Alaska’s Open Meetings Law

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3rd Edition

PREFACE

The first edition of this publication appeared in 1992 under the title "Alaska's Open Meetings Act: A Guide For Local Governments And School Districts." In 1994 the Alaska State Legislature passed significant amendments to AS 44.62.310-.312, popularly known as the Open Meetings Act, which is reprinted in the Appendix. Among other changes, the legislation clarified the definitions of "governmental body" and "meeting" coming within the coverage of the act. Sweeping changes were made to the law of remedies available for violation of the act. The second edition of this publication was published in 1996 to incorporate these legislative changes. This third edition broadens the scope of the publication and provides additional analysis. It also refers to all court decisions discussing the Open Meetings Act that have been issued since 1996.

This publication refers to court decisions from several different courts. Generally, only those opinions from the Alaska Supreme Court (cited as Alaska) would be considered binding precedents. Cases cited from other states, or from the Superior Court (cited as Alaska Super. Ct.) or the U.S. District Court for Alaska (cited as D. Alaska) are cited for illustrative purposes. Although those cases show how courts interpret the Open Meetings Act, they are not precedents binding on any other court's interpretation of the act.

This publication is intended to provide accurate and authoritative information in regard to the subject matter covered. It is made available with the understanding that the author and publisher are not engaged in rendering legal or other professional service. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

I. INTRODUCTION TO ALASKA'S OPEN MEETINGS ACT

A. Background

Alaska's open meetings law has been in the statute books since the earliest days of statehood. For the first twenty years since statehood in 1959, no reported Alaska court decision even mentioned the open meetings law. The first decision to do so appeared in 1980,1 and since then there have been many. In the 1980s there were eleven reported decisions in which the law played a substantive role and another eight where the law was mentioned, but played an insignificant part. In the 1990s, the law was substantively applied in ten reported cases and mentioned in another four decisions.

In 1994 the law, popularly known as the Open Meetings Act, was significantly amended by the Alaska Legislature. Among other changes, the legislation clarified the definitions of "governmental body" and "meeting" within the coverage of the act. Sweeping changes were made to the legislated remedies for violation of the act.

One should be aware of the effect of these changes when reviewing court decisions based on the prior law.

B. The OMA Requires Meetings To Be Open To The Public

Alaska's "Open Meetings Act" ("OMA"), AS 44.62.310-.312, requires meetings of most legislative or administrative state and local governmental bodies to be open to the public. The essence of the OMA is stated in its first sentence:

> All meetings of a governmental body of a public entity of the state are open to the public except as otherwise provided by this section or another provision of law.2

The OMA, generally applicable to the state government, is specifically made applicable to all municipalities by AS 29.20.020 and AS 44.62.310. School districts are also subject to the OMA according to AS 44.62.310(h)(3).

The complete Open Meetings Act, as in effect on the date of this paper, is reprinted in the Appendix at the end of this paper.

C. State Policy Regarding Open Meetings

State law expresses a strong policy in favor of opening governmental meetings to the public. The statement of policy says government exists to aid in the conduct of the people's business; government actions should be taken openly and deliberations conducted openly; the people do not yield their sovereignty to government agencies; the people do not give public servants the right to decide what is good for the people to know and not good for them to know; and the right of the people to remain informed shall be protected so the people may retain control over the government.3 Further, the OMA is to be narrowly construed to avoid unnecessary executive sessions and exemptions from coverage of the act.4

This statement of policy is quoted often by the courts when interpreting the OMA. It provides a strong impetus for court interpretations of the OMA in favor of openness.

II. WHO IS COVERED BY THE ACT?

The Open Meetings Act requires that many governmental meetings be properly noticed and open to the public. To whom do these requirements apply?

A. Public Entities

The OMA applies to every "governmental body" of a "public entity." "Public entity" is defined to include entities of the state, the University of Alaska, and all political subdivisions, including boards, commissions, agencies, municipalities, school districts, public authorities and corporations, and other governmental units of the state and political subdivisions of the state.5

B. Governmental Bodies

For OMA purposes a "governmental body" means an assembly, council, board, commission, committee, and any other similar body of any public entity.6 Both home rule and general law municipalities are covered equally.7 By its terms, the act also applies to members of a subcommittee or other subordinate unit of a governmental body if the subordinate unit consists of two or more members.

