

The New Jersey Open Public Meetings Act (OPMA)

What is OPMA?

The *Open Public Meetings Act*, also known as “*The Sunshine Law*,” was approved on October 21, 1975 and became effective on January 19, 1976 (P.L. 1975, c. 231). It was enacted in response to growing public cynicism about politics and distrust of government in the wake of the Vietnam War and Watergate. The intent of the OPMA was to have government meetings conducted in the open, to the greatest extent possible, consistent with the public interest and without invading individual privacy.

N.J.S.A. 10:4-7: Definition of public body, public meeting

The Legislature finds and declares that the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies, is vital to the enhancement and proper functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public’s effectiveness in fulfilling its role in a democratic society, and hereby declares it to be the public policy of this State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.

- A. The Open Public Meetings Act (OPMA) creates a strong presumption of access, and should be liberally construed. However, not all meetings are public meetings.
- B. In order to be covered by OPMA, the public body in question must:
 - Consist of more than one person; AND
 - Be empowered by law to spend public funds; OR
 - Be empowered by law to affect a person’s rights.
- C. The following groups or meetings of individuals are NOT considered “public bodies” and thus are not covered by OPMA:
 - Informal or advisory bodies
 - Meetings between a public official subordinates who are not empowered to act by vote
 - Political party organizations
 - Meetings not open to all members of the public body
 - Meetings where discussion or action on public business will NOT take place
 - Typical partisan caucus meetings
 - Chance encounters of members of a public body
- D. The following situations are NOT considered “meetings” under OPMA
 - Meetings attended by less than an effective majority of the members of the public body; this is usually a quorum
 - An ad hoc group consisting of several members of various public bodies without any power to vote
 - Informal polling of council members by township attorney, so long as there is not discussion or action as a unit

- E. Meeting includes meetings taking place through “communications equipment”.
- This includes telephones, cell phones, **text messages, emails**, and social media, among others. If a quorum of the public body uses any communications equipment to **discuss** or decide upon public business, a meeting has likely occurred in violation of OPMA
- F. A meeting between newly elected officials who have not yet taken office may be considered a meeting under OPMA, if they meet with the intent to discuss public business.

N.J.S.A. 10:4-12: Meetings open to public; exclusion of public; subject matter of discussion.

a. Except as provided by subsection b. of this section all meetings of public bodies shall be open to the public at all times. Nothing in this act shall be construed to limit the discretion of a public body to permit, prohibit or regulate the active participation of the public at any meeting, except that a municipal governing body and a board of education shall be required to set aside a portion of every meeting of the municipal governing body or board of education, the length of the portion to be determined by the municipal governing body or board of education, for public comment on any governmental or school district issue that a member of the public feels may be of concern to the residents of the municipality or school district.

b. A public body may exclude the public only from that portion of a meeting at which the public body discusses:

(1) Any matter which, by express provision of federal law or State statute or rule of court shall be rendered confidential or excluded from the provisions of subsection a. of this section.

(2) Any matter in which the release of information would impair a right to receive funds from the Government of the United States.

(3) Any material the disclosure of which constitutes an unwarranted invasion of individual privacy such as any records, data, reports, recommendations, or other personal material of any educational, training, social service, medical, health, custodial, child protection, rehabilitation, legal defense, welfare, housing, relocation, insurance and similar program or institution operated by a public body pertaining to any specific individual admitted to or served by such institution or program, including but not limited to information relative to the individual's personal and family circumstances, and any material pertaining to admission, discharge, treatment, progress or condition of any individual, unless the individual concerned (or, in the case of a minor or incompetent, his guardian) shall request in writing that the same be disclosed publicly.

(4) Any collective bargaining agreement, or the terms and conditions which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body.

(5) Any matter involving the purchase, lease or acquisition of real property with public funds, the setting of banking rates or investment of public funds, where it could adversely affect the public interest if discussion of such matters were disclosed.

(6) Any tactics and techniques utilized in protecting the safety and property of the public, provided that their disclosure could impair such protection. Any investigations of violations or possible violations of the law.

(7) Any pending or anticipated litigation or contract negotiation other than in subsection b. (4) herein in which the public body is, or may become a party. Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in

order for the attorney to exercise his ethical duties as a lawyer.

(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

(9) Any deliberations of a public body occurring after a public hearing that may result in the imposition of a specific civil penalty upon the responding party or the suspension or loss of a license or permit belonging to the responding party as a result of an act or omission for which the responding party bears responsibility.

