

The Vermont School Boards Association and Vermont Superintendents Association



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Agenda

Open Meeting Law

- "Public Bodies"
- "Meetings"
 - Trainings and Retreats
 - Email conversations
- Executive Sessions

Public Records Act

- What records are public?
- How to respond to records requests

Elections

- Incompatible offices
- Informational materials to the electorate

Open Meeting Law



What is the Open Meeting Law?

OML Declaration of Public Policy:

... public commissions, boards, councils and other public agencies in this state exist to aid in the conduct of the people's business and are accountable to them ...

¹ V.S.A. § 311

What does the Open Meeting Law mean?

The intent of the law is to create transparency and accountability in government by requiring public bodies to come to consensus in decision-making before the public and with public participation.



The Open Meeting Law provides that all meetings of a public body are always open to the public, with rare exceptions.

To whom does the Open Meeting Law apply?

All PUBLIC BODIES, including State and municipal boards, councils, and commissions.
This also includes all committees and subcommittees of those bodies.



The Open Meeting Law must be followed anytime a “quorum” holds a “meeting.”



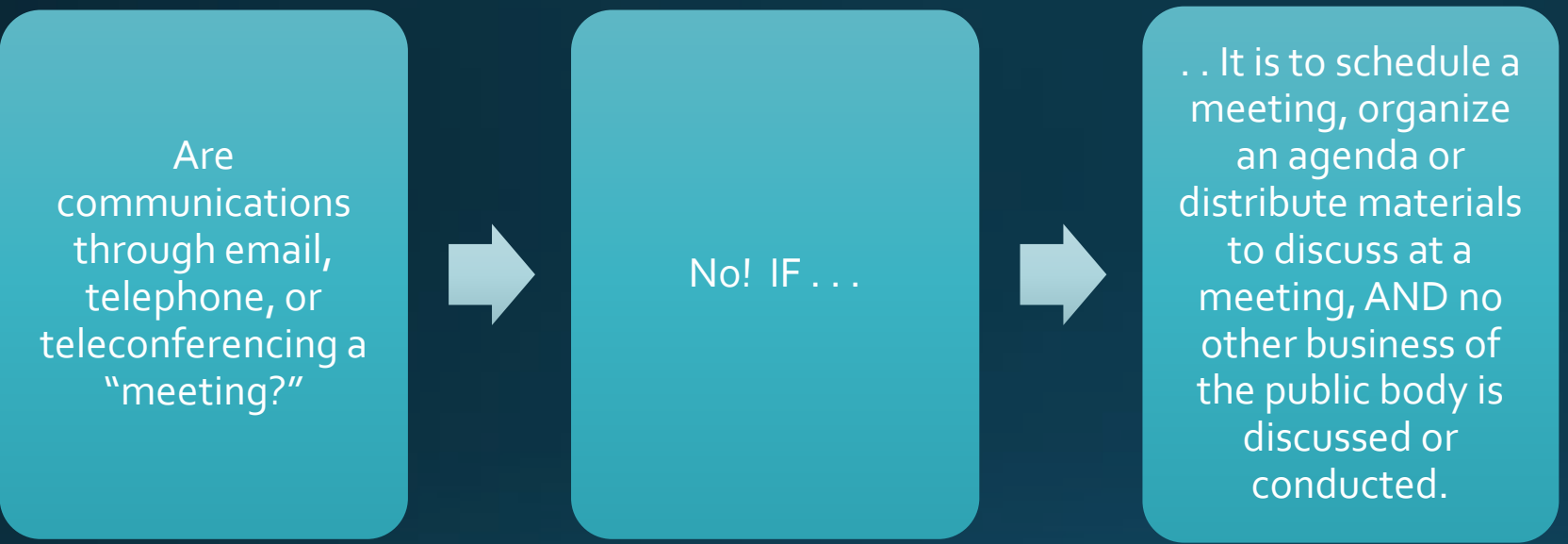
A **Quorum** = a majority of the entire public body

A **Meeting** = a gathering of a public body's quorum to discuss business or take action.



The business of the public body means the public body's governmental functions including any matter that public body has supervision, control, jurisdiction, or advisory power.

Are
communications
through email,
telephone, or
teleconferencing a
“meeting?”



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graph LR; A[Are communications through email, telephone, or teleconferencing a "meeting?"] --> B[No! IF...]; B --> C[... It is to schedule a meeting, organize an agenda or distribute materials to discuss at a meeting, AND no other business of the public body is discussed or conducted.];
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What is not a meeting?

