

Open Meetings Act—Closed Meeting Minutes

Introduction

The Michigan Open Meetings Act (OMA) provides that all meetings of a public body shall be open to the public and be held in a place available to the general public. (MCL 15.261 et seq.) The OMA also provides, however, for those situations in which a public body may meet in closed or executive session. (MCL 15.268) This discussion during a closed session is limited to the minutes taken during a closed session and assumes that the public body met in a properly closed session.

Are minutes required to be taken at a closed session?

Yes. The OMA requires that a separate set of minutes shall be taken at the closed session. (MCL 15.267(2)) According to an opinion of the Michigan attorney general, the minutes must reflect:

- the date, time, and place;
- members present and absent; and
- the purpose of the closed session. (Opinion of the Attorney (OAG) No. 6817)

Who may take the minutes?

The municipal clerk or a secretary designated by the public body.

Are the minutes available to the public?

No. The minutes may only be disclosed if required by court order in a civil action filed in accordance with MCL 15.270, 15.271 or 15.273. OAG No. 6353 provides that disclosure may not be made even if the person requesting the closed session subsequently waives or withdraws the request and consents to disclosure.

Who approves the minutes and when?

The public body. The public body may meet in closed session to approve the minutes of a closed session if the decision to go into closed session to approve the minutes of the past closed session is made in an open session of the public body.

May the minutes of a closed session be destroyed?

The minutes of a closed session may be destroyed one year and one day after approval of the minutes of the regular meeting at which the closed session was approved.

Are the minutes of a closed session subject to the Michigan Freedom of Information Act?

The minutes of a closed session are exempt from disclosure under the Michigan Freedom of Information Act unless required by court order in accordance with the Open Meetings Act.

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STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

Opinion No. 6817

September 14, 1994

OPEN MEETINGS ACT:

Decisions may be made only at open meetings

OPEN MEETINGS ACT:

Contents of minutes of closed sessions

Sections 7 and 8 of the Open meetings Act, which authorize closed sessions for deliberations on certain enumerated topics, apply only to deliberations. Decisions of public bodies must be made at a meeting open to the public.

Public bodies must take minutes of a closed session that reflect the date, time, place, members present and absent, and the purpose or purposes of the closed session.

Honorable Greg Kaza

State Representative

The Capitol

Lansing, Michigan

You have asked two questions regarding closed sessions under the Open Meetings Act (OMA), MCL 15.261 et seq; MSA 4.1800(11) et seq. Your first question is:

Do sections 7 and 8 of the Open Meetings Act refer only to deliberations and not to actual votes and decisions of a public body?

Sections 7 and 8 of the OMA allow a public body to go into closed session for deliberations on certain enumerated topics. However, section 3(2) of the OMA states that "[a]ll decisions of a public body shall be made at a meeting open to the public." (Emphasis added.) In contrast, section 3(3) of the OMA states that "[a]ll 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." (Emphasis added.) MCL 15.263(2) and (3); MSA 4.1800(13)(2) and (3). The language of these provisions is clear and unequivocal and does not require interpretation. *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 738; 330 NW2d 346 (1982). *Lake Carriers' Ass'n v Director of the Department of Natural Resources*, 407 Mich 424, 429; 286 NW2D 416 (1979). Section 3(2) of the OMA clearly requires that all decisions of a public body take place in an open session. Section 3(3) of the OMA only allows a public body to go into closed session under sections 7 and 8 for deliberations on certain enumerated topics. This is confirmed by *St. Aubin v Ishpeming City Council*, 197 Mich App 100, 102; 494 NW2d 803 (1992), in which the court stated that "[t]he OMA requires that all decisions of a public body must be made at a meeting open to the public."

It is my opinion, therefore, in response to your first question, that sections 7 and 8 of the OMA, which authorize closed sessions for deliberations on certain enumerated topics, apply only to deliberations. Decisions of public bodies must be made at a meeting open to the public.

Your second question may be stated as:

Does section 7 of the Open Meetings Act require minutes to be published regarding a closed session and, if so, what information must be placed in those minutes?

Section 7(2) of the OMA, MCL 15.267(2); MSA 4.1800(17)(2), provides:

A separate set of minutes shall be taken by the clerk or the designated secretary of the public body at the closed session. These minutes shall be retained by the clerk of the public body, are not available to the public, and shall only be disclosed if required by a civil action filed under section 10, 11, or 13. These minutes may be destroyed 1 year and 1 day after approval of the minutes of the regular meeting at which the closed session was approved.

Thus, public bodies are required to take and retain minutes of closed sessions, but they may not make those minutes available to the public unless the disclosure is ordered by a court. OAG, 1985-1986, No 6353, p 255, 257 (April 11, 1986); OAG, 1981-1982, No 6019, p 507, 510 (December 29, 1981).

