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MESSAGE FROM THE
OMBUDSMAN

SIDEBAR:

- The Ombudsman for Public Access is Staff Attorney Danee Garone.
- Open meeting law and public records law materials and updates are available on our website.
- [Click here](#) to view our updated open meeting law booklet.
- [Click here](#) to view our updated public records law booklet.
- Review past [Public Access Newsletters](#)
- [Upcoming Training/Outreach](#) - Contact Danee Garone for more.

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From the Office of the Arizona Ombudsman — Citizens' Aide

The Public Record

State Ombudsman Dennis Wells

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Does the Public Have a Right to Speak at Public Meetings?

Does the public have a general right to speak at public meetings? The short answer is no.

The open meeting law clearly establishes or recognizes a right to attend and listen. "All meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings." A.R.S. § 38-431.01(A). It does not, however, contain any provisions granting or recognizing the right of members of the public to speak at a meeting.

The closest the open meeting law comes to establishing a right to speak at public meetings is to lay out an optional call to the public. "A public body may make an open call to the public during a public meeting, subject to reasonable time, place and manner

restrictions, to allow individuals to address the public body on any issue within the jurisdiction of the public body." A.R.S. § 38-431.01(H).

Although the open meeting law does not establish or recognize a right to speak at meetings for the public, is there something in First Amendment jurisprudence or elsewhere that specifically establishes or recognizes such a right? Again, the answer is no.

The Ninth Circuit Court of Appeals has recognized that open meetings are "limited public forums" for First Amendment purposes. *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990). "A council can regulate not only the time, place, and manner of speech in a limited public forum, but also the content of speech—as long as con-

tent-based regulations are viewpoint neutral and enforced that way." *Norse v. City of Santa Cruz* 629 F.3d 966, 975 (9th Cir. 2010).

The *White* court held that a public body cannot declare that the public has no First Amendment rights at public meetings; however, a "meeting is still just that, a governmental process with a governmental purpose." 900 F.2d at 1425. For instance, members of the public can express themselves, such as by making provocative gestures at meetings, as long as the expression does not "actually disrupt" the meeting. The court, however, did not interpret the First Amendment (or anything else in the Constitution) as recognizing the general right of the public to speak or be heard at a meeting.

Recording Votes in Meeting Minutes

In 2018, the Legislature amended the open meeting law to require that the minutes or recording for each meeting include how each member of the public body votes. Specifically, the written minutes or recording for each meeting must include "[a]n accurate description of all legal actions proposed, discussed or taken, including a record of how each member voted." A.R.S. § 38-431.01(B)(4). What form must this record take? If a vote is unanimous, can the minutes or recording simply indicate that the vote was unanimous?

The statute does not specifically say, and the courts have yet to weigh in on the new language. A.R.S. § 38-431.01(B)(2) requires that meeting minutes or a recording indicate which members of a public body were present and which were absent. If this requirement is met, it would likely satisfy the new language to indicate that a vote was unanimous if all members who were present voted exactly the same way.

The best (and safest) practice would be for the written minutes or recording to explicitly indicate by name how each member voted for each vote. This can be tricky if a public body makes a recording instead of taking written minutes. The public may not know what each member looks or sounds like, so the recording should indicate by name how each member voted for each vote. The key is that the public must be informed of exactly how each member voted (or did not vote).

Legislation: 54th Legislature

HB 2032: This bill would have amended A.R.S. § 15-181, making most charter school entities and “management organizations” that contract with charter schools subject to the open meeting and public records law. It was completely changed via a strike-all amendment.

SB 1408: Very similar to the first version of HB 2032 and did not advance beyond second read.

HB 2174: This bill would amend A.R.S. §§ 13-907 and 13-4052 regarding the sealing of arrest and conviction records and allowing for the erasure of certain criminal records. It did not advance beyond second read.

HB 2191: This bill originally would have amended A.R.S. § 39-121.01 of the public records law and added § 39-129. After a strike-all amendment, it instead created §§ 44-7901 and -7902. This bill prohibits the use of criminal justice records or the information therein for soliciting business or pecuniary gain, including charging to have the information removed. The bill includes monetary damages for violations. The bill does not apply to news gathering and publishing. This bill was signed into law on 4/1/2019.

HB 2501: This bill would amend A.R.S. §§ 41-151.09, 41-151.15, and 41-151.26 so that the Arizona State Library is the central depository of electronic records, in addition to already being the repository for physical records. Nearly identical versions of the bill have passed each house of the Legislature. The bill is awaiting concurrence.

HB 2507: This bill would amend A.R.S. § 38-1161 so that newly acquired police vehicles must have video recording systems, and every uniformed peace officer must have a wearable video recording system. The bill did not advance beyond second read.

SB 1135: This bill would have made a variety of changes to A.R.S. § 39-121.01 of the public records law. Most significantly, the bill would have deemed a public records request denied if the an agency/official did not respond to the request in one of four specified ways within ten working days of receiving the request. The bill did not advance beyond second read.

SB 1164: This bill would have amended A.R.S. § 38-431.03 of the open meeting law to clarify that public bodies must disclose executive session minutes and discussions to the Ombudsman-Citizens’ Aide in the course of an investigation. Both the House and Senate passed the bill; however, the Governor vetoed it.

SB 1360: Would have amended A.R.S. § 41-1609.03 to make private contractors that provide “detention or incarceration services for offenders” subject to the public records law. It did not progress beyond second reading.

Arizona Ombudsman – Citizens’ Aide

Greetings!



In our spring newsletter, we address whether the public has a right to speak at open meetings, the best practice for complying with the open meeting law’s new vote record requirement, and we take a look at pending public access legislation.

As always, our goal is to provide you with timely and informative information related to Arizona’s Public Record and Open Meeting Laws. If you have suggestions and ideas for an upcoming newsletter, or questions you want answered, please feel free to contact our office. Public records law and

open meeting law training is also available upon request.

Sincerely,
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