

SAGINAW VALLEY STATE UNIVERSITY BOARD TRAINING



OPEN MEETINGS ACT PRIMER

Presented by
Joseph B. Urban, Esq.
Clark Hill, PLC
151 S. Old Woodard, Suite 200
Birmingham, MI 48009
(248) 988-1829
March 25, 2010
jurban@clarkhill.com
<http://www.clarkhill.com>

These materials are intended to provide general information and do not constitute legal or other professional advice for any specific situation or create an attorney-client relationship.

CLARK HILL

BOARD RESPONSIBILITIES ROUTINELY IMPACTED BY:

- **Academy's Charter and Oversight Agreement**
 - The sins of others
- **Open Meetings Act**
- **Freedom of Information Act**
- **Family Educational Rights to Privacy Act**
- **Also of some significance:**
 - Incompatible Public Offices
 - Contracts With Public Entities

OPEN MEETINGS ACT

- **MOST BASIC RULES: All meetings of a public body must be posted and conducted in the open, after proper notice**
- **There must be an opportunity for public comment at every posted meeting of the Board or a Board committee**
- **All deliberations and decisions of a public body must occur at a meeting open to the public**
- **Minutes of open meetings must be recorded and available to the public**

A BASIC COROLLARY: One Board Member acting outside of an open meeting cannot bind or speak for the Board of Directors unless specifically empowered to do so – not only is this dangerous for the academy, it could cost the board member his/her governmental immunity

Example: Management company asks board president to sign a loan document not previously deliberated upon by the Board of Directors

Example: Board Treasurer directs bookkeeper to amend budget

FACTORS TO CONSIDER

- **What is a meeting?**

- When a quorum of a “public body” is gathered for the purpose of deliberating toward **or** rendering a decision on public policy

- **Who is a public body?**

- The Academy Board is a public body

- A quorum of a public body is a public body for purposes of the meeting requirement

- A gathering of less than a quorum may also be a public body for purposes of the meeting requirement

- In limited circumstances, a single Board member may be a public body for purposes of the meeting requirement

WHAT IS A MEETING OF A PUBLIC BODY?

- If less than a quorum meets, and those members have been authorized by the Board to deliberate toward a matter of public policy
- A committee of less than a quorum is delegated a governmental function by the Board (e.g., decide student discipline appeals)
- A quorum of Board members unexpectedly occurs and the individuals then deliberate towards a decision on a public policy

EXAMPLES FROM COURT DECISIONS

- **Board committee assigned to review evaluation of administrators and length of administrator contracts; committee's refusal to meet in open violated the OMA even though committee recommended no changes to the Board and no Board action was taken**
- **A committee exercises authority if the committee controls whether a topic reaches the full board, by making a recommendation, or letting the issue die in committee**

WHAT TO AVOID

- **Deliberations via email, instant messaging, etc.**
- **Deliberations or decisions via round robin phone calls**
- **Straw or informal polls in closed session**
- **Appearing to have reached a foreordained conclusion during the open meeting**
- **Advance informal meetings to decide what to do at an open meeting**

MORE PITFALLS

- **Planned meetings of sub quorum of Board designed to evade requirement of open meetings**
 - If quorum appears at meeting noticed as meeting of sub quorum or of Board committee of less than quorum, either excess Board members should leave or meeting adjourned and posted as quorum of Board
- **Quorum of Board gathered together receives staff input or information on issues coming before the Board**

WHAT IS PERMITTED

- **Principal can talk to each Board member separately to inform them of facts or events or to poll Board on issues**
- **Individual Board members can lobby individual Board members about issues**

GREY AREA OF THE LAW – SOCIAL GATHERINGS

- **Lots of line drawing depending on the context and purpose and function of gathering**
- **Statute is clear in its intent and courts generally err in favor of ruling for open processes**
- **Gatherings are a grey area at this time given case law and AGOs**
 - When in doubt, post gathering as an open meeting
 - Avoid appearance of backroom decision making

