

THE ARIZONA OPEN MEETING LAW



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Message from the Arizona Ombudsman

“Let the people know the facts and the country will be safe.”

– Abraham Lincoln, 1861

The operation and activities of government and of government officials are issues of interest to the general public. The Open Meeting Law is in place to ensure that the people’s business is conducted publicly. The law also helps public officials do their jobs more efficiently and effectively.

Effective January 1, 2007, in an effort to increase government awareness and provide the citizens of Arizona an effective and efficient means to get answers and resolve public access disputes, new legislation expanded the Ombudsman-Citizens’ Aide Office to provide free services to citizens and public officials to help untangle the public access web. The duties of the Ombudsman include: preparing materials on public access laws, providing training, coaching and assisting citizens, investigating complaints, requesting testimony or evidence, conducting hearings, making recommendations, reporting misconduct, and referring violations to the Office of the Attorney General for enforcement.

This pamphlet contains information relating to the Arizona Open Meeting Law and is provided to serve as a quick reference for you. Part I of the pamphlet contains a copy of the text of the Open Meeting Law Statutes. Part II of the pamphlet contains Chapter 6 of the Arizona Agency Handbook, which explains the Open Meeting Laws.¹ Part III of the pamphlet provides a summary of recent statutory changes, recent case law, and recent Attorney General Opinions.² Part IV provides the Ombudsman’s statutory authority to educate and investigate matters relating to public access laws.

For more information, or to schedule training, please call the Ombudsman’s Office at 602-277-7292 or 800-872-2879. You can also send a letter to Arizona Ombudsman-Citizens’ Aide 3737 N. 7th St. Suite 209 Phoenix, AZ 85014, fax a letter to 602-277-7312, send an e-mail to ombuds@azoca.gov, or come into the office. Of course, you can always visit the Ombudsman’s website at www.azoca.gov.

Patrick Shannahan
Arizona Ombudsman – Citizens’ Aide

¹ Please note that the Arizona Agency Handbook was last revised in May 2001. For a summary of recent activity, please see Part III.

² Part III is not an exhaustive list of recent activity.

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ARTICLE 3.1 - PUBLIC MEETINGS AND PROCEEDINGS

38-431. Definitions

In this article, unless the context otherwise requires:

1. “Advisory committee” or “subcommittee” means any entity, however designated, that is officially established, on motion and order of a public body or by the presiding officer of the public body, and whose members have been appointed for the specific purpose of making a recommendation concerning a decision to be made or considered or a course of conduct to be taken or considered by the public body.
2. “Executive session” means a gathering of a quorum of members of a public body from which the public is excluded for one or more of the reasons prescribed in section 38-431.03. In addition to the members of the public body, officers, appointees and employees as provided in section 38-431.03 and the auditor general as provided in section 41-1279.04, only individuals whose presence is reasonably necessary in order for the public body to carry out its executive session responsibilities may attend the executive session.
3. “Legal action” means a collective decision, commitment or promise made by a public body pursuant to the constitution, the public body’s charter, bylaws or specified scope of appointment and the laws of this state.
4. “Meeting” means the gathering, in person or through technological devices, of a quorum of members of a public body at which they discuss, propose or take legal action, including any deliberations by a quorum with respect to such action.
5. “Political subdivision” means all political subdivisions of this state, including without limitation all counties, cities and towns, school districts and special districts.
6. “Public body” means the legislature, all boards and commissions of this state or political subdivisions, all multimember governing bodies of departments, agencies, institutions and instrumentalities of the state or political subdivisions, including without limitation all corporations and other instrumentalities whose boards of directors are appointed or elected by the state or political subdivision. Public body includes all quasi-judicial bodies and all standing, special or advisory committees or subcommittees of, or appointed by, the public body.
7. “Quasi-judicial body” means a public body, other than a court of law, possessing the power to hold hearings on disputed matters between a private person and a public agency and to make decisions in the general manner of a court regarding such disputed claims.

38-431.01. Meetings shall be open to the public

- A. All meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings. All legal action of public bodies shall occur during a public meeting.
- B. All public bodies shall provide for the taking of written minutes or a recording of all their meetings, including executive sessions. For meetings other than executive

sessions, such minutes or recording shall include, but not be limited to:

1. The date, time and place of the meeting.
 2. The members of the public body recorded as either present or absent.
 3. A general description of the matters considered.
 4. An accurate description of all legal actions proposed, discussed or taken, and the names of members who propose each motion. The minutes shall also include the names of the persons, as given, making statements or presenting material to the public body and a reference to the legal action about which they made statements or presented material.
- C. Minutes of executive sessions shall include items set forth in subsection B, paragraphs 1, 2 and 3 of this section, an accurate description of all instructions given pursuant to section 38-431.03, subsection A, paragraphs 4, 5 and 7 and such other matters as may be deemed appropriate by the public body.
- D. The minutes or a recording of a meeting shall be available for public inspection three working days after the meeting except as otherwise specifically provided by this article.
- E. A public body of a city or town with a population of more than two thousand five hundred persons shall:
1. Within three working days after a meeting, except for subcommittees and advisory committees, post on its internet website, if applicable, either:
 - (a) A statement describing the legal actions taken by the public body of the city or town during the meeting.
 - (b) Any recording of the meeting.
 2. Within two working days following approval of the minutes, post approved minutes of city or town council meetings on its internet website, if applicable, except as otherwise specifically provided by this article.
 3. Within ten working days after a subcommittee or advisory committee meeting, post on its internet website, if applicable, either:
 - (a) A statement describing legal action, if any.
 - (b) A recording of the meeting.
- F. All or any part of a public meeting of a public body may be recorded by any person in attendance by means of a tape recorder or camera or any other means of sonic reproduction, provided that there is no active interference with the conduct of the meeting.
- G. The secretary of state for state public bodies, the city or town clerk for municipal public bodies and the county clerk for all other local public bodies shall distribute open meeting law materials prepared and approved by the attorney general to a person elected or appointed to a public body prior to the day that person takes office.
- H. A public body may make an open call to the public during a public meeting, subject to reasonable time, place and manner restrictions, to allow individuals to address the public body on any issue within the jurisdiction of the public body. At the conclusion of an open call to the public, individual members of the public body

may respond to criticism made by those who have addressed the public body, may ask staff to review a matter or may ask that a matter be put on a future agenda. However, members of the public body shall not discuss or take legal action on matters raised during an open call to the public unless the matters are properly noticed for discussion and legal action.

- I. A member of a public body shall not knowingly direct any staff member to communicate in violation of this article.

38-431.02. Notice of meetings

- A. Public notice of all meetings of public bodies shall be given as follows:
 1. The public bodies of the state shall file a statement with the secretary of state stating where all public notices of their meetings will be posted and shall give such additional public notice as is reasonable and practicable as to all meetings.
 2. The public bodies of the counties, school districts and other special districts shall file a statement with the clerk of the board of supervisors stating where all public notices of their meetings will be posted and shall give such additional public notice as is reasonable and practicable as to all meetings.
 3. The public bodies of the cities and towns shall file a statement with the city clerk or mayor's office stating where all public notices of their meetings will be posted and shall give such additional public notice as is reasonable and practicable as to all meetings.
 4. The public bodies of the cities and towns that have an internet web site shall post all public notices of their meetings on their internet web site and shall give additional public notice as is reasonable and practicable as to all meetings. A technological problem or failure that either prevents the posting of public notices on a city or town web site or that temporarily or permanently prevents the usage of all or part of the web site does not preclude the holding of the meeting for which the notice was posted if all other public notice requirements required by this section are complied with.
- B. If an executive session will be held, the notice shall be given to the members of the public body, and to the general public, stating the specific provision of law authorizing the executive session.
- C. Except as provided in subsections D and E, meetings shall not be held without at least twenty-four hours' notice to the members of the public body and to the general public.
- D. In case of an actual emergency, a meeting, including an executive session, may be held on such notice as is appropriate to the circumstances. If this subsection is utilized for conduct of an emergency session or the consideration of an emergency measure at a previously scheduled meeting the public body must post a public notice within twenty-four hours declaring that an emergency session has been held and setting forth the information required in subsections H and I.
- E. A meeting may be recessed and resumed with less than twenty-four hours' notice

if public notice of the initial session of the meeting is given as required in subsection A, and if, prior to recessing, notice is publicly given as to the time and place of the resumption of the meeting or the method by which notice shall be publicly given.

- F. A public body that intends to meet for a specified calendar period, on a regular day, date or event during such calendar period, and at a regular place and time, may post public notice of such meetings at the beginning of such period. Such notice shall specify the period for which notice is applicable.
- G. Notice required under this section shall include an agenda of the matters to be discussed or decided at the meeting or information on how the public may obtain a copy of such an agenda. The agenda must be available to the public at least twenty-four hours prior to the meeting, except in the case of an actual emergency under subsection D.
- H. Agendas required under this section shall list the specific matters to be discussed, considered or decided at the meeting. The public body may discuss, consider or make decisions only on matters listed on the agenda and other matters related thereto.
- I. Notwithstanding the other provisions of this section, notice of executive sessions shall be required to include only a general description of the matters to be considered. Such agenda shall provide more than just a recital of the statutory provisions authorizing the executive session, but need not contain information that would defeat the purpose of the executive session, compromise the legitimate privacy interests of a public officer, appointee or employee, or compromise the attorney-client privilege.
- J. Notwithstanding subsections H and I, in the case of an actual emergency a matter may be discussed and considered and, at public meetings, decided, where the matter was not listed on the agenda provided that a statement setting forth the reasons necessitating such discussion, consideration or decision is placed in the minutes of the meeting and is publicly announced at the public meeting. In the case of an executive session, the reason for consideration of the emergency measure shall be announced publicly immediately prior to the executive session.
- K. Notwithstanding subsection H, the chief administrator, presiding officer or a member of a public body may present a brief summary of current events without listing in the agenda the specific matters to be summarized, provided that:
 - 1. The summary is listed on the agenda.
 - 2. The public body does not propose, discuss, deliberate or take legal action at that meeting on any matter in the summary unless the specific matter is properly noticed for legal action.

38-431.03. Executive sessions

- A. Upon a public majority vote of the members constituting a quorum, a public body may hold an executive session but only for the following purposes:
 - 1. Discussion or consideration of employment, assignment, appointment, pro-

- motion, demotion, dismissal, salaries, disciplining or resignation of a public officer, appointee or employee of any public body, except that, with the exception of salary discussions, an officer, appointee or employee may demand that the discussion or consideration occur at a public meeting. The public body shall provide the officer, appointee or employee with written notice of the executive session as is appropriate but not less than twenty-four hours for the officer, appointee or employee to determine whether the discussion or consideration should occur at a public meeting.
2. Discussion or consideration of records exempt by law from public inspection, including the receipt and discussion of information or testimony that is specifically required to be maintained as confidential by state or federal law.
 3. Discussion or consultation for legal advice with the attorney or attorneys of the public body.
 4. Discussion or consultation with the attorneys of the public body in order to consider its position and instruct its attorneys regarding the public body's position regarding contracts that are the subject of negotiations, in pending or contemplated litigation or in settlement discussions conducted in order to avoid or resolve litigation.
 5. Discussions or consultations with designated representatives of the public body in order to consider its position and instruct its representatives regarding negotiations with employee organizations regarding the salaries, salary schedules or compensation paid in the form of fringe benefits of employees of the public body.
 6. Discussion, consultation or consideration for international and interstate negotiations or for negotiations by a city or town, or its designated representatives, with members of a tribal council, or its designated representatives, of an Indian reservation located within or adjacent to the city or town.
 7. Discussions or consultations with designated representatives of the public body in order to consider its position and instruct its representatives regarding negotiations for the purchase, sale or lease of real property.
- B. Minutes of and discussions made at executive sessions shall be kept confidential except from:
1. Members of the public body which met in executive session.
 2. Officers, appointees or employees who were the subject of discussion or consideration pursuant to subsection A, paragraph 1 of this section.
 3. The auditor general on a request made in connection with an audit authorized as provided by law.
 4. A county attorney or the attorney general when investigating alleged violations of this article.
- C. The public body shall instruct persons who are present at the executive session regarding the confidentiality requirements of this article.
- D. Legal action involving a final vote or decision shall not be taken at an executive session, except that the public body may instruct its attorneys or representatives

as provided in subsection A, paragraphs 4, 5 and 7 of this section. A public vote shall be taken before any legal action binds the public body.

- E. Except as provided in section 38-431.02, subsections I and J, a public body shall not discuss any matter in an executive session which is not described in the notice of the executive session.
- F. Disclosure of executive session information pursuant to this section or section 38-431.06 does not constitute a waiver of any privilege, including the attorney-client privilege. Any person receiving executive session information pursuant to this section or section 38-431.06 shall not disclose that information except to the attorney general or county attorney, by agreement with the public body or to a court in camera for purposes of enforcing this article. Any court that reviews executive session information shall take appropriate action to protect privileged information.

