

AG 13
1983

Guidelines on the Open Public Meetings Law



New Jersey State Library

State of New Jersey

THOMAS H. KEAN
Governor

Department of State

JANE BURGIO
Secretary of State

ATTORNEY GENERAL'S LIBRARY

MAR 6 1984

STATE OF NEW JERSEY

THOMAS H. KEAN, Governor

DEPARTMENT OF STATE

JANE BURGIO, Secretary of State

INTRODUCTION

The "Open Public Meetings Act", P.L. 1975, c. 231, took effect on January 19, 1976. The declared purpose of this Act is to insure the right of all citizens to have advance notice of and attend all meetings of public bodies at which any business affecting the public is discussed or acted upon, with certain limited exceptions to protect the public interest and to preserve personal privacy. Consistent with this purpose, the general requirement of the law is that "all meetings of public bodies shall be open to the public at all times."

The Department of State originally prepared these guidelines to acquaint citizens with some of the requirements of the Act. This has been updated by the Department of State to take into account recent court interpretations and opinions of the Attorney General's office.

I. OPEN MEETINGS (N.J.S.A. 10:4-12)

What, in general, does the Open Public Meetings Act require?

Answer:

In general, the "Open Public Meetings Act" requires that "the public and the press have advance notice of and the opportunity to attend most meetings, including executive sessions, of public bodies," except under certain limited circumstances.

II. PUBLIC BODY (N.J.S.A. 10:4-8a)

To whom does the Open Public Meetings Act apply?

Answer:

The Open Public Meetings Act applies to any "public body" which is defined in the Law as any "commission, authority, board, council, committee or any other group of two or more persons organized under the laws of this State, and collectively empowered as a voting body to perform a public governmental function affecting the rights, duties, obligations, privileges, benefits, or other legal relations of any person, or collectively authorized to spend public funds."

What public bodies do not have to follow the Act?

Answer:

Specific exemptions are provided for the Judiciary, any grand or petit jury, parole bodies, or any agency or body acting in a parole capacity, the State Commission of Investigation, the Apportionment Commission and political party organizations.

When must a public body adhere to the provisions of this Act?

Answer:

To be covered by the provisions of this Act, "a meeting must be open to all the public body's members, and the members present must intend to discuss or act on the public body's business." Thus, "typical partisan Caucus meetings and chance encounters of members of public bodies are neither covered by the provisions of this Act, nor are they intended to be so covered." The Act does apply to meetings that are for the purpose of official action.

What is meant by "laws of this State"?

Answer:

"Laws of this State" is not specifically defined in the Act but should include statutes, rules and regulations, resolutions and ordinances.

What is meant by "collectively empowered"?

Answer:

Although not specifically defined in the Law, "collectively empowered" means that the authority to act does not reside in any one individual, but is shared by all members of a body, and may only be exercised with the vote, consent or approval of the majority or an effective quorum of all the members.

Does the Law apply to county and local as well as State government?

Answer:

Yes, the Law applies to public bodies on the municipal, county and State levels of government. It also applies to school districts, sewerage authorities and intrastate independent authorities.

Does the Law apply to private organizations and corporations?

Answer:

No, the Law only applies to government agencies, or in the words of the Law, those "empowered . . . to perform a public governmental function . . ."

Does the Law apply to Advisory Committees?

Answer:

No, informal or purely advisory bodies with no effective authority are not covered by the Law. The Law only applies to bodies that affect "the rights, duties, obligations, privileges, benefits, or other legal relations of any person" or that are "collectively authorized to spend public funds." Informal or purely advisory bodies are not "collectively empowered" to affect rights; rather, the person or body being advised has this power. If, however, a commission recommends a course of action that may affect rights, then their meetings should be open to the public.

Does the Act apply to Faulkner Act Charter Commissions?

Answer:

Yes, the power of a Faulkner Act Charter Commission to influence in a material way a person's vote concerning a proposed form of government is sufficient to bring it under the Act.

