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Open Meetings Act

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Open Meetings Act

What is a public body?

The actual language in the statute:

MCL 15.262(a) which reads: “Public body” means any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, that is empowered by state constitution, statute, charter, ordinance, resolution, or rule ***to exercise governmental or proprietary authority or perform a governmental or proprietary function***; a lessee of such a body performing an essential public purpose and function pursuant to the lease agreement; or the board of a nonprofit corporation formed by a city under section 4o of the home rule city act, 1909 PA 279, MCL 117.4o.

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Open Meetings Act

- **Herald, 463 Mich 111 (2000)-** City Manager acting pursuant to his authority under the city charter does not constitute a public body under the OMA.
- **Booth, 444 Mich 211- (1993)-** A governing body cannot delegate its duties to committee to avoid the OMA's definition of public body.

It Does Not Include:

The OMA does not apply to a committee of a public body that adopts non-policymaking resolutions, tributes or memorials. Further, it does not include ***purely advisory*** committees that consist of less than a quorum of the entire board.

The OMA does not apply to "a social or chance gathering or conference not designed to avoid" the OMA. This means it is okay for members of a public body to meet socially outside of their business as members of the public body without fear of violating the OMA. ***However, members must be mindful not to discuss official business at such gatherings.***

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What is a Meeting?

A “meeting” means the convening of a public body at which ***a quorum*** is present ***for the purpose of deliberating toward or rendering a decision on a public policy.***

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What is Deliberating?

This word is ***not*** defined in the OMA. However, let's apply a little bit of common sense here:

Discussing, considering, exchanging views or debating a matter is likely to be considered "deliberating".

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Pinebrook Warren, LLC v. City of Warren, --- N.W.3d --- (2024)

Advisory Function v. Delegating Public Body's Decision-making Powers

Issue Presented: Whether a local marijuana review committee is a public body subject to the Open Meetings Act (the OMA), MCL 15.261 et seq.

Committee at Issue: The Review Committee had the authorization to review and score applicants. Included 3 of 7 City Council members. The City Council was supposed to make the final decision.

Pinebrook Warren, LLC v. City of Warren, --- N.W.3d --- (2024)

Reality: Court found the committee did a lot of work to find viable candidates. In particular, the committee conducted meetings that extensively discussed, scored and essentially ranked the applicants. Moreover, it was undisputed the City Council adopted the committee's scoring without much discussion and ranking the applicants themselves.

Pinebrook Warren, LLC v. City of Warren, --- N.W.3d --- (2024)

- In the end the Committee's actual work served as the basis for the Supreme Court's ruling finding it a "public body."
- Per the Court, "The scoring of the applications, which included consideration of the 17 objective and subjective factors set forth in the Marijuana Ordinance, ***went to the essence of who would be selected for a license—or, stated differently, the public policy of who would receive licenses under the terms of the Marijuana Ordinance***. Accordingly, the ordinance empowered the Review Committee to perform work that was integral to the licensing selection process." ***The Review Committee, through both scoring and ranking the applications, effectively decided which applicants would receive licenses***.

Pinebrook Warren, LLC v. City of Warren, --- N.W.3d --- (2024)

IMPACT: Focus is on the committee's work rather than its purported authority. In accordance with ***Booth,*** the courts will be skeptical of any committee that is deciding issues that are part of the governing body's responsibilities or authority. Also, the governing body's "final approval" is not enough to maintain a committee's "advisory" status. Again, the focus is on the authority granted and tasked completed by the committee to determine the OMA's applicability.

Pinebrook Warren, LLC v. City of Warren, --- N.W.3d --- (2024)

IMPACT (cont.): *Pinebrook Warren* isn't the only 2024 case that discusses delegation of authority. For example, the January 2024 ruling in *Armstrong v Ottawa Cty Bd of Comm'rs* briefly addressed the issue. *Specifically,* the Court acknowledged the "theoretically'" possible situation where a sitting public body could delegate its authority under the OMA to an elected group before the elected group actually took office.

