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Witness to the Process

How New Jersey's Open Public Meetings Act provides access to information

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Passed in 1975, the Open Public Meetings Act requires that the public and the press be given advance notice and opportunity to attend meetings, including executive sessions of public bodies, except where the public interest or individual rights would be jeopardized. N.J.S.A. 10:4-6, et seq. The OPMA recognizes that the public's access to information during all phases of the deliberation, policy formulation, and decision-making process is vital to a properly functioning democratic process. Furthermore, the act articulates New Jersey's public policy that "secrecy in public affairs undermines the faith of the public in government" and that the public's effectiveness in fulfilling its role of holding officials accountable in a democracy is premised upon access to information. As a result, the OPMA outlines the public's right to know and witness the process by which New Jersey's governing bodies make their decisions.

To this effect, the act is liberally construed by courts to accomplish its purpose and any exceptions to full disclosure are strictly interpreted.

The OPMA requires that any meeting attended by, or open to, all members of a public body and held with the intent to discuss or act upon the specific public business of that body be open to the public.

To be covered under the OPMA, a public body must be "organized by law" and "collectively empowered as a multimember voting body to spend public funds or affect persons' rights," provided the gathering qualifies as a meeting under the act and does not fall within any of its exceptions.

Specifically, a public body may be "a commission, authority, board, council, committee or any other group of two or more persons organized" under the laws of New Jersey. Public bodies perform public governmental functions affecting the "rights, duties, obligations, privileges, benefits, or other legal relations of any person" or is authorized to expend public funds. While the Legislature is a public body subject to the act, the OPMA excludes from its coverage the judicial branch of government, juries, parole boards, agencies acting in a parole capacity, the State Commission of Investigation, the Apportionment Commission under Article IV, Section III, of the New Jersey Constitution, and any political party committee organized under N.J.S.A. 19:1-1, et seq.

The act defines "meeting" to include any gathering, including those held by means of communication equipment that is attended by, or open to, all members of a public body held with the intent on the part of the members present to discuss or act as a unit upon the specific public business of that body. To be subject to the disclosure requirements of the OPMA, a gathering must be attended by an "effective majority" of the members. Depending on the public body, an effective majority may be significantly less than half the body's members. For example, where a planning board consisting of 11 members can only do business at a meeting attended by a quorum of its members (in this case six) and where the body acts on a majority vote of the quorum, the effective majority would be four members. Additionally, a subcommittee of less than an effective majority may carry on business related to a specific matter provided

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the subcommittee reports back to the entire governing body at a public meeting. However, a public body may not hold several small private meetings and discuss identical issues to circumvent the requirement of a public meeting.

Informal and purely advisory bodies are not covered by the OPMA. Similarly, meetings of groups that are not empowered to act by vote, such as a public official meeting with his or her subordinates or advisors, conventions, and other similar events, are not covered by the OPMA. Additionally, partisan caucuses and chance social encounters between members of a public body at which public business is discussed are generally exempted from the act. Workshops or training sessions that involve "public business," however, may be subject to the requirements of the act if they include disclosure of reports, investigations, or findings of the public body or its subdivisions. Atty. Gen. F.O. 1976, No. 19. Furthermore, the New Jersey Supreme Court has recently held that a private, nonprofit corporation, designated by the city to redevelop property that the city donated to it, and collectively authorized to spend $31 million of tax exempt city bonds, was considered to be a public body under the act and thus required to open its meetings to the public. *Times of Trenton Pub. Corp. v. Lafayette Yard*, 183 N.J. 519 (2005). This ruling suggests the OPMA may apply to any entity empowered by a public body to spend public monies. Finally, newly elected members of a public body who meet prior to taking office who intend to discuss appointments and policies may be covered by the act if final decisions on appointments and policies are reached.

Also, meetings that are recessed from one day to the next are not subject to the OPMA's notice requirements. If a meeting was recessed, however, because of an emergency and the notice requirements for an emergency meeting were met, action taken at the recessed meeting would not likely be invalid under the OPMA. Thus, if a public body believes that a meeting on a public matter will not be completed in a single meeting, advance written notice should be provided recognizing the possibility of a continuance.

