

Chapter 5

A PRACTICAL GUIDE TO SUNSHINE LAW MATTERS

Jean Maneke
The Maneke Law Group, L.C.
Kansas City, Mo.

Frequently asked questions regarding the state Open Meetings/Open Records Law includes the following:

1. How do I know if the entity I am covering is subject to the open meetings/open records law?

The provisions of § 610.010(4), RSMo, define what constitutes a “public governmental body” and any entity that falls within that definition must follow the state open meetings/open records law. Generally, this includes any body that is created by state statute or any political subdivision of a state, county, city or other municipal government. Also included are special purpose districts, such as fire, water and sewer districts, governmental deliberative bodies whose members are elected or any committee appointed by a public governmental body that reports back to that body. Also included are governing bodies of higher education institutions, and policy advisory committees appointed by the president or other executive officer of any college or university system supported by state funds, and subcommittees that are appointed by and that report back to a public governmental body.

Another subcategory of public governmental bodies are “quasi” bodies, defined as certain qualified bodies formed to enter into contracts with governmental bodies or bodies performing a public function which receive tax credits, tax abatement or other public tax dollars, but only to the extent that those bodies are discussing matters that relate to these tax appropriations.

2. What constitutes a meeting of a public body?

Section 610.010(5) basically defines a meeting as a meeting of the body at which public business is discussed. Specifically excluded from this definition is a gathering for social or ministerial purposes. One appellate court case holds that no meeting occurs unless a quorum is present. A “meeting” also includes a public vote of a quorum of the members of a body taken by telephone or other means in order to avoid holding a meeting, but the sunshine law limits the situations where votes may be taken by telephone.

3. How are votes to be recorded?

The law states that votes shall be recorded in the minutes and that if a roll call vote is taken in an open meeting, it must be recorded so as to attribute the vote of each member. When a vote is taken in a public meeting, a liberal interpretation of this law would seem to deem that in order to be recorded to give the same information as one who attended would have received, it would be necessary for all votes to be recorded as roll call votes. However, there is at present no court decision affirming this interpretation of the law. In some cases, other state statutes mandate that a particular public body must take a particular vote on a particular issue by roll call vote. All votes in closed meetings must be taken by roll call vote. An elected member of a public governmental body attending a meeting by teleconference cannot vote where other members of the body are actually present in person. If an emergency vote must be taken by telephone polling of members of the body, notice must be given 24 hours in advance or the reason for the good cause for violating the statutory requirements must be placed in the minutes of the body.

4. How are notices to be posted and can I present a “blanket” request to get all notices of a particular public body given to me?”

The law requires that notices of meetings be posted 24 hours in advance, exclusive of weekends and holidays, in a place reasonably accessible to the public and in a location at the principal office of the body holding the meeting, or if no office exists, at the location where the meeting will be held. The notice must include the date, time and place of each meeting and its tentative agenda in a manner “reasonably calculated to advise the public” of what will be discussed at that meeting. If a body intends to meet via an Internet chat room, notice must also be posted on its website in addition to physically at its principal office.

If the body cannot meet this 24-hour deadline, a notice may be posted at a shorter time but the minutes of the body must state the good cause for the failure to give the 24-hours notice.

The notice requirement also provides that bodies are required to make copies of the notice available to members of the news media who request notice of meetings of a particular body. And there is an opinion of the Missouri Attorney General providing that this requirement may mean that a body must send by facsimile to the news media such notices in order to meet this requirement.

5. May meetings be closed when members of the body are afraid that if they take the action they are discussing, they might be sued by someone impacted by the decision being made?

The exceptions to the state open meetings/open records law are to be construed narrowly, the law states. There is an exception that allows meetings to be closed when the discussion relates to “legal actions, causes of action or litigation.” Primarily, this is designed, it would appear, to allow a public body to meet with its attorney and have the attorney/client protection allowed by other provisions of our laws. One court case has indicated that this term means there must be a real threat of litigation for a public body to close a meeting. (*Tuft v. City of St. Louis*, 936 S.W. 2d 113 (1996).)