38-431.04. Writ of mandamus

Where the provisions of this article are not complied with, a court of competent jurisdiction may issue a writ of mandamus requiring that a meeting be open to the public.

38-431.05. Meeting held in violation of article; business transacted null and void; ratification

- A. All legal action transacted by any public body during a meeting held in violation of any provision of this article is null and void except as provided in subsection B.
- B. A public body may ratify legal action taken in violation of this article in accordance with the following requirements:
 - 1. Ratification shall take place at a public meeting within thirty days after discovery of the violation or after such discovery should have been made by the exercise of reasonable diligence.
 - 2. The notice for the meeting shall include a description of the action to be ratified, a clear statement that the public body proposes to ratify a prior action and information on how the public may obtain a detailed written description of the action to be ratified.
 - 3. The public body shall make available to the public a detailed written description of the action to be ratified and all deliberations, consultations and decisions by members of the public body that preceded and related to such action. The written description shall also be included as part of the minutes of the meeting at which ratification is taken.
 - 4. The public body shall make available to the public the notice and detailed written description required by this section at least seventy-two hours in advance of the public meeting at which the ratification is taken.

38-431.06. Investigations; written investigative demands

- A. On receipt of a written complaint signed by a complainant alleging a violation of this article or on their own initiative, the attorney general or the county attorney for the county in which the alleged violation occurred may begin an investigation.

- B. In addition to other powers conferred by this article, in order to carry out the duties prescribed in this article, the attorney general or the county attorney for the county in which the alleged violation occurred, or their designees, may:
1. Issue written investigative demands to any person.
 2. Administer an oath or affirmation to any person for testimony.
 3. Examine under oath any person in connection with the investigation of the alleged violation of this article.
 4. Examine by means of inspecting, studying or copying any account, book, computer, document, minutes, paper, recording or record.
 5. Require any person to file on prescribed forms a statement or report in writing and under oath of all the facts and circumstances requested by the attorney general or county attorney.
- C. The written investigative demand shall:
1. Be served on the person in the manner required for service of process in this state or by certified mail, return receipt requested.
 2. Describe the class or classes of documents or objects with sufficient definiteness to permit them to be fairly identified.
 3. Prescribe a reasonable time at which the person shall appear to testify and within which the document or object shall be produced and advise the person that objections to or reasons for not complying with the demand may be filed with the attorney general or county attorney on or before that time.
 4. Specify a place for the taking of testimony or for production of a document or object and designate a person who shall be the custodian of the document or object.
- D. If a person objects to or otherwise fails to comply with the written investigation demand served on the person pursuant to subsection C, the attorney general or county attorney may file an action in the superior court for an order to enforce the demand. Venue for the action to enforce the demand shall be in Maricopa county or in the county in which the alleged violation occurred. Notice of hearing the action to enforce the demand and a copy of the action shall be served on the person in the same manner as that prescribed in the Arizona rules of civil procedure. If a court finds that the demand is proper, including that the compliance will not violate a privilege and that there is not a conflict of interest on the part of the attorney general or county attorney, that there is reasonable cause to believe there may have been a violation of this article and that the information sought or document or object demanded is relevant to the violation, the court shall order the person to comply with the demand, subject to modifications the court may prescribe. If the person fails to comply with the court's order, the court may issue any of the following orders until the person complies with the order:
1. Adjudging the person in contempt of court.
 2. Granting injunctive relief against the person to whom the demand is issued to restrain the conduct that is the subject of the investigation.
 3. Granting other relief the court deems proper.

38-431.07. Violations; enforcement; removal from office; in camera review

- A. Any person affected by an alleged violation of this article, the attorney general or the county attorney for the county in which an alleged violation of this article occurred may commence a suit in the superior court in the county in which the public body ordinarily meets, for the purpose of requiring compliance with, or the prevention of violations of, this article, by members of the public body, or to determine the applicability of this article to matters or legal actions of the public body. For each violation the court may impose a civil penalty not to exceed five hundred dollars against a person who violates this article or who knowingly aids, agrees to aid or attempts to aid another person in violating this article and order such equitable relief as it deems appropriate in the circumstances. The civil penalties awarded pursuant to this section shall be deposited into the general fund of the public body concerned. The court may also order payment to a successful plaintiff in a suit brought under this section of the plaintiff's reasonable attorney fees, by the defendant state, the political subdivision of the state or the incorporated city or town of which the public body is a part or to which it reports. If the court determines that a public officer with intent to deprive the public of information violated any provision of this article the court may remove the public officer from office and shall assess the public officer or a person who knowingly aided, agreed to aid or attempted to aid the public officer in violating this article, or both, with all of the costs and attorney fees awarded to the plaintiff pursuant to this section.
- B. A public body shall not expend public monies to employ or retain legal counsel to provide legal services or representation to the public body or any of its officers in any legal action commenced pursuant to any provisions of this article, unless the public body has authority to make such expenditure pursuant to other provisions of law and takes a legal action at a properly noticed open meeting approving such expenditure prior to incurring any such obligation or indebtedness.
- C. In any action brought pursuant to this section challenging the validity of an executive session, the court may review in camera the minutes of the executive session, and if the court in its discretion determines that the minutes are relevant and that justice so demands, the court may disclose to the parties or admit in evidence part or all of the minutes.

38-431.08. Exceptions; limitation

- A. This article does not apply to:
1. Any judicial proceeding of any court or any political caucus of the legislature.
 2. Any conference committee of the legislature, except that all such meetings shall be open to the public.
 3. The commissions on appellate and trial court appointments and the commission on judicial qualifications.
 4. Good cause exception determinations and hearings conducted by the board of fingerprinting pursuant to section 41-619.55.
- B. A hearing held within a prison facility by the board of executive clemency is sub-

ject to this article, except that the director of the state department of corrections may:

1. Prohibit, on written findings that are made public within five days of so finding, any person from attending a hearing whose attendance would constitute a serious threat to the life or physical safety of any person or to the safe, secure and orderly operation of the prison.
 2. Require a person who attends a hearing to sign an attendance log. If the person is over sixteen years of age, the person shall produce photographic identification which verifies the person's signature.
 3. Prevent and prohibit any articles from being taken into a hearing except recording devices, and if the person who attends a hearing is a member of the media, cameras.
 4. Require that a person who attends a hearing submit to a reasonable search on entering the facility.
- C. The exclusive remedies available to any person who is denied attendance at or removed from a hearing by the director of the state department of corrections in violation of this section shall be those remedies available in section 38-431.07, as against the director only.
- D. Either house of the legislature may adopt a rule or procedure pursuant to article IV, part 2, section 8, Constitution of Arizona, to provide an exemption to the notice and agenda requirements of this article or to allow standing or conference committees to meet through technological devices rather than only in person.

38-431.09. Declaration of public policy

It is the public policy of this state that meetings of public bodies be conducted openly and that notices and agendas be provided for such meetings which contain such information as is reasonably necessary to inform the public of the matters to be discussed or decided. Toward this end, any person or entity charged with the interpretations of this article shall construe any provision of this article in favor of open and public meetings.

Part II

Arizona Agency Handbook Chapter 7 Open Meetings

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7.1 Scope of this Chapter.

This Chapter discusses Arizona's Open Meeting Law, A.R.S. §§ 38-431 to -431.09, with particular emphasis on the application of the Open Meeting Law to the day-to-day operations of state officers, bodies, and agencies. This Chapter does not resolve all issues that may arise under the Open Meeting Law, but rather is intended to serve as a reference for public officials who must comply with the law. Anyone faced with a situation not specifically addressed in this Chapter should consult their legal counsel before proceeding.

7.2 Arizona's Open Meeting Law.

7.2.1 History of Arizona's Open Meeting Law. All fifty states have enacted some type of legislation providing the public with a statutory right to openness in government. In addition, the United States Congress in 1976 enacted the Federal Open Meeting Act, 5 U.S.C. § 552b. Arizona's Open Meeting Law was first adopted in 1962 and amended in 1974, 1975, 1977, 1978, 1982, 1983, 1985, 1990, and extensively in 2000. For a detailed discussion of the early history of the Open Meeting Law through 1975, *see* Ariz. Att'y Gen. Op. 75-7.

7.2.2 Legislative Intent. The Legislature has repeatedly expressed its intent that the Open Meeting Law be construed to maximize public access to the governmental process. In first enacting the Open Meeting Law in 1962, the Legislature declared that: "It is the public policy of this state that proceedings in meetings of governing bodies of the state and political subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this act that their official deliberations and proceedings be conducted openly."

In 1978, after a series of court opinions narrowly construing the Open Meeting Law, the Legislature reiterated its policy by adding A.R.S. § 38-431.09. That statute now provides:

It is the public policy of this state that meetings of public bodies be conducted openly and that notices and agendas be provided for such meetings which contain such information as is reasonably necessary to inform the public of the matters to be discussed or decided. Toward this end, any person or entity charged with the interpretation of this article shall construe any provision of this article in favor of open and public meetings.

A.R.S. § 38-431.09. In keeping with this expressed intent, any uncertainty under the Open Meeting Law should be resolved in favor of openness in government. Any question whether the Open Meeting Law applies to a certain public body likewise should be resolved in favor of applying the law.

7.3 Government Bodies Covered by the Open Meeting Law.

7.3.1 Generally. The provisions of the Open Meeting Law apply to all public bodies. A public body is defined in A.R.S. § 38-431(6) as follows:

“Public body” means the legislature, all boards and commissions of this state or political subdivisions, all multimember governing bodies of departments, agencies, institutions and instrumentalities of the state or political subdivisions, including without limitation all corporations and other instrumentalities whose boards of directors are appointed or elected by the state or political subdivision. Public body includes all quasi-judicial bodies and all standing, special or advisory committees or subcommittees of, or appointed by, such public body.

This definition specifically includes public bodies of all political subdivisions. A political subdivision is defined in A.R.S. § 38-431(5) to include “all political subdivisions of this state, including without limitation all counties, cities and towns, school districts and special districts.”

The definition of public body encompasses five basic categories of public bodies: 1) boards, commissions, and other multimember governing bodies; 2) quasi-governmental corporations; 3) quasi-judicial bodies; 4) advisory committees; and 5) standing and special committees and subcommittees of any of the above. *See* A.R.S. § 38-431(6).

7.3.2 Boards and Commissions. All boards and commissions and other multimember governing bodies of the state or its political subdivisions or of the departments, agencies, institutions, and instrumentalities of the state or its political subdivisions are covered by the Open Meeting Law. *See* A.R.S. § 38-431(6). The multimember governing body must be created by law or by an official act pursuant to some legal authority. *See id.* Examples of public bodies created by law include the Arizona Legislature, county boards of supervisors, city and town councils, school boards, the governing boards of special districts, and all state, county, and municipal licensing and regulatory boards.

The Open Meeting Law applies only to multimember bodies and does not apply to the deliberations and meetings conducted by the single head of an agency. *See* Ariz. Att’y Gen. Ops. I92-007, 75-7. Accordingly, the director of a department is not subject to the Open Meeting Law when meeting with staff members to discuss the operations of the department.

7.3.3 Quasi-Governmental Corporations. The boards of directors of corporations and instrumentalities of the state or its political subdivisions are subject to the Open Meeting Law when the members of the board are appointed or elected by the state or its political subdivisions. *See* A.R.S. § 38-431(5), (6). For example, the Board of Directors of the Phoenix Civic Improvement Corporation falls into this category. The Open Meeting Law does not apply, however, to a private non-profit hospital association

that has a board of directors elected by the electorate of the hospital district. *Prescott Newspapers, Inc. v. Yavapai Community Hosp. Ass'n*, 163 Ariz. 33, 785 P.2d 1221 (App. 1989).

7.3.4 Quasi-Judicial Bodies. The Open Meeting Law defines a quasi-judicial body as “a public body, other than a court of law, possessing the power to hold hearings on disputed matters between a private person and a public agency and to make decisions in the general manner of a court regarding such disputed claims.” A.R.S. § 38-431(7). This definition was added by the Legislature in 1978 to reverse the Arizona Supreme Court’s decision in *Arizona Press Club, Inc. v. Bd. of Tax Appeals*, 113 Ariz. 545, 558 P.2d 697 (1976), which held that the Open Meeting Law did not apply to bodies conducting quasi-judicial functions, such as license revocation proceedings. *See* Ariz. Att’y Gen. Op. 78-245. The Arizona Board of Tax Appeals and similar quasi-judicial bodies are now expressly covered by the Open Meeting Law. A.R.S. § 38-431(6), (7).

Contested case proceedings or quasi-judicial or adjudicatory proceedings conducted by public bodies are subject to all of the requirements of the Open Meeting Law. *Rosenberg v. Bd. of Regents*, 118 Ariz. 489, 578 P.2d 168 (1978); *City of Flagstaff v. Bleeker*, 123 Ariz. 436, 600 P.2d 49 (App. 1979); Ariz. Att’y Gen. Op. 75-7.