The OPMA requires that closed private meetings must be valid under an exception to the Act, or action taken, if not cured, is voidable. There are nine exceptions to the OPMA's general rule that meetings must be open to the public. A public body may exclude the public from those portions of a meeting and discuss the following matters in closed session:

1) Any matter that federal law, state statute, or court rule expressly denotes as confidential;

2) Any matter in which the release of information would impair a right to receive funds from the United States government;

3) Any material that constitutes an unwarranted invasion of individual privacy if disclosed, such as any records, data, reports, recommendations, or other personal material of educational training, social service, medical, health, custodial, welfare, housing, relocation, insurance, rehabilitation, legal defense, information related to an individual's personal and family circumstances, information pertaining to the admission or treatment of any individual;

4) Any collective bargaining agreement, including negotiation of said terms;

5) Any matter involving the purchase, lease, or acquisition of real property with public funds, the setting of banking rates or investment of public funds, where it could adversely affect the public interest if discussion of such matters were disclosed;

6) Any tactics or techniques used to protect the safety and property of the public, provided that their disclosure could impair such protection, including investigations of violations or possible violations of the law;

7) Any pending or anticipated litigation or contract negotiation where the public is or may become a party, including matters falling within the attorney-client privilege;

8) Any matter involving employment, appointment, termination of employment, terms and conditions of employment, the evaluation, promotion, or disciplining of any prospective or current public officer employed or appointed by the public body;

9) Any deliberations of the public body occurring after a public hearing that may result in the imposition of a specific civil penalty, or the suspension or loss of license or permit upon the responding party as a result of an act or omission for which the responding party bears responsibility.

These exceptions to the OPMA's mandate of public access are to be strictly construed. For example, exception 5 does not apply to rent control actions because it is not specifically enumerated in the act. Similarly, "anticipated litigation" in exception 7 limits closed sessions to those matters specifically related to litigation; the mere threat of litigation or the fact that litigation is pending does not afford the public body the right to close their meetings entirely.

To exclude the public from any public meeting to discuss a matter, a public body must first adopt a resolution that states the general nature of the matter to be discussed and indicate the time when and under what circumstances the discussion held in the closed session may be disclosed to the public. This formal resolution must be adopted at a public meeting for which adequate notice has been provided. Once the resolution has been adopted, the public body may enter closed session without further notice or on some other date in the future set forth in the resolution.

Resolutions closing the session to the public should be as specific as possible and the public body should endeavor to include as much information as possible about the matters to be discussed without harming the public interest, in accord with the policy behind the act. To this effect, general resolutions passed for the convenience of the public body will not meet the degree of specificity required by the OPMA.

While in closed executive session, a public body may not act; instead it may only debate those matters outlined in the resolution. Public bodies should take care to ensure that a closed meeting is not used to circumvent the act to avoid invalidation of its subsequent actions or an appearance of impropriety that may erode the public's confidence in the body. Thus, a public body in closed session is required to keep minutes of the meeting. The OPMA requires only that minutes be taken in a reasonable comprehensible manner and merely state the subject discussed and action taken, if

any. The act does not require that a detailed record of the closed session be created.

Minutes from closed sessions should be approved and made "promptly available" for public inspection in the same manner as those from open meetings. During approval of minutes from the closed session, however, the public body must decide when the minutes will be released — typically once the justification for the closed session has passed. In many public bodies, prompt approval of closed session minutes is accomplished through a committee established for this purpose.

During closed, executive sessions, members of a public body may discuss a matter and take a straw vote to identify whether there is a consensus vote among members. However, once the straw vote is taken, members of the public body should return to public session and publicly vote on the matter at hand. Thus, a straw vote may be taken, provided the public body does not act on it and discussion on the matter under construction is related to the issues necessary to qualify the matter for a closed session. Significantly, the reasons for a public body's decisions following a closed session need not be revealed or stated under the OPMA.

