

ISB GOVERNMENT AND PUBLIC SECTOR LAWYERS

Chapter 2, Title 74, Idaho Code Open Meetings Overview

Theodore E. Argyle, retired
Chief Civil Deputy
Ada County Prosecuting Attorney's Office 1988 – 2018

General Rule

All **meetings** of a **governing body** of a **public agency** shall be open to the public.

Practice pointer: An open meeting does not necessarily require public testimony unless it is also a public hearing.

Noble v. Kootenai Cty. ex rel. Kootenai Cty. Bd. of Comm'rs, 148 Idaho 937, 231 P.3d 1034 (2010)

Key Definitions

Meeting

Convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter.

Practice Pointer: What does “convening” mean?

Key Definitions

Governing Body

Members of any public agency which consists of two (2) or more members with the authority to make decisions for or recommendations to a public agency regarding any matter.

Authority means granted by statute, ordinance, or legislative act. *Safe Air For Everyone v. Idaho State Dep't of Agric.*, 145 Idaho 164, 177 P.3d 378 (2008)

Key Definitions

Decision

Any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure . . .

on which a vote of a governing body is required,

at any meeting at which a quorum is present.

Practice pointer: Are serial meetings a violation?

Key Definitions

Exception

[a decision does] not include ministerial or administrative actions necessary to carry out decisions previously adopted in a meeting held in compliance with this chapter.

No S. Crt. case law guidance.

Key Definitions

Deliberation

The receipt or exchange of information or opinion relating to a decision.

Petersen v. Franklin Cty., 130 Idaho 176, 178–82, 938 P.2d 1214, 1216–20 (1997)

Key Definitions

Deliberation

[deliberation does] not include informal or impromptu discussions of a general nature.

No case law guidance.

Practice pointer: Fireworks example.

Other Rules

Meetings may be conducted using telecommunications devices.

However, one member of the board must be present at the location where the agenda said the meeting would be conducted.

Practice pointer: Ask the Clerk to test the equipment before the meeting and make sure everyone is audible.

Notice of Meetings

Regular Meetings - No less than a five (5) calendar day meeting **notice** and a forty-eight (48) hour **agenda** notice shall be given, unless otherwise provided by statute.

Practice pointer: Notice of a fixed time, place and date for regular meetings of your councils, boards, commissions, and committees can be adopted once a year by resolution.

Practice pointer: Is codification adequate?

Notice of Meetings

Special Meetings - Shall not be held without at least a twenty-four (24) hour meeting and agenda notice, unless an emergency exists.

Emergency Meetings – Not clear but probably require 24 hour notice. See 74-204(2).

News media from maintained list must be contacted.

Notice of Meetings

Showing up at the meeting is a bar to claiming notice was inadequate.

Gardner v. Evans, 110 Idaho 925, 929–30, 719 P.2d 1185, 1189–90 (1986)

Agendas

- An agenda is required for each meeting.
- Post prominently at the place where the agency conducts business or where the meeting will be held.
- Must be posted online if an online presence is maintained.

Agendas

- Contents:
 - Action items designated as such.
 - Filing lawsuits, settlement – *City of McCall v. Buxton*, 146 Idaho 656 (2009), *Farrell v. Bd. of Comm'rs, Lemhi Cty.*, 138 Idaho 378, 64 P.3d 304 (2002).
 - Work sessions – *State ex rel. Roark v. City of Hailey*, 102 Idaho 511 (1981).
 - Practice pointer: Failing to designate an action item probably means no action can be taken at that meeting

Agendas

- S. Crt Says Agendas should include:
 - the type of meeting being conducted
 - whether the meeting is being held in order to conduct additional evidence gathering, or merely to confirm what an agency has already decided based upon the evidence in the record
 - whether the hearing body will be accepting public comment, and
 - generally, what the procedures for that meeting shall be.
 - *Noble v. Kootenai Cty. ex rel. Kootenai Cty. Bd. of Comm'rs*, 148 Idaho 937, 231 P.3d 1034 (2010)

Agendas

- Amendments of the Agenda
 - Prior to 48 hours before the meeting (24 for a special meeting) may amend and repost.
 - Within 48 hours before the meeting (24 for special meetings) motion and vote required **at beginning of the meeting** to approve the change.

