CLOSED SESSIONS UNDER THE OPEN MEETINGS ACT: AN OVERVIEW

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The purpose of the Open Meetings Act (OMA), MCL 15.261 *et. seq.*, is to encourage governmental accountability by facilitating public access and to provide an opportunity for the general public to better understand issues and decisions of public concern. In light of this purpose, the Open Meetings Act's requirements are interpreted broadly and its exemptions are interpreted narrowly. *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 83–85, 669 NW2d 862 (2003).
All meetings of a public body shall be open to the public and shall be held in a place available to the general public. All persons shall be permitted to attend any meeting except as otherwise provided in this act. MCL 15.263(1).
“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. MCL 15.262(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. MCL 15.262(b).
“Decision” means a determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy. MCL 15.262(d).
All decisions of a public body shall be made at a meeting open to the public. MCL 15.263(2).
Overview of OMA

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).
As used in the OMA, the term “public body” connotes a collective entity. The statutory terms used illustratively to define “public body”—“legislative body” and “governing body”—do not encompass individuals. A single individual is not commonly understood to be akin to a “board,” “commission,” “committee,” “subcommittee,” “authority,” or “council”—the bodies specifically listed in the act by the Legislature… Perhaps the strongest common-sense basis for concluding that an individual was not contemplated by the Legislature as a “public body” is to consider how odd a concept it would be to require an individual to “deliberate” in an open meeting.

MCL 15.268 allows, but does not require, ("we first note that § 8 of the Open Meetings Act merely permits the public body to meet in a closed session, it does not require a closed meeting.” Chonich v Ford, 115 Mich App 461, 467, 321 NW2d 693(1982)), a public body to meet in a closed session for only the following 10 purposes:
1. 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. MCL 15.268(a).
2. 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. MCL 15.268(b).
3. For strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement if either negotiating party requests a closed hearing. MCL 15.268(c).
4. To consider the purchase or lease of real property up to the time an option to purchase or lease that real property is obtained. MCL 15.268(d).
5. 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. MCL 15.268(e).
6. 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. This subdivision does not apply to a public office described in subdivision (j). MCL 15.268(f).
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7. Partisan caucuses of members of the state legislature. MCL 15.268(g).
8. To consider material exempt from discussion or disclosure by state or federal statute. MCL 15.268(h).
9. For a compliance conference conducted by the department of commerce under section 16231 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.16231 of the Michigan Compiled Laws, before a complaint is issued. MCL 15.268(i).
10. In the process of searching for and selecting a president of an institution of higher education established under section 4, 5, or 6 of article viii of the state constitution of 1963, to review the specific contents of an application, to conduct an interview with a candidate, or to discuss the specific qualifications of a candidate … MCL 15.268(j).
Procedurally, a 2/3 roll call vote of members elected or appointed and serving is required to call a closed session, except for the closed sessions permitted under section 8(a), (b), (c), (g), (i), and (j). The roll call vote and the purpose or purposes for calling the closed session shall be entered into the minutes of the meeting at which the vote is taken. MCL 15.267(a).
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 13.2 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. MCL 15.267(b).
Each subsection enumerated in MCL 15.268, which contains all the permissible purposes for which a public body may meet in a closed session, should be read in isolation as setting forth an independent OMA exception. That the closed meeting may not have been authorized by MCL 15.268(a) is immaterial because it was clearly allowed by MCL 15.268(h).

Who can attend a closed session? The answer is unclear and will depend on the specific exemption. “If defendant was concerned that the exemption would not apply if the consultation included individuals other than defendant's attorney, defendant could have requested that the members gather in a room and defendant's attorney could discuss the settlement negotiations with them privately.”

MCL 15.268(a). Charter or ordinance provisions regarding employee reviews/disciplinary hearings are not enforceable if in conflict with OMA. The OMA supersedes all local charter provisions related to the requirements for open meetings of local public bodies that were in force when it was enacted. MCL 15.261(2). *Deitrick v City of Charlotte*, 254678, 2005 WL 901089 (Mich App, Apr. 19, 2005).
MCL 15.268(c). Plaintiff contends that defendants were not permitted to come to any conclusions during the closed session. However, the OMA allows a closed session “for strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement.” Such a session would be pointless and absurd if the OMA were to prevent the public body from forming any conclusions about its strategic course of action. In order to conduct a meaningful strategic session, the public body must be allowed to make determinations concerning its goals and tactics relative to the negotiations.