Pinebrook Warren, LLC v. City of Warren, --- N.W.3d --- (2024)

Post *Pinebrook Warren*

- ***Herald*** and ***Booth*** are still good law, but Booth appears to be the focus. ***Booth*** analysis, appears more consistent with OMA's pro-transparency intent.
- A governing body's "final approval" isn't enough to avoid OMA requirements. The Court had an issue with the simple "adoption" of committee's decisions.
- A committee's purported goals, whether its from an ordinance, aren't enough. It's all about the tasks completed.
- Despite ***Herald***'s ruling, an individual could become a "public body" under the OMA depending on the authority the governing body provides or work relied up

Pinebrook Warren, LLC v. City of Warren, --- N.W.3d --- (2024)

BEST PRACTICE TIP: ***Don't rubber stamp committee work.***

The Technology Trap

Deliberating can be done electronically.

Both emails and texting can be a violation of the OMA. For example, a board member A comes up with a great idea. Board member A shares this idea with the entire board. Then the other members of the board start replying via the "***Reply All***" feature of the email system.

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The Technology Trap

Even if the emails or texts are not relevant to the public issues being considered, these communications could still be subject to FOIA. *Do you really want your constituents to know you were texting about what to do after the meeting while the budget was being discussed*?

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What is Wrong with Exchanging E-Mails and Text Messages During an Open Meeting?

1. If they have a bearing on the issues being considered, they can be considered deliberations. Since they are not made public during the meeting, it could be an OMA violation.
2. Even if the e-mails are not relevant to the public issues being considered, e-mails sent between members or on publicly owned or funded devices could still be subject to FOIA. *Do you really want your constituents to know you were texting about what to do after the meeting while the budget was being discussed?*

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Notice

- All public bodies ***must*** provide notice of their meetings.

- The OMA requires that all of the following information be contained in the notice:

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Notice

- (a) A public notice shall always contain the name of the public body to which the notice applies, its telephone number if one exists, and its address. MCL 15.264(a)
- (b) A public notice for a public body shall always be posted at its principal office and any other locations considered appropriate by the public body. Cable television may also be utilized for purposes of posting public notice. MCL 15.264(b)

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Special or Rescheduled Meeting Notices

- For a rescheduled regular or a special meeting, ***a public notice stating the date, time, and place of the meeting shall be posted at least 18 hours before the meeting*** in a prominent and conspicuous place at both the public body's principal office AND…

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Special or Rescheduled Meeting Notices

- …if the public body directly or indirectly maintains an official internet presence that includes monthly or more frequent updates of public meeting agendas or minutes, ***on a portion of the website that is fully accessible to the public***. The public notice on the website shall be included on either the homepage or on a separate webpage dedicated to public notices for nonregularly scheduled public meetings and accessible via a prominent and conspicuous link on the website's homepage that clearly describes its purpose for public notification of those nonregularly scheduled public meetings. MCL 15.265(4)

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Recessed Meetings

- If a meeting is recessed for more than 36 hours, the public body must post a notice (with all of the same requirements) before the meeting is reconvened. MCL 15.265(5)

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Emergency Meetings

- In the event of a severe and imminent threat to the health, safety, or welfare of the public and 2/3 of the members of the public body determine that delay would be detrimental to the efforts to lessen or respond to the threat, the 18-hour notice may be waived.
- **However…**

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Emergency Meetings

- The public body must make paper copies of its notice available at the meeting; and
- Explain in detail the reasons for not complying with the 18-hour notice; and
- Post the notice on its website.

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Emergency Meetings

- The explanation must be specific not a generic “an imminent threat to the health of the public” or “a danger to public welfare and safety”.
- Compliance with the notice requirements for emergency meetings in this subsection does not create, and shall not be construed to create, a legal basis or defense for failure to comply with other provisions of this act and does not relieve the public body from the duty to comply with any provision of this act. MCL 15.265(5)

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Notice

- The public can subscribe to notices for a yearly fee of not more than the reasonable estimated cost for printing and postage.
- Notices must be made available to any newspaper published in the state and to any radio and television station located in the state, free of charge. MCL 15.266

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Meeting Fundamentals

- All meetings ***shall*** be ***open*** to the public and ***shall*** be held in a place available to the general public. MCL 15.263(1)

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Meeting Fundamentals

All persons shall be permitted to attend any meeting (unless otherwise provided in the act – i.e., "breach of the peace actually committed at the meeting").

This right includes the right to tape-record, to videotape, to broadcast live on radio, and to telecast live on television the proceedings of a public body at a public meeting. MCL 15.263(1)

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Meeting Fundamentals

- This right shall not depend on the prior approval of the public body.