Does the Law apply to committees and subcommittees of a public body?

Answer:

The definition of "public body" covers all committees organized under the laws of this State. The statute is unclear, however, as to whether the definition encompasses committees or subcommittees created by a public body. The question of coverage should probably turn upon the particular circumstances and a factual assessment of the nature and extent of the authority delegated to the committee or subcommittee. For example, if the public body has delegated its decision-making authority to the committee or subcommittee, then the

committee or subcommittee must follow the Act. On the other hand, a contrary conclusion would result if the responsibility of the committee or subcommittee is merely to investigate, advise and recommend suggested courses of action with meaningful and final review and decision-making authority retained by the public body.

III. MEETINGS (N.J.S.A. 10:4-8b)

What meetings of a public body must be open to the public and press?

Answer:

The general mandate of the Law is that any formal or informal gathering which is attended by or open to all members of the public body and which is held with the intent to discuss the business of the public body must be held in open session.

Must a gathering of less than a quorum of the members of a public body be held in public?

Answer:

The Law specifically states that a gathering attended by less than an "effective majority" if the members of a public body is not required to be held in public. However, where an effective majority fails to attend a scheduled meeting for which notice has been provided, the meeting should nevertheless be held in open session if the members present proceed to discuss the business of that public body.

What is meant by an "effective majority"?

Answer:

Although not specifically defined in the Law, "effective majority" means the number of members that must be present for the public body to take formal or official action, i.e., for it to decide a case or pass a resolution, rule, regulation, ordinance, etc. For example, if a public body were composed of nine members and a majority of the members has to be present before it could take official action, then an "effective majority" would be five. On the other hand, if the public body could take official actions with only three of the nine members present, then an "effective majority" would be only three.

Must a Political Caucus of the members of a public body be held in open session?

Answer:

No. Since a political caucus is only open to one party and would not be open to all the members of the public body, it would not be required to be held in open session. If all the members of a public body were, from one political party, the Law would not allow them to hold closed meetings by simply calling them political caucuses. Nor would the Law allow an effective majority of the members of the public body to use the political caucus mechanism to circumvent the Law's provisions. The Law specifically states that "No person or public body shall fail to invite a portion of its members to a meeting for the purpose of circumventing the provisions of this act." (N.J.S.A. 10:4-11).

Does the Law require that both discussion and voting take place in public?

Answer:

Yes.

Does the term "meeting" include informal gatherings?

Answer:

If the informal gathering includes or is open to all members of a public body and is held with the intent to discuss or act upon the public business of that body, then such a gathering is a meeting and must be open to the public.

Does the term "meeting" also include "agenda sessions," "work sessions," and "discussion sessions"?

Answer:

Yes, if the agenda session, work session or discussion session is open to all members of the public body and is held for the purpose of discussing or acting upon public business, it must be open to the public.

May a public body limit public participation during an open meeting?

Answer:

Yes, a public body may permit, prohibit or regulate active participation. (N.J.S.A. 10:4-12a).

IV. NOTICE (N.J.S.A. 10:4-8d)

Must notice be given before a public body holds a meeting?

Answer:

Yes, the general rule stated in the Law is that "no public body shall hold a meeting unless adequate notice thereof has been provided to the public."

What type of notice does the Law require be given before a public body holds a meeting?

Answer:

The Law requires two types of notices which may be referred to as "Annual Notice" and "48-Hour Notice." (N.J.S.A. 10:4-8d, N.J.S.A. 10:4-18).

What is "Annual Notice"?

Answer:

"Annual Notice" is the requirement in the Law that each year, a public body compile and disseminate a schedule of the regular meetings to be held by it during the upcoming year.

When must this "Annual Notice" be disseminated?

Answer:

The annual notice must be disseminated within seven days following the annual organization or reorganization meeting of the public body. If the public body does not have an annual organization or reorganization meeting, then the "Annual Notice" of regular meetings must be given by January 10 of that year.

What information must the "Annual Notice" contain?

