

# DCMO BOCES

## Freedom of Information Law, Open Meetings Law and Executive Sessions

presented by

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# Freedom of Information Law

## ■ Availability of Records

- a record is presumed available for disclosure
  - FOIL does not require agencies to create documents not already in existence.
- school must either grant or deny the request within **5 business days** after receipt, or **give estimated date**
- if available, the records-seeker **has a right to examine the record, obtain a copy, and have it certified by the agency**
  - if record cannot be located, the records-seeker is entitled to a **statement** from the agency to that effect

# Freedom of Information Law

- If FOIL request is denied (in writing with explanation and notice of appeal rights):
  - records-seeker may appeal to person designated by Board of Education to determine appeals within 30 days
  - all denied appeals are subject to challenge in Court, not by appeal to the Commissioner

# Freedom of Information Law

- District must prove exemption from disclosure
- Records not Required to be Disclosed
  - records made confidential by federal or state law
    - “student records” are largely **exempt from disclosure**, under Family Educational Rights & Privacy Act (see Student Records & Information Section below).
    - teacher disciplinary records, **prior to a final 3020-a panel decision**, are also exempt, by law
    - material covered by **attorney-client privilege** is exempt from disclosure

# Freedom of Information Law

- Records not Required to be Disclosed (cont'd)
  - "intra- or inter-agency materials," which are not:
    - statistical or factual tabulations or data
    - instructions to staff that affect the public
    - final policies or determinations
    - external audits
  - records whose disclosure could result in an impairment of contract awards or negotiations
  - records whose disclosure would result in interference with law enforcement activities

# Freedom of Information Law

- Records not Required to be Disclosed (cont'd)
  - records whose disclosure could result in an unwarranted invasion of personal privacy
    - for example, **employee evaluations** are exempt and **Social Security numbers and home addresses of employees** do not have to be released under this exception
    - However, the following are available:
      - an **agency's payroll** list is always available, regardless of privacy concerns
      - **final vote of each Board Member**
  - examination questions and answers

# Freedom of Information Law

## ■ Penalties

- court may **order** disclosure of the record
- court may award the records-seeker **attorneys fees**
- the willful concealment or destruction of public records with intent to prevent the public inspection of such records is a **crime**

# Freedom of Information Law

## ■ 2006 Amendments:

Must accept requests for records received by e-mail;

Must respond by e-mail if requested if the District has the technology to scan a record without an effort additional to responding to a request in a different manner.

Note: if a photocopy must be made in order to redact protected information prior to scanning, district may charge for photocopies.



# Freedom of Information Law

## ■ 2008 Amendments:

- Record Reproduction Fees: 25 cents/page up to 9x14 inches; actual cost of reproduction beyond (hourly salary of lowest paid employee with skills to make the copy; cost of storage device/media provided to person making the request; cost of outside service making copy if unable to prepare in house)
- Note: no charge for employee time unless minimum of two hours necessary to prepare requested copies; cannot charge for search time

# Freedom of Information Law

- 2008 Amendments:
  - Must provide response on media requested if reasonably able to do so in-house or with outside service
  - Cannot encrypt records provided in computer format

# Freedom of Information Law

- 2008 Amendments:
  - The District can require that those who request lists of names and addresses provide written certification that they will not use them for solicitation or fundraising purposes, and will not sell, give or otherwise make the lists available to someone else for such purposes.

# Freedom of Information Law

- 2008 Amendments:

- If an outside service can provide copying, programming or other services required to fulfill a FOIL request, it may not be denied on the basis that it is voluminous or that locating or reviewing the records is burdensome because of insufficient staffing or any other basis.

# Freedom of Information Law

- 2008 Amendments:
  - If the District has the ability to retrieve or extract a record or data maintained in a computer storage system with reasonable effort, it must do so. If doing it electronically is more efficient (i.e., takes less employee time) than manual retrieval or redaction, it must be done electronically.

# Freedom of Information Law

- 2008 Amendments:
  - When the District maintains records electronically that include both public and exempt items, it must design its information retrieval methods in a manner that permits the segregation and retrieval of available items, whenever practicable and reasonable.

# Freedom of Information Law

- **2008 Amendments:**
  - Districts must annually update their list of records by subject matter on an annual basis and indicate on the list the date of the most recent update.
  - If the District maintains a website, it must post the current list of records on the website and link the posting to a website of the Committee on Open Government.

# Freedom of Information Law

## ■ REMEMBER:

- RECORDS ARE PRESUMED AVAILABLE UNLESS DISTRICT CAN PROVE OTHERWISE
- ACCESS CAN ONLY BE DENIED FOR EXPRESS EXEMPTIONS
- PENALTIES FOR VIOLATIONS INCLUDE DISCLOSURE ORDERS, ATTORNEY'S FEES AND CRIMINAL PROSECUTION
- CONVERSELY, DISCLOSURE OF CONFIDENTIAL RECORDS TO THE PUBLIC CAN RESULT IN PROBLEMS FOR DISTRICT



# Board Meetings – How many?

- By law, once each quarter of the year.
- By practice, most boards meet monthly.

# Board Meeting - Agendas

- While having an agenda for any meeting is a good practice, there is no requirement in the law for there to be an agenda for either regular or executive session meetings of the Board of Education.
- As a result, where agendas are generated, the degree of information/detail is totally a matter of discretion for the Board of Education and the Board can modify the agenda

# Board Meetings - Community Participation

- The Open Meetings Law is designed to insure that you can observe those who govern governing. It is geared toward “observation”.
- There is no law requiring that public input be solicited or allowed at Board of Education or other municipal meetings subject to the Open Meetings Law.

