

UTAH OPEN AND PUBLIC MEETINGS ACT
Utah Municipal Attorneys Association
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The Act specifically says that it is the intent of the Legislature that the State and its political subdivisions exist to aid in the conduct of the people's business and that they are to take their actions openly and that their deliberation are to be conducted openly.¹

This statement of public policy is important because it guides the courts interpreting provisions of the Act. The appellate courts have said that in light of this policy the Act is to be construed broadly in favor of openness and the exceptions are to be narrowly construed. The policy and the courts interpretation of the policy make it important to know how the Act defines certain otherwise common words.

Here are some of the important definitions contained in the Act.

Meeting. A meeting is defined as the convening of a public body when a quorum is present. It includes workshops and executive sessions even though the act does not define either. The definition of meetings includes either in person or through electronic communications.

The definition of meeting is qualified by the description that it must be for the purpose of discussing, receiving comments from the public about, or acting on a matter over which the public body has jurisdiction or advisory power.

The exceptions to the definition of meeting are very narrow. They include a chance meeting, a convening of a public body that has both legislative and executive responsibilities where no public funds are appropriated, where the meeting is convened just to implement administrative matters.² Social meetings are also not subject to the Open and Public Meetings Act³ although there does not appear to be any definition of what a social meeting is.

Convening. Convening is defined to mean the calling of a meeting of a public body by a person, authorized to do so, for the purpose of either discussing or acting on a matter over which that public body has either jurisdiction or advisory power.

Quorum. Is a simple majority of a public body unless another statute sets out a different quorum. Except a quorum is not two elected officials by themselves when no action is taken.

¹ Utah Code section 52-4-102.

² This could apply to small fifth and fourth class cities and towns where individual council members have administrative departments but should only be used in very few circumstances.

³ Utah Code 52-4-208

Public Body. A public body is any group of two or more persons, officially created (by constitution, statute ordinance or resolution), that has the power to expend, disburse, or is supported in whole or part by tax revenue and has authority to do the public's business.⁴

If public body is convened into a meeting with a quorum present then that meeting must comply with the Act. The Act contains requires minimal compliance in three basic areas: **notice**, **public access**, and **public record keeping**.

Notice of meeting.

Any public body that has holds regular meetings, such as the regular city council meetings, must give public notice at least annually, of the anticipated meeting schedule. The notice must include the date, time, and place of the scheduled meetings.⁵

In addition to this annual notice of regular meetings, each meeting must have its own notice. This notice must be given at least twenty-four hours prior to the meeting and needs to consist of the agenda, the date, time, and place of the meeting.

Both the annual notice and the notice requirements for each meeting are satisfied by posting the written notice at the principal office of the public body or at the building where the meeting is to be held and providing a copy of the notice to at least one newspaper of general circulation within the jurisdiction of the public body or to a local media correspondent.

The State of Utah has a website called the Utah Public Notice website and all cities or towns are also required to post their meeting notices on this website.

Each meeting notice must include an agenda for the meeting. The agenda must also provide enough detail to notify the public as to the topics to be discussed and the decisions that may be made.⁶ If an item in not on the agenda, no final action can be taken on that item. However, at the discretion of the chair of the meeting, an item not on the agenda, brought up by the public, can be discussed, if no final action is taken on the matter.

Public Access.

Generally all parts of all meetings are required to be open to the public. There are however some circumstances when a portion of a meeting may be closed to the public. These are intended to

⁴ Utah Code 52-4-103(7)(a)

⁵ Utah Code 52-4-202.

⁶ Utah Code 52-4-202(6)

be very limited exceptions and every meeting, even one anticipated by the body to be closed to the public, must be convened and begin as a public meeting. A city or town public body can close portions of its meetings to do the following:

- a) Discuss the character, professional competence, or physical or mental health of an individual.
- b) Hold a strategy session to discuss collective bargaining.
- c) Hold a strategy session to discuss pending or reasonably imminent litigation.
- d) hold a strategy sessions to discuss the purchase, exchange, or lease of real property when public discussion of the transaction would disclose the appraisal or estimated value of the property under consideration or prevent the public body from completing the transaction.
- E) hold a strategy sessions to discuss the sale of real property.
- f) Discuss the deployment of security devices and investigative proceedings regarding criminal conduct.⁷

In addition there are other purposes for closed meetings that are not relevant to Cities and Towns.

The Act specifically requires that if a work shop or executive session is being held on the same day as a regularly scheduled meeting of the public body, then the workshop or executive session must be held at the same location as the regularly scheduled meeting with certain limited exceptions.⁸ Workshop and executive session are not defined terms in the Act.