What is not a meeting?

Are social gatherings, conventions, conferences, training programs, press conferences, or media events a "meeting?"



No! Unless . . .



. . .the public body discusses specific business of the public body that, at the time of the exchange, the participating members expect to be business of the public body at a later time.



Is a RETREAT a "meeting"? It depends! What will you discuss?

What is not a meeting?

A “meeting” does not mean a gathering of a quorum of a public body at a duly warned meeting of another public body, provided that the attending public body does not take action on its business.

What is a meeting?

A “meeting” can occur anywhere



It can include any physical location, hybrid location, remote location



Including email strings and social media conversations

Are we
having a
meeting
right now
by
accident?

The following are probably not permissible
(but, ask your attorney):

Group emails involving a quorum of a public
body that discuss the body's business.

Collective editing of a document by a quorum.

Participation in a Facebook group or Front
Porch Forum by a quorum if the body's
business is discussed.

What
notice
should the
public
have of a
meeting?

It depends on what
type of meeting it is!



But all meetings need
an agenda*

What notice should the public have of a regular meeting?



Adopt a resolution setting time and place at your yearly organizational meeting. Post an agenda at least 48 hours before each meeting.



Where to post? On a website the public body maintains or designates, in the municipal clerk's office, and in two designated public places. Act 1 of 2023, temporarily allows substituting some electronic postings until July 1, 2024.

What notice should the public have of a special meeting?



Notice (time, place, purpose) and agenda should be posted 24 hours in advance.



Where to post? On the public body's website, in the clerk's office, and in two designated public places (or, temporarily, electronic ones). Notify a newspaper or radio station, all members of the body, and any person who has requested notification.

What notice should the public have of an emergency meeting? "Only when necessary to respond to unforeseen occurrence or condition requiring immediate attention."



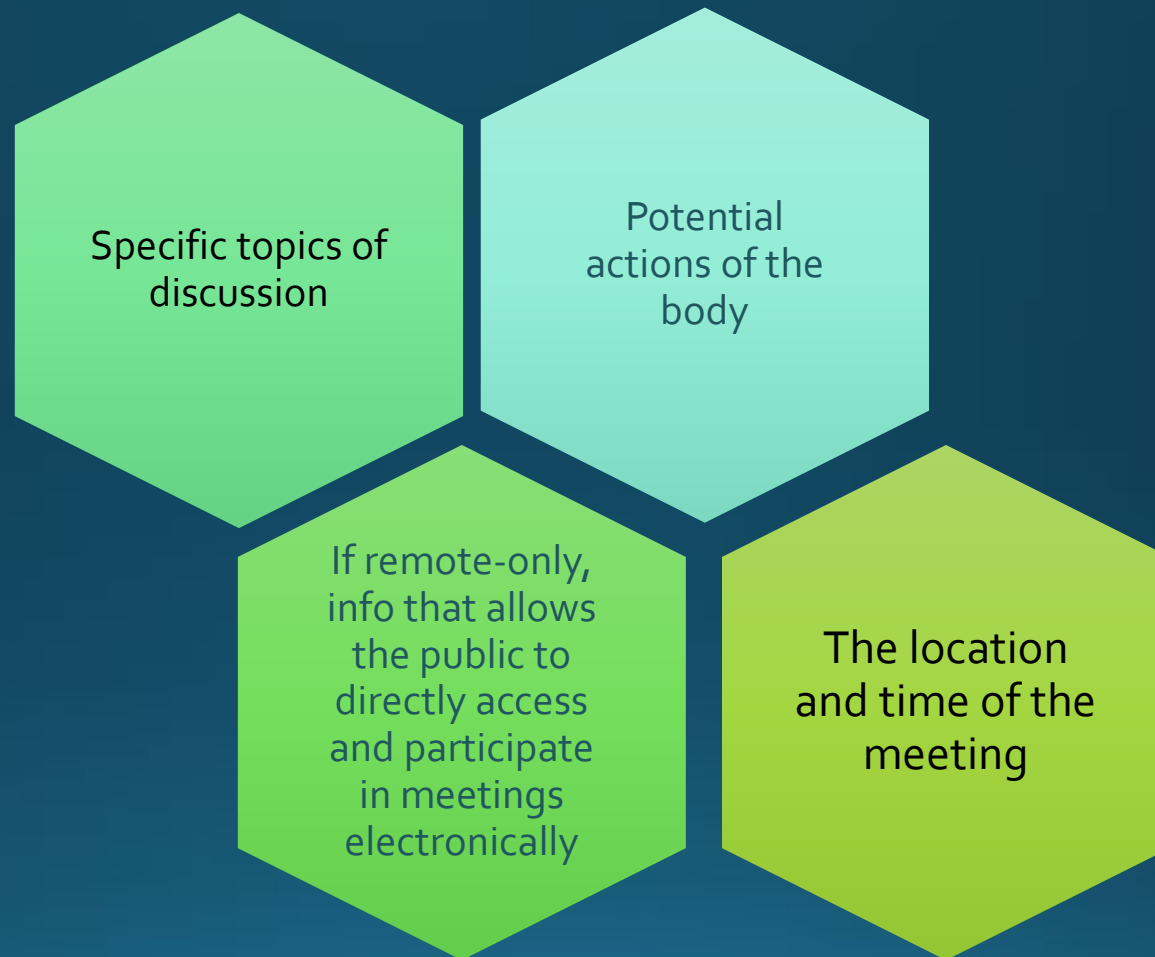
Public bodies must give "some public notice . . . as soon as possible before the meeting."



