

UTAH OPEN & PUBLIC MEETINGS ACT

Utah Code §§ 52-4-101 et seq.

What is OPMA?

- OPMA requires that the public's business be done in public.
- It provides requirements for conducting meetings of public officials, who have the authority to make policy and budget decisions in the public's interest.
- It requires that there be notice and an open deliberative process before a public body votes on matters under its jurisdiction.
- **ALL** votes are taken in public.

What is a Public Body?

OPMA defines a Public body as:

Any administrative, advisory, executive, or legislative body of the state or its political subdivisions that:

1. Is created by the Utah Constitution, statute, rule, ordinance, or resolution;
2. Consists of two or more individuals;
3. Expend, disburses, or is supported in whole or in part by tax revenue; **and**
4. Is vested with the authority to make decisions regarding the public's business.

What is a Meeting?



A gathering of a public body or specified body “with a **quorum** present” convened “for the express purpose of acting as a public body or specified body” to receive comment about, deliberate about, or take action upon a **relevant matter**. Utah Code § 52-4-103(5).

What is a Quorum?

A simple majority of the membership of a public body, unless otherwise defined by applicable law.



What is a Relevant Matter?

A matter “within the scope of the authority of a public body or specified body.”

If the body has executive and legislative responsibilities, it does not include “a managerial or operational matter.”



NOTICE and AGENDA

CLASS A NOTICE

- All public bodies and specified bodies
- 63G-30-102(1)

CLASS B NOTICE

- Applies to certain municipal meetings and meetings of taxing authorities
- 63G-30-102(2)

NOTICE

CLASS A NOTICE

- At least 24 hrs. in advance of meeting;
- Posted on Utah Public Notice Website;

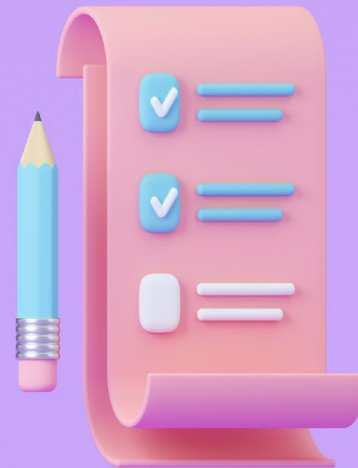
CONT.

- Posted on public body's official website **IF** the body has both an official website and an annual budget of at least \$250K; and
- In certain instances, posting at physical locations

NOTICE

CLASS B NOTICE

- All Class A notice requirements
- In addition:
 - Mailings to residents in certain areas; and
 - Mailings to specific people when required by statute



AGENDA



- Posted with notice;
- Must list items with “reasonable specificity” (an average person would be on notice as to all topics of discussion and action planned for the meeting).

Notice Requirements

In addition, a public body that holds regular meetings that are scheduled in advance over the course of a year shall give public notice at least once a year of its annual meeting schedule.





**MEETING
MINUTES**

Records of Open Meetings

Do we have to keep minutes and/or recordings?

- YES TO BOTH!
- Even though there is an audio recording, the approved written minutes will be the official record.
- Both written minutes and recording of open meetings are public records.
- Public body shall establish and implement procedures for the public body's approval of the written minutes of each meeting.

Written Minutes

- Date, time, and place of meeting;
- Names of members present and absent;
- Substance of all matters proposed, discussed, or decided by the public body which may include a summary of comments;
- Record, by individual member, of each vote taken by the public body;
- Name of each person who makes a public comment and the substance of the comment; and
- Any other information that is a record of the proceedings of the meeting that any member requests be entered in the meetings or recording.





Posting Approved Minutes and Audio Recordings to Public Notice Website

Pending Minutes:

Available to public within 30 days after the meeting (State Public Body and Specified Local Public Body). All other public bodies required to make pending minutes available to public in a reasonable amount of time.

Approved Minutes:

Posted on the PNW within 3 business days of public body's approval (All Public Bodies). A website link to approved minutes may be posted on the PNW for public bodies that are not a State or Specified Local Public Body.

Audio Recordings:

Audio recording or a link to the audio recording posted on the PNW within 3 business days after the meeting (State Public Body). Specified Local Public Body and all other public bodies are required to make audio recording available to public within 3 business days after meeting but no requirement to post.

Electronic Meetings



An electronic meeting occurs when at least one member of the public body attends electronically (video or audio), even if most people attend in person.

- The public body must adopt resolution, rule, or ordinance governing the use of electronic meetings. **(52-4-207(2))**
- Notice requirements still apply.

Do we have to provide a physical anchor location?

- Not if all the members of the public body attend electronically **(52-4-207(5)(e))**
 - **Exception:** Body must provide an anchor location if it receives a written request at least 12 hours before the start of the meeting. **(52-4-207(4)(a))**
 - The body **MAY** provide the public an electronic attendance link **(52-4-207(4)(b))**
- Electronic meetings may be held without an anchor location (even if a body receives a request 12 hours in advance) if it presents a substantial risk to health or safety (COVID), but requires written determination by the chair of the public body.