7.3.5 Advisory Committees. Advisory committees are subject to all of the requirements of the Open Meeting Law, except the minute-taking requirements. A.R.S. § 38-431.01(A), (B). An advisory committee is defined as any group
officially established, upon motion and order of a public body or by the presiding officer of the public body, and whose members have been appointed for the specific purpose of making a recommendation concerning a decision to be made or considered or a course of conduct to be taken or considered by the public body.

A.R.S. § 38-431(1). This definition does not include advisory groups established by the single head of an agency unless they are created pursuant to a statute, city charter, or other provision of law or by an official act pursuant to some legal authority. *See* Ariz. Att’y Gen. Op. I92-007; Section 7.3.2. A staff committee consisting exclusively of employees of the public body is not an advisory committee.

7.3.6 Special and Standing Committees and Subcommittees. Special and standing committees and subcommittees of, or appointed by, any of the public bodies described above are also covered by the Open Meeting Law, although subcommittees are not required to keep minutes. A.R.S. § 38-431.01(A), (B). A special or standing committee may consist of members of the public body who have been appointed by or authorized to act for the public body. A.R.S. § 38-431(6). The fact that a committee consists, in whole or in part, of persons who are not members of the public body does not affect its status as a public body subject to the Open Meeting Law. *See* Ariz. Att’y Gen. Op. I80-202.

7.4 Government Bodies and Proceedings Not Covered by the Open Meeting Law.

The Legislature has determined that certain public bodies need not comply with all or portions of the Open Meeting Law in particular circumstances. This section identifies some of those limited exceptions.

7.4.1 Judicial Appointment Commissions. The Commissions on Appellate and Trial Court Appointments and the Commission on Judicial Qualifications are expressly exempt from the Open Meeting Law. A.R.S. § 38-431.08(A)(3).

7.4.2 Proceedings Before Courts. The Open Meeting Law does not apply to judicial proceedings of courts within the judicial branch of government. A.R.S. §§ 38-431(7), -431.08(A)(1).

7.4.3 The Legislature. Meetings of legislative conference committees must be open to the public; however, the committees are exempted from all other requirements of the Open Meeting Law. A.R.S. § 38-431.08(A)(2). The Open Meeting Law does not apply to the activities of a political caucus of the Legislature. *Id.* § (A)(1); *cf.* Ariz. Att’y Gen. Op. I83-128. The Open Meeting Law permits either house of the Legislature to adopt a rule or procedure exempting itself from the notice and agenda requirements of the Open Meeting Law or to allow standing or conference committees to meet through technological devices rather than in person. A.R.S. § 38-431.08(D).

7.4.4 Student Disciplinary Proceedings. Actions concerning the “discipline, suspension or expulsion of a pupil” are not subject to the Open Meeting Law. A.R.S. § 15-843. This same statute, however, prescribes the procedures that the school board must follow in handling these matters.

7.4.5 Insurance Guaranty Fund Boards. Special meetings of the property and casualty insurance guaranty fund in which the financial condition of any member insurer is discussed are exempt from the Open Meeting Law. A.R.S. § 20-671.

7.4.6 Hearings Held in Prison Facilities. Hearings held by the Board of Pardons and Paroles in a prison facility are subject to the Open Meeting Law, but the Director of the State Department of Corrections may prohibit certain individuals from attending such hearings because they pose a serious threat to the safety and security of others or the prison. Other conditions on attendance, such as signing an attendance log and submitting to a reasonable search, may be imposed as well. A.R.S. § 38-431.08(B).

7.4.7 Board of Fingerprinting. Good cause exception hearings conducted by the Board of Fingerprinting pursuant to A.R.S. § 41-619.55 are exempt from the Open Meeting Law. A.R.S. § 38-431.08(A)(4).

7.4.8 Homeowners Associations. Because they are not governmental “public bodies,” homeowners associations are not covered by the Open Meeting Law. Ariz. Att’y Gen. Op. 97-012. They do, however, have to comply with separate notification requirements. *Id.* Those requirements must be enforced privately because the Attorney General and County Attorneys have no jurisdiction over such matters. For more information on the requirements of homeowners associations, *see* A.R.S. § 33-1801 *et seq.*

7.5 The Actions and Activities Covered by the Open Meeting Law.

7.5.1 Generally. All meetings of a public body shall be public, and all persons desiring to attend shall be permitted to attend and listen to the deliberations and proceedings. A.R.S. § 38-431.01(A). All legal action of public bodies shall occur during a public meeting. *Id.* A meeting is defined as “the gathering, in person or through technological devices, of a quorum of members of a public body at which they discuss, propose or take legal action, including any deliberations by a quorum with respect to such action.” A.R.S. § 38-431(4). The definition of meeting was modified by the Arizona Legislature in 2000 to prohibit a quorum of a public body from secretly communicating through technological devices, including facsimile machines, telephones, and electronic mail.

All discussions, deliberations, considerations, or consultations among a majority of the members of a public body regarding matters that may foreseeably require final action or a final decision by the governing body, constitute “legal action” and, therefore, must be conducted in a public meeting or executive session in accordance with the Open Meeting Law. Ariz. Att’y Gen. Ops. 75-8, I79-4. *See also* A.R.S. §§ 38-431.01(A), -431(3). Whether the matter to be discussed may foreseeably require final action is the key to this inquiry. It is nearly impossible to establish a precise guideline as to when this foreseeability test has been met, and each case should be viewed on its own merits and all doubts resolved in favor of compliance with the Open Meeting Law. The safest course of action is to comply with the Open Meeting Law whenever a majority of the body discusses the business of the public body. It does not matter what label is placed on a gathering. It may be called a “work” or “study” session, or the discussion may occur at a social function. Ariz. Att’y Gen. Op. I79-4. Discussion of the public body’s business may take place only in a public meeting or an executive session in accordance with the requirements of the Open Meeting Law.

7.5.2 Circumvention of the Open Meeting Law. Discussions and deliberations between less than a majority of the members of a governing body, or other devices, when used to circumvent the purposes of the Open Meeting Law violate that law. *See* Ariz. Att’y Gen. Op. 75-8; *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974). Public officials may not circumvent public discussion by splintering the quorum and having separate or serial discussions with a majority of the public body members. Splintering the quorum can be done by meeting in person, by telephone, electronically,

or through other means to discuss a topic that is or may be presented to the public body for a decision. Public officials should refrain from any activities that may undermine public confidence in the public decision making process established in the Open Meeting Law, including actions that may appear to remove discussions and decisions from public view.

7.5.3 Applicability to Staff Members and Others. The Open Meeting Law further provides that members of public bodies shall not knowingly direct any staff member to communicate in violation of the Open Meeting Law. A.R.S. § 38-431.01(H). People knowingly aiding, agreeing to aid or attempting to aid another person in violating the Open Meeting Law can be held liable for civil penalties, attorneys' fees, and costs pursuant to A.R.S. § 38-431.07(A). *See* Sections 7.12.3 and 7.12.4. Hence, staff members, representatives, citizens and others should take steps to ensure they are not acting in a manner to commit a violation or subject themselves to liability.

7.6 Notice of Meetings.

7.6.1 Generally. The Open Meeting Law requires at least 24 hours advance notice of all meetings to the public body and to the general public. Notice makes it possible for the public to attend public meetings by informing them of when and where to go, and of the matters under consideration. So informed, the public can enjoy meaningful participation. Arizona courts have emphasized the importance of sufficient notice of meetings. The Arizona Court of Appeals explained "The notice provisions in the open meeting law are obviously designed to give meaningful effect to provisions such as A.R.S. §§ 38-431.01(A) and 38-431.09. The goal of exposing the public decision-making process to the public itself could be significantly, if not totally thwarted, in the absence of mandatory notice provisions and their enforcement." *Carefree Improvement Ass'n v. City of Scottsdale*, 133 Ariz. 106, 649 P.2d 985 (Ariz. App. 1982).

7.6.2 Notice to Members of the Public Body. Notice of all meetings, including executive sessions, must be given to the members of the public body. A.R.S. § 38-431.02(C). Generally, this requirement is met by mailing or hand-delivering a copy of the notice to each member of the public body.

7.6.3 Notice to the Public. Notice of all meetings, including executive sessions, must be given to the public. A.R.S. § 38-431.02. Giving public notice is a two step process. *Id.*

7.6.3.1 Disclosure Statement. The first step is the filing by the public body of a disclosure statement identifying where public notices of its meetings will be posted. Public bodies of the state must file this statement with the Secretary of State. A.R.S. § 38-431.02(A)(1). *See* Form 7.1. Public bodies of counties, school districts, and

other special districts must file this statement with the Clerk of the Board of Supervisors. *Id.* § (A)(2). Public bodies of cities and towns must file the statement with the City Clerk or Mayor’s office. *Id.* § (A)(3). The location identified must be a place to which the public has reasonable access. The location should have normal business hours, should not be geographically isolated, should not have limited access and should not be too difficult to find.

7.6.3.2 Public Notice of Meetings. Once the disclosure statement has been filed, the public body must give notice of each of its meetings by posting a copy of the notice in the public place identified in the disclosure statement and by giving “such additional public notice as is reasonable and practicable as to all meetings.” A.R.S. § 38-431.02(A). *See* Forms 7.2, 7.3, 7.4. Various public bodies fulfill this obligation to provide “additional notice” by providing news releases to the news media concerning proposed meetings, mailing notices to those asking to be informed of meetings, including the date and time of such meetings in their newsletters and other publications and providing information on the Internet or on public access television.

In addition to complying with the requirements of the Open Meeting Law, the notice should conform with the provisions of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 - 12213 (Supp. 1992). *See* Sections 15.25.2 - 15.25.5. Public bodies should include a statement such as the following in any notice it issues: “Persons with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting [name of designated agency contact person] at [telephone number and TDD telephone number]. Requests should be made as early as possible to allow time to arrange the accommodation.”

7.6.4 Contents of the Notice. Generally, the notice should include information identifying the public body and the date, time, and place of the meeting. *See* Forms 7.2, 7.3. In identifying the place of the meeting, the notice should specify the street address of the building and the room number or other information identifying the specific room in which the meeting will be held. *See* Form 7.7 (Sample Notice and Agenda). In addition, the notices of public meetings and notices of executive sessions must contain an agenda of the matters to be considered by the public body at the meeting or information on how the public may obtain a copy of such an agenda. A.R.S. § 38-431.02(G). For a complete discussion of the agenda requirements, see Section 7.7. Notice of a public meeting at which the public body intends to ratify a prior act must contain additional specific information. *See* Section 7.11; Form 7.12.

7.6.5 Time for Giving Notice. As a general rule, a meeting may not be held without giving the required notice at least twenty-four hours before the meeting. A.R.S. § 38-431.02(C). The best practice is for public bodies to give as much notice as possible. There are three exceptions to the twenty-four hour notice requirement.

First, in the case of an “actual emergency,” the meeting may be held upon such shorter notice as is “appropriate under the circumstances.” *Id.* § (D). An actual emer-

gency exists when, due to unforeseen circumstances, immediate action is necessary to avoid some serious consequence that would result from waiting until the required notice could be given. The existence of an actual emergency does not dispense with the need to give twenty-four hours' written notice to an employee to be discussed in executive session. A.R.S. § 38-431.03(A)(1); *see* Sections 7.7.9 and 7.9.4.

Second, notice of a meeting at which the public body is to consider the ratification of a prior act taken in violation of the Open Meeting Law must be given seventy-two hours in advance of the meeting. A.R.S. § 38-431.05(B)(4); *see* Section 7.11.

Finally, less than twenty-four hours' notice may be given when a properly noticed meeting is recessed to a later date. A.R.S. § 38-431.02(E). A meeting may be recessed and resumed with less than twenty-four hours' notice if public notice of the initial session of the meeting is given, and if, before recessing, notice is publicly given as to the time and place of the resumption of the meeting or the method by which notice shall be publicly given. *Id.* Notice of the resumption of a meeting must comply with the agenda requirements respecting the matters to be addressed when resumed. *Id.* § (G). This may be accomplished by the presiding officer of the public body either stating at the meeting the time, place, and agenda of the resumed meeting or stating where a written notice and agenda of the resumed meeting will be posted. If an executive session is to be recessed and resumed with less than twenty-four hours notice, the time, place, and agenda of the resumed meeting should be communicated to the members of the public body and to the public by reconvening in public session and following one of the two steps described above.

7.6.6 Notice of Regular Meetings. A public body that intends to meet for a specified calendar period on a regular day or date during the calendar period, and at a regular place and time, may post public notice of such meetings at the beginning of such period and need not post additional notices for each meeting. A.R.S. § 38-431.02(F); *see* Form 7.4. The notice must specify the period for which the notice is applicable. *Id.* However, this method of posting notice will not satisfy the agenda requirements unless the notice also contains a clear statement that the agenda for any such meeting will be available at least twenty-four hours in advance of the meeting and a statement as to where and how the public may obtain a copy of the agenda. A.R.S. § 38-431.02(G).