Where to post? Depends on the circumstances.
(Focus on the OML's underlying purpose.)

What should be on the agenda*?

*Additions and deletions are permissible as first act of business at the meeting, but keep in mind the OML's underlying purpose.



What needs to be in the minutes?

- "Give a true indication of the business of the meeting."
- "Cover all topics and motions that arise."
- Minimum content:
 - members present;
 - active participants;
 - motions, proposals, resolutions, and their dispositions; and,
 - vote results, noting individual votes if roll call.



Where and how should the minutes be posted?

- Must be available for inspection and copying upon request no later than five calendar days after the meeting.
- Posted to the website no later than five calendar days from the date of the meeting, if a public body maintains or designates a website.
- Must remain posted on the website for at least one year after the meeting. (Exception: Draft minutes can be replaced with updated minutes.)



What is an Executive Session?

- A closed portion of an open meeting.
- Generally, avoid use unless clearly necessary.
- Only appropriate if the business fits into one of 15 statutory categories:
 - After making a specific finding of clear and substantial disadvantage:
 - Contracts
 - Labor relations agreements with employees
 - Arbitration or mediation
 - Grievances (but not tax grievances)
 - Pending/probable litigation or prosecution to which body may be a party
 - Confidential attorney/client communications
 - No specific finding required:
 - Negotiating or securing real estate options
 - Appointment, employment, or evaluation of public officer or employee
 - Disciplinary or dismissal action against a public officer or employee
 - Clear and imminent peril to public safety
 - Records exempt from disclosure under the PRA
 - Academic records, suspension, or discipline of students
 - Testimony in Parole Board proceedings (if the disclosure could result in harm to the person testifying)
 - Pharmacy rebate agreements as protected by law
 - Security or emergency response measures (if the disclosure could jeopardize public safety)



How does a public body get into an Executive Session?



- Only if the public body votes to enter in an open session and indicates its reason for doing so.
- The motion must state the nature of the business of the executive session, be supported by a majority of the board, and be recorded in the minutes.
- When preparing an agenda, consult with legal counsel if there is a question about whether an executive session is permissible or about which provision of the executive session law applies.

Topics requiring a specific finding that “premature general public knowledge would clearly place the public body or a person involved at a substantial disadvantage.”

Labor relations agreements with employees;

Contracts;

Arbitration or mediation;

Grievances, other than tax grievances;

Pending or probable civil litigation or prosecution, if the public body is or may be a party; or,

Confidential attorney-client communications, if made to provide legal services to the body.

Example: A board intends to discuss a contract with a bus company.

Does the board automatically vote to enter executive session?



No – first the board must determine that discussing the contract in open meeting would result in premature general public knowledge that would clearly place the board or the bus company at a substantial disadvantage.

Here are two recommended motions to make IF the topic requires a specific finding that the "premature general public knowledge would clearly place the public body or person involved at a substantial disadvantage." If the motion is approved, the body can move into executive session.

"I move to find that premature general public knowledge regarding the board's contract with Best Bus Company would clearly place the board at a substantial disadvantage because the board risks disclosing its negotiation strategy if it discusses the proposed contract terms in public."

"I move to enter executive session for the purpose of discussing the board's contract with Best Bus Company under the provisions of Title 1, Section 313(a)(1)(A) of Vermont Statutes (contracts)."