Before any part of a meeting may be closed for one of these valid reasons, the public body must be called together in an open meeting. At least two-thirds of the members of the public body present must vote to close the meeting, before it can be closed. The reasons for holding the closed meeting and the vote either for or against the proposition to hold the meeting are to be entered into the minutes of the public portion of the meeting.

No ordinance, resolution, rule, regulation contract, or appointment can be approved at a closed meeting.⁹ In addition it is not permissible to interview a person applying to fill an elected position in a closed meeting.¹⁰

Public records—minutes and recordings.

The Act requires that written minutes be kept of all meetings. The minutes must include certain minimal detail.¹¹ The written minutes of an open meeting must include the date, time, and place of a meeting; the names of the members present and absent; the substance of the matters

⁷ Utah Code 52-4-205

⁸ Utah Code 52-4-201

⁹ Utah Code 52-4-204(3)

¹⁰ Utah Code 52-4-205(2)

¹¹ There is no provision for closing a meeting to discuss the general category of personnel. It is never appropriate to close a meeting to discuss general personnel matters. You can close a meeting to discuss an individual.

discussed or decided on including a summary of the comments made by members of the body; a record, by individual member, of the votes taken; the names of any person who made comments in the meeting; the substance, in brief of the comments made; and any other material a member of the public body requests be entered in the minutes that is a record of what occurred in the meeting. The minutes of an open meeting in which a portion is closed must also include the reason for holding the closed meeting, where the closed meeting will be held, and the vote by member to close the meeting.

The closed meetings minutes must include the date, time, and place of the meeting; the names of the members present and absent; and the names of other persons present except where disclosure would infringe on the confidence necessary to fulfill the purpose of closing the meeting.

The city or town must adopt a policy defining what is reasonable for getting the minutes approved as final and must make draft minutes available to the public at the same time they are available to members of the public body. These minutes are public records and are available to the public and a draft copy of the minutes for the City or Town Council must be available within 30 days of the meeting and within 3 days from when they are approved.

All open meeting must also be recorded. The recording must be labeled with the date, time and place of the meeting and are public documents that must be made available to the public for its listening pleasure or for copying within three business days following the meeting. The recording must be complete and unedited. In addition the Utah Open and Public Meetings Act gives the public the right to record any open meeting. This recording could include either audio recording or video recording of the meeting.

The closed portion of the meeting must also be recorded with limited exceptions. These recordings of the closed portion of a meeting are protected records under the Government Records Access and Management Act and, therefore, should not become public except under the provisions of that act. Disclosure of the information discussed in a closed meeting without the permission of the public body may be a violation of the Utah Municipal Officers and Employees Ethics Act¹² and the Government Records and Access Act.

There is a limited exception to the requirement that a closed meeting be recorded. Meetings in which the competence or physical or mental health of an individual is discussed or the deployment of security devices is discussed do not need to be recorded. The public body holding the meeting can have the chair or presiding officer sign a sworn affidavit affirming that the sole purpose for closing the meeting was to discuss only those issues.

¹² Utah Code 10-3-1304(2)(a)

Enforcement of open meetings act.

It is a criminal offense to knowingly or intentionally violate the Open and Public Meetings Act.¹³ The attorney general and the county attorneys of the state are charged with enforcing the Open and Public Meetings Act. The Office of the Attorney General is required to give annual notice to public bodies of any changes in the open meetings law and the presiding officer of all public bodies is required to provide annual training in how to comply with the Act.¹⁴

Private individuals can also enforce the open meetings act by bringing suit if done in a timely fashion. They must bring the action within 90 days from the violation (30 days if it is a bond issue). They may bring suit to enjoin or force compliance with provisions of the act. If the private individuals prevail, the court may award reasonable attorneys fees and court costs to the successful plaintiffs.

¹³ Utah Code 52-4-305

¹⁴ Utah Code section 52-4-104.

FREQUENT QUESTIONS TO WHICH I HAVE GIVEN INCONSISTENT ANSWERS

Can you hold a closed session without the words closed session being on the agenda?

Answer: Yes.

The only procedural requirements for a closed meeting are that a quorum is present; the meeting is an open meeting for which notice has been given; and two-thirds of the members of the public body present at the open meeting vote to approve closing the meeting.¹⁵

The only requirement for agenda contents is that it shall provide reasonable specificity to notify the public as to the topics to be considered at the meeting. Each topic shall be listed under an agenda item on the meeting agenda.¹⁶

At the discretion of the presiding member of the public body, a topic raised by the public may be discussed during an open meeting, even if the topic raised by the public was not included in the agenda or advance public notice for the meeting.

Can you vote in a closed session?