Within seven days after the public body's annual reorganization (or by January 10), every public body must post and maintain a schedule of meetings to be held throughout the year. In addition to posting the schedule, notice of annual meetings must also be sent to two newspapers and the relevant clerk, as described in section § 6-3:1-1. Notably, annual notice requires only that the location, time, and date of each meeting to be disclosed. Once annual notice is made, no further notice is required unless provided for in a local ordinance or in the event that the annual schedule is modified. In other words, publication of the agenda is only required in those instances where no annual notice has been provided. Nevertheless, municipal bodies should indicate whether formal action on public business may be taken during an annual meeting in defining the nature of each scheduled annual meeting

The agenda of a public meeting that is not an annual meeting should be as complete as possible at the time it is published pursuant to the notice requirements set forth in the Act. Once published, no additional notice is required to accommodate modifications or changes to the proposed agenda. Furthermore, action taken at a regular meeting by a municipal body which is not listed on the public agenda is not per se void unless it can be shown that the published agenda was calculated to mislead the public or otherwise intentionally omitted items from the agenda that it knew would be acted upon.

Actions taken by the public body on items placed on an agenda after notice has been given may be voided if specific notice of the new item is not given if the matter involves a substantial public interest or controversy, or is the subject of litigation. Consequently, public bodies should make every effort to ensure that agendas are as complete as possible to avoid challenges to its actions under the OPMA.

At the beginning of every public meeting subject to the Act, the presiding individual must publicly announce whether or not "adequate" notice was provided. While this statement must be entered into the minutes of the meeting, failure to do so contemporaneously may not result in the invalidation of action taken during the meeting. If "adequate" notice of the meeting was provided, the announcement must describe the time, place, and manner of such notice. However, if "adequate" notice was not made, the presiding individual must articulate the urgent nature of the matter, the substantial harm to the public interest likely to result from delay, that the scope of the meeting will be limited to discussion of the urgent matter, the manner in which notice (even if inadequate) was provided, whether the meeting was foreseeable, and if foreseeable, why "adequate" notice was not provided.

In accord with the purpose of the act, official debate and action should be taken in public where possible to avoid challenges and invalidation. Acts taken in closed session may be declared null and void where a closed session cannot be justified or the public body disregarded, intentionally or otherwise, the requirements of the OPMA. Additionally, under the Municipal Land Use Law, N.J.S.A. 40:55D-9(b), zoning and planning boards are permitted to enter closed session when considering applications. However, a planning or zoning board cannot hear an application and then discuss it in closed session. Instead the application must be discussed as any matter of public policy affecting the rights of individuals — in public view.

Moreover, public action must be supported by facts placed in public record. To ensure that a fair hearing is provided and a fully reviewable record is created, a public body may not act on facts that are not part of the record. Thus, the process of drafting a resolution or deciding issues or conditions upon which the public has not had an opportunity to comment must be open to the public.

The OPMA does not increase public participation in public meetings, but simply opens government to the public. To this effect, the OPMA does not "limit the discretion of a public body to permit, prohibit or regulate the act of participation of the public at any meeting."

Similarly, the Supreme Court of New Jersey recently recognized a common law right to videotape public meetings. *Tarus v. Pine Hill.* However, a public body may enact neutral guidelines to prevent the recording of meetings from disrupting the business of the body or other citizens' right of access. Reasonable restrictions may determine the number and kind of camera permitted, the position of the camera and operator, lighting, noise levels, special requirements, or require fair payment for electricity used. Thus, public bodies are not obligated to place regulations on the use of video cameras, and any restriction must be designed to prevent disruption of the meeting and other citizens' rights rather than precluding a political opponent from exercising his or her right to videotape.

Commonly referred to as the "Sunshine Law," the OPMA requires that "adequate notice" be give for each covered regular, special, or rescheduled meeting. Actions taken without adequate notice are voidable, not void.

The act requires written notice which states the time, date, location, and agenda (to the extent that it is known) must be posted at least 48 hours in advance of the meeting.

Adequate notice must be published

and posted in the following manner:

• Notice must be "prominently posted" in at least one public place reserved for similar announcements;

• Notice must be mailed, telephoned, telegrammed, or hand delivered to at least two newspapers that have the greatest likelihood of informing the public within the public body's jurisdiction; and

• Notice must be filed with the clerk of the municipality or the clerk of the county, depending upon the public body's geographic boundaries.