Answer:

The "Annual Notice" must contain the time, date and, to the extent known, the location of each meeting to be held during the forthcoming year.

Once "Annual Notice" has been given by a public body, may it be revised or modified during the year?

Answer:

Yes, the public body may revise the annual notice at any time during the year provided that, within seven days of revising it, the revision be mailed, posted and submitted in the same manner as was the original annual notice. It is also important to note that the revision will not be effective for any meeting to be held within less than 48 hours of its distribution.

What is "48-Hour Notice"?

Answer:

"48-Hour Notice" refers to the requirement in the Law that written advance notice be given at least 48 hours prior to a meeting of a public body.

For what meeting must "48-Hour Notice" be given?

Answer:

"48-Hour Notice" must be given for all meetings of a public body except those meetings whose date, time and location are listed in the Annual Notice Schedule. However, adequate notice of a closed session must be given. Prior to going into closed session at the meeting, a public body must pass a resolution stating the specific items to be discussed in the closed session.

If the Annual Notice Schedule contains the time and date but not the location of a meeting, must "48-Hour Notice" of that meeting still be provided?

Answer:

Yes. The Annual Notice Schedule will only permit waiver of the "48-Hour Notice" requirement when the time, date and the location of the meeting is correctly listed. If any one of those elements is missing from the Annual Notice Schedule, or is incorrect, then "48-Hour Notice" of the meeting must be provided.

What information must be placed in the "48-Hour Notice"?

Answer:

The "48-Hour Notice" must contain:

1. the time, date and location of the meeting.
2. the agenda of the meeting to the extent it is known, and
3. a statement of whether formal action will be taken at the meeting.

When "Annual Notice" or "48-Hour Notice" is required, to whom is it to be distributed?

Answer:

The Law requires "Annual Notice" and "48-Hour Notice" to be:

1. prominently posted in one public place reserved for announcements of this type;
2. transmitted to two newspapers;
3. filed with the clerk;
4. mailed to any person who requests it and who has paid the fee established by the public body to cover the cost of providing that notice.

How does the public body determine which two newspapers to send the notices to?

Answer:

The Law requires the newspapers chosen be those most likely to inform the people in the public body's jurisdictional area of the meeting. One must be the official newspaper designated by the public body or by the political jurisdiction in which the public body is located.

To which newspapers must agencies of Statewide jurisdiction send their notices?

Answer:

Although the Law permits agencies of Statewide jurisdiction to designate their own official newspapers, it is advised that such agencies send one set of notices to an official newspaper designated by the Secretary of State, and a second set of notices to either the agency's own official newspaper or to another newspaper having the greatest likelihood of informing the public.

Does the Law require the public body to have the notices published in the newspapers or only sent to them?

Answer:

The Law requires the public body to transmit the notices to the newspapers. It does not require that the notices be published, nor, on the other hand, does it prohibit publication of them.

When a public body mails the "48-Hour Notice" to the newspapers, must the notice be placed in the mail or actually received by the newspapers at least 48 hours before the meeting?

Answer:

Although the Law is unclear on this question, the Law's intent seems to be that the notice must be placed in the mail at a sufficient time in advance so as to reasonably be expected to be received by the newspapers at least 48 hours prior to the meeting.

Where must a public body file notices?

Answer:

The clerk with whom the "Annual Notices" and "48-Hour Notices" are to be filed depends on the nature of the public body.

1. Municipal Bodies - If the public body's geographic boundaries are co-extensive with that of a single municipality, the notices must be filed with the clerk of that municipality.
2. County Bodies - If the public body's geographic boundaries are co-extensive with that of a single county, the notices must be filed with the clerk of that county.
3. Statewide Bodies - If the public body has Statewide jurisdiction, the notices must be filed with the Secretary of State.
4. Regional & Other Bodies - If the public body does not have Statewide jurisdiction or geographic boundaries co-extensive with a single county or single municipality, the notices must be filed with the clerk of each municipality or county encompassed within the public body's jurisdiction.

