Staying Afloat in Legal Waters: Navigating OPMA, RICE, Executive Session

19th Annual Current Issues in Planning and Zoning Continuing Education Conference, May 10, 2019

OPEN PUBLIC MEETINGS ACT

• “Sunshine Law” – N.J.S.A. 10:4-6 to 21
  • Applies to ANY public body that votes on public matters
  • Public has the right to know about the meetings
  • Creates process for noticing
  • Annual Meeting calendar
  • Addresses Executive Session portion
  • Establishes specific criterion for Executive Session
  • Recognizes emergency meeting needs
  • Notification statement at every meeting
  • Minutes
OPEN PUBLIC MEETINGS ACT

• “Sunshine Law” – N.J.S.A. 10:4-6 to 21
  • Applies to ANY public body that votes on public matters;
  • Provides public notification for meetings of any public body;
  • Meeting means and includes any gathering, including communication equipment ... and includes any gathering body, ..., to discuss or act as a unit upon the specific public business of that body;
  • “Public business” means and includes all matters which relate in any way, directly or indirectly, to the performance of the public body’s functions
  • Does not apply to gathering attended by less than an effective majority of the members of the public body

OPEN PUBLIC MEETINGS ACT

• Must provide Adequate Notice
  • written advance notice of at least 48 hours
  • time, date, location
  • extent known, the agenda of any regular, special or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken
  • Notice shall be
    • (1) prominently posted in at least one public place reserved for such or similar announcements,
    • (2) mailed, telephoned, telegrammed, or hand delivered to at least two newspapers which newspapers shall be designated by the public body to receive such notices
    • (3) filed with the municipal clerk
OPEN PUBLIC MEETINGS ACT

• Notice of meetings – exceptions
  • Limited only to items listed
  • Affirmative vote of three quarters of members present meeting can be held without adequate notice if:
    • Required to deal with matters of urgency and likely to cause substantial harm
    • Limited to the discussion of and acting on the urgency and importance
    • Notice is provided as soon as possible following the calling of such meeting by:
      • Posting written notice in the public place
      • Notifying two newspapers, one being that appointed by the municipality
      • Notify by telephone, telegram or delivering such notice to newspapers

OPEN PUBLIC MEETINGS ACT

• Annual notice
  • Either within 7 days following annual reorganization OR
  • No later than January 10 of such year
  • Mailed to at least two newspapers, one being the municipality’s official newspaper
  • Provides a list of meeting dates for the year
  • Identifies the time and location meetings will be held
  • Posted in a public location
  • Resolution adopted by the board for publication
  • Copy/Copies sent to anyone so requesting if a prepayment has been arranged
OPEN PUBLIC MEETINGS ACT

• Announcement required to be read at the beginning of all meetings to include:
  • Adequate notice of meeting has been provided
    • Includes time, place and manner that notice was provided
    • Date of annual calendar adoption
    • Date of publication of the calendar

EXECUTIVE SESSION – 10:4-12

• Public may be excluded from that portion of the meeting if the following items are discussed:
  • provision of Federal law or State statute or rule of court shall be rendered confidential
  • the release of information would impair a right to receive funds from the Government of the United States
  • disclosure of which constitutes an unwarranted invasion of individual privacy
  • collective bargaining agreement
EXECUTIVE SESSION

• Public may be excluded from that portion of the meeting if the following items are discussed:
  • purchase, lease, or acquisition of real property with public funds;
  • tactics and techniques utilized in protecting the safety and property of the public;
  • pending or anticipated litigation or contract negotiation;
  • matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining;

EXECUTIVE SESSION

• General reasons used by Planning & Zoning Board
  • Pending or anticipated litigation
  • Contract negotiation
  • Matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining
    • Discussion of professionals for annual appointment
    • Hiring of in-house personnel recommendations (i.e.: planner)
EXECUTIVE SESSION

• Entering into closed session – a resolution must be adopted to include:
  • general nature of the subject to be discussed
  • precisely as possible, the time when and the circumstances under which the discussion conducted in closed session can be disclosed
• Public is excluded from this portion of the meeting
• Once closed session is finished, the public body must return to the public portion where:
  • Acknowledge members present
  • If vote is needed, decision of the discussion item is to be voted on in the public portion

MINUTES – 10:414

• Required to maintain reasonably comprehensive minutes of all meetings that includes:
  • Time and place
  • Members present
  • Actions taken
  • Vote of each member
  • Any other information required to be included
• Prompt availability
OPMA and Court Cases

