

# Public Access Laws: The Open Door Law

Karen Arland  
Ice Miller LLP  
December 15, 2016

# Public Purpose; Liberal Construction of Open Door Law

- ➔ Often referred to as ""Sunshine Law".
- ➔ Underlying public purpose is that government should be open and accessible to the public.
- ➔ The Open Door Law is to be liberally construed; when in doubt, access to meetings is the preferred outcome.

# Open Door Law

## Key Terms

- ➔ A meeting is a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business.
- ➔ An executive session is a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose.
- ➔ Not a meeting:
  - ➔ any social or chance gathering not intended to avoid the chapter;
  - ➔ any on-site inspection of any project; program; or facilities of applicants for incentives or assistance from the governing body;
  - ➔ traveling to and attending meetings of organizations devoted to betterment of government;

# Open Door Law

## Definitions *(cont'd)*

- ➔ A governing body is two or more individuals who are:
  - ➔ the board, commission, council, or other body of a public agency that takes official action upon public business; or
  - ➔ any committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated.
  
- ➔ A governing body is not: a gathering of agency employees conducting the internal staff operations of a public agency.

# Open Door Law

## Definitions *(cont'd)*

- ➔ Official action means to:
  - ➔ receive information;
  - ➔ deliberate;
  - ➔ make recommendations;
  - ➔ establish policy;
  - ➔ make decisions; or
  - ➔ take final action.
- ➔ Final action means: to vote.

# Open Door Law

## Definitions *(cont'd)*

- ➔ Public business means any function upon which the public agency is empowered or authorized to take official action.

# Open Door Law

## General Requirement for Open Meetings

- ➔ With few exceptions, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them.
- ➔ A secret ballot vote may not be taken at a meeting.

# Open Door Law

## Posting Notice to Public Required

- ➔ Public notice of the date, time and place must be given for all meetings of a governing body.
- ➔ Notice must be given at least 48 hours prior to the time of the meeting, not including Saturdays, Sundays, or legal holidays (IC 1-1-9-1).
- ➔ Does not apply to reconvened meetings (EXCEPT executive sessions) where announcement of the date, time, and place of the reconvened meeting is made at the original meeting and recorded in the memoranda and minutes, and there is no change in the agenda
- ➔ Notice of the meeting must be posted at the principal office of the public agency holding the meeting or, if no such office exists, at the building where the meeting is to be held.

# Open Door Law

## Posting Notice to Public Required

- ➔ Notice of regular meetings need be given only once each year, except that an additional notice shall be given where the date, time, or place of a regular meeting or meetings is changed.
  - ➔ This does not apply to executive sessions.

# Open Door Law

## Required Notice to Media

- ➔ Public notice of a meeting must also be given by delivering a copy of the notice to all news media which deliver an annual written request for the notices not later than December 31 for the next succeeding calendar year to the governing body of the public agency.
- ➔ If a meeting is called to deal with an emergency, the 48 hour notice requirements do not apply, but:
  - ➔ news media which have requested notice of meetings must be given the same notice as is given to the members of the governing body; and
  - ➔ the public must be notified by posting a copy of the notice.

# Open Door Law

## Methods of Notice to Media

- ➔ The governing body shall give notice by one of the following methods, to be determined by the governing body:
  - ➔ depositing the notice in the United States mail with postage prepaid.
  - ➔ transmitting the notice by electronic mail, if the public agency has the capacity to transmit electronic mail.
  - ➔ transmitting the notice by facsimile (fax).

# Open Door Law

## Optional Additional Electronic Notice

- ➔ Governing body may adopt a policy to provide for additional notice to public by electronic means:
  - ➔ e-mail notice sent to any person who has requested notice annually by December 31 of a year; or
  - ➔ posting notice on the governmental entity's website.

# Open Door Law

## Minutes or Memoranda

- ➔ Memoranda shall be kept of all meetings and must include:
  - ➔ date, time, and place of the meeting.
  - ➔ members of the governing body recorded as either present or absent.
  - ➔ general substance of all matters proposed, discussed, or decided.
  - ➔ record of all votes taken, by individual members if there is a roll call.

# Open Door Law

## Minutes or Memoranda *(cont'd)*

- ➔ The memoranda are to be available within a reasonable period of time after the meeting for the purpose of informing the public of the governing body's proceedings.
- ➔ Minutes, if any, are to be open for public inspection and copying.

# Open Door Law

## Executive Session

- ➔ Under a few circumstances, the governing body may meet in executive session – it may exclude members of the public from the meeting.
- ➔ Public notice is still required, but the notice must also clearly indicate the statutorily-permitted purpose of the executive session.

# Open Door Law

## Executive Session *(cont'd)*

- ➔ Memoranda are still required, but must also include a certification that the only subject or subjects discussed were those stated in the notice.
- ➔ Final action (casting a vote) may not be taken in an executive session.
- ➔ A meeting may not be recessed, convened in executive session, and then reconvened.