The OMA draws a distinction between two types of governmental bodies: those with authority to establish polices or make decisions for the public entity, and those with authority only to advise or make recommendations to the public entity. Both of these types of bodies are covered by the OMA, but the distinction arising from the way a "meeting" is defined[8] affects the remedies that will be available for violations of the OMA.[9]

C. Some Examples

It is important to note that a body does not have to have any decision-making power to be subject to the OMA. A body is subject to the OMA even if its only power is to give advice or make recommendations on matters of public concern.

Certain bodies are easy to categorize as policy-making or decision-making bodies. Obviously included in this category are the Local Boundary Commission, a reapportionment board, borough assemblies, city councils, school boards, boards of adjustment, and boards of equalization. Each of these is easily characterized as a "governmental body" with decision-making authority.

Other bodies may sometimes have policy-making and decision-making authority and at other times have only advisory authority. The functions assigned to each board, committee, or commission should be examined to determine if it has some authority to make policy or decisions binding on the government. Examples of bodies that sometimes have policy or decision-making authority might include planning and zoning commissions, port authority boards, service area boards and similar bodies.

An example of a body that does not have authority to make policy or decisions for the governmental entity would be an advisory neighborhood council, like the community councils in the Municipality of Anchorage.

Alaska Supreme Court decisions have held that some not so obvious groups are governmental bodies covered by the OMA. For instance, the following are or may be covered: a local tenure committee formed to advise the administration of the University of Alaska,[10] a gathering of municipal assembly members at a developer's office for an informal discussion of a proposed development,[11] and a joint federal/state advisory task force (including both agency and non-agency members) formed to give advice to administrative agencies about the terms of proposed leases.[12]

The very first reported case interpreting Alaska's OMA was an attempt to apply it to the Alaska Bar Association to void the results of a 1978 meeting of the board of governors held in Hawaii.[13] The court held that the statute[14] governing the bar association, as in effect at that time, exempted the association from the OMA. At the very next legislative session the law was amended to make the OMA expressly applicable to the Alaska Bar Association, with specific requirements that 30 days' notice be given of all meetings and that all board meetings be held within Alaska.[15]

D. Who Is Not Covered?

1. Individuals

One assembly member, council member, board member, or other individual member of a body may meet alone with members of the public or lobbyists to discuss matters of public business without violating the OMA.[16] It has also been decided that the Commissioner of the Department of Fish and Game, acting under authority delegated to him by the Board of Game, did not fall within the coverage of the current OMA when, acting alone, he deliberated and adopted subsistence hunting regulations.[17]

2. Employees and staff

Staff meetings and other gatherings of employees of the public entity are expressly exempt from coverage under the OMA.[18] Thus, a weekly staff meeting of department heads and the mayor or municipal manager, for example, is not a governmental body covered by the act. The Alaska Supreme Court also held that everyday dealings of public employees with each other and with members of the public in day-to-day conduct of government business are not "meetings" of "bodies" and that such employees are not "governmental units."[19]

However, sometimes an employee may be appointed to a board or committee that has either decision-making authority or advisory authority for the public entity. In such cases the board or committee is covered by the OMA. The mere presence of one or more employees on such a body will not exempt it from the act.

3. Quasi-judicial bodies solely when making decisions

State agencies, municipalities, and school districts may, from time to time, convene meetings of quasi-judicial bodies to make decisions in adjudicatory proceedings. Examples of quasi-judicial bodies include the Local Boundary Commission, the Worker's Compensation Board, boards of adjustment, boards of equalization, boards of appeals, and disciplinary boards. Sometimes other bodies may also sit as quasi-judicial bodies, such as the assembly, council, planning and zoning commission, and school board. Such bodies are exempt from the OMA when meeting *solely* to make a decision in an adjudicatory proceeding.[20] An "adjudicatory proceeding" is generally one in which the rights of specific, identified individuals are being determined, such as a request for a zoning variance, an appeal of a tax assessment, or consideration of a contract termination.