7.6.7 Notice of Executive Sessions. When an executive session is to be held, the notice must state the specific provision of law authorizing the executive session. A.R.S. § 38-431.02(B); *see* Form 7.5. This provision requires that the notice specify the numbered paragraph of subsection (A) of A.R.S. § 38-431.03 that authorizes the executive session. A general citation to A.R.S. § 38-431.03 or subsection (A) of that section is insufficient. For example, a public body intending to meet in executive session for purposes of discussing the purchase or lease of real property must cite in its notice "A.R.S. § 38-431.03(A)(7)." A.R.S. § 38-431.02(B). The public body must cite only the paragraphs applicable to the matters to be discussed and should not issue a standardized form notice that cites all executive session provisions. In addition, an

agenda is required for an executive session. A.R.S. § 38-431.02(G); *see* Section 7.7.3.

In the case of an executive session concerning personnel matters, the public body must give written notice to the affected officer, appointee, or employee in addition to the public notice described above. A.R.S. § 38-431.03(A)(1); *see* Section 7.9.4; Form 7.13. Such written notice must be provided not less than 24 hours before the scheduled meeting.

Many public bodies do not know whether they will have any legal questions on matters on the agenda until the discussion occurs. The Attorney General has opined that public bodies may provide with their notices and agendas a statement that matters on the public meeting agenda may be discussed in executive session for the purpose of obtaining legal advice thereon, pursuant to A.R.S. § 38-431.03(A)(3). Ariz. Att’y Gen. Op. I90-19. An example of such a statement is “The Board may vote to hold an executive session for the purpose of obtaining legal advice from the Board’s attorney on any matter listed on the agenda pursuant to A.R.S. § 38-431.03(A)(3).” Similar statements are not sufficient for other types of executive sessions. *See* Section 7.7 for further discussion.

7.6.8 Combined Notice of Public Meeting and Executive Session. In many cases the public body may want to have the option to retire into executive session during the course of a public meeting. Although separate notices of the public meeting and executive session may be given pursuant to Sections 7.6.6 and 7.6.7, the public body may choose to combine the notice of the public meeting and of the possible executive session in one document. An example for doing so is set forth in Form 7.6 and the sample notice and agenda, Form 7.7.

7.6.9 Maintaining Records of Notice Given. Each public body should keep a record of its notices, including a copy of each notice that was posted and information regarding the date, time, and place of posting. A suggested procedure is to file in the records of the public body a copy of the notice and a certification in a form similar to Form 7.8.

7.7 Agendas.

7.7.1 Generally. In addition to notice of the time, date, and place of the meeting, the public body must provide an agenda of the matters to be discussed, considered, or decided at the meeting. A.R.S. § 38-431.02(G). Although this Section provides guidelines for the preparation of agendas, it does not answer every question that will arise. Specific problems should be discussed with the public body’s legal counsel. A public body should not have problems if it in good faith follows the Legislature’s declaration of policy that agendas “contain such information as is reasonably necessary to inform the public of the matters to be discussed or decided.” A.R.S. § 38-431.09. If there is a doubt, all questions should be resolved in favor of greater disclosure of information.

7.7.2 Contents of the Agenda — Public Meeting. The agenda for a public meeting must contain a listing of the “specific matters to be discussed, considered or decided at the meeting.” A.R.S. § 38-431.02(H). This requirement does not permit the use of generic agenda items such as “personnel,” “new business,” “old business,” or “other matters” unless the specific matters or items to be discussed are separately identified. *See Thurston v. City of Phoenix*, 157 Ariz. 343, 344, 757 P.2d 619, 620 (App. 1988). The degree of specificity of the agenda depends on the circumstances. For example, if an environmental board is going to consider the approval of pesticides for application within 1/4 mile of a school, a listing such as “Approval of pesticides for application within 1/4 mile of a school” is sufficient. However, if the board is going to consider removing a pesticide from the approved list, the agency should specify the pesticide being considered for removal. *See* Form 7.7 (Sample Notice and Agenda).

If it is likely that the public body will find it necessary to discuss any particular agenda item in executive session with the public body’s attorney, the agenda should plainly say so. For example, the agenda might include a provision stating “The Board may vote to hold an executive session for the purpose of obtaining legal advice from the Board’s attorney on any matter listed on the agenda pursuant to A.R.S. § 38-431.03(A)(3).”

7.7.3 Contents of the Agenda—Executive Session. The agenda for an executive session must contain a “general description of the matters to be considered” A.R.S. § 38-431.02(I). The description must amount to more than just a recital of the statutory provisions authorizing the executive session, but should not contain any information that “would defeat the purpose of the executive session, compromise the legitimate privacy interests of a public officer, appointee or employee or compromise the attorney-client privilege.” *Id.* In preparing executive session agenda items, the public body must weigh the legislative policy favoring public disclosure and the legitimate confidentiality concerns underlying the executive session provision. For example, if a board desires to consider the possible dismissal of its executive director, the board may list on the agenda “Personnel matter — consideration of continued employment of the board’s executive director.” However, when the public disclosure of the board’s consideration of charges against an employee might needlessly harm the employee’s reputation or compromise the employee’s privacy interests, the board may eliminate from the agenda description the identity of the employee being considered. If it is already publicly known that the board is considering charges against the employee, disclosure of the employee’s identity in the agenda would not defeat the purpose of the executive session.

7.7.4 Distribution of the Agenda. The agenda may be made available to the public by including it as part of the public notice or by stating in the public notice how the public may obtain a copy of the agenda and then distributing the agenda in the manner prescribed. A.R.S. § 38-431.02(G); *see* Forms 7.2 - 7.4, 7.6, 7.7.

Because both the public notice and the agenda must be available at least twenty-

four hours in advance of a meeting, the simplest procedure is to include the agenda with the public notice. *See* Form 7.7 (Sample Notice and Agenda).

However, when the public notice is issued well in advance of a meeting, as in the case of notice of regularly scheduled meetings, *see* Section 7.6.6, it may be more appropriate to state how the public may obtain a copy of the agenda and distribute it accordingly.

7.7.5 Consent Agendas. Public bodies may use “consent agendas” so long as certain requirements are met. Consent agendas are typically used as a time-saving device when there are certain items on the agenda which are unlikely to generate controversy and are ministerial in nature. Some examples are approval of travel requests and approval of minutes. Public bodies often take one vote to approve or disapprove the consent agenda as a whole. When using a consent agenda format for some of the items on a meeting agenda, public bodies should fully describe the matters on the agenda and inform the public where more information can be obtained. A good practice is to require that an item be removed from the consent agenda upon the request of any member of the public body. *See* Form 7.7 (Sample Notice and Agenda).

Public bodies should take caution when using consent agendas. The Arizona Supreme Court has held that taking legal action, including that taken after an executive session, must be preceded by a disclosure of “that amount of information sufficient to apprise the public in attendance of the basic subject matter of the action so that the public may scrutinize the action taken during the meeting” *Karol v. Board of Educ. Trustees*, 122 Ariz. 95, 98, 593 P.2d 649, 652 (1979). The court also specifically condemned the practice of voting on matters designated only by number, thereby effectively hiding actions from public examination. *Id.*

7.7.6 Discussing and Deciding Matters Not Listed on the Agenda. The public body may discuss, consider, or decide only those matters listed on the agenda and “other matters related thereto.” A.R.S. § 38-431.02(H). The “other matters” clause provides some flexibility to a public body but should be used cautiously. The “other matters” must in some reasonable manner be “related” to an item specifically listed on the agenda. *Thurston v. City of Phoenix*, 157 Ariz. 343, 344, 757 P.2d 619, 620 (App. 1988).

If a matter not specifically listed on the agenda is brought up during a meeting, the better practice, and the one that will minimize subsequent litigation, is to defer discussion and decision on the matter until a later meeting so that the item can be “specifically” listed on the agenda. If the matter demands immediate attention and is a true emergency, the public body should consider using the emergency exception described in Section 7.6.9.

7.7.7 Calls to the Public. In 2000, the Legislature clarified the limitations on open calls to the public during public meetings. A.R.S. § 38-431.01(G) now provides that a public body may make an open call to the public to allow individuals to address the public body on any issue within the jurisdiction of the public body. Members of the public

body may not discuss or take action on matters raised during the call to the public that are not specifically identified on the agenda. A.R.S. § 38-431.01(G). Public body members may, however, respond to criticism made by those who have addressed the public body, ask staff to review a matter, or ask that a matter be put on a future agenda. *Id.* See also Ariz. Att’y Gen. Op. I99-006.

The best practice is to include language similar to the following on the agenda to explain in advance the reason members of the public body cannot respond to topics brought up during the call to the public that are not on the agenda: “Call to the Public: This is the time for the public to comment. Members of the Board may not discuss items that are not specifically identified on the agenda. Therefore, pursuant to A.R.S. § 38-431.01(G), action taken as a result of public comment will be limited to directing staff to study the matter, responding to any criticism or scheduling the matter for further consideration and decision at a later date.”

7.7.8 Current Event Summaries. The Open Meeting Law allows the chief administrator or presiding officer of a public body to present a brief summary of current events without listing in the agenda the specific matters to be summarized, provided that the summary is listed on the agenda and that the public body does not propose, discuss, deliberate or take legal action at that meeting on any matter in the summary unless the specific matter is properly noticed for legal action. A.R.S. § 38-431.02(K). Public bodies should limit the use of this provision to appropriate situations and should strive to provide as much advance information as possible to the public.

7.7.9 Emergencies. A public body may discuss, consider, and decide a matter not on the agenda when an actual emergency exists requiring that the body dispense with the advance notice and agenda requirements. A.R.S. § 38-431.02(D). See Section 7.6.5 for a discussion of what constitutes an actual emergency.

To use the emergency exception, the public body must do several things. First, the public body must give “such notice as is appropriate to the circumstances” and must “post a notice within twenty-four hours declaring that an emergency session has been held” and setting forth the same information as is required in an agenda for a regular meeting. A.R.S. § 38-431.02(D); see Form 7.9.

Next, prior to the emergency discussion, consideration, or decision, the public body must announce in a public meeting the reasons necessitating the emergency action. A.R.S. § 38-431.02(J). If the emergency discussion or consideration is to take place in an executive session, this public announcement must occur at a public meeting prior to the executive session. *Id.*

Finally, the public body must place in the minutes of the meeting a statement of the reasons for the emergency. *Id.* In the case of an executive session, this statement will appear twice, once in the minutes of the public meeting where the reasons were publicly announced, and again in the minutes of the executive session where the emergency discussion or consideration took place. See Section 7.8.2(7).

7.7.10 Changes to the Agenda. If a public body finds it necessary to change an agenda by modifying the listed matters or adding new ones, a new agenda must be prepared and distributed in the same manner as the original agenda, at least twenty-four hours in advance of the meeting. Ariz. Att’y Gen. Op. I79-45. Changes in the agenda within twenty-four hours of the meeting may be made only in case of emergency. Ariz. Att’y Gen. Op. I79-192; *see* Section 7.7.9.

7.8 Minutes.

Minutes must be taken of all public meetings and executive sessions, except that minutes need not be taken of meetings conducted by subcommittees and advisory committees. A.R.S. § 38-431.01(B).

7.8.1 Form of and Access to the Minutes. Minutes may be taken in writing or may be recorded by a tape recorder or video tape recorder. A.R.S. § 38-431.01(B); *see* Forms 7.10, 7.11. The minutes of a public meeting must be available for public inspection within three working days after the meeting. A.R.S. § 38-431.01(D). Public bodies concerned about distributing minutes before they have been officially approved at a subsequent meeting should mark the minutes “draft” or “unapproved” and make them available within three working days of the meeting. In no event should minutes be withheld from the public pending approval. Minutes must be reduced to a form that is readily accessible to the public. *See id.* If the minutes have been recorded by a mechanical recorder, allowing the public to have access to that recording is sufficient. However, if the minutes were taken in shorthand, those minutes must be typed or written out in longhand in order to comply with this requirement. *See* Form 7.10. The minutes of an executive session are confidential and may not be disclosed to anyone except certain authorized persons. A.R.S. § 38-431.03(B); *see* Section 7.8.4. To ensure confidentiality, minutes of executive sessions should be stored separately from regular session minutes to avoid inadvertent disclosure.

7.8.2 Contents of the Minutes of Public Meetings. The minutes of a public meeting must contain the following information:

1. “The date, time and place of the meeting.” A.R.S. § 38-431.01(B)(1).
2. “The members of the public body recorded as either present or absent.” *Id.* § (B)(2).
3. “A general description of the matters [discussed or] considered.” *Id.* § (B)(3). Minutes must contain information regarding matters considered or discussed at the meeting even though no formal action or vote was taken with respect to the matter. *See id.* § (B)(4).
4. “An accurate description of all legal actions proposed, discussed or taken and the names of persons who proposed each motion.” *Id.* § (B)(4). This does not require that the name of each person who votes on a motion be indicated, but only that the

member who proposed it be shown in the minutes. Generally, however, the agency, for its own benefit, will include the names of the member who seconded and those who voted in favor of or against the motion. In any case, it is wise for the minutes to reflect how the body voted and the numerical breakdown of the vote, e.g., 3 in favor, 1 against, 1 abstention.