Here are two recommended motions with the example of a labor relations question before the board. Here, again, if the motion is approved, the body can move into executive session.

"I move to find that premature general public knowledge regarding an employee's leave request would place the employee and the board at a substantial disadvantage because it would reveal personal medical information of the employee."

"I move to enter executive session for the purpose of discussing an employee's leave request under the provisions of Title 1, Section 313(a)(1)(B) of Vermont Statutes (labor relations agreements with employees)."

Executive Session for Academic Records or Suspension or Discipline of Students:



This topic DOES NOT REQUIRE a specific finding that “premature general public knowledge would clearly place the public body or person involved at a substantial disadvantage.”

Example Motion: “I move to enter executive session for the purpose of discussing the suspension of a student under the provisions of Title 1, Section 313(a)(7) of Vermont Statutes (the academic records or suspension or discipline of students).”

What should happen in an Executive Session?



While in executive session, a board may only discuss the subject matter referenced in the motion to enter executive session.

The public body decides who attends: legal counsel, staff, anyone who is the subject of discussion or whose information is needed.

Minutes are not required to be taken (AND, we recommend that you do NOT take them).

What should happen in an Executive Session?



A board cannot take any action in executive session except actions related to securing real estate options.

Ultimate action on all other items must be taken by motion and vote in open session. That motion should provide enough information (subject to confidentiality considerations) to allow members of the public to understand the nature and substance of the action taken.

Unless other law requires it, a public body may opt to conduct its business in public, even if an executive session is permissible.

What should be different if the meeting is held electronically or in a hybrid manner?

One or more board members attend remotely (under longstanding OML):

- Introductions when meeting convenes.
- All must be able to hear and be heard throughout meeting.
- All votes not unanimous must be by roll call.

A quorum of board members attend remotely (under longstanding OML):

- Agenda must designate a physical location for public participation. At least one board or staff member must be physically present.
- BUT SEE....



What should be different if the meeting is held electronically or in a hybrid manner?

Board opts to waive physical location requirement (under Act 1 of 2023, permissible until July 1, 2024):

- The board must use technology that permits the attendance of the public through electronic or other means.
- Whenever feasible, the board must allow the public to access the meeting by telephone.
- The board must post information about how the public may access meetings electronically and include this information in the published agenda.
- School boards must audio or video-record meetings unless unusual circumstances make it impossible for them to do so.



Public Comment



Meetings of the Voters

- Governed by Elections law:
 - Only registered voters may speak at floor meeting, unless the voters authorize non-voters to speak

Meetings of Public Bodies

- Governed by the OML:
 - "The public" must be given a reasonable opportunity to express its opinion...
- Governed by Education law:
 - "Any person in the district" must have a reasonable opportunity to appear and express views...

Public Comment: Meetings of Public Bodies

The public shall be given a reasonable opportunity to express its opinion on matters considered by the public body during the meeting. 1 V.S.A. § 312(h).

- So long as order is maintained.
- Subject to reasonable rules by the chair.

Any person in the school district must have a reasonable opportunity to appear and express views on any matter before the board. 16 V.S.A. § 554(b).

- The board must give reasons for its actions in writing upon request.



What is "reasonable"? It depends!
(Consult your attorney.)



Enforcement and Penalties for OML Violations

The aggrieved party must allege a specific violation of the Open Meeting Law and make a request for specific actions to cure the violation.

A public body has 10 calendar days to respond.

If acknowledge a violation, have 14 calendar days to cure it and take measures to prevent reoccurrence.

Failure to correct a violation could result in attorney's fees and other litigation costs.



Open Meeting Law and Collective Bargaining

In 2018, the VT Supreme Court issued *Caledonia Central* decision holding that the Open Meeting Law does not apply to collective bargaining negotiations between a supervisory union negotiating committee and a teachers' union because such negotiations are not "meetings" under the Open Meeting Law.

In its decision, the court stated that the Open Meeting Law was ambiguous, and it relied on the interplay between the Open Meeting Law, the Vermont Labor Relations for Teachers and Administrators Act, and the Public Records Act to resolve that ambiguity.



Open Meeting Law and Collective Bargaining continued . . .

Since Open Meeting Law does not apply, negotiations are not required to be held in public BUT it can be public if all the parties agree!

This raises questions about whether an SU negotiations council is required to warn its negotiations sessions.

During such sessions, there may be periods of time when the SU committee is meeting by itself to discuss priorities, strategies, etc., and, therefore, not strictly negotiating.