A public body is only required to provide notice to newspapers that have the ability to publish notices at least 48 hours in advance of the meetings. Provided the newspaper is capable of publishing the notice in a timely fashion, the public body is only required to transmit the notice to the newspaper, not ensure that the paper publishes it.

In addition to these methods, a public body may also provide electronic notice of any meeting through the Internet. However, electronic notice is not a substitute for adequate notice as described above.

Upon the affirmative vote of three quarters of the members present, a public body may still hold a meeting to discuss emergent matters, despite failure to provide adequate notice, if:

• The matter is of such urgency and importance that a delay to provide notice would likely result in substantial harm to the public interest; and

• The meeting is limited to discussion of such emergent matters; and

• Notice of the meeting is provided as soon as possible after it is called by the methods described in section § 6-3:1.1; and

• Either the public body could not have foreseen the need for such meeting when adequate notice could have been provided or, even if the meeting was foreseeable at the time notice could have been provided, no notice was posted.

Monetary consequences to the municipality derived from 48-hours delay generally do not qualify as an emergent matter. Indeed, case law suggests that emergent matters under the act must be of tremendous adverse significance to the public good in light of the act's purpose.

Exception 8 permits a public body to enter closed session when discussing personnel actions. This is the broadest of all the exceptions discussed above.

Proper notice of personnel actions requires that advance written notice be provided so that the affected person can make an intelligent decision as to whether or not the action should be taken at a public meeting or in closed session.

Whenever the employment, appointment, termination of employment, terms and conditions of employment, evaluation, promotion, or discipline of any prospective or current public officer, appointee, or employee is to be discussed by a public body, the affected individual or individuals have the right to notice sufficient to determine whether or not the discussion should take place at a public meeting. Sufficient notice of a personnel matter may be actual or constructive, depending upon the situation. Constructive notice that personnel actions will be considered in executive session is permissible when the posted agenda and statements at prior public meetings indicated that a reduction in force would be considered in executive session. However, constructive notice is only permitted where groups of employees will be affected. It is not sufficient in cases of individual personnel actions.

Moreover, the right to have a meeting made public is a right that must be exercised by *all* affected employees and cannot be exercised on their behalf by employee representatives. Interviews of applicants should be conducted in public, and not in closed session. However, proceedings related to the employment of school superintendents and police disciplinary hearings may be discussed in closed session.

Any action taken by a public body at a meeting that does not conform to the provision of the OPMA is voidable in a proceeding in lieu of prerogative writ in the Superior Court. Such action may be brought within 45 days after the action sought to be voided has been made public. The public body, however, has a right to take corrective or remedial action by acting de novo, or to conduct a "re-run," at a public meeting held in conformity with this act. Significantly, any action for which advance notice is provided as required by the OPMA is not voidable solely for failure to conform to any notice requirement in this act.

Any person may apply to the Superior Court for injunctive orders or other remedies to ensure compliance with provisions of the act. Remedies available to litigants under the OPMA are not limited to invalidating official action, but also include equitable, declaratory, or other relief. However, the OPMA does not afford an individual the right to seek damages for a violation of the Act's provisions.

Injunctive orders or other remedies may also be invoked where official action is taken, inadequate notice, exclusion of all or some part of the public, or not keeping minutes or making them promptly available. Such orders may be prospective in operation and the legislative intent of the Act provides maximum flexibility to courts to rectify governmental action that falls short of the standards of openness prescribed for the conduct of official business. However, courts will not direct when and how a governing body should conduct its business provided the requirements of the OPMA have been met.

Whenever a member of the public body believes that a meeting is being held in violation of the Act, the member must state his or her belief, along with specific reasons, that shall be recorded in the minutes of the meeting. If the member's objection to the meeting is overruled by the majority of those present, the member may continue to participate in the meeting without penalty. Although knowing violations of the OPMA result in fines of $100 for the first offense and between $100 and $500 for each subsequent offense, such fines have rarely been applied to members of public bodies subject to the act. ■