# Open Door Law

## Executive Session *(cont'd)*

- ➔ An executive session may be held:
  - ➔ where authorized by federal or state statute.
  - ➔ for discussion of strategy with respect to any of the following:
    - ➔ initiation of litigation or litigation that is either pending or has been threatened specifically in writing.
    - ➔ collective bargaining.
    - ➔ the purchase or lease of real property by the governing body up to the time a contract or option to purchase or lease is executed by the parties.

# Open Door Law

## Executive Session *(cont'd)*

- ➔ Permitted executive sessions (continued)
  - ➔ to receive information about and interview prospective employees.
  - ➔ with respect to any individual over whom the governing body has jurisdiction:
    - ➔ to receive information concerning the individual's alleged misconduct; and
    - ➔ to discuss, before a determination, the individual's status as an employee.

# Open Door Law

## Executive Session *(cont'd)*

- ➔ Permitted executive sessions
  - ➔ when considering the appointment of a public official, to:
    - ➔ develop a list of prospective appointees.
    - ➔ consider applications.
    - ➔ make one (1) initial exclusion of prospective appointees from further consideration.
  - ➔ Interviews of prospective appointees must be conducted at a meeting that is open to the public.

# Open Door Law

## Executive Session *(cont'd)*

- ➔ Permitted executive sessions
  - ➔ to discuss a job performance evaluation of individual employees. This subdivision does not apply to a discussion of the salary, compensation, or benefits of employees during a budget process.
  - ➔ for discussion of records classified as confidential by state or federal statute.

# Open Door Law

## Executive Session *(cont'd)*

- ➔ Permitted executive sessions
  - ➔ interviews and negotiations with industrial or commercial prospects or agents of industrial or commercial prospects by an economic development commission or the governing body of a political subdivision.

# Open Door Law

## Participation by Electronic Communication

- ➔ A member of the governing body of a public agency who is not physically present at a meeting of the governing body but who communicates with members of the governing body during the meeting by telephone, computer, video conferencing, or any other electronic means of communication, but the member:
  - ➔ may not vote on matters taken at the meeting unless the member's participation is expressly authorized by statute; and
  - ➔ may not be considered to be present at the meeting unless considering the member to be present at the meeting is expressly authorized by statute.

# Open Door Law

## Remedies for Violations

- ➔ Any person may file a lawsuit to:
  - ➔ obtain a declaratory judgment;
  - ➔ enjoin continuing, threatened or future violations; or
  - ➔ have a policy, decision or final action taken in violation of the ODL declared void.
- ➔ Lawsuit must be filed:
  - ➔ before any bonds or notes are issued;
  - ➔ within 30 days of the occurrence of the action; or
  - ➔ no later than 30 days after the person knew or should reasonably have known, that a violation had occurred.

# Open Door Law

## Participation by Electronic Communication

- ➔ Redevelopment Commissions are expressly authorized to conduct meetings electronically.
  - ➔ All participating members; and
  - ➔ All members of the public who are physically present at the meeting must be able to simultaneously communicate with each other.
  - ➔ At least one-third (1/3) of the members must be physically present at the place where the meeting is conducted; and .
  - ➔ All votes during the meeting must be taken by roll call vote.
- ➔ The member shall be considered present for purposes of establishing a quorum and may vote on any action taken at the meeting.

# Open Door Law

## Remedies for Violations *(cont'd)*

- ➔ Court may take a variety of actions to remedy the violation, taking into account the severity of the violation, whether the violation prevented the public from fully understanding the policy or decision under consideration, and whether the public interest will be served by the remedy.

# Open Door Law

## Civil Penalties

- ➔ A public agency and an officer or management level employee of a public agency are subject to civil penalties if the officer or employee, with specific intent to violate the Open Door Law:
  - ➔ fails to give proper notice of a regular meeting, special meeting, or executive session;
  - ➔ takes final action outside a regular meeting or special meeting;
  - ➔ participates in a secret ballot vote during a meeting;
  - ➔ discusses subject not eligible for discussion during an executive session; or
  - ➔ fails to prepare a memorandum of a meeting.
- ➔ Up to \$100 for first offense; up to \$500 for subsequent offenses.

# Public Access Counselor Powers and Duties

- ➔ The Public Access Counselor is appointed by the Governor to:
  - ➔ establish and administer a program to train public officials and educate the public on the rights of the public and the responsibilities of public agencies under the public access laws.
  - ➔ to distribute to newly elected or appointed public officials the public access laws and educational materials concerning the public access laws.

# Public Access Counselor

## Powers and Duties *(cont'd)*

- ➔ to respond to informal inquiries made by the public and public agencies by telephone, in writing, in person, by facsimile, or by electronic mail concerning the public access laws.
- ➔ to issue advisory opinions to interpret the public access laws upon the request of a person or a public agency.