5. The name of each person “making statements or presenting material to the public body and a [specific] reference to the legal action,” (see item 4) to which the statement or presentation relates. *Id.*
6. If the discussion in the public session did not adequately disclose the subject matter and specifics of the action taken, the minutes of the public meeting at which such action was taken should contain sufficient information to permit the public to investigate further the background or specific facts of the decision. *See* Section 7.7.5; *Karol v. Board of Educ. Trustees*, 122 Ariz. 95, 593 P.2d 649 (1979).
7. If matters not on the agenda were discussed or decided at a meeting because of an actual emergency, the minutes must contain a full description of the nature of the emergency. A.R.S. § 38-431.02(J); *see* Sections 7.6.5 and 7.7.9.
8. If a prior act was ratified, the minutes must contain a copy of the disclosure statement required for ratification. A.R.S. § 38-431.05(B)(3); *see* Section 7.11.2; Form 7.10.

7.8.3 Contents of the Minutes of Executive Sessions. The minutes of executive sessions must contain the following information:

1. “The date, time and place of the meeting.” A.R.S. § 38-431.01(B)(1), (C).
2. “The members of the public body recorded as either present or absent.” *Id.* § (B)(2), (C).
3. “A general description of the matters considered.” *Id.* § (B)(3), (C); *see* Section 7.8.2(3).
4. An accurate description of all instructions given to attorneys or designated representatives pursuant to A.R.S. § 38-431.03(A)(4), (5) and (7). *See* Sections 7.9.7, 7.9.8 and 7.9.10.
5. A statement of the reasons for emergency consideration of any matters not on the agenda. *See* A.R.S. § 38-431.02(J); Section 7.8.2(7).
6. Such other information as the public body deems appropriate. For example, the public body might record in its minutes that those present were advised that the information discussed in the session and the session minutes are confidential. *See* Form 7.11.

Arizona courts have held that once a complainant alleges facts from which a reasonable inference may be drawn supporting an Open Meeting Law violation, the burden of proof immediately shifts to a public body to prove that an affirmative defense or exception to the Open Meeting Law authorized an allegedly inappropriate executive session. *Fisher v. Maricopa County Stadium Dist.*, 185 Ariz. 116, 122, 912 P.2d 1345, 1351 (App. 1995). Hence, the best practice is for public bodies to tape record or keep

detailed minutes of executive sessions in order to ensure that they are prepared to meet their burden of proof in the event a lawsuit is filed.

7.8.4 Confidentiality of Executive Session Minutes. The minutes of an executive session and all discussions that take place at an executive session are confidential and may not be disclosed to anyone, A.R.S. § 38-431.03(B), except that they may be disclosed to the following people:

1. Any member of the public body that met in the executive session and members who did not attend the executive session. A.R.S. § 38-431.03(B)(1); *Picture Rocks Fire Dist. v. Updike*, 145 Ariz. 79, 699 P.2d 1310 (App. 1985).
2. Any officer, appointee, or employee who was the subject of discussion at an executive session authorized by A.R.S. § 38-431.03(A)(1) may see those portions of the minutes directly pertaining to them. A.R.S. § 38-431.03(B)(2); *see* Section 7.9.4.
3. Staff personnel, to the extent necessary for them to prepare and maintain the minutes of the executive session.
4. The attorney for the public body, to the extent necessary for the attorney to represent the public body.
5. The Auditor General in connection with the lawful performance of its duty to audit the finances or performance of the public body. A.R.S. § 38-431.03(B)(3); Ariz. Att’y Gen. Op. I79-130.
6. The Attorney General or County Attorney when investigating alleged violations of the Open Meeting Law. A.R.S. § 38-431.03(B)(4).
7. The court, for purposes of a confidential inspection. A.R.S. § 38-431.07(C).

The Open Meeting Law requires that a public body advise all persons attending an executive session or obtaining access to executive session minutes or information that such minutes and information are confidential. A.R.S. § 38-431.03(C). Public bodies should maintain executive session minutes in a secure file separate from the public meeting minutes to guard against accidental disclosure.

7.9 Executive Sessions.

Section 38-431.03, A.R.S., contains an exception to the general requirement of the Open Meeting Law that all meetings must be open to the public. That Section provides seven specific instances in which a public body may discuss matters in an executive session. An executive session is defined as “a gathering of a quorum of members of a public body from which the public is excluded for one or more of the reasons prescribed in [A.R.S. § 38-431.03].” A.R.S. § 38-431(2). An executive session may be convened solely for the purpose of discussing matters and, in limited instances, giving instructions to attorneys and designated representatives. A.R.S. § 38-431.03(D). No legal action may be taken in the executive session. *Id.*

Arizona courts have strictly construed the seven authorized executive session topics because their legislative charge is to “promote openness in government, not to expand exceptions which could be used to obviate the rule.” See *Fisher v. Maricopa County Stadium Dist.*, 185 Ariz. 116, 124, 912 P.2d 1345, 1353 (App. 1995). Thus, unless the proposed discussion plainly falls within one of the Open Meeting Law executive session topics or is specifically authorized by the public body’s enabling legislation, discussion should take place only in a public meeting.

In litigation, the burden of proof is initially on the complainant to “allege facts from which a reasonable inference may be drawn supporting an Open Meeting Law violation.” *Id.*, 185 Ariz. at 122, 912 P.2d at 1351. The burden then immediately shifts to the public body to prove that an affirmative defense or exception to the Open Meeting Law authorized the executive session. *Id.*

7.9.1 Deciding to Go Into Executive Session. Before a public body may go into executive session, a majority of the members constituting a quorum must vote in a public meeting to hold the executive session. A.R.S. § 38-431.03(A). Generally, the vote will be taken immediately before going into executive session. However, in some cases an agency may know that at a future date it will need to meet in executive session, in which case it can then vote at the public meeting to meet on the later date in executive session. On that future date, the agency does not have to first meet again in a public session.

7.9.2 Executive Session Requirements. Once the majority of members of a public body has voted to hold an executive session, the chairman of the public body should ask the public to leave and remove all materials such as briefcases and backpacks to ensure that no recording devices have been left in the room. All persons must leave the meeting except the members of the public body and those individuals whose presence is reasonably necessary for the public body to carry out its executive session responsibilities. A.R.S. § 38-431(2). The chairman should remind all present that the business conducted in executive sessions is confidential pursuant to A.R.S. § 38-431.03(C).

7.9.3 Authorized Executive Sessions. The Open Meeting Law permits only seven categories of topics to be discussed in executive session. A.R.S. § 38-431.03(A). These seven categories are discussed in Sections 7.9.4 - 7.9.10. Because courts are likely to strictly construe these provisions, unless the proposed discussion plainly falls within an executive session category it should take place only in a public meeting. Finally, the Open Meeting Law does not require that these discussions take place in executive session. If public disclosure of the public body’s discussion is not prohibited by any other statutory provision and government interests are not threatened, a public body may choose to conduct its discussions in a public setting.

7.9.4 Personnel Matters. The discussion or consideration of employment, assignment,

appointment, promotion, demotion, salaries, discipline, resignation, or dismissal of a public officer, appointee, or employee of a public body may take place in an executive session. A.R.S. § 38-431.03(A)(1); *City of Flagstaff v. Bleeker*, 123 Ariz. 436, 600 P.2d 49 (App. 1979). This authorization for an executive session applies only to discussions concerning specific officers, appointees, and employees. This provision permits discussion in executive session of applicants for employment or appointment even though the applicants may not be currently employed by the public body.

If the affected officer, appointee, or employee requests, these discussions must be conducted in a public meeting and not in an executive session. A.R.S. § 38-431.03(A)(1). Accordingly, the Open Meeting Law requires that an officer, appointee, or employee who is the subject of the discussion in executive session must be given advance written notice of the proposed executive session. *Id.* The notice given to the officer, appointee, or employee must describe the matters to be considered by the public body in a manner sufficient to enable the employee to make the initial decision whether to have the matters discussed in a public meeting. *Id.* In addition, the written notice must be given sufficiently in advance of the proposed meeting, and in no event less than twenty-four hours prior to the meeting, to enable the employee to make the foregoing determination and to prepare an appropriate request for a public meeting. *Id.*; see Ariz. Att’y Gen. Op. I79-49. See also Form 7.13. There is no emergency exception to the requirement that an affected officer, appointee, or employee receive at least twenty-four hours’ notice. However, the public body can discuss personnel matters in a public meeting with less than twenty-four hours’ notice if an actual emergency exists. A.R.S. § 38-431.02(D). See Sections 7.6.5 and 7.7.9.

Although the public body may *permit* the public officer, appointee, or employee being discussed to attend the executive session, the Open Meeting Law is unclear whether he has the right to attend. Whether he attends or not, the public body must make the minutes of the executive session available to the public officer, appointee, or employee who was the subject of discussion in the executive session. A.R.S. § 38-431.03(B)(2).

A public body may consider several persons for possible appointment to a position or consider several employees for possible disciplinary action. In such cases, the public body may consider the matter in executive session provided all those being considered are given the required notice. If some, but not all of those given notice request a public meeting, the public body has two options: the public body may limit the public discussion to those persons filing the request and discuss the remaining persons in an executive session; or, because the Open Meeting Law does not require the public body to discuss personnel matters in executive session, the public body may discuss the entire matter in a public meeting.

Public bodies should take care to ensure that the scope of executive sessions for personnel discussions is limited to true personnel matters. The Attorney General has opined that the Open Meeting Law prohibits public bodies from conducting in executive sessions lengthy information gathering meetings that explore the operation of public programs under the guise of conducting a personnel evaluation. Only the actual

evaluation—discussion or consideration of the performance of the employee—may take place in an executive session. Ariz. Att’y Gen. Op. I96-012. A public body that wishes to discuss or consider an employee’s evaluation in executive session, pursuant to A.R.S. § 38-431.03(A)(1), should adopt a bifurcated process that would permit the public body to gather information about public programs at a public meeting, while allowing the public body to enter executive session to discuss or consider the actual evaluation. Ariz. Att’y Gen. Op. I96-012.

7.9.5 Confidential Records. An executive session may be held when the public body is considering or discussing “records exempt by law from public inspection.” A.R.S. § 38-431.03(A)(2). This specifically includes situations in which the public body is receiving and discussing “information or testimony that is specifically required to be maintained as confidential by state or federal law.” *Id.* This provision allows the use of an executive session whenever the public body intends to discuss or consider matters contained in records that are confidential by law. *See* Ariz. Att’y Gen. Ops. I90-058, I87-131. However, when confidential matters can be adequately safeguarded, the discussion may take place during a public meeting. *Cf.* Ariz. Att’y Gen. Op. I87-038 (medical records). The record being considered need not be expressly made confidential by statute, but rather may fall within the category of confidential records discussed in Chapter 6 of this handbook. For example, to preserve confidentiality, preliminary audit reports of state agencies prepared by the Auditor General are confidential and should be discussed by the public body in executive session. Ariz. Att’y Gen. Op. I80-035. Similarly, complaints against licensees that are investigated by a public body may be discussed in executive session. Ariz. Att’y Gen. Op. I83-006. In 2000, the Legislature revised the statute to allow public bodies to take testimony in executive sessions in certain situations. Public bodies should ensure that state or federal law requires that the public body maintain confidentiality of the information it receives before convening an executive session under A.R.S. § 38-431.03(A)(2).

7.9.6 Legal Advice. A public body may also go into executive session for the purposes of “discussion or consultation for legal advice with the attorney or attorneys of the public body.” A.R.S. § 38-431.03(A)(3). For this exemption to apply, the attorney giving the legal advice must be the attorney for the public body. *Id.* For purposes of this discussion, the “attorney for the public body” means a licensed attorney representing the public body, whether that attorney is a full time employee of the body, the attorney general or county, city, or town attorney responsible for representing the public body, an attorney hired on contract, or an attorney provided by an insurance carrier to represent the public body.

This provision authorizes consultations between a public body and its attorney. Accordingly, the only persons allowed to attend this executive session are the members of the public body, the public body’s attorney, and those employees and agents of both whose presence is necessary to obtain the legal advice. The mere presence of an attorney of the public body in the meeting room is not sufficient to justify the use of this

executive session provision. This provision can only be used for the purpose of obtaining “legal advice,” which involves the exchange of communications between lawyer and client. Once the legal advice has been obtained, the public body must go back into public session unless some other executive session provision applies and has been identified in the notice. *See City of Prescott v. Town of Chino Valley*, 166 Ariz. 480, 803 P.2d 891 (1990). Discussion between the members of the public body about what action should be taken is beyond the realm of legal advice, and such discussions must be held in public session.