To be exempt from the OMA means that such bodies, in such cases, may meet in executive session to deliberate and make a decision in the pending case. If the meeting is convened *solely* for that purpose, public notice is not even required (such a meeting is entirely *exempt* from the OMA). However, if other public matters are also addressed at such a meeting, then public notice is required and the other requirements of the OMA must be met as to the other matters to be addressed.

The exemption from the OMA also means that a quasi-judicial body, when meeting to make a decision in an adjudicatory proceeding, is also further exempt from AS 29.20.020(a), meaning it does not have to give the public an opportunity to be heard during the deliberation session.[21]

4. Organizational votes

The OMA does not apply to votes required to organize a governmental body.[22] Organizing votes are those that elect the leaders or officers of the body, such as the mayor, mayor pro tempore, chair, vice-chair, secretary, parliamentarian, and the like.

5. Meetings of membership organizations

Public entities are frequently members of other organizations, like the Alaska Municipal League, Alaska Association of School Districts, National League of Cities, and so on. Sometimes the body, *e.g.*, council, board, or commission, or the members of those bodies will themselves be members of other organizations. These membership organizations may be national, state, or local in scope.

The OMA does not apply to meetings held for the purpose of participating in or attending gatherings of such membership organizations if the public entity, the body, or the member of the body is a member.[23] However, this exception only applies if no action is taken and no business of the governmental body is conducted at the meeting of the membership organization.

6. Hospital staff

Also exempt from the OMA are meetings of a hospital medical staff and meetings of the governing body or any committee of a hospital when meeting solely to act upon matters of professional qualifications, privileges or discipline.24

7. Alaska Legislature

As applied to the Alaska Legislature, the OMA, like the legislature's Uniform Rule 22, is viewed by the court merely as a rule of procedure concerning how the legislature has determined to do business. While by its literal terms the OMA is applicable to the legislature, a violation of the OMA by the legislature will not be considered by the courts, absent infringement of the rights of a third person or violation of constitutional restraints or a person's fundamental rights.25

In 1994 the legislature enacted a law requiring itself to adopt guidelines applying open meetings act principles to the legislature.26 This was to have been done during the 1995 legislative session, but it has still not happened as of this writing.

8. Alaska Railroad

The Alaska Railroad Corporation is a public corporation and an instrumentality of the state within the Department of Community and Economic Development. As such it would be ordinarily be subject to the OMA, but the law grants the Alaska Railroad an express exemption from the act.27 However, the railroad corporation act requires the board of governors to provide reasonable notice to the public of its meetings.28 This is identical to the OMA's requirement of giving reasonable notice to the public, so the discussion below concerning the meaning of "reasonable public notice" under the OMA is relevant to the Alaska Railroad board of governors.29 The list of topics that may be discussed in executive session by the Alaska Railroad board of governors is considerably broader than that found in the OMA.30 Because of the similarities between the laws, the discussion below concerning executive sessions will have considerable relevance to the Alaska Railroad.31

9. Others

The U.S. government, corporations, including non-profits, and Native entities are not covered by the OMA. A clause of AS 44.62.310(a) extending the OMA to "organizations . . . supported in whole or in part by public money" was removed from the law in 1994.

III. WHAT IS A MEETING?

The OMA has two definitions of "meeting" that differ significantly. One definition is applied to decision-making or policy-making bodies, and the other definition applies to advisory-only bodies. The differences between these two kinds of bodies is discussed in Section II.C. The different definitions require each kind of body to be discussed separately.

A. Meeting-Decision-Making Or Policy-Making Body

For a decision-making or policy making body, the OMA defines a meeting to be:

> a gathering of members of a governmental body when . . . more than three members or a majority of the members, whichever is less, are present, [and] a matter upon which the governmental body is empowered to act is considered by the members collectively 32

1. A meeting may take any form

There is no particular format required for a gathering of members of a decision-making body to become a meeting under the OMA. In fact, if a sufficient number of members are present, *any* gathering where public business is considered may become a meeting subject to the act, including dinner before or coffee after a formally scheduled meeting. Informal gatherings are treated the same as formally called meetings. Work sessions are treated the same as regular meetings. Furthermore, it does not matter whether the government called the meeting, an individual or a private business called the meeting, or nobody called the meeting. No matter where, when, or how it occurs, it is a meeting if a sufficient number of members of a covered body get together and collectively consider a subject upon which the body is empowered to act. In this context, transacting public business is broadly construed. It includes *every* step of the deliberative and decision-making process, including work sessions, investigations, fact-gathering, lobbying and simple discussions of matters of public business.33

2. Four members or a majority make a meeting

Before the 1994 amendments to the OMA there was uncertainty about how many members of a body could meet without violating the OMA. The amendments have clarified this issue.