Agendas

- Amendments to the agenda made **during** the meeting require a vote **and** must state the reason the matter could not have been added to the agenda before the meeting.
- No action may be taken on a newly added matter unless it is an emergency.

Minutes

The governing body of a public agency shall provide for the taking of **written** minutes of all its meetings.

Writings don't include recordings – *State v. Yzaguirre*, 144 Idaho 471, 163 P.3d 1183 (2007)

Minutes

- Contents:
 - Members of the governing body present at the meeting;
 - All motions, resolutions, orders, or ordinances proposed and their disposition; and
 - The results of all votes.
- Remember - some open meetings may also be public hearings which have additional requirements.

Minutes

Contents Of Minutes For An Executive Session:

Minutes pertaining to an executive session shall include a reference to the specific statutory subsection authorizing the executive session and shall also provide sufficient detail to identify the purpose and topic of the executive session but shall not contain information sufficient to compromise the purpose of going into executive session.

Practice pointer: How do you provide sufficient detail of litigation without compromising purpose?

Executive Sessions – Idaho Code Sec. 74-206(1)...

Must be by motion identifying the proper code section;

By roll call; and

With a 2/3 majority in favor.

The governing board may not switch topics in executive session – come out and vote to go back into executive session based on the proper section.

Practice pointer: Post the proper sections on the agenda if known.

Executive Sessions – Idaho Code Sec. 74-206(1)...

- a) “To consider hiring...an individual...wherein the respective qualities of individuals are to be evaluated...” does not include filling a vacancy in an elected office or general staffing needs.
- b) “To consider the evaluation, dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent, or public school student”.

Executive Sessions

- c) “To conduct deliberations concerning labor negotiations or to acquire an interest in real property which is **not owned** by a public agency”.

Practice pointer: Can sales of a public agency’s property ever be discussed in an executive session?

- d) To consider records that are exempt from disclosure in Chapter 1, Title 74, Idaho Code.

Executive Sessions

- f) To communicate with legal counsel for the public agency to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated, but imminently likely to be litigated. The mere presence of legal counsel at an executive session does not satisfy this requirement.

Practice pointer: Pending means filed. What does “imminently likely” mean?

Executive Sessions

- i) To engage in communications with a representative of the public agency's risk manager or insurance provider to discuss the adjustment of a pending claim or prevention of a claim imminently likely to be filed. The mere presence of a representative of the public agency's risk manager or insurance provider at an executive session does not satisfy this requirement.

Practice pointer: Includes ICRMP. Tort claims, other filed claims, and lawsuits are covered. Again, what does "imminently likely" mean?

Executive Sessions

No executive session may be held for the purpose of taking any final action or making any final decision.

Violations

- If an action, or any deliberation or decision making that leads to an action, occurs at any meeting which fails to comply with the provisions of this chapter, such action shall be null and void.

Violations

- A previous action on a matter taken in violation of the Act does not taint a decision on the same matter made at a meeting held in compliance with the Act.
- *Petersen v. Franklin Cty.*, 130 Idaho 176, 178–82, 938 P.2d 1214, 1216–20 (1997), *State v. City of Hailey*, 102 Idaho 511, 514, 633 P.2d 576, 579 (1981)
- Practice pointer: Must the error be announced to avoid personal liability? See *Taking the Cure below*.

Violations

- Any member of a governing board who conducts or participates in a meeting that violates these provisions will be subject to a personal civil penalty.
 - 1st “innocent” violation - up to \$250
 - “knowing” violations – up to \$1,500
 - 2nd “knowing” violation within 12 months – up to \$2,500
- Practice pointer: Probably can't be paid by the governmental entity

Enforcement

- Any person affected by a violation of the provisions of this act may commence a civil action to **void** the action within 30 days.
- Doesn't appear to allow private enforcement of civil penalties.
- Standing?
 - *Arnold v. City of Stanley*, 158 Idaho 218, 220–23, 345 P.3d 1008, 1010–13 (2015). A general wish to enforce good government is not enough.
 - *Rural Kootenai Org., Inc. v. Board of Comm'rs*, 133 Idaho 833 (1999).