7.9.7 Litigation, Contract Negotiations, and Settlement Discussions. A public body may hold an executive session for the purpose of “[d]iscussion or consultation with the attorneys of the public body in order to consider its position and instruct its attorneys regarding the public body’s position regarding contracts that are the subject of negotiations, in pending or contemplated litigation or in settlement discussions conducted in order to avoid or resolve litigation.” A.R.S. § 38-431.03(A)(4). This provision allows consideration and instruction only—it does *not* allow a public body to conduct contract negotiations or settlement discussions in an executive session.

This provision allows a public body to give its attorneys instructions on how they should proceed in contract negotiations, pending or contemplated litigation involving the public body, and settlement discussions. For example, the public body might authorize its attorney to settle a lawsuit on the most favorable terms possible up to a certain amount. Of course, if the attorney were to obtain an agreed settlement, the public body must formally approve it at a public meeting.

This provision is unique in that it permits public bodies to “instruct” their attorneys. In these limited situations, the public body must be able to discuss and arrive at some consensus on its position before it instructs its legal counsel. Executive session minutes must contain an accurate description of all instructions given. A.R.S. § 38-431.01(C).

The discussion in Section 7.9.6 of the definition of “attorney for the public body” applies with equal force to this Section.

7.9.8 Employee Salary Discussions. A public body may hold an executive session for the purpose of “[d]iscussions or consultations with designated representatives of the public body in order to consider its position and instruct its representatives regarding negotiations with employee organizations regarding the salaries, salary schedules or compensation paid in the form of fringe benefits of employees of the public body.” A.R.S. § 38-431.03(A)(5). This provision permits a public body, in executive session, to consult and discuss with its representatives its position on negotiating salaries or compensation paid in the form of fringe benefits and instruct representatives on how they should deal with the employee organizations. It does not authorize an executive session for purposes of meeting with the employees’ representative. If the public body or any standing, special, or advisory committee or subcommittee of the public body conducts the negotiations, those negotiations must be conducted in a public meeting.

This provision also allows the public body to “instruct” its representatives. The discussion in Section 7.9.7 of the practice of confirming instructions in public session and the minute-taking requirements applies with equal force to this Section.

7.9.9 International, Interstate, and Tribal Negotiations. A public body may go into executive session for the purpose of “[d]iscussion, consultation, or consideration for international and interstate negotiations.” A.R.S. § 38-431.03(A)(6). This provision does not apply to meetings at which the public body receives recommendations from representatives of federal agencies. Ariz. Att’y Gen. Op. I80-159.

This provision also permits a city or town, or its designated representatives, to enter into executive session with “members of a tribal council, or its designated representatives, of an Indian reservation located within or adjacent to the city or town.” A.R.S. § 38-431.03(A)(6). This is the only type of executive session in which negotiations with another party can take place.

7.9.10 Purchase, Sale or Lease of Real Property. A public body may meet in executive session to discuss and consult with its representatives concerning negotiations for the purchase, sale, or lease of real property. A.R.S. § 38-431.03(A)(7). This provision does not authorize an executive session for the purpose of meeting with representatives of the party with whom the public body is negotiating. This provision permits the public body to instruct its representatives regarding the purchase, sale or lease. For example, the public body can authorize its representative to negotiate up to a certain amount. Of course, the final contract must be approved by the public body in a public meeting.

This provision also allows the public body to “instruct” its representatives. The discussion in Section 7.9.7 of the practice of confirming instructions in public session and the minute-taking requirements applies with equal force to this Section.

7.9.11 Taking Legal Action. In an executive session, the public body may discuss and consider only the specific matters authorized by the statute. Furthermore, the public body may not take a vote or make a final decision in the executive session, but rather must reconvene in a public meeting for purposes of taking the binding vote or making final decisions. Taking a straw poll or informal or preliminary vote in executive session is unlawful under the Open Meeting Law. *See* A.R.S. § 38-431.03(D).

7.10 Public Access to Meetings.

7.10.1 Public Participation and Access. The public must be allowed to attend and listen to deliberations and proceedings taking place in all public meetings, A.R.S. § 38-431.01(A); however, the Open Meeting Law does not establish a right for the public to participate in the discussion or in the ultimate decision of the public body, Ariz. Att’y Gen. Op. 78-1. Other statutes may, however, require public participation or

public hearings. For example, before promulgating rules, state agencies must permit public participation in the rule making process, including the opportunity to present oral or written statements on the proposed rule. *See* Chapter 11. *See also* Section 7.7.2 for a discussion of the authorization (but not requirement) for public bodies to use an open call to the public.

The public body must provide the public with access to all public meetings. *See* A.R.S. § 38-431.01(A). This requirement is not met if the public body invokes any procedure or device that obstructs or inhibits public attendance at public meetings, such as requiring persons to sign in before they are permitted to attend the meeting or holding the meeting in a remote location, in a room too small to accommodate the reasonably anticipated number of observers, in a place to which the public does not have access, such as private clubs, or at an unreasonable time, such as 6:00 A.M. The Open Meeting Law, however, does not prevent a public body from requiring persons who intend to speak at the meeting to sign a register so as to permit the public body to comply with the minute-taking requirements. *See* Section 7.8.2(5).

In addition to complying with the Open Meeting Law, the notice and accommodations should conform with the provisions of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 - 12213 (Supp. 1992). *See* Sections 15.25.2 - 15.25.5. The public body may want to include a statement such as the following in any notice it issues: “Persons with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting [name of designated agency contact person] at [telephone number and TDD telephone number]. Requests should be made as early as possible to allow time to arrange the accommodation.”

7.10.2 Telephone Conferences. If one or more members of a public body are unable to be present in person at a public meeting, they may nevertheless participate by telephone or video conference if the practice is approved by the public body and is not prohibited by statutes applicable to meetings of the public body. Ariz. Att’y Gen. Ops. I91-033, I83-135. This practice presents several practical and legal problems and should be used only where there are no reasonable alternatives to presence at the meeting.

A public body must comply with the following guidelines to avoid violations of the Open Meeting Law.

1. The notice and the agenda should state that one or more members of the public body will participate by telephonic or video communications. In the appropriate notice, insert the following after the first sentence: “Members of the [name of public body] will attend either in person or by telephone conference call.”
2. The public meeting place where the public body normally meets should have facilities that permit the public to observe and hear all telephone or video communications.
3. The public body should develop procedures for clearly identifying all members participating by telephonic or video communications.
4. The minutes of the meeting should identify the members participating by tele-

phonic or video communications and describe the procedures followed to provide the public access to all communications during the meeting.

7.10.3 Recording the Proceedings. “All or any part of a public meeting ... may be recorded by any person in attendance by means of a tape recorder, camera or other means of sonic reproduction.” A.R.S. § 38-431.01(E). A public body may prohibit or restrict such recordings only if they actively interfere with the conduct of the meeting. *Id.*

7.11 Ratification.

7.11.1 Generally. A public body may ratify action previously taken in violation of the Open Meeting Law. *See* A.R.S. § 38-431.05(B). Ratification is appropriate when the public body needs to retroactively validate a prior act in order to preserve the earlier effective date of the action. For example, a public body may be required by law to approve its budget by a certain date. If the public body discovered after the statutory deadline that its earlier approval violated the Open Meeting Law, it could face serious legal problems. Even if the body met quickly to properly approve the budget, the approval would not have been made prior to the statutory deadline. Accordingly, the 1982 amendments permit the public body to meet and approve retroactively the action previously taken — that is, to ratify its prior action.

Ratification merely validates the prior action; it does not eliminate liability of the public body or others for sanctions under the Open Meeting Law, such as civil penalties and attorney’s fees.

7.11.2 Procedure for Ratification. The Open Meeting Law provides a detailed procedure for ratification. A.R.S. § 38-431.05(B). That procedure is as follows:

1. The decision to ratify must take place at a public meeting held in accordance with the Open Meeting Law.
2. The decision to ratify must be taken within thirty days after discovery of the violation or after such discovery should have been made by the exercise of reasonable diligence. A complaint from the public or the press that a public body has violated the Open Meeting Law should be investigated promptly, as a court may view this communication as the “discovery” from which the thirty day period runs.
3. The public notice of the meeting at which ratification is to take place, in addition to complying with the other requirements of the Open Meeting Law, *see* Sections 7.6 and 7.7, must include (a) a description of the action to be ratified, (b) a clear statement that the public body proposes to ratify a prior action, and (c) information on how the public may obtain a written description of the action to be ratified. *See* Form 7.12.
4. In addition to the notice and agenda of the meeting, the public body must make available to the public a detailed written description of the action to be ratified and

a description of all prior deliberations, consultations, and decisions by members of the public body related to the action to be ratified.

5. The description required under paragraph 4 must be included as part of the minutes of the meeting at which the decision to ratify was made.
6. The public notice, agenda, and written description discussed in paragraphs 3 and 4 must be made available to the public at least seventy-two hours prior to the public meeting.

7.12 Sanctions for Violations of the Open Meeting Law.

7.12.1 Nullification. All legal action transacted by any public body during a meeting held in violation of any provision of the Open Meeting Law is null and void unless subsequently ratified. A.R.S. § 38-431.05. The procedures for ratification are described in Section 7.11.2.

The Arizona Supreme Court, however, has held that legal actions taken in violation of the Open Meeting Law are voidable at the discretion of the court. *Karol v. Board of Educ. Trustees*, 122 Ariz. 95, 97, 593 P.2d 649, 651 (1979). In the *Karol* case, the court held that: “[A] technical violation having no demonstrated prejudicial effect on the complaining party does not nullify all the business in a public meeting when to conclude otherwise would be inequitable, so long as the meeting complies with the intent of the legislature.” *Id.*, 122 Ariz. at 98, 593 P.2d at 652. This decision imposes a substantial compliance test and requires a weighing of the equities before a court will declare an action void. The decision, however, preceded the 1982 amendment to the Open Meeting Law which specifically authorizes a procedure for ratification. It remains to be seen whether this change will cause the court to follow the literal language of the Open Meeting Law. Nevertheless, the serious consequences that flow from having an action of a public body declared void should serve to remind the public body that it should take every precaution to avoid even technical violations of the Open Meeting Law.

In some cases, the public body may have discussed a matter at an unlawful meeting, but thereafter met in a lawful open meeting at which it took a formal vote as its “final action.” The Arizona Court of Appeals has held that the subsequent “final action” taken at a lawful meeting is not void. *Valencia v. Cota*, 126 Ariz. 555, 617 P.2d 63 (App. 1980). The public body taking the final action at the subsequent lawful meeting should make available at that time the substance of all discussions that took place at the earlier unlawful meeting. If the public body wishes to preserve the effective date of the earlier action rather than simply redecide the matter, it must go through the ratification process. *See* Section 7.11.

7.12.2 Investigation and Enforcement. The 2000 Legislature enacted substantial revisions to the Open Meeting Law, including extensive changes to the investigation and enforcement provisions of the law. The Attorney General and County Attorneys are

authorized to investigate alleged Open Meeting Law violations. A.R.S. § 38-431.06.

The Open Meeting Law now specifically provides that the Attorney General and County Attorneys shall have access to executive session minutes when they are investigating alleged violations of the Open Meeting Law. A.R.S. § 38-431.03(B)(4). The Open Meeting Law also provides that disclosure of executive session information (such as disclosure to the Attorney General) does not constitute a waiver of the attorney-client privilege and directs courts reviewing executive session information to protect privileged information. *Id.* § (F).

The investigative authority of the Attorney General and County Attorneys was strengthened by the 2000 Legislature. The Attorney General and County Attorneys may issue written investigative demands to any person, administer oaths or affirmations to any person for the purpose of taking testimony, conduct examinations under oath, examine accounts, books, computers, documents, minutes, papers and recordings, and require people to file written statements, under oath, of all the facts and circumstances requested by the Attorney General or County Attorney. A.R.S. § 38-431.06(B). If a person fails to comply with a civil investigative demand, the Attorney General or County Attorney may seek enforcement of the demand in Superior Court.

Any person affected by “legal action” of a public body, the Attorney General, or the County Attorney for the county in which the alleged violation occurred, may file suit in superior court to require compliance with or prevent violations of the Open Meeting Law or to determine whether the law is applicable to certain matters or legal actions of the public body. A.R.S. § 38-431.07.

Additionally, when the provisions of the Open Meeting Law have not been complied with, a court of competent jurisdiction may issue a writ of mandamus requiring a meeting to be open to the public. A.R.S. § 38-431.04. A writ of mandamus is an order of the court compelling a public officer to comply with certain mandatory responsibilities imposed by law.

