



WMRC
Board Training & Update
Open Meetings, Conflicts, Ethics & Records

(More specific information is contained in the Board Member's Handbook)

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Assistant Attorney General

April 11, 2024



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Board Functions & Duties



- Organization and function of Boards
 - Management v. Policy & Rule Making
 - Membership and interests represented
- Three basic duties of Board members
 - **Duty of care**
 - ✦ Attend board meetings R305-8
 - ✦ Prepare and participate
 - **Duty of Loyalty**
 - ✦ Disclose conflicts of interest
 - ✦ Follow the R305-9 to resolve any conflicts
 - **Duty of Obedience**
 - ✦ Act in accordance with Boards powers & duties § 19-6-104

Roles of Board & Division



- UCA § 19-6-103 Organization
 - 12 member Board
 - Knowledgeable about solid and hazardous waste and radiation and safety matters
- UCA § 19-6-104, 19-3-103.1 Powers & Duties
 - Make rules § 19-6-105, 19-3-103.1
 - Establish waste management and radiation control standards, implement programs, etc.
- UCA § 19-6-107 Director
 - Functions
 - ✦ Executive secretary to Board
 - ✦ Technical support staff
 - ✦ Development of rules and standards
 - ✦ Implementation & enforcement of rules and standards

Role of AGO



- “In House Counsel”
 - Multiple roles
 - ✦ Attorney, advisor, negotiator
- DEQ is agency “Client”
 - RPC 1.13 Organization as client
 - § 19-1-204
 - No individual attorney-client relationship
 - Employees
 - Individual Board Members

Board Rulemaking



- Quasi Legislative Function
 - UCA §§ 63G-3-101 *et seq.*
- Proposed Rule
 - Initiated by the staff, Board, or public
 - Considered by the Board and approved for public comment
 - Published in the State Bulletin
- 30 day (or more) public comment period
 - Public hearing may be mandatory or discretionary
- Staff reviews comments, may suggest rule changes
- Board discussion and action on rule
- Final rule published with an effective date

Open Public Meetings



- UCA, Title 52, Chapter 4 - Open Meetings Act
- “...the legislature finds and declares that the state, its agencies and political subdivisions, exist to aid in the conduct of the *people’s* business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.”

Open Meetings Act



- All Board business is conducted in an open public meeting
 - Meetings may be closed in limited circumstances
- An agenda must be posted at least 24 hours before a meeting, stating date, time and place of the meeting
- H.B. 36, 2024, changed the definition of “Meeting”
- The Act does not apply to chance meetings

Open Meetings Act



- Electronic Meetings

- § 52-4-207(2)(a) ...must be a rule governing the use of electronic meetings
- § 52-4-207(2)(c) ...anchor location required
- Pandemic required procedural changes
 - ✦ Exec. Order 2020-5 suspended the rule and anchor location requirements
 - ✦ HB 5002 (special session) rescinded the Exec. Order and now provides that a board may convene an electronic meeting *without* anchor location if a written determination is made on risk. The requirement for a rule was reinstated.
 - ✦ UAC R305-2 DEQ has a rule on electronic meetings

Open Meetings Act



- § 52-4-207(5)– no anchor location
- The Chair is required to:
 - Make a written determination regarding risk associated with an anchor location which must be included in meeting notice
 - The determination must be read at beginning of meeting
 - The public notice/agenda must provide information regarding how public can access, observe and make comments

Open Meetings Act



- **Electronic Meeting Amendments - H.B. 22 (2022)**
 - Rule must establish how a quorum is calculated for e-meeting
 - Rule required to allow a proxy vote in electronic meeting
 - Board may provide procedure for recording votes of members, including defining circumstances under which a roll call vote is required. Utah Code § 52-4-207(2)(c)(vi).
 - Votes by members of the Board who are not at the physical location of the meeting shall be confirmed by the Chair. Utah Admin. Code R305-2-3(4).

Amendments – H.B. 36 (2024)



- Anchor location where Board holds electronic meeting: physical location where Board normally holds meetings
- Another location reasonably as accessible to the public as the location where the Board normally conducts meetings.

Amendments – H.B. 36 (2024)



- “Meeting means a gathering:
 - Of a public body (the Board)
 - With a quorum present
 - Convened by individual with authority to convene
 - Following the processes for convening
 - For express purpose of acting as public body to:
 - ✦ Receive public comment about a relevant matter
 - ✦ Deliberate about a relevant matter
 - ✦ Take action about a relevant matter

Amendments – H.B. 36 (2024)



- Predetermining public body action prohibited.
 - Individuals constituting a quorum may not act together outside a meeting in a concerted and deliberate way to predetermine an action to be taken by the public body.
 - (“Quorum” means a simple majority of the membership of the Board.)