Taking the “Cure”

- A violation may be cured by a public agency upon:
 - The agency’s self-recognition of a violation; or
 - Receipt by the secretary or clerk of the public agency of written notice of an alleged violation. A complaint filed and served upon the public agency may be substituted for other forms of written notice.

Taking the “Cure”

The governing body has fourteen (14) days to respond publicly and either acknowledge the violation and state an intent to cure or state that it has determined that no violation has occurred. Failure to respond shall be treated as a denial of any violation for purposes of proceeding with any enforcement action.

Taking the “Cure”

Following the public agency’s acknowledgment of a violation, the public agency shall have fourteen (14) days to cure the violation by declaring that all actions taken at **or resulting** from the meeting in violation of this act void.

Practice pointer: Voiding the action can have a significant effect on settlements and executed contracts.

Final Thoughts

- Your clients have a tendency to think the world will end if the public learns about operational details. Frankly, there isn’t much that is “sensitive” about local government, except buying private land, litigation, and personnel matters. These are all authorized executive session topics.
- Most members of the public quickly get bored with the routine details.
- It is easier to put too much on the agenda than it is to fix it afterwards.
- When in doubt, put it on an agenda.

State of Idaho
Office of the Attorney General
Open Meeting Law Checklist

Regular Meetings

Meeting Date and Time: _____

Meeting Location: _____

[Idaho Code § 67-2342(4) and (5)]

Before Meeting

- Meeting Notice posted **5 or more** calendar days prior to the meeting date. [Idaho Code § 67-2343(1)]
- Agenda Notice posted **at least 48 hours** prior to the meeting. [Idaho Code § 67-2343(1)]
- Posting of Amended Agenda [Idaho Code § 67-2343(4)]

During Meeting

- First: Any agenda amendments? [Idaho Code § 67-2343(4)(b) and (c)]
- Secretary or other person appointed to take minutes. [Idaho Code § 67-2344(1)]

After Meeting

- Minutes available to the public within a reasonable time after the meeting. [Idaho Code § 67-2344(1)]

State of Idaho
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Open Meeting Law Checklist

Special Meetings

Meeting Date and Time: _____

Meeting Location: _____

[Idaho Code § 67-2342(4) and (5)]

Before Meeting

- Meeting and Agenda Notice posted **at least 24 hours** prior to the meeting. [Idaho Code § 67-2343(2)]
- Notification provided to the news media. [Idaho Code § 67-2343(2)]
- Posting of Amended Agenda [Idaho Code § 67-2343(4)]

During Meeting

- First: Any agenda amendments? [Idaho Code § 67-2343(4)(b) and (c)]
- Secretary or other person appointed to take minutes. [Idaho Code § 67-2344(1)]

After Meeting

- Minutes available to the public within a reasonable time after the meeting. [Idaho Code § 67-2344(1)]

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Open Meeting Law Checklist

Executive Sessions

Session Date and Time: _____
Session Location: _____

[Idaho Code § 67-2342(4) and (5)]

Executive Session Only - Before Session

- Meeting and Agenda Notice posted at **least 24 hours** prior to the session. [Idaho Code § 67-2343(3)]
- Posting of Amended Agenda [Idaho Code § 67-2343(4)]

Executive Session During Regular or Special Meeting

- Motion to enter Executive Session to discuss one of exemptions listed in Idaho Code § 67-2345 and ½ vote to enter Executive Session reflected in regular/special meeting minutes. [Idaho Code § 67-2345(1)]

During Session

- First: Any agenda amendments? [Idaho Code § 67-2343(4)(b) and (c)]
- Secretary or other person appointed to take minutes. [Idaho Code § 67-2344(1)]

After Session

- Minutes must reference statutory subsection authorizing executive session and identify purpose and topic of session. [Idaho Code § 67-2344(2)]
- Minutes available to the public within a reasonable time after the meeting. [Idaho Code § 67-2344(1)]

QUESTIONS?