Answer: Yes on some things.

The Act says that an ordinance, resolution, rule, regulation, contract, or appointment may not be approved at a closed meeting.¹⁷ And that in a closed meeting, a public body may not interview a person applying to fill an elected position or discuss filling a midterm vacancy or temporary absence; or discuss the character, professional competence, or physical or mental health of the person whose name was submitted for consideration to fill a midterm vacancy or temporary absence in Elected Office¹⁸

“Therefore, as long as the "information obtaining" procedures are conducted in the open and any final or formal action is announced or issued in the open, the "decision making" or deliberation of a public body during a judicial process may be held in private and is exempt from the requirements of the Act.” *Dairy Product Services, Inc., v. City of Wellsville*, 2001 UT 81.

¹⁵ Utah Code 52-4-204

¹⁶ Utah Code 52-4-202

¹⁷ Utah Code 52-4-204(3)

¹⁸ Utah Code 52-4-205(3)

"In generally accepted terms, to strategize means to devise plans or means to achieve an end." ¹⁹

Who can come into a closed session?

Answer: Anyone the body allows.

The Act requires the minutes of the closed portion of the meeting to contain the names of all others present except where the disclosure would infringe on the confidentiality necessary to fulfill the original purpose of closing the meeting²⁰ which implies that others can be present.

Can a City Council exclude the recorder or members of the body from a meeting?

Answer: Maybe.

The body may not expel a member of the body from an *open public meeting* or prohibit the member from attending an *open public* meeting except on a two-thirds vote of the members for disorderly conduct at the open public meeting; a member's direct or indirect financial conflict of interest regarding an issue discussed at or action proposed to be taken at the open public meeting; or a commission of a crime during the open public meeting. However, a body may adopt rules or ordinances that expand the reasons or establish more restrictive procedures for the expulsion of a member from a public meeting.²¹

The city recorder or deputy city recorder shall attend the meetings and keep the record of the proceedings of the governing body.²²

What happens if someone in the closed session shares the discussion with someone?

Answer: They may but probably won't go to jail.

Both a recording and written minutes of closed meetings are protected records under Title 63G, Chapter 2, Government Records Access and Management Act, except that the records may be disclosed under a court order only as provided under Section 52-4-304.²³

¹⁹ *Kearns-Tribune Corp. v. Salt Lake County Commn.* 2001 UT 55.

²⁰ Utah Code 52-4-206(4)

²¹ Utah Code 10-03-607

²² Utah Code 10-6-136

²³ Utah Code 52-4-206(5)

A public employee or other person who has lawful access to any protected record and who intentionally discloses, provides a copy of, or improperly uses a protected record knowing that the disclosure or use is prohibited under this chapter, is guilty of a class B misdemeanor unless he or she used or released the protected information in the reasonable belief that the use or disclosure of the information was necessary to expose a violation of law involving government corruption, abuse of office, or misappropriation of public funds or property or he or she did so based on a good faith belief that the disclosure, provision, or use was in accordance with the law.²⁴

Recorded Disclosure of the information discussed in a closed meeting without the permission of the public body may be a violation of the Utah Municipal Officers and Employees Ethics Act.²⁵

Is it a violation of the open meetings Act to engage in electronic communications outside of the public meeting?

Answer: Just the spirit of the Act but not the letter.

The intent of the Legislature is that the state, its agencies, and its political subdivisions take their actions openly; and conduct their deliberations openly.²⁶

Electronic message is a defined term in the act it includes electronic mail; instant messaging; electronic chat; text messaging or any other method that conveys a message or facilitates communication electronically.²⁷

In 2011 the legislature added a section that states nothing in this chapter shall be construed to restrict a member of a public body from transmitting an electronic message to other members of the public body at a time when the public body is not convened in an open meeting.²⁸

Can a council member bring up a matter not on the agenda for discussion?

Answer: It depends.

At the discretion of the presiding member of the public body, a topic raised by the public may be discussed during an open meeting, even if the topic raised by the public was not included in the agenda or advance public notice for the meeting.²⁹

²⁴ Utah Code 63G-2-801(1)

²⁵ Utah Code 10-3-1304(2)(a)

²⁶ Utah Code 52-4-102

²⁷ Utah Code 52-4-103(4)

²⁸ Utah Code 52-4-210

²⁹ Utah Code 52-4-202(6)

INTERESTING UTAH CASES

Kearns-Tribune Corp. v. Salt Lake County Commn. 2001 UT 55.

