

**OOR**

Office of Open Records

## PENNSYLVANIA'S SUNSHINE ACT (OPEN MEETINGS LAW)

The Pennsylvania Sunshine Act, 65 Pa.C.S. §§ 701-716, requires agencies to deliberate and take official action on agency business in an open and public meeting. It requires that meetings have prior notice, and that the public can attend, participate, and comment before an agency takes that official action.

The Office of Open Records (OOR) does not enforce the Sunshine Act, but it does provide training on the law. Following are answers to the most frequently asked questions the OOR receives regarding the Sunshine Act.

### Which agencies are subject to the Sunshine Act?

Any state or local government body and all sub-units appointed by that body that perform an essential government function and exercises authority to take official action or render advice. It can include boards, councils, authorities, commissions, and committees.

The Sunshine Act defines an "agency" as the "body and all committees thereof that are authorized to render advice or take official action" on behalf of the governing body.

### What's considered a meeting?

The law defines a meeting as "any prearranged gathering of an agency which is attended or participated in by a quorum of the members of an agency held for the purpose of deliberating agency business or taking official action."

Note that the Sunshine Act applies any time a quorum deliberates agency business or takes official action, no matter the physical location of those deliberations or actions. The use of the term "prearranged" does not allow agencies to thwart the intent of the Sunshine Act simply by holding an unscheduled discussion about agency business.

### What's considered official action?

The definition of "official action" includes four categories:

1. Recommendations made by an agency pursuant to statute, ordinance or executive order.
2. The establishment of policy by an agency.
3. The decisions on agency business made by an agency.
4. The vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order.

### What's considered agency business?

The law defines agency business as "the framing, preparation, making or enactment of laws, policy or regulations, the creation of liability by contract or otherwise or the adjudication of rights, duties and responsibilities." Agency business specifically does *not* include administrative action (i.e., the execution or carrying out of previously approved official action or policies).

## What's considered deliberation?

Deliberation is defined as the "discussion of agency business held for the purpose of making a decision."

## What notice must an agency provide prior to public meetings?

For regular public meetings, agencies (including committees) must provide at least three days advance notice prior to the first regularly scheduled meeting of the calendar or fiscal year, along with all further scheduled meetings for the remainder of the calendar or fiscal year. The notice – which must include the date, time, and location of the meetings – must be printed in a paid newspaper of general circulation. A notice must also be posted at the location(s) where the meetings are to take place.

For a special or rescheduled public meeting, agencies must provide at least 24 hours advance notice, with the notice being printed in a paid newspaper of general circulation and posted at the location where the meeting is to take place.

Although not required by the Sunshine Act, including the purpose of a meeting, particularly a special meeting, is a good practice followed by many agencies. Some local government statutes, such as the Borough Code, require the subject to be included in special meeting notices. (See 8 Pa.C.S. §1006.)

## Can the public comment during public meetings?

Yes. The Sunshine Act gives the public the right to comment on issues "that are or may be before the board." Agencies must provide a reasonable opportunity for residents and/or taxpayers to comment on an issue before a decision takes place.

Agencies are permitted to establish rules to oversee public comment by, for example, limiting the time for each commenter. The OOR encourages agencies to take care when imposing time limits on public comment. Three minutes is a common limit and may be more than enough at most public meetings. However, it may not be adequate at certain meetings, such as when a complex draft budget is being discussed. It can be a good practice to allow for flexibility in any policy imposing time limits on public comment, taking care to ensure that the agency does not show partiality to some commenters over others.

Agencies are also permitted to limit comment to residents and taxpayers of the area served by the agency.

## Can the public ask questions during the comment period?

Yes. Although members of the agency are not *required* to provide an answer, it is a good practice to do so whenever possible. Answering questions can demonstrate a commitment to helping constituents and, in many cases, answering questions informally at a public meeting can reduce future requests under the Right-to-Know Law, which saves time and money for both the agency and the commenter / requester.