# Board Meetings - Community Participation

- Boards who do permit public input at Board meetings, can set reasonable rules with regard to such public participation.
- Most Boards of Education provide for public participation through a comment period.

# Open Meetings Law

- The Open Meetings Requirement
  - Every meeting of a public body shall be open to the general public, except for executive sessions
  - Must convene in open session before going into executive session.

# Open Meetings Law

- The Open Meetings Requirement
  - Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit **barrier-free physical access** to the physically handicapped.
  - Consider **number of attendees** when deciding on meeting location.

# Open Meetings Law

## ■ Notice for Covered Meetings

- if the meeting is scheduled at least **1 week in advance**, the time and place of meeting must be given to the news media and conspicuously posted in 1 or more designated locations at least **72 hours before the meeting**.
- Meetings **not** scheduled at least 1 week in advance; notice must be given, to the extent practicable, at a reasonable time prior thereto.
- Any board member can call a special meeting on at least 24 hours notice to board members.

# Open Meetings Law

## ■ Exempt Meetings

- judicial or quasi-judicial proceedings;
- deliberations of political committees, conferences and caucuses;
- any matter made confidential by federal or state law;
- Board Workshops, etc. - training & education



# Open Meetings Law

## ■ Executive Sessions in Covered Meetings

### ■ Procedure for Convening an Executive Session

- upon a **majority vote** of its total membership,
- taken in an **open meeting**
- pursuant to a **motion**
- identifying the **general area or areas** of the subject or subjects to be considered, a public body may conduct an executive session
- for **enumerated purposes only**.

# Open Meetings Law

## ■ Executive Sessions (continued)

### ■ The enumerated purposes:

- discussions regarding proposed, pending or current litigation.
- collective negotiations pursuant to article fourteen of the civil service law.
- the medical, financial, credit or employment history of a **particular** person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a **particular** person or corporation.

# Open Meetings Law

## ■ Executive Sessions (continued)

### ■ The enumerated purposes:

- the preparation, grading or administration of examinations.
- the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body
- information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed.

# Open Meetings Law

- *Zehner v. Jordan-Elbridge Central School District*, 2012 WL 266449, (4th Dept 2012).
  - Upheld a lower court decision finding that the Board of Education, “violated the Open Meetings Law on three occasions by merely reciting statutory categories for going into executive session without setting forth more precise reasons for doing so.”
  - Upheld the lower court’s award of attorney’s fees.

# Open Meetings Law

- What does *Zehner* mean?
- How do you give a more precise reason for going into executive session without compromising the confidentiality of executive session?
- How precise do the reasons need to be?

# Open Meetings Law

- Executive Sessions (continued)
  - With certain exceptions, school boards may not generally take action in executive sessions.
  - charges against tenured teachers must be voted on in executive session.

# Open Meetings Law

- Executive Sessions (continued)
- Attendance at an executive session **shall** be permitted to any member of the public body.
- Attendance at an executive session **may** be permitted to any other persons authorized by the public body.

# Open Meetings Law

- Purpose of the executive session is to discuss confidential information that is deemed appropriate for private discussion leading to what will ultimately become a public determination.
- In accordance with the General Municipal Law, this is an important public purpose which **must be respected**.



# Open Meetings Law

- Executive Sessions (continued)
  - No municipal officer or employee shall:
    - disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests.
- By permitting the use of executive sessions, there is a legislative recognition of the fact that discussion of some issues is **best done privately** before a final determination is made.

# Open Meetings Law

## ■ Minutes & Executive Sessions

- Minutes must be taken at all open meetings of a public body.
- Minutes of open meetings must consist of a record or summary of all resolutions and any other matters formally voted upon, the date, and board members' votes thereon.
- Minutes must be taken at executive sessions of any action that is taken by formal vote. **Minutes need not be taken of executive sessions where no action is taken.**

# Open Meetings Law

## ■ Minutes & Executive Sessions

- Minutes of executive sessions must consist of a **record or summary of the final determination** of such action, and the date and vote thereon; the summary need not include confidential matters.
- Minutes of open meetings must be available to the public **within two weeks** from the date of the meeting; minutes of executive sessions must be available to the public within one week from the date of the session.

# Open Meetings Law

## ■ Enforcement

- through proceeding in Court
- actions taken in meetings in violation of the Law can be declared void by Court
- attorney's fees available

# Open Meetings Law

- Public Officers Law Sec. 103(e)
  - Effective February 2, 2012
  - Purpose – Public should have prior access to records that will be discussed at an open meeting

# Open Meetings Law

- Records Subject to Prior Disclosure and Availability
  - Records scheduled to be discussed during open meeting.
  - Records required to be disclosed pursuant to FOIL.
  - Proposed resolutions, law, rules, regulations, policies or amendments thereto.
  - “[T]o the extent practicable as determined by the agency.”

# Open Meetings Law

- How to make the records available.
  - “Copies of such records may be made available for a reasonable fee, determined in the same manner as provided therefor [by FOIL].”
  - “If the agency in which a public body functions maintains a regularly and routinely updated website and utilizes a high speed internet connection, such records shall be posted on the website to the extent practicable as determined by the agency or the department, prior to the meeting.”

# Open Meetings Law

## ■ REMEMBER:

- Most meetings are open to the public
- You **must** call executive session from open session
- Executive sessions can **only** be called for “enumerated purposes”
- Minutes of executive session **must be taken if action is taken**
- Violations of the Law can lead to Board actions being declared **void**



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