7.12.3 Civil Penalties. The court may impose a civil penalty not exceeding five hundred dollars against any person for each violation of the Open Meeting Law. A.R.S. § 38-431.07(A). This penalty can be assessed against a person who violates the Open Meeting Law or who knowingly aids, agrees to aid or attempts to aid another person in violating the Open Meeting Law. *Id.* This penalty is assessed against the individual and not the public body, and the public body may not pay the penalty on behalf of the person assessed, *see id.*

7.12.4 Attorney’s Fees. The court may also order payment of reasonable attorney’s fees to a successful plaintiff in an enforcement action brought under the Open Meeting Law. A.R.S. § 38-431.07(A). Normally those fees will be paid by the state or political subdivision of which the public body is a part or to which it reports. *Id.* However, if the court determines that a public officer violated the Open Meeting Law “with intent to deprive the public of information or of the opportunity to be heard,” the court must assess against that public officer or a person who knowingly aided, agreed to aid

or attempted to aid the public officer in violating the Open Meeting Law all of the costs and attorney's fees awarded to the plaintiff. *Id.* As in the case of an award of civil penalties, the public body may not pay such an award of attorney's fees assessed against the public officer individually. *See id.*

7.12.5 Expenditure for Legal Services by Public Body Relating to the Open Meeting Law. A public body may not retain counsel or expend monies for legal services to defend an action brought under the Open Meeting Law unless the public body has legal authority to make such an expenditure pursuant to other provisions of law and it approves the expenditure at a properly noticed open meeting prior to incurring the obligation. A.R.S. § 38-431.07(B).

7.12.6 Removal From Office. If the court determines that a public officer violated the Open Meeting Law "with intent to deprive the public of information or of the opportunity to be heard," the court may remove the public officer from office. A.R.S. § 38-431.07(A).

Form 7.1

Disclosure Statement

Section 7.6.3.1

STATEMENT OF LOCATIONS WHERE ALL NOTICES OF THE MEETINGS OF THE [NAME OF PUBLIC BODY] WILL BE POSTED

TO: THE HONORABLE SECRETARY OF STATE and THE CITIZENS OF ARIZONA

Pursuant to A.R.S. § 38-431.02, the [name of public body] hereby states that all notices of the meetings of the [name of public body] and any of its committees and subcommittees will be posted [identify the location where notices will be posted and include the hours during which such locations are open to the public, for example, “in the lobby of the State Capitol located at 1700 West Washington, Phoenix, Arizona, and at the press room of the State Senate Building, 1700 West Washington, Phoenix, Arizona. Both locations are open to the public Monday through Friday from 8:00 a.m. to 5:00 p.m. except legal holidays.”] Such notices will indicate the date, time, and place of the meeting and will include an agenda or information concerning the manner in which the public may obtain an agenda for the meeting.

Dated this ____ day of _____, 20____.

[name of public body]

By [authorized signature]

Form 7.2

Notice of Public Meeting of a Public Body

Sections 7.6.3, 7.7.4, 7.10.1

NOTICE OF PUBLIC MEETING OF THE [NAME OF PUBLIC BODY]

Pursuant to A.R.S. § 38-431.02, notice is hereby given to the members of the [name of public body] and to the general public that the [name of public body] will hold a meeting open to the public on [date, time, and exact location].

The agenda for the meeting is as follows:

[List the specific matters to be discussed, considered, or decided.
See Form 7.7 (Sample Notice and Agenda)]

[OR]

A copy of the agenda for the meeting will be available at [location where the agenda will be available] at least twenty-four hours in advance of the meeting.

Dated this ____ day of _____, 20 ____.

[name of public body]

By [authorized signature]

Persons with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting [name, telephone number, TDD telephone number]. Requests should be made as early as possible to arrange the accommodation.

Form 7.3

Notice of Public Meeting of a Subcommittee or Advisory Committee of a Public Body

Sections 7.6.3, 7.10.1

NOTICE OF MEETING OF THE [NAME OF SUBCOMMITTEE OR ADVISORY COMMITTEE] OF THE [NAME OF PUBLIC BODY]

Pursuant to A.R.S. § 38-431.02, notice is hereby given to the members of the [name of committee] of the [name of public body] and to the general public that the [name of committee] of the [name of public body] will hold a meeting open to the public on the [date, time, and exact location].

The agenda for the meeting is as follows:

[List the specific matters to be discussed, considered or decided.
See Form 7.7 (Sample Notice and Agenda)]

[OR]

A copy of the agenda for the meeting will be available at [location where the agenda will be available] at least twenty-four hours in advance of the meeting.

Dated this ____ day of _____, 20____.

[name of public body]

By [authorized signature]

Persons with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting [name, telephone number, TDD telephone number]. Requests should be made as early as possible to arrange the accommodation.

Form 7.4

Notice of Regular Meetings of a Public Body

Sections 7.6.3, 7.6.6, 7.7.4, and 7.10.1

NOTICE OF REGULAR MEETINGS OF THE [NAME OF PUBLIC BODY]

Pursuant to A.R.S. § 38-431.02(F), notice is hereby given to the members of the [name of public body] and to the general public that the [name of public body] will hold regular meetings on the [specific day of month] of each month during the year [year]. The meetings will begin at [time] and will be held at [exact location].

A copy of the agenda for the meeting will be available at [location where the agenda will be available] at least twenty-four hours in advance of the meeting.

Dated this ____ day of _____, 20 ____.

[name of public body]

By [authorized signature]

Persons with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting [name, telephone number, TDD telephone number]. Requests should be made as early as possible to arrange the accommodation.

Form 7.5

Notice of Meeting and Possible Executive Session of a Public Body

Sections 7.6.8 and 7.10.1

NOTICE OF MEETING AND POSSIBLE EXECUTIVE SESSION OF THE [NAME OF PUBLIC BODY]

Pursuant to A.R.S. § 38-431.02, notice is hereby given to the members of the [name of public body] and to the general public that the [name of public body] will hold a meeting open to the public on [date, time, and exact location] for the purpose of deciding whether to go into executive session. If authorized by a majority vote of the [name of public body], the executive session will be held immediately after the vote and will not be open to the public.

The agenda for the meeting is as follows:

[Include a general description of the matters to be discussed or considered, but exclude information that would defeat the purpose of the executive session. *See* Form 7.7 (Sample Notice and Agenda)]

[OR]

A copy of the agenda for the meeting will be available at [location where the agenda will be available] at least twenty-four hours in advance of the meeting.

This executive session is authorized under A.R.S. § 38-431.03, Subsection (A), paragraph [list applicable provision].

Dated this ____ day of _____, 20____.

[name of public body]

By [authorized signature]

Persons with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting [name, telephone number, TDD telephone number]. Requests should be made as early as possible to arrange the accommodation.

Form 7.6

Notice of Combined Public Meeting and Executive Session

Sections 7.6.8, 7.7.4, and 7.10.1

**NOTICE OF COMBINED PUBLIC MEETING AND EXECUTIVE
SESSION OF [NAME OF PUBLIC BODY]**

Pursuant to A.R.S. § 38-431.02, notice is hereby given to the members of the [name of public body] and to the general public that the [name of public body] will hold a meeting open to the public on [date, time, and exact location]. As indicated in the agenda, pursuant to A.R.S. § 38-431.03(A)(X), the [name of public body] may vote to go into executive session, which will not be open to the public, to discuss certain matters.

The agenda for the meeting is as follows:

[List the specific matter to be discussed, considered, or decided. See Form 7.7 (Sample Notice and Agenda). Identify those matters that may be discussed or considered in executive session and identify the paragraph of A.R.S. § 38-431.03(A) authorizing the executive session, but exclude information that would defeat the purpose of the executive session.]

[OR]

A copy of the agenda for the meeting will be available at [location where the agenda will be available] at least twenty-four hours in advance of the meeting.

Dated this ____ day of _____, 20 ____.

[name of public body]

By [authorized signature]

Persons with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting [name, telephone number, TDD telephone number]. Requests should be made as early as possible to arrange the accommodation.

Form 7.7

Sample Notice and Agenda of Public Meeting and Executive Session

Sections 7.6.4, 7.6.8, 7.7.2, 7.7.4, and 7.10.1

NOTICE AND AGENDA OF MEETING OF THE ARIZONA COMMISSION ON THE ENVIRONMENT

Pursuant to A.R.S. § 38-431.02, notice is hereby given to the members of the Arizona Commission on the Environment and to the general public that the Arizona Commission on the Environment will hold a meeting open to the public on January 21, 2000, beginning at 8:30 a.m. in Room 201, Health Building, 1740 West Adams, Phoenix, Arizona. As indicated in the following agenda, the Arizona Commission on the Environment may vote to go into executive session, which will not be open to the public, to discuss certain matters.

The agenda for the meeting is as follows:

- I. Call to Order. (Chairman Smith)
- II. Approval of Minutes of October 19, 1999 Meeting.
- III. Committee Reports. (Oral reports of the following committees and discussion thereon.)
 1. Computer Committee. Report by the chair of the Commission's Advisory Committee on proposals for acquiring a new computer system for the Commission.
- IV. Personnel.
 1. Consideration of applicants for Director of the Commission. The Commission may vote to discuss this matter in executive session pursuant to A.R.S. § 38-431.03(A)(1). The names of the applicants may be obtained by contacting the Commission's Executive Secretary.
 2. Selection of Director of the Commission. The Commission may defer a decision on this matter to a later date.
- V. Litigation.
 1. *State v. Acme Polluters*. Discussion and decision concerning possible settlement. The Commission may vote to discuss this matter with the Commission's attorneys in executive session pursuant to A.R.S. § 38-431.03(A)(3) and (4). The Commission may decide the matter in the public meeting or defer decision to a later date.
 2. Instituting Litigation. Discussion with and instruction to the Com-

mission's attorneys concerning the filing of an enforcement action against The Brown Corporation. The Commission may discuss this matter in executive session pursuant to A.R.S. § 38-431.03(A)(2), (3), and (4). The Commission may decide the matter in the public meeting or defer decision to a later date.

VI. Consent Agenda.

Approval of routine warrants, purchase orders, travel claims, employee leave and transfer requests, and employee resignations. (Documentation concerning the matters on the consent agenda may be reviewed at the Commission's office.) Any matter on the Consent Agenda will be removed from the Consent Agenda and discussed as a regular agenda item upon the request of any Commission member.

1. Approval of purchase order numbers 1204, 1205, and 1206 for purchase of computer equipment.
2. Approval of travel claims for employees John Q. Smith and Mary M. McGee.
3. Approval of resignation of Daniel Warren and resolution to thank Daniel Warren for ten years of service.

VII. Call to the Public.

This is the time for the public to comment. Members of the Board may not discuss items that are not on the agenda. Therefore, action taken as a result of public comment will be limited to directing staff to study the matter or scheduling the matter for further consideration and decision at a later date.

VIII. Announcements.

Announcements of future meeting dates and other information concerning the Commission.

A copy of the agenda background material provided to Commission members (with the exception of material relating to possible executive sessions) is available for public inspection at the Commission's office, Room 402, Health Building, 1740 West Adams, Phoenix, Arizona.

Dated this 7th day of January, 2000.

ARIZONA COMMISSION ON THE ENVIRONMENT

Chris Jones
Executive Secretary

Persons with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting [name, telephone number, TDD telephone number]. Requests should be made as early as possible to arrange the accommodation.

Form 7.8

Certification of Posting of Notice

Section 7.6.9

CERTIFICATION OF POSTING OF NOTICE

The undersigned hereby certifies that a copy of the attached notice was duly posted at [place] on [date and time] in accordance with the statement filed by the [name of public body] with the [name of public officer with whom the statement was filed].

Dated this ____ day of _____, 20____.

[name and title of person signing the certificate]

Form 7.9

Special Notice of Emergency Meeting

Section 7.7.9

**SPECIAL NOTICE OF AN EMERGENCY MEETING
OF [NAME OF PUBLIC BODY] HELD [DATE]**

Pursuant to A.R.S. § 38-431.02(D), notice is hereby given that an emergency session of the [name of public body] was held on [date, time, and exact location].

At the emergency session the [name of public body] [describe the specific matters discussed, considered, or decided, or in the case of matters considered in an emergency executive session, a general description of the matters considered, provided that no information is included that would defeat the purpose of the executive session].

Dated this ____ day of _____, 20____.

[name of public body]

By [authorized signature]

Form 7.10

Minutes of Public Meeting

Sections 7.8.1 and 7.8.2

**MINUTES OF PUBLIC MEETING OF THE [NAME OF PUBLIC BODY]
OF MEETING HELD [DATE]**

A public meeting of the [name of public body] was convened on [date, time, and exact location]. Present at the meeting were the following members of the [name of public body]: [names of members present]. Absent were: [names of members absent]. The following matters were discussed, considered, and decided at the meeting:

1. [Generally describe all matters discussed or considered by the public body.]
2. [Describe accurately all legal actions proposed, discussed, or taken and the names of persons who proposed each motion].
3. [Identify each person making statements or presenting material to the public body, making specific reference to the legal action about which they made statements or presented material.]
4. [Other required information. *See* Section 7.8.2(6), (7), (8).]