Such a gathering may meet the definition of a “special meeting” under the Open Meeting Law, requiring the posting of a notice at least 24 hours prior to the meeting.

We recommend you seek advice from your attorney on this issue.



Questions on Public Meetings?

Public Records



Public Records

All government records are *public records*.
Some public records are *exempt* from disclosure.

What is a public record?

“Any written or recorded information, regardless of physical form or characteristics, produced or acquired in the course of public agency business.”



Who is covered by the Public Record Law?

“PUBLIC AGENCIES” of the state and its municipalities: State and municipal agencies, boards, departments, commissions, committees, branches, instrumentalities, and authorities.



Who may ask to inspect or copy a Public Records?

Any person!



“The identity and motive of the requestor cannot be considered when weighing access to public documents.”

Shlansky v. City of Burlington and Burlington Police Department, 2010 VT 90.

How is a Public Records request made?

Requesters can inspect records during customary business hours

State records on weekdays, 9-12 and 1-4.

Municipal records when the office is open to provide services.

Tips for requesters:

No “in writing” requirement (but it’s a good idea!)

List or specifically describe the records you’d like to see.

Be clear: INSPECT or COPY.

NO CHARGE to inspect.

If you ask for copies, you may request an estimate of the fee.

Date your request and include your contact info.



How does a Public Body respond to a Public Records request?



“Promptly” produce the record for inspection.

“Promptly” means “immediately, with little or no delay, and unless otherwise provided [in the public records act] not more than three business days...”

Accept the request in any manner or format.

Exception: If staff time costs are involved, an agency may require requests to be made in writing.

If necessary, consult with the requestor to clarify or narrow the request or get additional information that will help you respond.

If necessary, request an extension of time.

Communicate with the requester!

How to make the Determination on if the Record should be released



The Rule: Public agencies MUST produce public records for inspection and copying unless the record is “exempt” under the statute.

THE POLICY: “...in the public interest to enable any person to review and criticize [government] decisions even though such examination may cause inconvenience or embarrassment.” 1 V.S.A. § 315.

THE BURDEN OF PROOF: The PRA “represents a strong policy favoring access...We construe these exceptions strictly against the custodians of records and resolve any doubts in favor of disclosure...The burden of proof is on the agency seeking to avoid disclosure.”

Wesco v. Sorrell, 2004

VT 102.

What are the Exemptions from Release?

Where are the exemptions? 40+ are listed in the PRA itself (1 V.S.A. § 317). Approximately 200 are scattered throughout statute.

Resources: Legislative Council's List of PRA Exemptions

Each public agency should know and maintain a compilation of the specific State and Federal laws and regulations that affect access to records in its custody.



Why should a Public Body comply with a Records Request?



If access is denied to a non-exempt public records request the body may face litigation and could be charged the requester's court costs.

If an individual willfully destroys or discards a public record without appropriate authority, they face fines.

More importantly, prompt compliance supports our notions of trust, openness, accountability, and ultimately our democracy.

Enforcement for Public Records Requests

- 1) Appeal to “head of agency.”
- 2) Within five business days, the head of the agency must:
 - Make the records available promptly; or
 - Give notice of denial in writing, including statutory basis, a brief statement of reasoning and supporting facts, and details about appeal rights.
- 3) Was Denial upheld? Is there no head of the agency? Were the time limits ignored?
 - The requester can file an appeal in court
 - There is a 30-day deadline for the appeal – generally counted from date of denial.



Questions on Public Records?



School Related-Elections

Who can serve as a School Board Member for a School District?



A member of a school board may not be regularly employed by the school district or by a school district in the same supervisory union.

16 V.S.A. § 558

A . . . school director shall not be first constable, collector of taxes, town treasurer, assistant town treasurer, auditor, or town agent.

17 V.S.A. § 2647

May school boards
provide info to the
electorate about
issues the voters will
decide?



Yes! BUT...



If dissemination of
electoral
informational turns
into advocacy for a
certain electoral
outcome AND the
board spends more
than \$1000, the board
must file campaign
finance reports with
the Secretary of
State's Elections
division.

Informational Materials in Advance of an Election

Questions on School Related - Elections?

Need help? Contact SOS

Elections: candidates, campaign finance,
meetings of the voters

- 802-828-2363
- sos.elections@vermont.gov

Municipal: open governance

- 802-828-1027
- jenny.prosser@vermont.gov

VSARA: records management

- 802-828-3897
- sos.rim@vermont.gov