- However, ***a public body may establish reasonable rules and regulations*** in order to minimize the possibility of disrupting the meeting. MCL 15.263(1)

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Meeting Fundamentals

All ***decisions*** of a public body shall be made at a meeting open to the public. MCL 15.263(2)

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Meeting Fundamentals

All ***deliberations*** of a public body constituting a quorum of its members shall take place at a meeting open to the public except as provided in this section and sections 7 and 8. MCL 15.263(3)

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Meeting Fundamentals

- A person does not need to provide their name or other information as a condition to attend the meeting. MCL 15.263(4)
- This means you may not require registration for someone to attend a meeting.
    - You may ask, but you cannot remove if they refuse.

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Meeting Fundamentals

- A person shall be permitted to address a public body under rules established and recorded by the public body. MCL 15.263(5)

- A public body can limit the time for each individual, but not the total time available for all public comment.

- However, preventing a member of the public from making public comment, or intentionally interrupting public comment, may constitute an intentional violation of the OMA, subjecting the board member to both civil and criminal penalties.

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Meeting Fundamentals

A person shall not be excluded from a meeting otherwise open to the public except for a ***breach of the peace actually committed at the meeting.***

MCL 15.263(6)

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Meeting Fundamentals

Public Comment

Preventing a member of the public from making public comment, or intentionally interrupting public comment may constitute an intentional violation of the OMA, subjecting the board member to both civil and criminal penalties.

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Closed Sessions

There are exceptions to the requirement that all sessions be open to the public found in MCL 15.268.

The closed session exceptions are not mandatory; that is, a public body is ***not required*** to go into a closed session.

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Closed Sessions

- Please remember: All **DECISIONS** must be made at a meeting ***open*** to the public.
- This means that you can deliberate (discuss, debate, persuade etc.) in an appropriate closed session but you ***may not make the decision in a closed session***. The motion to take action needs to take place in an open session.

Closed Sessions

- A separate set of minutes ***shall*** be taken by the clerk (or designated secretary) at the closed session.
- These minutes are not to be disclosed unless a judge orders them produced in an action under Sections 10, 11, or 13 of the OMA.
- These minutes may be destroyed 1 year and 1 day after the approval of the minutes of the regular meeting at which the closed session minutes were approved. MCL 15.267(2)

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Permitted Purposes for Closed Sessions

(a) To consider the dismissal, suspension, or disciplining of, or to hear complaints or charges brought against, or to consider a periodic personnel evaluation of, ***a public officer, employee, staff member, or individual agent, if the named person requests a closed hearing***. A person requesting a closed hearing may rescind the request at any time, in which case the matter at issue shall be considered after the rescission only in open sessions. *Does NOT require 2/3 vote*

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Permitted Purposes for Closed Sessions

(b) To consider the dismissal, suspension, or disciplining of a student if the public body is part of the school district, intermediate school district, or institution of higher education that the student is attending, and if the student or the student's parent or guardian requests a closed hearing. *Does not require 2/3 vote*

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Permitted Purposes for Closed Sessions

(c) For strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement if either negotiating party requests a closed hearing.

Does not require a 2/3 vote

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Permitted Purposes for Closed Sessions

(d) To consider the purchase or lease of real property up to the time an option to purchase or lease that real property is obtained.

**__Requires__* a 2/3 vote*

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Permitted Purposes for Closed Sessions

(e) To consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial effect on the litigating or settlement position of the public body.

__Requires__ 2/3 vote

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Permitted Purposes for Closed Sessions

(f) To review and consider the contents of an ***application for employment or appointment to a public office*** if the candidate requests that the application remain confidential. However, except as otherwise provided in this subdivision, ***all interviews by a public body for employment or appointment to a public office shall be held in an open meeting pursuant to this act.***

__Requires__ 2/3 vote

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Permitted Purposes for Closed Sessions

(h) To consider material exempt from discussion or disclosure by state or federal statute.

__Requires__ 2/3 vote

This exception covers materials considered in a written attorney-client privileged document, which would be exempted under FOIA. It also includes health information protected under HIPAA, or other materials exempted from public disclosure

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Minutes

The OMA requires a separate set of minutes be kept for each closed session a public body enters. The OMA does not require a specific procedure for the approval of closed session minutes. These minutes must be retained by the clerk of the public body. ***Closed session minutes are not public records***, and may only be disclosed if required by Court order.