In addition to providing "Annual Notice" or "48-Hour Notice," does the Law contain any requirements that must be carried out at the meeting itself?

Answer:

Yes, at the commencement of each meeting, the person presiding must publicly announce and have placed in the minutes a statement that the notice requirements of the Law have been satisfied stating the time, place and manner in which the required notice was provided.

May a public body discuss or act upon items raised by individual members of the public body or members of the public if the item was not included on the agenda distributed with the 48-Hour Notice?

Answer:

Yes, a public body may discuss or act upon matters raised in open meetings by the public, or raised in open meetings by a member of the public body who did not foresee the item arising at the time the agenda was prepared or who tried and failed to have a matter included on the agenda.

New Jersey State Library

V. EMERGENCY MEETINGS (N.J.S.A. 10:4-9)

If the notice required by the Law is not provided, may the public body still hold a meeting?

Answer:

Unless the meeting is called to consider a "crisis or emergent situation", no public body may hold a meeting if the required notice has not been given.

What is meant by an "Emergency Meeting"?

Answer:

"Emergency Meeting" refers to the exception in the Law that allows a public body to hold a meeting in an emergency situation without first complying with the notice requirements. Under the Law, an emergency situation exists when:

1. matters of urgency and importance must be dealt with, and
2. substantial harm to the public interest would be likely to result if the meeting were delayed to provide the required notice.

What must the public body do before it can hold an "Emergency Meeting"?

Answer:

Before a public body can hold an emergency meeting:

1. Three quarters of the members of the public body who are present must vote in favor of holding the meeting; and
2. As soon as possible following the calling of the meeting, notice of the meeting must be:
 - a. prominently posted in the public place reserved for such notices,
 - b. telephoned, telegraphed or hand-delivered to the two newspapers designated to receive meeting notices, and
 - c. the person presiding must publicly announce at the commencement of the meeting and have placed in the minutes (5b)
 - (1) a statement that the normal notice requirements of the Law have not been met,
 - (2) the nature of the urgency and importance that requires holding the meeting without giving the otherwise required notice,
 - (3) the nature of the public harm likely to result if the meeting is delayed for the purpose of complying with the notice requirements,
 - (4) the reason why the need for holding the meeting could not have been foreseen at a time when the required notice could have been provided, or if it could have been foreseen, the reason why the required notice was not provided,
 - (5) the time, place and manner in which any notice of the meeting was provided, and
 - (6) a statement that the meeting will be limited to the specific matter of urgency and importance for which the meeting was called.

If "48-Hour Notice" cannot be given, is a public body under a duty to provide any other notice before holding an "Emergency Meeting"?

Answer:

Yes. Even though "48-Hour Notice" cannot be given, a public body is under a duty to give whatever notice it can under the circumstance. If, for example, it has time to inform the two newspapers of the time and place of the meeting, it must do so.

May an "Emergency Meeting" be held if the matter of urgency and importance could reasonably have been foreseen in time to give the required notice?

Answer:

Yes.

What may be discussed or acted upon during an "Emergency Meeting"?

Answer:

An "Emergency Meeting" must be limited to the matters of urgency and importance necessitating the calling of the meeting.

VI. EXECUTIVE OR CLOSED SESSIONS (N.J.S.A. 10:4-12)

May a public body hold a closed session to discuss a matter before it votes on it?

Answer:

Generally, no. A public body may hold a closed session to discuss a matter only if that matter falls within one of the exceptions to the public meetings requirement contained in the Law and only if the procedure set forth in the Law for the holding of closed sessions is followed. If the matter to be discussed does not fall within one of the stated exceptions, then even if the matter is sensitive or controversial, both the discussion and any voting must take place in public.

What are the exceptions to the requirement that a public body hold its meetings in public?