Section 7 of the OMA does not specify any content requirements for the minutes of closed sessions. However, section 9(1) of the OMA states:

Each public body shall keep minutes of each meeting showing the date, time, place, members present, members absent, any decisions made at a meeting open to the public, and the purpose or purposes for which a closed session is held. The minutes shall include all roll call votes taken at the meeting. Corrections in the minutes shall be made not later than the next meeting after the meeting to which the minutes refer. Corrected minutes shall be available no later than the next subsequent meeting after correction. The corrected minutes shall show both the original entry and the correction.

MCL 15.269(1); MSA 4.1800(19)(1).

Section 9(1) applies to each meeting. It is not limited to open meetings. Thus, the section 9(1) requirement that meeting minutes reflect the date, time, place, members present, and members absent is equally applicable to minutes of open meetings and closed sessions. However, the section 9(1) requirement that minutes reflect any decisions made and any roll call votes taken is inapplicable to minutes of closed sessions, since public bodies may not make decisions in closed session. Similarly, section 9(2) and (3) concern the availability of meeting minutes to the public, and clearly apply only to open meeting minutes.

Section 7(1) of the OMA requires that "the purpose or purposes for calling a closed session shall be entered into the minutes of the [open] meeting at which the vote is taken." Section 9(1) contains a similar requirement. It is possible to construe section 9(1) as merely restating section 7(1) in this regard. However, it is a fundamental rule of statutory construction that every word, sentence and section of a statute should be given effect, so that no word or phrase is treated as surplusage or rendered nugatory, if possible. See Soap & Detergent Ass'n, supra, 415 Mich at 738, and Attorney General ex rel Dep't of Natural Resources v Sanilac County Drain Comm'r, 173 Mich App 526, 531; 434 NW2d 181 (1988). In light of the broader sweep of section 9(1), it is my opinion that the most appropriate construction of this language is that it creates a general requirement that all minutes, whether of an open meeting or a closed session, reflect the purpose of the closed session.

It is my opinion, therefore, in answer to your second question, that public bodies must take minutes of a closed session that reflect the date, time, place, members present and absent, and the purpose or purposes of the closed session.

Frank . Kelley

Attorney General

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STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

Opinion No. 6353

April 11, 1986

OPEN MEETINGS ACT:

Closed session requested by an elected public officer

Disclosure of minutes of closed session

WORDS AND PHRASES:

'Public officer'

Closed sessions of a public body subject to the Open Meetings Act may be requested by an elected public officer pursuant to the Open Meetings Act.

The Open Meetings Act permits disclosure of the minutes of a closed session of a public body held pursuant to MCL 15.268; MSA 4.1800(8), only upon order of a court in accordance with the Act.

Honorable R. Robert Geake

State Senator

The Capitol

Lansing, Michigan 48909

You have requested my opinion on two questions concerning closed sessions under the Open Meetings Act, MCL 15.261 et seq; MSA 4.1800(11) et seq. Your first question may be stated as follows:

Does the term 'public officer,' as used in MCL 15.268(a); MSA 4.1800(8)(a), include elected as well as appointed officers?

MCL 15.263(3); MSA 4.1800(13)(3), provides that all deliberations of a public body must take place at a meeting open to the public, except as otherwise provided in MCL 15.267-15.268; MSA 4.1800(17)-4.1800(18). MCL 15.268 (a); MSA 4.1800(18)(a), provides that a public body may meet in a closed session:

'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 thereafter only in open sessions.' (Emphasis added.)

The term 'public officer' is not defined in any provision of the Open Meetings Act. Under such circumstances, where the term is assigned no statutory definition, the words must be construed according to their common and ordinary usage. Production Credit Association of Lansing v Department of Treasury, 404 Mich 301; 273 NW2d 10 (1978).

The meaning of the term 'public office' has been addressed by numerous Michigan appellate decisions. See, e.g., Marxer v City of Saginaw, 270 Mich 256, 260-263; 258 NW 627 (1935); People v Freedland, 308 Mich 449, 455-458; 14 NW2d 62 (1944); Meiland v Wayne Probate Judge, 359 Mich 78, 86-87; 101 NW2d 336 (1960); Solomon v Highland Park Civil Service Commission, 64 Mich App 433, 437; 236 NW2d 94 (1975), lv den 396 Mich 812 (1976); and People v Clark, 134 Mich App 324, 326-327; 350 NW2d 878, lv den 419 Mich 959 (1984). These authorities clearly establish that it is the nature and source of the officer's authority which determine whether the individual must be considered to be a 'public officer.' The question of whether the position is elective or appointive is of no consequence. As the Michigan Supreme Court stated in Marxer, 270 Mich at 260:

'A public office is a public station or employment conferred by election or appointment. It embraces the ideas of tenure, duration, emolument, and duties. United States v. Hartwell, 6 Wall. (73 U.S.) 385.'