On the other hand: “It is clear to us that defendants' actions in closed session here were not mere deliberations. Although defendants returned to open session to vote, they were by that point merely announcing publicly the decision at which they arrived during closed session. Any alleged distinction between consensus building and a determination or action, as advanced in the OMA's definition of “decision,” is a distinction without a difference. To hold otherwise would “undermine the legislative intent to promote responsible and open government.” Consequently, the decisions about the real estate in this case should have been made during open session.

MCL 15.268(e). We conclude that subsection 8(e) exists for the obvious purpose of allowing a public body to prepare for litigation without having to broadcast its trial or settlement strategy to the opposition along with the rest of the general public.

In light of this legislative purpose, we hold that a public body's attorney for purposes of subsection 8(e) is any attorney who, through exercise of an attorney-client relationship with the public body, helps the public body prepare for specific pending litigation. Accordingly, we reject plaintiffs' argument that subsection 8(e) was wholly inapplicable because the city council was not meeting with “its attorney.”

MCL 15.268(e) exempts from OMA requirements discussions of those matters in which a judgment has not yet been reached or in which a settlement agreement has not been accepted. *The Detroit News, Inc v City of Detroit*, 185 Mich App 296, 303, 460 NW2d 312 (1990).
MCL 15.268(f). Private telephone interviews conducted by defendants' personnel committee violated the OMA. Based on the plain language of the statute, the mere recording of the interviews without presentation of the interviews in open session did not comport with the OMA.

_Solom v. Dickinson County Library Bd, 235062, 2002 WL 1308337 (Mich App, June 14, 2002)._
MCL 15.268(h) permits a public body to conduct a closed session “(t)o consider material exempt from discussion or disclosure by state or federal statute”.

The most frequently utilized statute under this subsection is FOIA, and particularly the attorney client privilege exemption and the exemption for matters of a personal nature that would constitute an unwarranted invasion of privacy if disclosed.
The privacy issue has not met with much success. “From defendant's viewpoint, disclosure of performance evaluations to the public is an intrusion of privacy which outweighs the public's right to know. Such a perspective overlooks the public interest in the area of government. People have a strong interest in public education. Because a large portion of the tax dollar goes for the support of the schools, the taxpayer is increasingly holding the boards and administrators accountable for these moneys. Further, the public continues to have an increasing interest in the educational process and expects this public body to be accountable for its actions.”

*Ridenour, supra at 805.*
The attorney client privilege has been much more accepted by the courts, but is subject to strict limitations.
The purpose of the attorney-client privilege is to allow a client to confide in his or her attorney secure in the knowledge that the communication will not be disclosed. This privilege, which attaches to confidential communications made for the purpose of obtaining legal advice on some right or obligation, may be asserted by either the attorney or the client. This is distinguishable from the OMA, which has as its purpose providing openness and accountability in government and is interpreted to accomplish this goal.

The exemption applies only to written, not oral, legal opinions. “We must reject the city council's argument that § 8(h) authorizes closed sessions on any matter shielded by the attorney-client privilege.” The only material that can be considered in closed sessions under this provision is material exempt from discussion or disclosure by a state or federal statute. The only statute relied on by the city council as justification for its closed sessions is FOIA, and in particular § 13(1)(h), which exempts from disclosure as a “public record” (defined as a writing, see § 2[c] ) information or records subject to the attorney-client privilege.

*Booth Newspapers, Inc, supra* at 467.
Additionally, the scope of the discussion must be limited to legal matters and not include incidental, non-legal matters. *Id.* at 468.

“We conclude that proper discussion of a written legal opinion at a closed meeting is, with regard to the attorney-client privilege, limited to the meaning of any strictly legal advice presented in the written opinion. The attorney-client-privilege exemption does not extend to matters other than the provision of strictly legal advice.”

After the business in a closed session has been concluded, the public body must adjourn the closed session and reconvene in open session, even if only to adjourn the public meeting.
Decisions made in violation of the OMA are subjected to being voided under certain circumstances, but are not void.
However, the city council duly reenacted and recorded the decision to hold the closed session pursuant to MCL 15.270(5) which provides that “[a] decision reenacted in this manner ... shall not be declared invalid by reason of a deficiency in the procedure used for its initial enactment.”

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While separate minutes are required to be kept of the closed session, deficiencies in the keeping of minutes of meetings are not grounds for invalidating the actions taken.

*Manning, supra* at 252.