## Can public meetings be recorded?

Yes. The Sunshine Act allows meetings to be recorded with an audio recorder or a video recorder. It also allows agencies to issue reasonable rules concerning the use of recording devices in order to avoid any disruptions. However, such rules cannot be an attempt to prevent a member of the public from recording a meeting.

The law does not require the recording of a public meeting to be announced in advance; however, it may be helpful for the chairperson in the opening statements to alert the public that the meeting might be recorded.

## Must agencies keep minutes of their public meetings?

Yes. Agencies are required to record the time, date, and place of their meetings; the names of the members present, the substance of all official action taken during the meetings, and a record of how each individual voted. The minutes must also include the names of all citizens who appeared officially and the subject of their testimony.

## What if a quorum is not present at the public meeting?

An agency cannot legally take official action if a quorum is not present. A quorum is the minimum number or majority of voting members of an agency that must be present in order for the agency to conduct business. The number of members needed to form a quorum varies by the type of agency involved.

## Can agency members participate in a meeting via telephone or video conference?

Yes. Agency members may participate in meetings by telephone or video conference. In addition, members participating in this manner count for purposes of determining whether a quorum is present. See *Babac v. Penn. Milk Marketing Bd.*, 613 A.2d 551 (Pa. 1992). ("[A] quorum of members can consist of members not physically present at the meeting but who nonetheless participate in the meeting and ... such quorum can take official action, provided that, the absent members are able to hear the comments of and speak to all those present at the meeting and all those present at the meeting are able to hear the comments of and speak to such absent members contemporaneously[.]")

The above does not apply to boroughs and First Class Townships. Per the codes governing those municipalities, a quorum of the council/commission must be physically present to conduct official business. Once the quorum is met, however, any additional members may participate remotely.

Relevant Codes:

First Class Township Code: 53 P.S. §§ 55702(b)-(b.1).

Borough Code: 8 Pa. C.S. §§ 1001(b)-(c).

## Can an agency have a closed meeting?

An agency may discuss certain matters in Executive Session, which is not held in public. Section 708 of the Sunshine Act enumerates seven reasons an agency may hold an Executive Session:

1. Discussing personnel matters;
2. Holding an information, strategy and negotiation session related to the negotiation of a collective bargaining agreement;
3. Considering the purchase or lease of real property;
4. Consulting with an attorney about active or pending litigation;
5. Discussing agency business which, if conducted in public, would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law;
6. Discussing certain academic matters (this reason is specifically limited to certain institutions of higher education); and
7. Discussing certain public safety issues if disclosure of the information discussed would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection.

The specific reason for an Executive Session must be announced in the public meeting either before or directly after the Executive Session. See *Reading Eagle Co. v. Council of City of Reading*, 627 A.2d 305 (Pa. Cmwlth. 1993), ("[T]he reasons stated by the public agency must be specific, indicating a real, discrete matter").

Closed gatherings may also be held "solely for the purpose of collecting information or educating agency members about an issue." See *Smith v. Township of Richmond*, 623 Pa. 209, 223 (Pa. 2013) ("[T]he Supervisors' four closed-door gatherings did not violate the [Sunshine] Act because they were held for informational purposes only and did not involve deliberations").

## Can official action be taken at a closed meeting?

No. Official action cannot be taken during Executive Session or a closed gathering. All official actions must be taken during the public portion of a meeting.

## Can agency members discuss agency business via email and/or social media?

It's important to draw a distinction between an individual agency member discussing agency business with members of the public and multiple agency members discussing agency business among themselves.

An agency member is permitted to discuss agency business with members of the public, whether by email or social media (or in person, on the telephone, via postal mail, etc.). In many cases, such communications are public records available under the Right-to-Know Law.

However, voting members of an agency are not permitted to deliberate except at a public meeting. In other words, agency members exchanging opinions about an upcoming vote or encouraging other agency members to vote a particular way in an email discussion or a discussion held via social media would violate the Sunshine Act.