Answer:

The law allows, but does not require, a public body to hold a closed session to discuss any of the following:

New Jersey State Library

1. matters rendered confidential by Federal law or that, if publicly disclosed, would impair the receipt of Federal funds;
2. matters rendered confidential by State statute or court rule;
3. material that would constitute an unwarranted invasion of individual privacy if disclosed. (Generally, to fall within this exception, the material would have to identify a specific individual and be of a personal nature. The individual whose privacy is concerned may require an open session.);
4. the terms and conditions of an existing or proposed collective bargaining agreement, including negotiation positions;
5. matters related to the purchase, lease or acquisition of real property with public funds;
6. matters related to the setting of banking rates or the investing of public funds, provided that public disclosure could adversely affect the public interest;
7. tactics and techniques utilized in protecting the safety and property of the public, provided that public disclosure could impair such protection;
8. investigations of violations or possible violations of the Law;
9. pending or anticipated litigation or contract negotiations in which the public body is or may become a party;
10. matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer;
11. quasi-judicial deliberations occurring after a public hearing that may result in the imposition of a civil penalty or the suspension or loss of a license or permit;
12. Personnel matters concerning the employment of a current or prospective employee of the public body except when all employees who's rights could be adversely affected request that such matter be discussed at a public meeting.

May matters other than those listed above be discussed by a public body in closed session?

Answer:

No. Only the 12 types of matters listed above may be discussed in closed session. Since everything else must be discussed in public, it is advisable for public bodies to group their agenda items in two parts: one to be discussed in public, the other to be discussed in closed session.

May a public body hold a closed session on a matter which falls within one of the exceptions to the Open Public Meetings Law if another statute requires it to be held in public session?

Answer:

No. Even if a matter falls within one of the exceptions to the Open Public Meetings Law, it may not be discussed or acted upon in closed session if another statute requires that specific matter to be discussed or acted upon in open session.

Must a public body do anything before it holds a closed session under one of the above exceptions?

Answer:

Yes, before going into closed session, a public body must adopt, at an open session, a resolution stating

1. the general nature of the subject to be discussed at the closed session, and
2. if and when that discussion can be disclosed to the public.

How does a public body determine whether it can release what happened at a closed session to the public?

Answer:

There is no set rule or method by which a public body can determine whether and when it should disclose to the public what transpired in closed session. The answer must depend on the circumstances of each case and the nature of the matter in question. As a very general guide, a matter should be released to the public when the reasons for discussing and acting on it in closed session no longer exist.

When disclosure of what happened at the closed session can be made to the public, what must be disclosed?

Answer:

Generally, that portion of the minutes covering the matter held in closed session should be disclosed. Those minutes should be in sufficient detail to give the public a general description or outline of the subject and issues discussed and any action taken pertaining to them.

VII. MINUTES (N.J.S.A. 10:4-14)

Does the Open Public Meetings Law require a public body to have a stenographic transcript made of each of its meetings?

Answer:

No, but the Law does require that minutes be kept of each meeting.

Must minutes be kept of so-called "work sessions" or "discussion sessions" or a public body?

Answer:

Yes, the Law requires each public body to keep minutes of "all its meetings" regardless of whether they are called "work sessions," "discussion sessions," "pre-meeting meetings," "information sessions" or given any other designation.

What must be included in the minutes?

Answer:

The Law requires that the minutes be reasonably comprehensible. At a minimum, the minutes must include:

1. the time and place of the meeting;
2. the names of the members present;
3. the time, place and manner in which adequate notice of the meeting was given or where adequate notice was not given, then
 - a. the nature of the urgency or importance that required holding the meeting without giving notice;
 - b. the nature of the harm to the public interest that would have been likely to occur if the meeting were delayed;
 - c. the subject matter to be discussed or acted upon at the meeting;
 - d. the time, place and manner in which any notice of the meeting was provided; and
 - e. the reason why the need for the meeting could not have been foreseen at a time when adequate notice could have been provided, or if it could have been foreseen, why adequate notice was not provided.
4. the subjects considered at the meeting;
5. a brief description of the actions taken; and
6. the vote of each member or any items voted upon.

