

# Open Meetings Act & Freedom of Information Act

An Overview for the  
North Oakland County Water Authority



The Freedom of Information Act goes hand-in-hand with the Open Meetings Act because they are part of a collection of laws often referred to as “sunshine laws” – laws that promote openness in government and do away with the stereotypical fat cat politicians working behind the scenes in smoke-filled rooms.

## Intent of Open Meetings Act

- Government business is public business
- Open to the public
- Accessible to the public
- Decisions made in public
- Deliberations made in public
- Proposed HB requires physical attendance

That last item is important because if the board has not complied with the Open Meetings Act, its decisions may be invalidated.

The court can step in if noncompliance with the law has impaired the rights of the public.

Now if a lawsuit has been initiated to invalidate the actions of the board for violating the Act, the board, without making any admission, can reenact the disputed decision in conformity with the Act. In other words, if there is an inadvertent violation of the Act, it's a relatively simple matter to correct the matter.

There is pending legislation that would require physical presence of a quorum of the members for the meeting to be valid. Further, under the proposal, votes from members not physically present would not be counted. So even if there is a quorum physically present, a member not in the room could participate by conference call, but couldn't vote by conference call. This proposal has passed the House, but has not yet been addressed by the Senate. It is opposed by the Michigan Townships Association because it would prevent board members from utilizing commonplace technology to conduct business. This is a bigger deal in rural areas, especially in the Upper Peninsula where inclement weather might force the cancellation of meetings if members couldn't participate remotely.

## Public Participation

- No meeting without public notice
- People can address the meeting
  - People means anyone not just residents
  - Address any topic on agenda
  - Can impose reasonable time limits
- Anyone can record or videotape the meeting
- Try to accommodate unexpected large crowd

The notice must be at least 18 hours before the meeting. That 18 hours means hours that the public can view the notice. So if a notice is posted at 5 p.m. on a Friday for an 8 a.m. Monday meeting and the building closes at 5:30 and opens at 7:30, but isn't open on the weekends, there is effectively a one-hour notice.

One can get around that by posting the meeting on the outside of the building or on the inside of a glass door where folks can walk up to the building and see the notice. Still, it's a much better practice to provide 18-working hours notice.

When people attend the meeting, they can do so anonymously if they'd like. One can pass around a sign-in sheet, but they can decline to sign. However, if they want to address the board and speak at the meeting, they can be required to give their name and address for meeting minutes purposes.

Anyone can record the meeting and that includes video recording or live broadcasts from CNN or more realistically, local cable TV outlets. They don't need prior permission to record.

One should try to accommodate an unexpected large crowd. The key word is unexpected. If a large crowd is expected, then steps ought to be taken to make appropriate accommodations, including moving the meeting to a larger facility.

## Virtual Meetings

- Grand opening celebrations with quorum
- Social gathering with quorum
- Site visit with quorum
- Telephone conversations to build consensus
- Email exchange with “reply to all”

You'll note that the operative word in the first three examples is “quorum.” The last two examples we don't have a face-to-face meeting, but it is still prohibited to use a telephone to build a consensus. That's because it would violate the two important principles of the Open Meetings Act, that deliberations and decisions are made in public. It is impermissible to subvert the Act, conduct deliberations in private and, for all intents and purposes, make a decision in private, only to reserve the display of making a public decision at the public meeting.

Until you make a different decision for your group and include it in your bylaws, Robert's Rules sets your quorum at a majority of the members.

According to Robert's Rules, a *quorum* is the minimum number of voting members who must be present at a properly called meeting in order to conduct business in the name of the group. A quorum should consist of "as large as can be depended upon for being present at all meetings when the weather is not exceptionally bad." In other words, at best, a quorum is just an educated guess.

NOCWA has addressed the quorum question in its bylaws. The more interesting question is how many votes does it take to adopt a motion in the presence of the minimum number of members constituting a quorum. Is it the majority of the members even if they wouldn't constitute the majority if the full complement of members were present. Fortunately, NOCWA bylaws address that as well. Votes must be unanimous.

## Closed Sessions

- Requires a 2/3 roll call vote
  - Consider purchase of real estate
  - Consult with legal counsel
  - Collective bargaining
  - Review application for employment

The two-thirds vote requirement means a roll call vote.

That last item, review application for employment doesn't need a 2/3 vote if the applicant requests a closed session.

Also a 2/3 vote isn't required to dismiss or discipline a public officer or employee if requested by the public officer or employee.