“The legislature expressly declared its purpose in enacting the Utah Open and Public Meetings Act in section 52-4-1, which reads, "It is the intent of the law that [the] actions [of the state, its agencies and political subdivisions,] be taken openly and that their deliberations be conducted openly." Utah Code Ann. § 52-4-1 (1998). As a result, we interpret the Utah Open and Public Meetings Act broadly to further the declared statutory purpose of openness. Because we construe the Act broadly, it therefore follows that the exceptions be strictly construed. In this case we construe the litigation exception narrowly so as to give effect to the legislative intent. We further note the intent of the legislature to permit some meetings to be closed under certain circumstances. In carrying out the purpose of openness, the legislature could have chosen to make the open meetings requirement absolute. It chose, however, to exclude some meetings from the openness requirement. ¶15

"In generally accepted terms, to strategize means to devise plans or means to achieve an end." at ¶18

Dairy Product Services, Inc., v. City of Wellsville, 2000 UT 81.

“Therefore, as long as the "information obtaining" procedures are conducted in the open and any final or formal action is announced or issued in the open, the "decision making" or deliberation of a public body during a judicial process may be held in private and is exempt from the requirements of the Act.” ¶60

Common Cause of Utah v. Public Serv. Comm'n, 598 P.2d 1312, 1315 (Utah 1979)

“[I]t is clear that the legislature intended that any official meeting of the [public body], wherein it performs the "information obtaining" phase of its activities, should not be held in private or in secret, but should be open to the public. However, once the "information obtaining" procedure has been completed, it is essential that during the "decision making" or judicial phase, those charged with that duty have the opportunity of discussing and thinking about the matter in private, free from any clamor or pressure, so they can calmly analyze and deliberate upon questions of fact, upon the applicable law, and upon considerations of policy, which bear upon the problems with which they are confronted.” At pg 1315

Harper v. Summit County, 2001 UT 10.

“As we concluded above, the issuance of certificates of zoning compliance and building permits is an administrative action to be performed by the zoning administrator (or his or her representative) and by the building inspector, respectively. See Summit County Development Code 1.6(11), 1.9 (July 1989). Because the planning commission is not required to participate in the application or issuance of these documents and because their issuance is merely an administrative action, the topic is not one required to be discussed in an open meeting and thus does not fall under the requirements of the Act. Again, if the County properly concluded that the facility was an authorized use in the zone, issuance of the building permit was legal and did not injure the Harpers. Discussion, or lack thereof, at the meeting does not affect the issue one way or the other. Cf. *Hutchison v. Cartwright*, 692 P.2d 772, 774 (Utah 1984) (“[N]o action by the county commissioners was necessary for the suspension or dismissal [of appellant] to become effective. Therefore, any meetings held or actions taken by the commissioners were irrelevant to the legality of appellant’s suspension and subsequent dismissal. His suspension and dismissal gave rise to no claims for violations of the open meetings law.”). Thus Harpers were not entitled to summary judgment on their open meetings claim.” ¶38

Gardner v. Board of County Comm. 2008 UT 6

“The Landowners’ challenge to Ordinance 97-1 under section 52-4-6 was not timely. Final actions taken in violation of section 52-4-6 are voidable, but a challenge seeking to void the action must be brought within ninety days of the violation. Utah Code Ann. § 52-4-8 (2002).⁵ The County approved Ordinance 97-1 at its January 13, 1997 meeting, but the Landowners did not challenge it until September 1997, well after the ninety-day time limit had expired. Thus, the district court did not err in dismissing the Landowners’ claim as untimely.” ¶20

Ellis v. Utah State Retirement Board, 757 P.2d. 882 (Utah App.)

“The Open and Public Meetings Act requires that every "meeting" of a "public body" be open to the public. As used in this Act, "public body" means "any administrative, advisory, executive or legislative body of the state or its political subdivisions which consists of two or more persons that expends, disburses or is supported in whole or in part by tax revenue and which is vested with the authority to make decisions regarding the public's business." Utah Code Ann. § 52-4-2(2) (1981).

We are persuaded that the Open and Public Meetings Act is not applicable to the Retirement Board. First, the Utah State Retirement Fund is administered as a common trust fund and not supported by tax revenue. Second, the Retirement Board is not vested with authority to make decisions regarding the public's business. The Board administers funds for the benefit of the beneficiaries and not for the public at large. *Hansen v. Utah State Retirement Bd.*, 652 P.2d 1332,

1338 (Utah 1982). When Hansen was decided, "[s]ome 80 percent of the beneficiaries [were] not state employees, but employees of municipalities or counties." *Id.* "No state funds [were] appropriated to meet any administrative costs." *Id.* Ellis's argument that the Board acted contrary to the Open and Public Meetings Act is without merit."