ALL BUSINESS CONDUCTED IN OPEN

- **UNLESS SITUATION LITERALLY FALLS WITHIN ONE OF SECTION 8 EXEMPTIONS**
- **WHEN IN DOUBT, PROCEED IN THE OPEN OR DO NOT DELIBERATE OR ACT**

NOTICE OF MEETINGS

- **Two types of notices:**
 - notice to board members
 - Governed by Academy bylaws and Charter
 - notice to public
 - Governed by the Open Meetings Act
 - 1) Regular meetings set at annual meeting
 - 2) Special meetings must be posted at least 18 hours in advance
 - Posting of notices
 - principal office of Academy
 - principal office of the Board (if no principal office, then county clerk and (according to some authorizing bodies, the Secretary of State))
 - governed by Charter and OMA

CONTENTS OF NOTICES

- **Name of Board of Directors**
- **Address of Board of Directors**
- **Telephone number of Board of Directors**
- **Time of meeting**
- **Date of meeting**
- **Place of meeting**
- **Statement indicating where official minutes are stored and available for inspection**
- **Americans with Disabilities Act Notice (not required, but recommended)**
- **Agendas for public hearings (e.g. Annual Budget Hearing)**

MINUTES

- **Required to keep minutes of meetings**
- **Contents:**
 - Date of meeting
 - Time of meeting
 - Place of meeting
 - Board of Directors members present and absent
 - Every decision made by Board of Directors
 - All roll call votes
 - A record of other votes
 - Purpose of a closed session
 - Corrections, if any from minutes of prior meeting

EXEMPTIONS FOR CLOSED SESSION

- **Limited to what is stated in section 8**
- **Narrowly construed**
- **Must be initiated by a majority Board vote, in some cases, by a 2/3 roll call vote**

MOST COMMON CLOSED SESSIONS

- **Collective Bargaining**
- **Student discipline** at request of **student or parents/guardian** or TO CONSIDER confidential student records
- **Certain types of employee matters listed in section 8(a)** at request of **employee**
- **Periodic personnel evaluation**
- **Written legal opinion**

MORE ON CLOSED SESSIONS

- **Consideration of lease or purchase of real property**
- **Considering records exempt under another statute, such as the FOIA, ADA, criminal background checks, etc.**

WHO CAN BE PRESENT?

- **Any person the Board deems important to the subject at hand**
- **For the most part, Board controls who is present**

MINUTES OF CLOSED SESSIONS

- **Minutes must still be kept**
- **Minutes are not available to the public except by court order**
- **Board fiduciary responsibility to maintain confidentiality - best example: collective bargaining negotiations**

COMMON QUESTIONS

- **Can I vote by proxy?**
- **Can I vote by speaker phone?**
- **Can I vote by Videophone?**
- **Can't we go into closed session to discuss a personnel matter?**

SOME COMMON PROBLEMS

- **No broad exemption for personnel matters**
 - Limited to one of stated purposes
 - At request of employee
 - Employee controls whether meeting reverts back to open
- **DO NOT TALK ABOUT OTHER SUBJECTS WHILE IN CLOSED SESSION FOR DIFFERENT PURPOSE**
- **Maintain confidence of closed session discussions**

CONSEQUENCES OF VIOLATIONS OF OMA

- Possible legal action by media or taxpayer
- Injunctive order against Board or invalidation of Board action
- Civil (up to \$500 personal) and criminal fines and penalties (misdemeanor, up to \$2000)
- Payment of attorneys fees of the plaintiff
- May have to vote again if first vote ruled improper
- Removal of Board member
- Media circus and resulting embarrassment
- Charter violation

3 RULES OF OMA SURVIVAL

- **If you make a mistake, admit it early and be proactive**
- **Don't fear reenactment of valid decisions**
- **Be careful in your use of closed sessions**