More recently, the Michigan Court of Appeals stated as follows in Solomon v Highland Park Civil Service Commission, 64 Mich App at 437:

'A public officer in the general everyday acceptance of the term is a special classification of those involved in government at what may be described as in an executive classification, whether his elevation to that status is elective or appointive.' (Emphasis added.)

See also, Poorman v State Board of Equalization, 99 Mont 543; 45 P2d 307 (1935); Sitton v Fulton, 566 SW2d 887 (Tenn Ct App), cert den (1978); and 67 CS, Officers, Sec. 3. It must be concluded, therefore, that the meaning of the term 'public officer' includes not only appointed, but also elected officials.

It must be emphasized, however, that MCL 15.268(a); MSA 4.1800(18)(a), permits a closed session only when it is requested by the individual who is the subject of the complaint. Even then, the closed session may be convened only for the purpose of hearing and deliberating upon or discussing that complaint. Any subsequent vote or decision upon such a complaint must be conducted in an open session and the public body's decision must be reflected in the minutes of the meeting. Palladium Publishing Co v River alley School Dist, 115 Mich App 490; 321 NW2d 705 (1982), lv den 417 Mich 1049 (1983); OAG, 1979-1980, No 5445, p 57 (February 22, 1979); OAG, 1979-1980, No 5632, p 563 (January 24, 1980).

It is my opinion, in response to your first question, that the term 'public officer,' as used in the Open Meetings Act, MCL 15.268(a); MSA 4.1800(18)(a), includes elected as well as appointed officers.

Your second question is:

May a public body which has held a closed session pursuant to a request made under the Open Meetings Act, Sec. 6(a), disclose tape recorded minutes of the closed session if the person who requested the closed session subsequently waives or withdraws that request and consents to such disclosure?

MCL 15.267(2); MSA 4.1800(17)(2), provides:

'A separate set of minutes shall be taken by the clerk or the designated secretary of the public body at the closed session. These minutes shall be retained by the clerk of the public body, shall not be available to the public, and shall only be disclosed if required by a civil action filed under section 10, 11, or 13. These minutes may be destroyed 1 year and 1 day after approval of the minutes of the regular meeting at which the closed session was approved.' (Emphasis added.)

This language is clear and unequivocal. It plainly prohibits disclosure of the minutes of a closed session unless such disclosure is ordered by a court in an appropriate action.

It may also be noted that an intentional violation of this provision could subject the public official making such disclosure to both criminal and civil penalties. MCL 15.272-15.273; MSA 4.1800(22)-4.1800(23).

The conclusion that such minutes may not be disclosed without an appropriate court order is further reinforced by MCL 15.268(a); MSA 4.1800(18)(a), which states in pertinent part:

'A person requesting a closed hearing may rescind the request at any time, in which case the matter at issue shall be considered thereafter only in open sessions.' (Emphasis added.)

As this provision demonstrates, the consequence of such a rescission is that all further deliberations are to be conducted in public. No provision is made for disclosure of the minutes of any previous closed proceedings. This is particularly significant in view of the unequivocal language contained in MCL 15.267(2); MSA 4.1800(17)(2), prohibiting such disclosure.

Such a construction may, in at least some cases, lead to a peculiar result. It is not difficult to imagine a situation where, for example, subsequent to a closed session held under MCL 15.268(a); MSA 4.1800(18)(a), the person who requested the closed session agrees to rescind his request and all parties involved in the closed session agree to the disclosure of the minutes. Under such circumstances, it is difficult to perceive any continued public interest in protecting the confidentiality of those minutes. Nevertheless, the prohibition contained in MCL 15.267(2); MSA 4.1800(17)(2), which is subject to potential civil and criminal penalties as provided in MCL 15.272-15.273; MSA 4.1800(22)-4.1800(23), is clear and unambiguous. It is a well established rule of statutory construction that the Legislature is presumed to have intended the meaning that is clearly expressed; accordingly, an unambiguous statute does not require interpretation and must be enforced as it is written. Soap Detergent Association v Natural Resources Commission, 415 Mich 728, 738; 330 NW2d 346 (1982). To the extent that such enforcement may lead to an undesirable result in at least some instances, the Legislature may wish to consider appropriate amendatory legislation.

I am constrained to conclude, therefore, and it is my opinion, that by virtue of MCL 15.267(2); MSA 4.1800(17)(2), the Legislature has prohibited a public body from disclosing the minutes of a closed session held pursuant to a request made under the Open Meetings Act, MCL 15.268(a); MSA 4.1800(18)(a), even though the individual who is the subject of the closed session subsequently withdraws or rescinds that request. It is my further opinion that such minutes may be disclosed only if ordered by a court in a civil action brought under MCL 15.270-15.271 or 15.273; MSA 4.1800(20)-4.1800(21) or 4.1800(23).

Frank . elley

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