Dated this ____ day of _____, 20____.

[name of public body]

By [authorized signature]

Form 7.11

Minutes of Executive Session

Sections 7.8.1, 7.8.3

**MINUTES OF EXECUTIVE SESSION
OF THE [NAME OF PUBLIC BODY] HELD [DATE]**

An executive session of the [name of public body] was convened on [date, time, and exact location]. The [name of public body] voted to go into executive session at a public meeting on [date, time, and exact location]. Present at the executive session were the following members of the [name of public body]: [names of members present]. Absent were: [names of members absent]. Also attending the executive session were: [names of those present including the reasons for their presence, for example, attorney for the public body, etc.]

The following matters were discussed and considered at the meeting:

1. [Generally describe the matters discussed or considered by the public body.]
2. [Describe all instructions given to attorneys or designated representatives pursuant to A.R.S. § 38-431.03(A)(4), (5) and (7).]
3. [If the executive session is held as an emergency session, include the statement of reasons for the emergency consideration. *See* Section 7.8.2(7).]
4. [Include such other information as the public body deems appropriate, including information necessary to establish that executive session was proper and appropriate. *See* Section 7.8.3(5).]

Dated this ____ day of _____, 20 ____.

[name of public body]

By [authorized signature]

Form 7.12

Notice of Action to be Ratified

Sections 7.6.4, 7.10.1, and 7.11.2

**NOTICE OF PUBLIC MEETING OF THE [NAME OF PUBLIC BODY]
FOR THE PURPOSE OF RATIFYING PAST ACTION TAKEN
IN VIOLATION OF OPEN MEETING LAW**

Pursuant to A.R.S. § 38-431.05, notice is hereby given to the members of the [name of public body] and to the general public that the [name of public body] will hold a meeting open to the public on [date, time, and exact location].

The purpose of the meeting is to ratify an action of the [name of public body] that may have been taken in violation of the Open Meeting Law. This action involved:

[Describe the action.]

The public may obtain a detailed written description of the action to be ratified, and all deliberations, consultations, and decisions by members of the public body that preceded and relate to this action to be ratified at [identify the location and include hours] at least 72 hours in advance of the meeting.

Dated this ____ day of _____, 20____.

[name of public body]

By [authorized signature]

Persons with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting [name, telephone number, TDD telephone number]. Requests should be made as early as possible to arrange the accommodation.

Form 7.13

Employee Notice of Executive Session

Section 7.9.4

[DATE]

[Name and Address of Officer
or Employee who is the subject
of discussion at the executive session]

Dear [Name of employee]:

This is to advise you that the [name of public body] will meet in executive session at its next meeting on [date, time, and exact location] to discuss [describe nature of matters to be discussed or considered]. You may request that the discussion take place during the [name of public body's] public meeting rather than in executive session, by contacting the undersigned not later than [date and time by which notification must be given*].

Any person with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting [name, telephone number, TDD telephone number]. Requests should be made as early as possible to arrange the accommodation.

Very truly yours,

[authorized signature]

* Since the public body must post its notice of either a public meeting or an executive session at least twenty-four hours before the meeting, the deadline for the employee to exercise his or her right to demand a public meeting must be more than twenty-four hours before the meeting.

Part III

Recent Changes to Arizona's Open Meeting Law

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STATUTORY CHANGES

A.R.S. § 38-431 amended by *Laws 2007, Ch. 71, § 1*:

- ◆ Defines advisory committee or subcommittee as any entity, however designated, that is officially established on motion or order of a public body or presiding officer of the public body, and whose members have been appointed for the specific purpose of making a recommendation concerning a decision to be made or considered or a course of conduct to be taken or considered by the public body.

A.R.S. § 38-431.01 amended by:

Laws 2006, Ch. 294, § 1

- ◆ Requires cities and towns with websites and a population of more than 2,500 persons to post a statement showing the legal actions taken during the meetings or any recordings of the meeting on their website within three working days after the meeting.
- ◆ Requires cities and towns with a population of more than 2,500 persons and with internet websites to post the approved minutes of all city and town council meetings on the internet website within two working days after the approval of the minutes.
- ◆ Provides that a technological problem or failure that prevents the posting of public notices or other usage of the website does not preclude the holding of the meeting, if all other public notice requirements are complied with.
- ◆ Section 38-431.01(E) was also amended to read, “[a]ll or any part of a public meeting of a public body may be recorded by any persons in attendance by means of a tape recorder or camera or any other means of sonic reproduction, provided that there is no active interference with the conduct of the meeting.” (emphasis added.)

Laws 2007, Ch. 71, §2

- ◆ Requires subcommittees and advisory committees to take meeting minutes or record all of their meetings, including executive sessions.
- ◆ Requires subcommittees and advisory committees to post a statement describing legal action taken during a meeting or any recording of a meeting on its internet website within ten working days of the meeting.

A.R.S. § 38-431.02 amended by *Laws 2002, Ch. 247, §1* and *Laws 2006, Ch. 294, §2*:

- ◆ Allows a member of a public body, during a public meeting, to present a brief summary of current events without listing in the agenda the specific matters to be summarized provided that the summary is listed on the agenda and the public body does not propose, discuss, deliberate, or take legal action at that meeting on any matter in the summary unless the specific matter is properly noticed for legal action.
- ◆ Requires cities and towns with websites and a population of more than 2,500

persons to post notices of their public meetings on their websites and give additional public notice as is reasonable and practical as to all meetings.

- ◆ Provides that technological problem or failure that prevents the posting of public notices or the usage of the website does not preclude the holding of a meeting, if all other public notice requirements are complied with.

RECENT CASE LAW

Tanque Verde Unified School District No. 13 of Pima County v. Bernini, 206 Ariz. 200, 76 P.3d 874 (App. Div.2 2003)

- ◆ The Arizona Court of Appeals determined that the term “negotiations” found in A.R.S. § 38-431.01(A)(7), which provides an exception to the Arizona Open Meeting Laws for discussion or consultations with designated representatives of the public body in order to consider its position and instruct its representatives regarding negotiations for the purchase, sale, or lease of real property, should be read narrowly and that the District violated the open meeting law by conducting site selection process for proposed high school in executive session.
- ◆ The court of appeals also held, however, that the District timely ratified selection of site for new school by holding public meeting and conducting single vote on issue, even though vote was held more than a year after decision was made in executive sessions which violated open meeting laws. The District had no basis for knowing that executive sessions had violated open meeting laws and only site selection process, not vote, was done in violation of open meeting laws.
- ◆ When a party claims a public body held an illegal executive session, the public body must prove that the session was properly conducted.
- ◆ A party who asserts that a public body has violated the open meeting law has the burden of proving that assertion.

Long v. City of Glendale, 208 Ariz. 319, 93 P.3d 519 (App. Div.1 2004)

- ◆ The open meeting law does not compel the general public to know the content of every public meeting or search public records pertaining to those meetings.
- ◆ The policy supporting the open meeting law is to open the conduct of the business of government to the scrutiny of the public and to ban decision making in secret.
- ◆ The policy behind the open meetings law did not include attributing knowledge to every citizen of every action taken at every public meeting.
- ◆ Legal action taken by the city had to occur at a public meeting.

State ex. rel. Thomas v. Schneider, 212 Ariz. 292, 130 P.3d 991 (App. Div. 1, 2006)(review denied September 26, 2006)

- ◆ The Arizona Court of Appeals concluded that the attorney-client privilege applies to all qualifying communications between an attorney and a client. City officers may claim their privilege in conversations with the city attorney for matters relating to their official powers and duties.
- ◆ Attorney-client privilege applies to communications between a government official and a government attorney in a grand jury proceeding against the government official.
- ◆ Communications that occur with governmental bodies in executive session can be subject to the attorney-client privilege even though there are a number of persons present during the communication.
- ◆ Statements made in executive session are confidential whether or not they are otherwise privileged, subject to only a few exceptions.
- ◆ Attorney cannot testify about communications made during executive session even pursuant to a grand jury subpoena.

ATTORNEY GENERAL OPINIONS ISSUED SINCE 2001

Opinion 104-001: As a public body created by statute, the Joint Underwriting Association is subject to all the public process laws applicable to the Department of Insurance, including state procurement, public records, open meeting, personnel code, fiscal controls, and governmental immunity provisions.

Opinion 105-004: E-mail communications among a quorum of the board are subject to the same restrictions that apply to all other forms of communications among a quorum of the board. E-mails exchanged among a quorum of a board that involve discussions, deliberations, or taking legal action on matters that may reasonably be expected to come before the board constitute a meeting through technological means. While some unilateral e-mail communications from a board member to a quorum would not violate open meeting law, a board member may not propose legal action in an e-mail as a device to circumvent the requirements in the open meeting law.

Opinion 107-001: The Board of Trustees appointed by the political subdivisions under A.R.S. section 11-952.01 constitutes a public body under A.R.S. section 38-431(6). In administering an employee benefits program on behalf of the political subdivisions that created it, the Board constitutes an instrumentality of those political subdivisions. Moreover, one or more of the participating political subdivisions appoints each trustee on the Board. Therefore, the Board falls within the definition of “public body” in A.R.S. section 38-431(6) and must comply with the Arizona Open Meeting Law.

Part IV

**Arizona Revised Statutes
Title 41. State Government
Chapter 8. Agencies of the Legislative Department,**

Article 5. Office of Ombudsman–Citizens’ Aide

41-1376.01. Additional powers and duties; definitions 58

41-1376.01. Additional powers and duties; definitions

- A. In addition to the powers and duties prescribed in section 41-1376, the ombudsman-citizens aide shall appoint two assistants, one of whom shall be an attorney, to help the ombudsman-citizens aide investigate complaints relating to public access laws involving an agency. The assistants shall train public officials and educate the public on the rights of the public and the responsibilities of public agencies under the public access laws. The assistants shall prepare interpretive and educational materials and programs in cooperation with the ombudsman-citizens aide and shall distribute to elected or appointed public officials the public access laws and educational materials concerning the public access laws.
- B. The annual report of the ombudsman-citizens aide shall include the following information about public access:
 - 1. The number of inquiries that are received from the public, the media and government agencies.
 - 2. The number of inquiries that are received about state agencies, county agencies, city or town agencies, school districts and other local jurisdictions.
 - 3. The number of requests that are received concerning public records and public meetings.
 - 4. The number of investigations that are conducted and the results of the investigations.
- C. For investigations made pursuant to this section, the ombudsman-citizens aide may:
 - 1. Make inquiries and obtain information considered necessary subject to the restrictions in section 41-1377.
 - 2. Enter without notice to inspect agency premises with agency staff on the premises.
 - 3. Hold hearings.
 - 4. Notwithstanding any other law, have access to all agency records, including confidential records, except:
 - (a) Sealed court records without a subpoena.
 - (b) Active criminal investigation records.
 - (c) Records that could lead to the identity of confidential police informants.
 - (d) Attorney work product and communications that are protected under attorney-client privilege.
 - (e) Confidential information as defined in section 42-2001, except as provided in section 42-2003, subsection M.
 - (f) Information protected by section 6103(d), 6103(p) or 7213 of the internal revenue code.
 - (g) Confidential information relating to section 36-2903, subsection I, section 36-2917, section 36-2932, subsection F or section 36-2972.
 - (h) Confidential information relating to sections 36-507, 36-509 and 36-2220.
 - (i) Documents that are protected by section 214 of the critical infrastructure information act of 2002 (6 United States Code section 133a) or by 49

Code of Federal Regulations Part 1520.

- (j) Information that is protected by section 214 of the critical infrastructure information act of 2002 (6 United States Code section 133a) or 49 Code of Federal Regulations part 1520 or critical infrastructure information as defined by section 41-1801 on government owned facilities that are classified as critical infrastructure by the federal government or as defined by section 41-1801.
- 5. Issue subpoenas if necessary to compel the attendance and testimony of witnesses and the production of books, records, documents and other evidence to which the ombudsman-citizens aide may have access pursuant to paragraph 4 of this subsection. The ombudsman-citizens aide may only issue a subpoena if the ombudsman-citizens aide has previously requested testimony or evidence and the person or agency to which the request was made has failed to comply with the request in a reasonable amount of time.
- D. It is contrary to the public policy of this state for any agency or any individual acting for an agency to take any adverse action against an individual in retaliation because the individual cooperated with or provided information to the ombudsman-citizens aide or the ombudsman-citizens aide's staff.
- E. For the purposes of this section:
 - 1. "Agency" has the same meaning prescribed in section 41-1371 but includes a public body as defined in section 39-121.01, subsection A, paragraph 2.
 - 2. "Public access laws" means:
 - (a) Title 39, chapter 1.
 - (b) Title 38, chapter 3, article 3.1.
 - (c) Any other state statute or rule governing access to public meetings or public records.