6. Can a public body close a meeting to discuss the possible purchase by some other company of real estate which will benefit the municipality?

Recent case law provides that the exception allowing a closing of a public meeting may only be used when the lease, purchase or sale of real estate is being done by the public governmental body. The courts have clearly stated that this exception is designed to allow a body to purchase real estate at a fair, market price. However, once the purchase is made, the information must be made public. (*Spradlin v. City of Fulton*, 982 S.W.2d 255 (1998).)

7. Are student records closed?

There is an exception in the law allowing meetings and records regarding scholastic probation, expulsion or graduation of identifiable individual students to be closed. Further, records of test or examination scores may be closed. Beyond that, there is not a specific provision under the law regarding total closure of student records. Sometimes a school district will try to withhold any information it has regarding a student, and will cite a federal law, called the Family Educational and Rights of Privacy Act (“FERPA”) which the institution will claim prohibits it from revealing any record containing student information. However, this issue was addressed by one federal court in Missouri, which concluded that because FERPA does not prohibit disclosure by law, it does not constitute a “record protected from disclosure by law” under exception 14 of the open meetings/open records law. (*Bauer v. Kincaid*, 759 F.Supp. 575 (W.D.Mo., 1991).) Recent changes to FERPA will pressure schools to close more records relating to student matters on campus.

8. Can a public body hold a closed “executive session”?

The state open meetings/open records law does not talk in terms of “executive sessions.” the law speaks only of “open meetings” and “closed meetings,” and therefore, a meeting can only be one or the other. If it is an open meeting, it must meet the requirements for an open meeting. If it is a closed meeting, the notice must have cited one of the exceptions allowing the meeting to be closed, the body must have voted to go into closed session at an open meeting, and only that matter that relates to the particular exception or exceptions cited may be discussed.

9. Are e-mails written by members of a public governmental body public?

If a member of a public governmental body communicates with a quorum of the body by email to discuss public business, whether the message goes from the public body’s e-mail account and system or whether the message goes from the member’s personal email account, then the member must send a copy of that message to the public body’s office computer or to the custodian of records for that public body so that it is available for access as a public record. Each public body is able to establish its own record archival policy as to the period of time e-mails are retained in the archives of the public governmental body.

10. How should I make a request for access to a public record?

There is no special form to request access to a public record. The person seeking the record should inquire to determine who the custodian of the records of that public entity is and then make the request to that person. It is critical that the request go to the custodian of records for the body or the body may not legally be required to respond to the request. *Anderson v. Village of Jacksonville*, 103 S.W.3d 190 (Mo. App. 2003). Of course, it is always beneficial to make the request in writing so that a person can document when the request was made. The body then has three days after receipt of the request to act

on it, either by producing the document/documents or by denying access, citing the exception under which denial is proper, or by advising that the access will be delayed and giving a detailed explanation as to why the delay is occurring and giving information regarding when the record will be available. A court would then be needed to determine if this delay constituted “reasonable cause.”

11. Can a public body withhold a document because it contains material that cannot be made public under the open meetings/open records exceptions?

The law specifically provides that if there is exempt material in a document, it must be segregated and the non-exempt portion be made available to the public. This is particularly useful in regard to accessing police records where part of an open record is alleged to be material which law enforcement believes is exempt from disclosure. This statute (§ 610.024) makes it clear that the burden lies on the public entity to segregate the information and make public that which is not subject to any exemption.