N.J.S.A. 10:4-13: Exclusion of public; resolution; adoption; contents.

No public body shall exclude the public from any meeting to discuss any matter described in subsection 7. b. until the public body shall first adopt a resolution, at a meeting to which the public shall be admitted:

a. Stating the general nature of the subject to be discussed; and

b. Stating as precisely as possible, the time when and the circumstances under which the discussion conducted in closed session of the public body can be disclosed to the public.

- A. Exemptions permitting closed sessions are strictly construed.
- B. As long as a public body permits comment on any topic whatsoever during the meeting, they may limit the time set aside for comment as well as the time permitted to each speaker.
 - The chair of the meeting, whether the Council President, Mayor, or other official, is vested with the power to order the removal of an individual who is disrupting a meeting, either by not keeping within their allotted time or by attempting to speak outside the public comment period. Adequate notice should be given as to the consequences of continued disruption before the chair orders them to be removed.
- C. A public body is permitted to “discuss” public business in closed session; this means that a public body may deliberate and debate an issue, but may NOT act. Actions and votes must take place in public. However, the public body is NOT required to explain the reasons for their action after a lawful closed session, as this would circumvent the entire purpose of permitting a close session.
- D. If an issue is does not fall within an exception and should be discussed in public, a public body may NOT discuss the issue in closed session or in private and then attempt to “cure” the OPMA violation by explaining the arguments that took place in public.
- E. If a public body meets in private or closed session to discuss a topic that should have been discussed in open session, they may remedy the violation by holding a public meeting and discussing fully and/or acting on the subject. Again, they may NOT simply report what was said in private, but MUST begin the debate anew.
- F. A public body may NOT structure its meetings so that the public is essentially uninformed as to when the public session of a meeting will begin. For example, a public body may not continually open a public meeting, then immediately go into a closed session of indeterminate length, and only after that once again open the meeting to the public.

G. Public safety includes those topics necessary to protect life or health. It does not include, for example, discussions on the organization of the First Aid Squad.

H. Employment and personnel matters

- Discussions of employment and personnel matters include, but are not limited to, discussions on the hiring, firing, qualifications, performance, merit, and shortcomings of employees
- Employees may request that the public body discuss their specific situation in public. This requires adequate notice to be given directly to the effected employee (commonly called a "Rice" notice.)
- If a public body is filling a position normally filled by an elected official under the Municipal Vacancy Law or any other law, the discussions may NOT be held in private, but must be public.
- This is not an evidentiary hearing allowing the affected employee to present evidence or cross examine
- There is no case law on whether an affected employee may choose to have their situation discussed in closed session but to also attend that closed session. Presumably an affected employee would be permitted to "have their cake and eat it too" by attending a closed session

I. Pending or anticipated litigation

- If the pending or anticipated litigation against the town was filed by a member of the public body, that member of the public body may be excluded from any executive session where that is discussed
- The public body cannot go into closed session by relying on an assertion that any action taken is likely to result in litigation

J. The resolution to enter closed session need not be in writing

- The resolution must include as much detail as possible. It may not state, for example, "...to discuss any matter exempted by OPMA" or "...to discuss matters falling within attorney-client privilege."
- The resolution must be passed at a public meeting for which notice has been given

N.J.S.A. 10:4-14: Minutes of meetings; availability to public

Each public body shall keep reasonably comprehensible minutes of all its meetings showing the time and place, the members present, the subjects considered, the actions taken, the vote of each member, and any other information required to be shown in the minutes by law, which shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with section 7 of this act.

- A. Handwritten notes to be used later in preparation of the minutes are NOT public documents under OPRA nor are they the minutes under OPMA.
- B. Minutes must be taken at all times, even during closed sessions. The minutes of closed sessions should be redacted as needed, but must be released if requested. Only extraordinary circumstances permit total suppression of the minutes.
- C. No hard and fast definition of "promptly available" exists. In one case, a court determined that promptly available meant two weeks following any regular meeting.

- D. "Reasonably comprehensible" means that the minutes must show what took place at a meeting and what final action was taken. It does NOT mean a verbatim record.

N.J.S.A. 10:4-21. Liberal construction.

This act shall be liberally construed in order to accomplish its purpose and the public policy of this State as set forth in section 2.

