

OPEN GOVERNMENT

The public's right to information about government activities lies at the heart of a democratic government

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OPEN GOVERNMENT STATUTES: MEETINGS AND DOCUMENTS

- General Assemblies across the county have enacted laws to allow the public to watch government in action and to inspect public documents
- State laws are often referred to as “sunshine” laws
- Collectively open government laws have two separate related yet distinct branches:

(1) Open meetings

(2) Freedom of information or public information acts

OPEN GOVERNMENT STATUTES: MEETINGS AND DOCUMENTS

- Local governments sometimes adopt stricter ordinances than the state law
- Charters sometimes contain provisions about open meetings that are different than state law
- Ex. Charter provision that no more than 2 elected officials could meet together without it being an open meeting even though a quorum would have been a larger number
- Most state laws have provisions

OPEN MEETINGS: BASICS

- Right of the public to observe a public body in an open session
- Right to observe does not necessarily mean the right to speak at an open session
- Right to observe all phases of deliberation, policy formation, and decision making of the public body
- A public comment portion of an open meeting generally comes from some other source such as an ordinance, bylaw, or charter
- A quorum of the public body triggers an open meeting
- Meetings can be held by teleconference or virtually
- Public bodies have different functions such as direct supervision and quasi-judicial that may not be subject to an open meetings requirement

OPEN MEETINGS: PROCEDURAL REQUIREMENTS

- Advanced publication of the meeting date and location
- Posting of an agenda prior to the meeting
- Minutes have to be taken and available for public inspection
- Minutes and agendas have to be preserved for a period of time
- Minutes have to be approved by the public body within a certain period of time after the meeting
- Meeting room has to “reasonably accessible” to the public

OPEN MEETINGS: VIRTUAL WORLD

- Some states are now requiring the livestreaming of meetings by certain public bodies
- Virtual meetings that had to happen during the pandemic are now accepted
- Virtual meetings have to have all of the same procedural steps as in person meetings
- Unlike in-person meetings, technological failures can before and during a meeting
- Present issues for an attorney

Practice tip: Always have a back-up plan if technology fails!

OPEN MEETINGS: CLOSED OR EXECUTIVE SESSIONS

- Closed or executive sessions encompass items of business where a General Assembly has determined that because of the nature of the item should not be discussed in open session
- Generally, a public body's decision to discuss the permissible closed session item is discretionary
- Some public bodies have functions such as direct supervision of individuals that may not be subject to Act or have to be done in closed session
- Procedural requirements may apply to a closed session such as voting to close the meeting and some disclosure of the topic and citation to the state law

Practice tip: Public bodies can stray from the topic in closed session so be prepared to coral the members back to the topic

OPEN MEETINGS: CLOSED SESSION TOPICS

- Common closed session topics:

(1) Legal advice/pending or potential litigation

(2) Personnel matters

(3) Real property acquisition

(4) Pending procurements

(5) Investigations

(6) Public security and cybersecurity

Practice tip: If someone says the item should be in closed session because they are worried about the politics of having the discussion in open session, be worried!

OPEN MEETINGS: VIOLATIONS

- Many states have compliance boards that police public bodies on open meetings
- Not much litigation in this arena but that doesn’t mean that you should not worry about open meetings violations
- Press loves to write about open meetings violations
- Compliance boards may have penalities

STATE FOIA OR PUBLIC INFORMATION ACTS(PIA)

- Federal Freedom of Information Act (FOIA) is not synonymous with a similar state law
- Don’t make an assumption that Federal FOIA provisions are the same although some federal case law on provisions might be instructive
- Most local government lawyers will be expected handle PIA requests even if you are not assigned as a PIA lawyer
- PIA requests come in all forms and in different ways

PUBLIC INFORMATION: BASICS

- Public records are anything made or received in the connection with public business
- Covers all forms of records: written documents, emails, handwritten notes, photographs, recordings, electronic documents, data, Teams/Zoom chats, voicemails, transcripts of voicemails, maps and copies of records
- Applies to anything in the possession of the government or a third party hired by the government (even though it might not be disclosable if requested)
- Private email accounts and text messages stored on private devices are most likely covered if they are made or received by a public employee
- PIAs are construed in favor or disclosure
- Not required to create documents to respond to a request

PUBLIC INFORMATION: BASICS

- PIAs generally categorize documents as follows:
  1. **Mandatory denial (government cannot disclose the document)**
  2. **Discretionary denial (government may deny the request under a specific legal standard)**
- Most PIAs encompass common-law privileges that can be the basis of a denial, i.e., attorney-client privilege, maybe “executive privilege”
- PIAs may recognize that another source of law that would require a mandatory denial will apply
- Source of law can be federal (ex. student records) or state (juvenile criminal records)

PUBLIC INFORMATION: PROCEDURAL REQUIREMENTS

- PIAs have multiple deadlines
- May have to respond with a couple of days that you have the records that are disclosable or you need up to 30 days to find record. Ex. Md. has a 10 day rule
- PIAs generally have up to 30 days to respond
- If you have a large request, you can ask the requestor to give additional time
- Most PIAs do not allow you to unilaterally decide you need more time to respond
- Practice tip: If you are assigned a PIA request, you cannot let it sit on your desk because the process to comply with a PIA begins almost immediately

PUBLIC INFORMATION: MANDATORY DENIALS

- PIAs have lots of mandatory denials: some are broad and some are very specific
- Some of the most common mandatory denials:

(1) Personnel records

(2) Confidential financial information

(3) Confidential commercial information

(4) Medical records

PUBLIC INFORMATION: DISCRETIONARY DENIALS

- PIAs have lots of discretionary denials: some are broad and some are very specific
- Some of the most common discretionary denials:

(1) Interagency memorandum/pre-decisional documents

(2) Investigatory records

(3) Public security

(4) Cybersecurity

PUBLIC INFORMATION: DENIALS

- Denials can be in whole or in part of a record (redactions)
- PIAs require you to tell the requester in writing what is being denied, why, citations to the PIA and how you can appeal that decision to deny
- Obligation to redact part of a record, if you can, rather than deny the entire document

Practice tip: Be careful with technology that does electronic redactions.

PUBLIC INFORMATION: FEES

- Most PIAs allow governments to charge fees to research and retrieve documents, reviews for disclosure, and copying/scanning fees
- Fees often have to estimated up front
- Fees generally must be reasonable and defensible
- Some PIAs allow for fee waivers in certain circumstances

Practice tip: Set what those fees are in a document and don't think you can charge a huge fee to get the requestor to drop the request

PUBLIC INFORMATION: ENFORCEMENT

- Many states have created PIA compliance boards to police government implementation of PIAs
- More court cases related to a PIA arena than in open meetings
- The government might have to produce records in camera for a judge to determine whether the denial was correct

PUBLIC INFORMATION: TECHNOLOGY CHALLENGES

- Teams and Zoom meetings present new challenges for government lawyers
- Know how the use of this technology is creating records that you may not have considered:

(1) Chats between employees

(2) Comments during virtual meetings and posting of documents within the virtual meeting

(3) Recordings of the meetings (check to see if you are a 3rd party consent state!)

(4) Automatic transcripts of meetings

(5) Transcripts of voice mail messages

Practice tip: All of the above are records under the PIA