## VOTING

**Abstain** – means to refuse to vote. Thus, a board member does not "vote" to abstain. If a vote requires a majority or a certain percentage of the members present for approval, an abstention has the same effect as a "no" vote.<sup>97</sup>

**Adjourning the meeting** - a presiding officer cannot arbitrarily adjourn a meeting without first calling for a vote of the members present.<sup>98</sup>

**Chairperson voting** – perhaps as a spillover from the well-known constitutional rule that the vice president can only vote to break a tie in the United States Senate<sup>99</sup> or that a legislative presiding officer usually refrains from voting unless his or her vote affects the result,<sup>100</sup> some believe that a board's presiding officer (usually, the chairperson) can only vote to break a tie. However, absent a contrary controlling provision, all board members may [vote](#) on any matter coming before a board.<sup>101</sup> A board's presiding officer can't vote on a motion and then, if the vote is tied, vote to break the tie unless explicitly authorized by law.<sup>102</sup>

**Expired-term members** – look first to the statute, charter provision, or ordinance creating the public body. Many statutes provide that "a member shall serve until a successor is appointed." Absent a contrary controlling provision, the general rule is that a public officer holding over after his or her term expires may [continue](#) to act until a successor is appointed and qualified.<sup>103</sup>

**Imposing a greater voting requirement** – where the Legislature has required only a majority vote to act, public bodies can't impose a greater voting requirement, such as requiring a two-thirds vote of its members to [alter](#) certain policies or bylaws.<sup>104</sup>

**Majority** – means simply "more than half."<sup>105</sup> Thus, on a 15-member board, eight members constitute a majority.

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<sup>97</sup> RRONR (10<sup>th</sup> ed.), p 390-395.

<sup>98</sup> *Dingwall v Detroit Common Council*, 82 Mich 568, 571; 46 NW 938 (1890),

<sup>99</sup> US Const, art I, §3.

<sup>100</sup> RRONR (10<sup>th</sup> ed.), p 392-393 – an assembly's presiding officer can break or create a tie vote.

<sup>101</sup> See OAG, 1981-1982, No 6054, p 617 (April 14, 1982).

<sup>102</sup> *Price v Oakfield Twp Bd*, 182 Mich 216; 148 NW 438 (1914).

<sup>103</sup> OAG, 1979-1980, No 5606, p 493 (December 13, 1979), citing *Greyhound Corp v Public Service Comm*, 360 Mich 578, 589-590; 104 NW2d 395 (1960). See also, *Cantwell v City of Southfield*, 95 Mich App 375; 290 NW2d 151 (1980).

<sup>104</sup> OAG, 1979-1980, No 5738, p 870 (July 14, 1980). OAG, 2001-2002, No 7081, p 27 (April 17, 2001), citing *Wagner v Ypsilanti Village Clerk*, 302 Mich 636; 5 NW2d 513 (1942).

<sup>105</sup> RRONR (10<sup>th</sup> ed.), p 387.

**Proxy voting** – the OMA requires that the deliberation and formulation of decisions effectuating public policy be conducted at open meetings.<sup>106</sup> Voting by proxy effectively forecloses any involvement by the absent board member in the board's public discussion and deliberations before the board votes on a matter effectuating public policy.<sup>107</sup> Without explicit statutory authority, this [practice](#) is not allowed.<sup>108</sup>

**Roll call vote** – there is no bright line rule for conducting a [roll call vote](#).<sup>109</sup> We suggest some rules of thumb. One, when a voice vote reveals a divided vote on the board (i.e., more than one no vote), a roll call vote should be conducted to remove doubt about the vote's count. Two, if you have board members participating by teleconference, a roll call will permit the secretary to accurately record the entire vote. Three, when the board is acting on matters of significance, such as, contracts of substantial size or decisions that will have multi-year impacts, a roll call vote is the best choice.

**Round-robin voting** – means approval for an action outside of a public meeting by passing around a sign-off sheet. This practice has its roots in the legislative committee practice of passing around a tally sheet to gain approval for discharging a bill without a committee meeting. "[Round-robinning](#)" defeats the public's right to be present and observe the manner in which the body's decisions are made and violates the letter and the spirit of the OMA.<sup>110</sup>

**Rule of necessity** – if a state agency's involvement in prior administrative or judicial proceedings involving a party could require recusal of all of its board members or enough of them to prevent a quorum from assembling, the common law rule of necessity precludes recusing all members, if the disqualification would leave the agency unable to adjudicate a question.<sup>111</sup> But the rule of necessity may not be applied to allow members of a public body to vote on matters that could benefit their [private employer](#).<sup>112</sup>

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<sup>106</sup> *Esperance v Chesterfield Twp*, 89 Mich App at 464, quoting *Wexford County Prosecutor v Pranger*, 83 Mich App 197; 268 NW2d 344 (1978).

<sup>107</sup> Robert's Rules concur: "Ordinarily it [proxy voting] should neither be allowed nor required, because proxy voting is incompatible with the essential characteristics of a deliberative assembly in which membership is individual, personal, and nontransferable." RRONR (10<sup>th</sup> ed.), p 414. The Michigan House and Senate do not allow proxy voting for their members.

<sup>108</sup> OAG, 2009-2010, No 7227, p \_\_ (March 19, 2009). OAG, 1993-1994, No 6828, p 212 (December 22, 1994), citing *Dingwall*, 82 Mich at 571, where the city council counted and recorded the vote of absent members in appointing election inspectors. The Michigan Supreme Court rejected these appointments, ruling that "the counting of absent members and recording them as voting in the affirmative on all questions, was also an inexcusable outrage."

<sup>109</sup> "The fact that the Open Meetings Act prohibits secret balloting does not mean that all votes must be roll call votes." *Esperance v Chesterfield Twp*, 89 Mich App at 464 n 9. The OMA does provide that votes to go into closed session must be by roll call. MCL 15.267.

<sup>110</sup> OAG, 1977-1978, No 5222, at p 218. See also, *Booth Newspapers*, 444 Mich at 229, which concluded that "round-the-horn" deliberations can constitute decisions under the OMA.

<sup>111</sup> *Champion's Auto Ferry, Inc v Michigan Public Service Comm*, 231 Mich App 699; 588 NW2d 153 (1998). The Court noted that the PSC members did not have any personal financial interest in the matter. *Id.* at 708-709.

<sup>112</sup> OAG, 1981-1982, No 6005, p 439, 446 (November 2, 1981). After OAG No 6005 was issued, the Legislature amended section 2a of 1973 PA 196, MCL 15.342a, to provide a procedure for voting by public officials in some limited circumstances where a quorum is otherwise lacking for a public entity to conduct business.

**Secret ballot** – the OMA requires that all decisions and deliberations of a public body must be made at an open meeting and the term "[decision](#)" is defined to include voting.<sup>113</sup> The OMA prohibits a "[voting procedure](#)" at a public meeting that prevents citizens from knowing how members of a public body have voted."<sup>114</sup> Obviously, the use of a secret ballot process would prevent this transparency. All board decisions subject to the OMA must be made by a public vote at an open meeting.<sup>115</sup>

**Tie vote** – a tie vote on a motion means that the motion did not gain a majority. Thus, the motion fails.<sup>116</sup>

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<sup>113</sup> See MCL 15.262(d) and 15.263(2) and (3).

<sup>114</sup> OAG, 1977-1978, No 5262, at p 338-339.

<sup>115</sup> *Esperance*, 89 Mich App at 464.

<sup>116</sup> *Rouse v Rogers*, 267 Mich 338; 255 NW 203 (1934). RRONR (10<sup>th</sup> ed.), p 392.