• *McGovern v. Rutgers University, 211 N.J. 94 (2012)*
  • Alumna sued the University Board of Governors
    • alleging Board violated OPMA's notice requirements,
    • that the topics discussed in the closed session did not fit within the statutory exemptions, and
    • Board's practice of immediately going into closed session for an unspecified period of time violates OPMA

OPMA and Court Cases (McGovern v. Rutgers)

• **Distinction between Meeting Notice and Closed Session Resolution**
  • N.J.S.A. 10:4-8 requires that the notice given in advance of a meeting
    • must include the agenda "to the extent known"
  • N.J.S.A. 10:4-13 describes content of the resolution a public body must adopt once a meeting is underway before going into closed session
    • Resolution must state "the general nature of the subject to be discussed" in the closed session by providing "as much knowledge as possible."
    • However, the latter is not required for the meeting notice.
• *McGovern v. Rutgers (cont.)*
  
  Court found that when the Board convened meeting in question, it adopted a resolution to go into closed session
  
  - The list of topics satisfied *N.J.S.A. 10:4-13* advising the public of "the general nature" of what was to be discussed.
  
  - However, the Court found the meeting notice was defective because it stated only that the Board would "act on a resolution to meet in immediate closed session to discuss matters falling within contract negotiation and attorney-client privilege."
  
  - When this notice was prepared, more was known about the proposed agenda than what was conveyed.

• *McGovern v. Rutgers (cont.)*

  Accordingly, this notice was inadequate because it did not include the agenda "to the extent" it was known as required by *N.J.S.A. 10:4-8.*
  
  Court further found certain topics discussed in closed session, namely policy recommendations and possible rule changes were inappropriate for closed session discussion.
OPMA and Court Cases

• McGovern v. Rutgers (cont.) - Remedies for Violation of OPMA
  • Court reviewed remedies available for violation of OPMA, consisting of:
    • fine
    • injunctive relief, or
    • voiding of action taken by Board - but concluded no remedies available to plaintiff since the Board took no action at the meeting to be voided,
  • N.J.S.A. 10:4-15; injunctive relief under N.J.S.A. 10:4-16 was inappropriate because the record disclosed no pattern of OPMA violations; and the record did not support a finding of a "knowing" violation required to impose a fine. N.J.S.A. 10:4-17

OPMA and Court Cases

• Sequencing of Open and Closed Sessions
  • OPMA does not require that a public body complete the open portion of its meetings before proceeding into closed session.
  • In McGovern, the Board’s practice was to convene an open meeting followed immediately by a closed meeting followed by a later-resumed open meeting.
  • The Court found that a public body must be afforded discretion in determining how to proceed through its agenda items and that absent proof of bad motive, the Court would not intervene.
**OPMA and Court Cases**

- **Application of OPMA to closed political caucus meeting**
  - *N.J.S.A. 10:4-7* allows “political partisan caucus meetings” as exception to OPMA requirements but does not define term;
  - Governing body all members of same political party & majority attended political caucus meeting.
  - Court held political caucus meeting did not meet OPMA definition of “meeting” where attendees did not intend to discuss or act on behalf of municipality and instead reviewed political ramifications of certain ordinances.

**OPMA AND COURT CASES**

  - In contrast to *Mountain Hill* decision, private partisan meetings of members of freeholder board found to violate OPMA were attended by:
    - majority of freeholders with freeholder director,
    - county planner,
    - representatives of engineering consultant with purpose of discussing pending decision for siting of county landfill
**OPMA and Court Cases**

**Obligation to Prepare Closed Session Minutes**

**Ability to Redact closed session minutes**

*Payton V. New Jersey Turnpike Authority, 148 N.J. 524 (1997)*

- OPMA requires minutes be prepared of closed session meeting. NJSA 10:4-14.
- Even if a public body legitimately conducts a meeting in closed session under any of the exceptions enumerated in OPMA, it nevertheless must make the minutes of that meeting "promptly available to the public" unless full disclosure would subvert the purpose of the particular exception.
- Redaction of closed session minutes allowed to extent necessary to avoid undermining purpose of exception.

**Application of OPMA to draft meeting minutes**


- OPMA does not apply to draft meeting minutes.
- Draft/work products
  - Reports prior to distribution
  - Letters
  - Master Plan documents
OPMA and Court Cases

• Board of Education posted agenda electronically without supporting attachments and appendices asserting no obligation under OPMA to provide such documentation prior to meeting
  • Court finds that OPMA does not define “agenda”
  • Ruled that standard dictionary definition of “agenda” as “list of things to be considered or done” should be standard.
  • Accordingly, Court finds that OPMA does not require supporting documentation to be published with agenda.
  • Court notes that electronic posting of agenda is not required by OPMA and must be in addition to standard written advance notice at least 48 hours before meeting (N.J.S.A. 10:4-8).