Ward v. Richfield City, 798 P.2d 757 (Utah 1990)

"Ward contends that Richfield City failed to comply with the agenda and notice provisions of the open meetings law and that such failure should void the action taken at the April 2 meeting. He argues that the subject of his discharge should have been listed on the agenda, even if discussions regarding him were conducted in a closed meeting. We agree that the purposes of the Open and Public Meetings Act would have been better served if the subject of Ward's discharge had been listed on the agenda. While, as the trial court stated, "[t]he absence of an item of business on the Agenda does not preclude its consideration," it would clearly violate the public policy behind the Act to strategically hide sensitive public issues behind the rubric of "other business." Such a stratagem is not alleged in this case. Indeed, the council sought to cure any possible violation of the Act by holding a fully publicized meeting on Ward's discharge on the 8th of June. We therefore agree with the court of appeals that "if technical violations had occurred in the April meeting, they were subsequently cured." *Ward v. Richfield City*, 776 P.2d at 96.

Ward also contends that the failure of the council to inform Colby of the resumption of open session rendered the session which followed a de facto closed session at which a final resolution of discharge was approved in violation of section 52-4-4. It was poor practice on the part of the council to tell a member of the public that he would be informed when open session resumed and then fail to do so. However, it was not a violation of the Act. The council lawfully closed the meeting to discuss "the character, professional competence, or physical or mental health of an individual." § 52-4-5(1)(a). The Act imposes no requirement on the council to notify anyone when it resumes open session after holding closed session. Members of the public who do not wish to wait near the council's meeting room during closed sessions may ask to be notified upon the resumption of open session. However, notification is merely a matter of courtesy, not of right. The council's failure to notify members of the public who have gone home or back to their offices is not a violation of the Act."

AN EXAMPLE OF HOW THE PRESS USES THE OPEN MEETINGS ACT

Recordings suggest communications agency broke open-meetings law during personnel vote

By Michael Anderson The Salt Lake Tribune

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Newly released audio recordings suggests that the Utah Communications Authority (UCA), which oversees 911 and radio operations in the state, violated the state open-meetings law the day that longtime executive director Steven Proctor resigned from the agency in the wake of a decade long \$1 million embezzlement.

The April 7 meeting of the UCA board was held mostly behind closed doors as the members voted to privately discuss personnel issues. The board later emerged into an open meeting and voted, without discussion, to "proceed with the decisions that were made in the closed meeting." Board members, many of them law enforcement officials, voted unanimously for the obscure motion.

The meeting ended with no elaboration of the issue, and the next day, UCA issued a news release and a letter to stakeholder agencies announcing the embezzlement and the resignation of Proctor, who headed the agency for 17 years. He was not implicated in wrongdoing.

UCA and its attorneys have placed the blame on Proctor's assistant, Patricia Nelson, and her daughter Crystal Evans. The two confessed in a civil judgment to using agency credit cards to make illicit purchases of some \$1 million over a decade. The minutes of the April 7 meeting were approved in the most recent UCA board session, on April 26. They were posted online April 27 and the audio followed on April 29, both appearing after The Salt Lake Tribune filed separate open-record requests.

Utah's Public and Open Meetings Act holds that it is illegal to take an action behind closed doors said Jeff Hunt, an attorney who is an expert in open-records and open-meetings law.

The motion approved in the open portion of UCA's meeting was "not any kind of meaningful way for the public to know what action was taken," Hunt said. He pointed to

the legislative intent in the law, which states that public bodies should "take their actions openly, and conduct their deliberations openly."

"To just say, 'We're going to ratify the action taken in closed session,' is not in the spirit or the letter of the law," Hunt said, although he acknowledged the law allows agencies to discuss personnel issues in private.

Asked about the legitimacy of the April 7 vote, Board Chairwoman Tina Mathieu on Monday told The Tribune, "You know full well that every vote must take place in an open meeting." She declined to answer what "decisions" were made in the closed-door meeting, but said she would look into the Tribune's query.

Nelson and Evans were able to steal agency money over a decade, according to UCA's civil action against the two, and the embezzlement was discovered in January only after a credit card statement with questionable purchases was found accidentally left in a printer. Nelson was fired Feb. 22.

A criminal investigation is underway, according to UCA.

The scandal has led to questions about UCA's lack of transparency.

Last month, lawmakers expanded a legislative audit into the agency and State Auditor John Dougall warned the agency to comply with state transparency reporting laws or lose public funding. Mathieu said she complied with the order, even though she contends UCA is exempt from the statute.

Also, a considerable gap remains in the publicly posted minutes from the agency's board meetings. Nothing between Oct. 13, 2015, and March 29 has been posted on the agency website.