The minutes of a closed session may be destroyed 1 year and 1 day after approval of the minutes of the open meeting where the closed session was approved.

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Your decisions are Presumed Valid

Decisions of a public body shall be presumed to have been adopted in compliance with the requirements of this act. The attorney general, the prosecuting attorney of the county in which the public body serves, or ***any person may commence a civil action in the circuit court to challenge the validity of a decision of a public body made in violation of this act.***

MCL 15.270(1)

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Invalidating Your Decisions

A decision made by a public body may be invalidated if the public body ***has not***:

- Had its meeting open to the public and held in a place available to the general public.
- Allowed all persons to attend (including the right to record the meeting).
- Made the decision at an open meeting.
- Deliberated toward a decision at an open meeting unless it was permitted to be closed. MCL 15.270(2)

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Invalidating Your Decisions

Your decision may also be invalidated if the public body has failed to give notice as required by the OMA and the court finds that the noncompliance or failure has impaired the rights of the public under this act. MCL 15.270(2)

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Time Limit to Sue

In most cases, ***60 days*** after the approved minutes are made available to the public by the public body; unless

MCL 15.270(3)(a)

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Time Limit to Sue

If the decision involves the approval of contracts, the receipt or acceptance of bids, the making of assessments, the procedures pertaining to the issuance of bonds or other evidences of indebtedness, or the submission of a borrowing proposal to the electors, within ***30 days*** after the approved minutes are made available to the public pursuant to that decision. MCL 15.270(3)(b)

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Venue

- Any county in which the public body serves.

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Reenactment

- If a case is filed against the public body to invalidate a decision of a public body for violating the requirements of the OMA, the public body **may** reenact the challenged action (in compliance with the OMA) without making an admission contrary to its interest.
- The reenacted decision shall be effective from the date of the reenactment and will not be invalid for the original deficiency. MCL 15.270(5)

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Lawsuit to Compel Compliance

If a public body is not complying with this act, the attorney general, prosecuting attorney of the county in which the public body serves, or a person may commence a civil action to compel compliance or to enjoin further noncompliance with this act.

MCL 15.271(1)

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Lawsuit to Compel Compliance

- An action for **injunctive relief** against a local public body shall be commenced in the circuit court, and venue is proper in any county in which the public body serves. *** If a person commences an action for injunctive relief, that person shall not be required to post security as a condition for obtaining a preliminary injunction or a temporary restraining order. MCL 15.271(2)

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Lawsuit to Compel Compliance

An action for mandamus against a public body under this act shall be commenced in the court of appeals. MCL 15.271(3)

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Lawsuit to Compel Compliance

If a public body is not complying with this act, and a person commences a civil action against the public body ***for injunctive relief*** to compel compliance or to enjoin further noncompliance with the act ***and succeeds in obtaining relief in the action***, the person shall recover court costs and ***actual attorney fees*** for the action.

MCL 15.271(4)

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Penalties

- A public official who ***intentionally*** violates this act is guilty of a misdemeanor punishable by a fine of not more than $1,000.00.
- A public official who is convicted of intentionally violating a provision of this act for a second time within the same term shall be guilty of a misdemeanor and shall be fined not more than $2,000.00, or imprisoned for not more than 1 year, or both. MCL 15.272

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And Wait… There's More….

A public official who intentionally violates this act shall be ***personally*** liable in a civil action for actual and exemplary damages of not more than $500.00 total, ***plus court costs and actual attorney fees*** to a person or group of persons bringing the action. MCL 15.273(1)

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But... But... But...

The only real defense to an intentional violation claim, other than proving there was no violation, is to essentially assert ignorance:

"[A]s an essential element of the crime of intentionally violating the OMA, an offender must have a ***subjective desire to violate the OMA or knowledge that the offender is committing an act violative of the OMA***." *People v Whitney*, 228 Mich App 230, 256 (1998).

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More on Penalties

- Not more than 1 action under this section shall be brought against a public official for a single meeting.
- An action under this section shall be commenced within 180 days after the date of the violation which gives rise to the cause of action.

MCL 15.273(2)

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Questions?

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