Some Frequently Asked Questions

Q. *Are all political caucus meetings exempt from the law?*

- A. Most are. There are cases, such as when a newly elected governing body which has not been sworn in meets to discuss appointments and then proceeds to give notice to incumbents that they will not be reappointed, where the courts have held that even though the members were not yet sworn in, they were subject to the Act because they were actually seeking to do public business at the caucus. The best advice is to be sure if a caucus is being held, that political leaders who are not members of the governing body are in attendance, and that the focus of the meeting is on the political "spin" of whatever are being discussed.

Q. *What is a chance social encounter?*

- A. Typically, if several members of a public body meet at a community function which is not being held by the governing body specifically, the fact that a majority of the body are at the meeting or event does not cause it to become an illegal meeting of the group. Even if they expect that some of their colleagues will be at a meeting, as long as they do not go there with the intent of holding a meeting with them to discuss public business, they are probably exempt from the act. On the other hand, if after every meeting a majority of the members of a board or governing body all go out for a cup of coffee together and during the course of their gathering continue to discuss the business of the public, sooner or later someone may seek to say that they are meeting illegally. Thus, while they cannot avoid some discussion of what has just occurred at a meeting, it should be as limited as possible, and general discussion as to future actions should be avoided.

Q. *What kind of meeting with advisory boards is exempt from the Act?*

- A. Over the years the courts have had the tendency to allow governing body's significant flexibility in terms of being able to meet with advisors off the record. However, if there is a serious issue in question, it is far better to exclude the public under the specific provisions outlined below, which allow a municipal governing body to go into closed session. Generally, the governing body is best off trying to restrict its closed meetings to those concerning a subject exempt from the Act. This is the safest course legally and makes the most sense in terms in spirit of the act and the maintenance of public confidence.

Q. *How far does the definition of 'public body' go?*

- A. The Supreme Court of New Jersey has held that a charter study commission is a public body, because they have the power to put onto the ballot a referendum question to decide a municipality's form of government. A private nonprofit corporation expending public funds to redevelop public land also has been held to fit the definition. The best rule is, when in doubt, assume the act applies. You can be reasonably sure a court will take a strict approach in any case of doubt.

Q. *Must all participants be physically present in a room to hold a meeting?*

- A. Although this may be preferable, the language in the definition of "meeting" clearly includes meetings held by means of communication equipment, and, in fact, some state boards conduct such meetings because of the difficulty in assembling groups of busy people in Trenton. As long as all have heard the

discussion, there is no reason why the participant who is out of town on business, but attached via the “umbilical cord” of a telephone line, cannot participate in and vote upon a matter during a meeting back home. Although there has not yet been legal precedent on the subject in New Jersey, in other states courts and attorney general opinions have recognized that emails can also pose Open Public Meetings issues. If a quorum of the governing body, enough to make a decision or to act, is discussing a municipal matter via email, they may be found to be holding a public meeting without properly noticing or inviting the public. Even if no action is taken pursuant to the emails, and the matter is later acted upon at a properly noticed open public meeting, the formal action can be viewed as something that was improperly decided in private and “rubber-stamped” in public. It is important to remember that the Open Public Meetings Act can be violated even if its requirements are literally met, but its policy of ensuring that government acts openly is circumvented by such “secret” preparations.

Q. *Are subcommittees unlawful?*

A. Many governing bodies set up subcommittees to look at particular issues and report back to the entire governing body. As long as such subcommittees are used for legitimate purposes, and not merely to make a decision or hear things in private, so as to avoid a full public discussion, the establishment of a subcommittee is not unlawful and does not violate this provision of the law.

Q. *How specific should a resolution going into executive session be?*

A. As specific as public interests will allow. If a particular tax appeal is to be discussed or existing litigation the caption of the case should be part of the resolution. On the other hand, if the municipality is going to make a “pre-emptive strike” by starting litigation against someone and is seeking an element of surprise, then, obviously, the specific nature cannot reasonably be divulged at such a time.

Q. *What about minutes of executive sessions?*

A. They should be made and adopted as soon after an executive session as possible, in the same manner as regular minutes. They should be made available to members of the governing body to review on a restricted basis, and they can be approved in the same manner as regular meeting minutes, with the understanding that they are not for public release at this time. If there is any need to discuss the minutes before adoption, it can be done in executive session. The benefits of adopting such minutes soon after the fact lie in the fact that it is important for members of the governing body to keep in mind what they did at these sessions, many of which occur at the end of a regular meeting when members may not be as awake as at the beginning of a meeting. Having the minutes will keep them apprised of their own activities.

(Excerpted from the N.J. State League of Municipalities Open Public Meetings Act booklet)