## Violations / Penalties

- Public can sue, collect damages
- Intentional violations = \$1,000 fine
- Personally liable to person bringing suit

What are the damages? Most of the time they won't be particularly high, but if the information is time-sensitive to the person making the request, there is a possibility of substantial damages.

If there is an intentional violation of the act, the fine is up to \$1,000. Admittedly, that's not a particularly large sum.

There is a likelihood of personal liability in the face of a lawsuit, but the exposure is not more than \$500. So, again, we not talking about substantial exposure.

## Freedom of Information Act

- Policy to allow citizens to be informed
- Applies to all public bodies, both state & local
  - *Except*
  - Governor, Lt. Governor
  - State executive office and employees
  - The judiciary
  - Individual legislators

The only persons who can't utilize the Freedom of Information Act to gather public documents are persons who are incarcerated. They have a lot of time on their hands, and they could clog the system if allowed to run amok.

With respect to the last item, you'll note that the state executive office and employees are exempt, but not the legislature. However, individual legislators are exempt. If they weren't, the feeling is that it would have a chilling affect on how they vote.

Contractors are not subject to the Freedom of Information Act. They are not public bodies subject to the Act.

## General Provisions

- Public record
  - Writing in the possession of...
  - In the performance of a public function
- Two classes of public records
  - Exempt from disclosure
  - Not exempt from disclosure

The public record is one that is in existence. Public bodies are not generally required to create a public record where none currently exists.

Although a “writing” is broadly defined, it doesn’t include computer software, but it does include data stored on a computer.

So the first question to ask is: “Is it a public record?” In other words, is it a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function. If it is not a public record, there’s no need to investigate further. It is not subject to the Act.

So while emails are subject to the Act, a request seeking “all emails,” is too broad and can be denied as a result.

If you can’t hand over the documents for whatever reason, you must provide a reasonable opportunity for someone to review the material during regular business hours. Reasonable rules can be put in place to protect the records and prevent excessive or unreasonable interference with the work performed by the public body.

The Act does not require a public body to create a new public record or make a compilation, summary or report of information.

## All Requests Must Be in Writing

- Must respond within five days or 10 day extension
  - Grant the request
  - Deny the request (in writing)
  - Grant part of the request
    - Provide some but not all of a multi-document request
    - Provide the requested document with redaction

### Note: Court ruling on exempted material

- Must describe what's being exempted
- Must provide justification for exemption

Writing means any writing, including faxes and emails. The writing does not have to specifically say "FOIA" although often people will do that to put us on notice that we have a limited amount of time to answer the question.

The five days means five **business** days. It doesn't include holidays or weekends. Also with respect to faxes and emails, they are not considered legally received until the next business day. That's when the five-day period starts running.

If you deny the request, you are required to explain why. The same is true if you grant part of the request and deny other parts. You must explain why the withheld documents are exempt.

If you provide a redacted document, you must tell what was redacted, such as a name, address, etc., without of course disclosing the name or address.

The 10-day extension is 10 **business** days. You only get one extension and you must explain why an extension is necessary.

## Charging for Information

- Can charge actual costs
  - Labor
  - Copying
  - Mailing
- Can demand deposit of ½ if cost exceeds \$50
- Can waive or reduce fee

Waiving the fee is usually done when providing the information serves a public interest. In the case of the WRC, we frequently waive fees for newspapers and other media outlets because they can assist us in publicizing information we want to share with the public.

## What's Exempt

1. Personal records / invasion of privacy
2. Records which would jeopardize safety
3. Records exempted by public policy
4. Records exempted by other statutes

Notice that the reference is for "personal" records, not "personnel" records. And there is two parts to that, the records must be of a personal nature and disclosure must be an invasion of privacy. Personnel records don't enjoy the kind of protection from public scrutiny as public employees would like to hope. How much are you paid is confidential if you work for a private company. It's open to discussion if you work for the government. After all, the reasoning behind that is that the public is paying the salary, they ought to know how much they're paying.

Records which would jeopardize safety usually refers to police agencies. The identification of an undercover officer, for example, would very likely put the officer's safety in jeopardy.

Public policy records include such things as medical records, but not necessarily medical records associated with a homicide.

Records exempted by other statutes would be something like police reports of an active investigation.

Can't just redact material without identifying the nature of what is being redacted. Now, there must be included a written justification for the exemption.

## What Happens After Denial?

- Appeal to the public body
- Petition a court to compel disclosure
  - If successful, attorney fees are paid
  - If denial was arbitrary, punitive damages awarded



## Comments / Questions