Open Meetings Act



- Penalties & Remedies
 - UCA § 52-4-303 action in violation may be *set aside* on judicial review
 - UCA § 52-4-304 release of minutes or record of a *closed* meeting.
 - UCA § 52-4-305 criminal penalties for *knowing or intentional* violation.
 - State may get to pay prevailing plaintiff's attorney fees and costs. Utah Code § 52-4-302(4).

Conflicts of Interest



- Boards are comprised of members who, by statute, are representatives of various interests and groups
 - Statutory Board selection criteria implicitly recognize a Member's interest may be impacted by Board action.
- Board Members are Subject to the *Utah Public Officers' and Employees' Ethics Act (Ethics Act)*
- UCA Title 67 Chapter 16
- UCA §19-1-201(1)(d)(i)(B) DEQ shall adopt rules regarding conflict of interest procedures.
- Failure to comply may jeopardize Board action

The Ethics Act



- Disclosure required when a Board member has a *substantial interest in a business regulated by DEQ*
 - Disclose position held and precise nature and value of the interest (n/a if the value is less than \$2,000).
 - ✦ Update if there is a significant change in position or value
 - ✦ Disclosure forms available from Attorney General's Office.
 - A “substantial interest” is:
 - ✦ Ownership (legal or equitable) of at least:
 - 10% of the outstanding capital stock of a corporation, or
 - 10% Interest in any other business entity
 - ✦ By an individual, individual's spouse or minor children

Ethics Act - Prohibitions



- The Board should be familiar with the prohibitions in the following sections of the ethics act:
- § 67-16-4 Improperly *disclosing* or *using* controlled information; *using* position to secure privileges
- § 67-16-5 Accepting gift, compensation or loan
 - UAC R477-9-3 DHRM Rule
- § 67-16-5.3 & 5.6 Requiring or offering donation, payment or service to agency in *exchange* for approval
- § 67-16-6 Receiving compensation for *assistance* in transaction involving agency

Identifying Conflicts



- It is incumbent on each Board member to disclose whether he or she may have a conflict of interest
- The Department has developed rules addressing conflicts of interest – R305-9
- R305-9-102 Disclosure of Interest Statements
- R305-9-103 Actual Conflict - Recusal
 - *Shall* be recused from voting
 - *May* be recused from participating in discussion
- R305-9-104 Potential Conflict
 - Ethics Act prohibitions, or
 - Due process

Conflict Procedures



- R305-9-105 Potential Conflict
 - Board member may recuse himself/herself from discussion and vote, or
 - Disclose the potential conflict and seek a determination by the Board about how to proceed.
- R305-9-106 Decision of the Board
 - Nature of the matter before the board
 - Nature of the potential conflict
 - Intent that the board reflect balanced viewpoints
 - Recuse from voting *or* recuse from discussion
- Consequences of a failure to comply
 - May void action taken by the Board

Records



- Government Records Access Management Act
 - UCA Title 63G Chapter 2
- All government “records” are generally open and available to the public with limited exceptions.
 - What is a record?
 - ✦ Documents, classification, retention
 - ✦ S.B. 77 “Public Information” notices, minutes & recordings
- **CAUTION!**
 - Texts
 - Email

Records



- GRAMA Access Revisions (2022)
 - H.B. 57
 - ✦ A “Record” on personal electronic device
 - ✦ Agency request for a Search of personal device for “Record”
 - S.B. 254 (access revisions)
 - ✦ Exempts records related to security measures
 - ✦ Classifies certain data as “protected”

GRAMA Revisions (2023)



- Agency has to make a search that is “reasonable in scope and intensity.”
- The search must not be unreasonably burdensome for the agency.
- Agency may petition the State Records Committee for relief from a “vexatious requester.”
 - If Committee grants the petition, the Agency is not required to fulfill the Respondent’s GRAMA requests for up to one year.
- Person claiming business confidentiality must defend the Agency if the Agency denies a requester access to the document claimed confidential.

Records Procedures



- Procedure
 - ✦ Written request, time for response
 - ✦ Appeals
- DEQ has adopted UAC R305-1 implementing the records access and management provisions of GRAMA.
- Each Division in DEQ has a designated records officer responsible for responding to records requests and any appeals.
- Penalties & Remedies
 - § 63G-2-802 - injunctive relief, costs & attorneys fees
 - § 63G-2-801 - Criminal penalties for *knowing or intentional* acts
 - Litigation Hold

Questions



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May All Your Kessel Runs Be Successful