After the minutes are prepared, are they open to public inspection?

Answer:

Yes, the minutes of each meeting are open to public inspection and copying except those portions of the minutes that relate to closed portion of the meeting may be withheld from disclosure. To facilitate this, the minutes should be prepared so that the first part of the minutes relates to the open portion of the meeting and the second part relates to the closed portion of the meeting.

May a public body charge a fee for providing copies of the minutes of its meetings to the public?

Answer:

Yes. Although the Open Public Meetings Law does not specifically address this question, that Law must be read in conjunction with the Right to Know Law, N.J.S.A. 47:1A-1 et seq., which has a provision dealing with the fees to be charged for obtaining copies of public records. Under that Law, reasonable fees for copies of public records may be established and, if not established, then the fees stated in that section may be charged.

May the news media request notices of meetings of a public body?

Answer:

Yes. The news media may request that a public body mail to the news media copies of any regular meeting schedule or revision, and any advance written notice of any regular, special or rescheduled meeting of such body. Also, if a resolution by the public body so provides, notice requested by the news media shall be mailed to the news media free of charge. (N.J.S.A. 10:4-19).

When will the request for notice terminate?

Answer:

Requests for notices shall terminate at midnight, December 31 of each year, but shall be subject to renewal upon a new request to the public body. (N.J.S.A. 10:4-19).

When do the minutes become public?

Answer:

The Law requires that the minute be made "promptly available to the public." Although prompt availability will depend on the circumstances of each case, it generally requires that the minutes be made available as soon after the meeting as it takes to prepare them.

If a public body holds monthly meetings, do the minutes of each meeting become public as soon as they are prepared by its staff or only after it has an opportunity to approve them formally at the next meeting?

Answer:

The minutes become public as soon as they are prepared by the staff of the public body. To hold them until they are formally approved at the next meeting would not meet the Law's requirement that the minutes be made "promptly available to the public." In releasing the minutes prior to formal approval, a statement should be placed at the top of them stating that the minutes have not been formally approved and are subject to change or modification by the public body at its next meeting.

Must a roll call vote be taken by the public body whenever it takes action on a matter before it?

Answer:

The Law requires that the minutes include "the vote of each member" on any action taken by the public body. If to accomplish this, it is necessary for the public body to take a roll call vote, then a roll call vote must be taken.

VIII. SANCTIONS (N.J.S.A. 10:4-15 through 17)

What can be done about official action taken by a public body in violation of the Open Public Meetings Law?

Answer:

Any person may, within 45 days of disclosure of an action taken at a meeting which did not conform to the provisions of the Law, move to have that action voided.

What can be done if it is evident that a violation will occur or recur?

Answer:

Any person may apply for an injunction to insure compliance with the Law if they believe a violation is imminent.

Are members of public bodies individually liable for violations of the Law?

Answer:

Yes, the Attorney General, county prosecutor, or the Public Advocate may take action against any person who knowingly violates any provision of the Act. The person may be fined \$100.00 for the first offense and no less than \$100.00 nor more than \$500.00 for any subsequent offense, recoverable by the State by a summary proceeding under the "Penalty Enforcement Law."

If a member of a public body believes that a meeting of that body is being held in violation of the Open Public Meetings Law, what can he do to protect himself from personal liability?

Answer:

If a member of a public body believes that a meeting of that body is being held in violation of the Open Public Meetings Law, he should immediately state his belief at the meeting and give the reasons why he feels that meeting is in violation of the Law. His statement must then be recorded in the minutes. If he is overruled by the majority, he may continue to participate in the meeting without fear of being personally penalized under the Law.

Will a member of a public body be indemnified if a penalty is assessed against him under this act?

Answer:

This question cannot be answered in the abstract. It will depend upon whether the public body has an indemnification statute, whether it applies to this type of situation and whether it would be against public policy to indemnify a person against a penalty imposed for the knowing violation of this act.

6M 10/83