Electronic Message Transmissions

The Open Public Meetings Act does not restrict members of a public body from transmitting an electronic message to other members of the public body when the body is **not** in an open meeting. (Still, avoid quorum discussion!)



Emergency Meetings



Due to unforeseen circumstances that must be articulable.

- An example might be a broken water line that cannot wait for the next scheduled meeting.
- Emergency!

Requires best notice practicable.

Cannot be held unless an attempt has been made to notify all members of the public body and a majority of the members approve the meeting.

**KEEP
OUT**

Closed Meetings

- A public body can close a meeting under certain circumstances.
- 52-4-205 lists **all** the reasons for closing an open meeting.
- Process:
 - A quorum must be present at the open meeting.
 - A motion to close the meeting must be made, naming the specific statutory reason for closure.
 - Roll call vote must be taken. Two-thirds of the body must approve the closed meeting.
- If the closed meeting is held to discuss 52-4-205(1)(a), (1)(f), or (2), the presiding member of the public body is to execute a sworn statement that the sole purpose of the closed meeting was to discuss these issues. No recording is required.
- If the meeting is closed for any other statutory reason, a recording shall be made, and written minutes may also be made. These are protected records under GRAMA.
- **NO VOTES ARE TAKEN IN CLOSED MEETINGS** (except a vote to end the closed meeting)

Reasons a Meeting May be Closed (not the full list)

1. To discuss character, professional competence, or physical or mental health of an individual (doesn't require recording if the chair signs an affidavit after);
2. To discuss collective bargaining;
3. To discuss pending or reasonably imminent litigation;
4. To discuss the purchase, exchange, or lease of real property, if public discussion would disclose the appraisal value or prevent the transaction on the best possible terms;
5. To discuss the sale of property, if public discussion would disclose the appraisal value or prevent transaction on best possible terms as long as there's public notice of sale and terms are disclosed before the sale;
6. To discuss security personnel, devices, or systems (doesn't require recording if the chair signs an affidavit after);
7. To discuss investigative proceedings regarding allegations of criminal misconduct; and
8. A few other exceptions relating to loans, the Legislature, Higher Education, and the Utah Procurement Code.

What is Forbidden During a Closed Meeting?

You may not:

- Approve an ordinance, resolution, rule, regulation, contract, or appointment.
- Interview a person to fill an elected position.
- Take final action: Final votes must be open and on the record.



What Happens if Someone Violates OPMA?

A court can void any action in violation of the law:

- Sometimes a violation can be cured by discussing and taking a public vote in a subsequent meeting.
- May have to pay court costs and attorney fees.
- “In addition to any other penalty under this chapter, a member of a public body who intentionally violates or intentionally abets or advises in violation of the closed meeting provisions of this chapter is guilty of a class B misdemeanor.” (6 months in jail and/or \$1,000 fine)



Remedies & Enforcement

Voiding final action

- Any final action taken in violation of Section 52-4-201, 52-4-202, 52-4-207, 52-4-208, or 52-4-209 is voidable by a court of competent jurisdiction.
- Must file suit to void final action within **90 days** of the action. (If the alleged violation involves bonds, notes, or other evidences of indebtedness, then **30 days**.)

Who can enforce OPMA?

- Attorney General and County Attorneys
- Any person denied a right by the action taken may sue to compel compliance or enjoin violations
- Aggrieved party may recover attorney's fees



Disruption of Meetings

OPMA does not prohibit the removal of any person from a meeting if the person willfully disrupts the meeting to the extent that orderly conduct is seriously compromised.





TRAINING

The presiding officer of a public body shall ensure that the body receives OPMA training on an annual basis.

Common Violations of OPMA

- Closed Meetings
 - Improper procedure (vote not conducted properly)
 - Closing for an impermissible purpose
 - Taking action in a closed meeting
- Notice
 - Failure to post 24 hours in advance
- Record of open meeting
 - Failure to post minutes/audio recordings in the time required



Parting Tips and Helpful Suggestions:



- 24-hour notice
- Be specific with agenda items
- Close meetings only for allowed statutory purposes and follow the process
- Provide minutes in a timely manner
- Don't text during meetings
- Receive training once a year
- Err on the side of transparency
- When in doubt, consult your legal counsel

SRC Procedural Training

- *Common Cause of Utah v. Utah Public Service Com'n*, 598 P.2d 1312 (1979)
 - In examining whether the Public Service Commission could deliberate in private, the Utah Supreme Court found:
 - The proceedings can be adversarial where the commission determines disputed issues
 - “The commission is required by law to operate very much in the same manner as courts. It is empowered to conduct hearings, administer oaths, compel attendance of witnesses, obtain depositions and the production of documents.