## What legal remedies are available for violations of the Sunshine Act?

Section 710.1(c) of the Sunshine Act permits anyone attending a public meeting to object to a perceived violation at any time during the meeting. Additionally, for state agencies, a member of the public can file a complaint with the Commonwealth Court. For local agencies, a member of the public can file a complaint

with the local Court of Common Pleas.

Any complaint must be filed within 30 days of the public meeting in which the alleged infraction occurred. If the alleged infraction occurred during a closed meeting, the complaint must be filed within 30 days of the discovery of the infraction, as long as it is no longer than one year from when the meeting was held.

The person alleging the infraction bears the burden of proof. See *Smith v. Township of Richmond*, 623 Pa. 209, 223 (Pa. 2013) ("[I]n view of the presumption of regularity and legality that obtains in connection with proceedings of local agencies, the challenger [of an agency meeting] bears the burden to prove a violation") (internal quotation and citation omitted).

In December 2020, Judge Swail of Westmoreland County found that officials in Monessen violated the Sunshine Act and ordered them to take a training course from the OOR.

## Are there penalties for violating the Sunshine Act?

Yes. In addition to being assessed attorneys' fees, any member of an agency who is found to have willfully violated the act can face criminal charges and subject to fines of \$100 to \$1,000 for the first offense, and \$500 to \$2,000 for the second offense. Any fine must be paid personally; an agency cannot pay the fine.

A court can also award attorney fees to the prevailing party if the court determines that either (1) an agency willfully or with wanton disregard violated the Sunshine Act or (2) the legal challenge was of a frivolous nature or was brought with no substantial justification.

## What are the agenda requirements for the Sunshine Act?

Senate Bill 554 amended the Pennsylvania Sunshine Act to include the requirement that agencies post the agenda for all public meetings at least 24 hours in advance. This change took effect August 29, 2021 and applies to all agencies covered by the Act.

The agenda requirement applies to all regular and Special public meetings, but does not include work sessions, conferences and Executive sessions where official action is not permitted.

The agenda should include all issues to be deliberated on and any planned official action, such as votes.

If the agency has a website or other social media platform that is publicly accessible, the agenda must be posted there. Postings are also required at the agency's offices, at the meeting site; and copies of the agenda must be available for the public at the meeting itself.

An agency can change the agenda within the 24-hour threshold provided the changes are de minimus, involve no expenditure of funds, and don't entail entering into a contract.

The agency can also add to the agenda at the meeting itself by majority vote. The reason for the change must be announced prior to any official action, including a vote, the amended agenda must be posted within 24 hours after the meeting, and the meeting minutes must reflect that the change was made.

## How specific should agenda items be to conform with the new Sunshine Act Requirements?

Until the courts weigh in further, Senate Bill 554 combined with existing Sunshine Act-related case law provides some initial perspective and guidance. What is often referred to as the "Reading Eagle Case", cited below, addresses the specificity of an agenda used by the agency when announcing the reasons for

entering into Executive Sessions. Perhaps the best reference is the words of the Commonwealth Court, which, in its ruling, cited language from a similar decision from the Supreme Court of Mississippi (highlighting added):

"The reason given, of course, must be meaningful. It must be more than some generalized term which in reality tells the public nothing. To simply say "personnel matters" or "litigation" tells nothing. *The reason stated must be of sufficient specificity to inform those present that there is, in reality, a specific, discrete matter or area which the board had determined should be discussed in executive session. . . .* When a board chairman tells a citizen he may not hear the board discuss certain business, he is taking liberties with the rights of that citizen, and the reason given for this interference must be genuine and meaningful, and one the citizen can understand. To permit generalized fluff would frustrate the very purpose of the Act."

Reading Eagle Co. v. Council, 156 Pa. Commw. 412, 416-17 (Pa. Cmmw. Ct. 1993)

It is advisable to use the same standard for agendas, whereby the description of the agenda item must be "of sufficient specificity to inform...that there is, in reality, a specific, discrete matter or area which the board has determined should be discussed (deliberated and/or decided by official action)." In sum, avoid general cryptic terms and provide as many specific concrete details as possible.