12. I believe the public body I am covering has violated the open meetings/open records law. What can I do about it?

The law provides that any citizen may sue a public body for such an alleged violation. The law also provides that a prosecuting attorney or the state attorney general’s office may also sue, either on behalf of the citizen or on its own behalf. If a suit is successfully brought, the court, upon finding that the public body has violated the law, must void any action taken that violated the law, unless the court decides that the public interest outweighs taking this action. If the court finds a “knowing” violation, the court must enter a fine in an amount up to \$1,000.00 against the body or the members of the body, and further may order payment of the plaintiff’s attorneys fees. If the court finds the body “purposely” violated the law, the court shall fine the body or its members a penalty up to \$5,000.00 and must order payment of the plaintiff’s attorneys fees. The court will also look at the size of the public body, the seriousness of the offense and whether there have been prior violations in making these determinations.

13. I want access to certain records in computer format. Can I obtain them in that fashion?

The state statute encourages public bodies to provide electronic access to records. Certainly if the records are maintained in an electronic format, it seems that a requester has a reasonable expectation that he or she may receive such information in an electronic format. Fees for copying records electronically may include the cost of copies, staff time (not to exceed the average hourly rate of pay for staff required to make the copies and programming) and the cost of the disk or other medium used for duplication.

14. Can law enforcement withhold access to police records from me? What is public and what is not public in those records?

The open meetings/open records law sets out certain categories of law enforcement records with specific provisions regarding access to these various categories of documents. First, arrest records of any kind are open records under the law. However, arrest records become closed if a person arrested is not charged within 30 days of his or her arrest, except that the “disposition” portion of that record may be accessed.

The second category of law enforcement records outlined in the state statutes are incident reports, which report the date, time, specific location, victim’s name and initial factual report of the matter. In some areas, these reports are called, in law enforcement jargon, the “face sheet” of a report. Incident reports under the current open meetings/open records law are open records, except when they contain information which law enforcement believes poses a risk of danger to the safety of a victim, witness, undercover officer or other person, in which case that information may be protected from disclosure.

Sometimes law enforcement will try to close an entire record using that excuse and the person requesting this record should remind the officers that the open meetings/open record law provides that if part of a record is closed, the agency must narrowly redact that information and make all other information in the record open and available to the public. This frequently is an area of controversy among those gathering information from law enforcement officers.

The final category of law enforcement documents are investigative records. Often, those comprise the other documents contained in the law enforcement report other than the “face sheet.” The investigative reports are closed until the matter becomes “inactive,” which the law defines as: a) a decision to not pursue the case; b) the running of the time allowed to file charges or the passage of ten years; c) the “finality” of the convictions of all persons by exhaustion or expiration of all appeal rights.

The problem with those three limitations is that, first, law enforcement probably will never admit it has decided to not pursue the case, due to the possibility that additional evidence which might turn up could cause a change in that decision, and

secondly, that inmates are forever filing habeas corpus motions and therefore the “finality” of a conviction may be delayed forever. Therefore, the practical implication of this “exception” to the closure of investigative records is that they will hardly ever be made open to the public.

As a final note, if the law enforcement agency keeps a “log” or “record” of daily calls or reports, the information in that log relating to the time, substance and location of calls for assistance and the response made must be available to the public, as well as other information which would ordinarily be contained in an incident report.

15. I believe that a person was arrested and charged in regard to a particular crime, but I cannot get access to the court file. Why?

Probably because the individual was “nolle prossed,” meaning the prosecutor decided to not pursue the matter, the accused was found not guilty, or the case was dismissed by the court. Under either of those scenarios, the disposition portion of the record is supposed to be made available, which would allow a reporter to find out from the clerk that either of the two above actions occurred.

If, instead, this involves a person who has pleaded guilty and has received a “SIS” sentence -- a suspended imposition of sentence -- then there is case law (*Yale v. City of Independence*, 846 S.W.2d 193) supporting the proposition that an SIS is not “finally terminated” until the probationary period is completed, so those records should be available to the public until that time occurs.

16. I want access to my community’s 911 records. Are those open?

Records from calls to 911 are closed records except that the portion of the record which parallels an incident report -- ie: the date, time, place and immediate facts and circumstances surrounding the initial report of the matter -- are open to the public.