OPMA and LAND USE BOARDS

• New Jersey Land Use Boards are subject to all OPMA requirements
• Closed sessions are also governed by the OPMA exceptions
• However, the New Jersey Municipal Land Use Law allows land use boards to meet in executive session for the purpose of discussing or studying matters to come before a board.
  • N.J.S.A. 40:55d-9 (b) (“an executive session for the purpose of discussing and studying any matters to come before the agency shall not be deemed a regular or special meeting within the meaning of this act”).
OPMA and Land Use Boards

• Despite executive session exception, boards are not allowed to use executive session for purpose of discussing and deliberating as to pending application. Accardi v. Mayor and Coun. Of No. Wildwood, 145 N.J. Super. 532 (Law Div. 1976).

• Note that if Board goes into executive session but continues discussion in same room in full view of public, it is not considered an executive session because the public is not excluded and is not a violation of OPMA. Hudanich v. Avalon, 183 N.J. Super. 244 (Law Div. 1981).

OPMA and Land Use Boards

• “Whispering Woods” Hearings
  • Exception to prohibition against discussing application in closed session
  • Land use board allowed to meet in closed session with its attorney and plaintiff’s attorney to discuss settlement of pending litigation.
  • Tentative settlement reached in closed session which was discussed and approved at regular public meeting and subsequently approved by resolution adopted at noticed public hearing.

OPMA and Land Use Boards

  *Holding that a planning board's closed meeting did not violate OPMA where there was not a quorum and no action was taken*
  *More recent appellate court decisions have noted approval of Whispering Woods procedure.*


OPMA and Land Use Boards

• **Recesses**
  *Lengthy hearing or full agenda, land use boards may take short recesses to allow use of rest rooms; provide breaks to court reports, staff & members*
  *During recesses, majority of board members should not gather outside of the hearing room*
  *Action may be considered an illegal executive session which may taint the application hearing.*
RICE NOTICE

• *N.J.S.A. 10: 4-12 (b) (8) of OPMA allows public body to discuss in closed session*
  • 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 may be adversely affected request in writing that the matter or matters be discussed at a public meeting. (Emphasis added)

RICE NOTICE

• Written notice should be sent to affected individual(s) at least forty-eight (48) hours in advance of the meeting.
  • Must include the time & place of the meeting and that the individual’s employment will be discussed
  • Must also inform the individual(s) affected that they have the right to request that the discussion be held in open session
RICE NOTICE and Court Cases

- New Jersey courts require that the affected prospective or current employee or appointee be provided with reasonable advance written notice of such discussion.
- This allows the affected individual the opportunity to:
  - (1) decide whether to request a public discussion, and
  - (2) prepare and present an appropriate request in writing.

*Rice v. Union County Regional High School Board of Education, 150 N.J. Super. 64 (App. Div. 1977)*

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RICE NOTICE and Recent Court Cases


- NJ Supreme Court reviewed the extent of the public body’s notice obligations under the OPMA and whether:
  - (1) The Rice notice for the personnel exception applied;
  - (2) Timing obligations for the release of minutes of meetings; and
  - (3) the appropriate remedy if the OPMA was violated.
- Determined OPMA does not address or require extensive discussion in public session with respect to personnel matter
RICE NOTICE and Recent Court Cases

• Concluded Rice notice not required because public entity already intended to take public action on personnel matter at issue

• Determination as to whether closed session minutes were “promptly released” fact-sensitive based on sensitivity of subject matter but should be released within days of approval unless extraordinary circumstances exist.

RICE NOTICE and Recent Court Cases

• In Kean, the board held both open and closed sessions in September and December 2014. Redacted minutes of the September closed session were released to the public five months later. The redacted minutes for the December closed session were released two months later.

• In declining to identify a specific time period for release of minutes to the public, the NJ Supreme Court noted factors considered by lower courts in determining whether meeting minutes were promptly released to the public.
The NJ Supreme Court identified the following factors to be considered in determining whether meeting minutes were promptly released to the public:

1. The staff experience in the publication of board minutes.
2. The subject matter of the minutes and its importance to the association and others directly affected by board action.
3. The subject matter of the minutes and its importance to the public, in general.
4. The intervals at which regular meetings were scheduled.
5. Whether meetings complained of were regularly scheduled or were, because of some exigency, held so close together that the board could not reasonably be expected to abide by the act's requirement.