SRC Procedural Training

- *Common Cause of Utah v. Utah Public Service Com'n*, 598 P.2d 1312 (1979)
 - “Its decisions are required to be supported by written findings. Moreover similar procedures are provided for rehearings and a review by this Court.”
 - The “information gathering” phase of the meeting must be conducted in an open public meeting

SRC Procedural Training

- *Common Cause of Utah v. Utah Public Service Com'n*, 598 P.2d 1312 (1979)
 - “However, once the ‘information obtaining’ procedure has been completed, it is essential that during the ‘decision making’ or judicial phase, those charged with that duty have the opportunity of discussing and thinking about the matter in private, free from any clamor or pressure, so they can calmly analyze and deliberate upon questions of fact, upon the applicable law, and upon considerations of policy, which bear upon the problems with which they are confronted”

SRC Procedural Training

- *Common Cause of Utah v. Utah Public Service Com'n*, 598 P.2d 1312 (1979)
 - Justice Wilkins concurrence:
 - “I . . . Wish to emphasize that . . . Because [the activities of the Commission] are judicial, these activities are clearly not subject to Utah’s Open and Public Meeting Act.”

SRC Procedural Training

- *Big Game Forever v. Peterson*, 2024 UT App 78
 - At the district court level, Big Game made only conclusory statements to keep the records protected.
 - The records were protected because they contained commercial information that would harm Big Game if released
 - The subcontractors listed in the records had been targeted by extremist animal rights groups
 - The statements were not supported by evidence or supporting information
 - The district court ruled against Big Game for its lack of supporting evidence and reasoning

SRC Procedural Training

- *Big Game Forever v. Peterson*, 2024 UT App 78
 - Big Game appealed to the Court of Appeals
 - Again, Big Game failed to support its conclusions that the district court erred
 - “. . . These conclusory statements do not meaningfully engage with the district court’s reasoning and are thus insufficient to carry Big Game’s burden of persuasion on appeal.”
 - The Court ruled against Big Game because it failed to offer support to its conclusions that the district court erred

SRC Procedural Training

- *Big Game Forever v. Peterson*, 2024 UT App 78
 - The analysis in *Big Game* is in line with *Deseret News Pub. Co. v. Salt Lake County*, 2008 UT 26:

“We conclude that government records are presumptively public under GRAMA, and thus, the County bears the burden of proving that it properly classified the [record] as nonpublic.”

- For a record to be restricted, the reasons behind the nonpublic classification must outweigh the reasons supporting disclosure. Tie goes to the requester. See 63G-2-403(11)(b); *Deseret News Pub.*

SRC Procedural Training

- *Big Game Forever v. Peterson*, 2024 UT App 78
 - The analysis in *Big Game* is in line with *Deseret News Pub. Co. v. Salt Lake County*, 2008 UT 26:

“We conclude that government records are presumptively public under GRAMA, and thus, the County bears the burden of proving that it properly classified the [record] as nonpublic.”

- For a record to be restricted, the reasons behind the nonpublic classification must outweigh the reasons supporting disclosure. Tie goes to the requester. See 63G-2-403(11)(b); *Deseret News Pub.*

SRC Procedural Training

- Evidentiary Standards
 - Begin with the presumption that records are public.
Deseret News Pub. Co. v. Salt Lake County, 2008 UT 26
 - The burden shifts to the government to show that its protective classifications were correctly applied.
Deseret News Pub. Co. v. Salt Lake County, 2008 UT 26
 - If the government doesn't adequately show that the classifications are correct, the records must be deemed public unless the committee reviews the records in camera and makes its own determination on the classification. Utah Code 63G-2-502(2)(b).

SRC Procedural Training

- Evidentiary Standards
 - If the records are correctly classified, whether by the government or Committee, then:
 - Burden shifts to requester to show that their interests in access is at least equal to the policy reasons supporting disclosure
 - Under *Schroeder*, the policy reasons to restrict access will likely always prevail. Therefore, the Committee must look at all the circumstances surrounding the request and determine whether the protective policy can withstand the factual circumstances.
 - This requires the Committee to dig into the surrounding facts and reasons of both parties

SRC Procedural Training

- Evidentiary Standards
 - If a record is properly classified as protected under 305(10), (17), (18), (23), (24), or (33), the requester must show by a preponderance of evidence that their interest in access is at least equal to the policy for the protection
 - Preponderance of evidence is a higher standard than the government's burden of proving its classification. Think 51%

SRC Procedural Training

- Evidentiary Standards
 - If a record is properly classified as protected under 305(11), the requester must show by clear and convincing evidence that their interest in access is at least equal to the policy for the protection
 - Clear and convincing evidence is a higher burden than preponderance of evidence. Think 60-80%

Presumed Public

- Favors the requester

Initial Classification

- Government's burden
- Substantial evidence

Weighing Analysis

- Interests in access at least equal to interests in restriction.

305(10), (17), (18),
(23), (24), (33)

- Requester's burden to show interests are at least equal to interests in restriction
- Preponderance of evidence

305(11)

- Requester's burden to show interests are at least equal to interests in restriction
- Clear and convincing evidence