For a decision-making or policy-making body, four members or a majority of the body, whichever is **less**, will comprise a meeting. A gathering of less than that number is not a meeting according to the definition.

The typical city council has six or seven members, depending on whether the mayor is a member of the council. In either case, a typical quorum is four. Therefore, a meeting will occur when four members of a typical city council are present and collectively consider a matter of city business.

For any larger body, like a borough assembly or school board with eight or more members, the number of members that could constitute a meeting is **always** four.

For a smaller body, like a subcommittee or board with less than six members, any gathering of a majority of the body will constitute a meeting if the members collectively consider any matter upon which the body has the power to act.

3. Teleconference meetings

Telephone conference meetings are allowed by the OMA.34 Both members of the body and the public are authorized to participate from remote locations. Presumably, speaker phones or their equivalent must be used so all persons present in every location may hear the proceedings and participate. Materials to be considered must be made available at teleconference locations, if practicable. Votes at a teleconference meeting must be taken by roll call so all will know how each member votes. Public notice of teleconference meetings must include notice of the location of the teleconference facilities that will be used.

The Supreme Court has approved, if somewhat reluctantly, the practice of allowing citizens to phone in comments to a public meeting that is held at a single site. The court did not consider this to be a teleconference meeting, and agreed that it had the effect of expanding public access consistent with the intent of the OMA.35

4. Issue: Telephone polling, serial communications, and e-mail

Occasionally, someone will "poll" the members of a governmental body, usually by telephone, but it may done by other means as well. One member, or a staff person for the public entity, may speak to all the members of the body, one at a time, to discuss an issue. The caller may either determine how the individual feels about the issue, or attempt to influence the way the individual feels about the issue. In this manner the outcome of the issue may be predetermined, without discussing it at a public meeting. This is sometimes called a "serial meeting" because it involves a series of consecutive communications closely related in time.

If there are not more than three members present at any one time for a collective discussion, such serial communications do not come within the OMA's 1994 definition of "meeting." Nevertheless, there is still some risk that serial communications might be considered an illegal meeting in violation of the OMA. The reason for this risk is that the series of telephone calls could be viewed by a court to have the effect of circumventing the OMA by determining the outcome of a vote before (or without) a meeting and without a public discussion.

Applying the law in effect before the 1994 OMA amendments, two courts have concluded a series of consecutive individual conversations may amount to an illegal meeting. A Superior Court judge in Juneau concluded that a series of telephone calls about nominees for appointment to advisory committees was an illegal meeting.[36] The Supreme Court in *Hickel v. Southeast Conference*[37] upheld a trial court finding that several one-on-one conversations by reapportionment board members, coupled with a lack of substantive discussion in a public meeting, was sufficient evidence to affirm the trial court finding that business was being conducted outside scheduled meetings in violation of the OMA.

A judge who gives great weight to the OMA's strong public policy favoring open meetings might reach the same result even though the current definition of a "meeting" seems to rule out that conclusion. In the context of the question of whether a quorum or less than a quorum could constitute a meeting, the Alaska Supreme Court said in a pre-1994 opinion:

Given the strong statement of public policy in AS 44.62.312, the question is not whether a quorum of a governmental unit was present at a private meeting. Rather, the question is whether activities of public officials have the effect of circumventing the OMA.[38]

Thus, if a court is persuaded that public business is being conducted outside the public scrutiny with the effect of circumventing the OMA, then it is possible a court will be tempted to overlook the fact that there is no "gathering ... when more than three members ... are present"[39] at any one time and nevertheless conclude the OMA is being violated.

Indeed, without even commenting on the fact that there were *no* members of the redistricting board *present* at a *gathering*, the superior court in *In re 2001 Redistricting Cases* concluded that the redistricting board violated the OMA by using e-mail for communications among three members of the five member board.[40] The offending e-mail communications concerned the important "board business" of choosing the locations for holding constitutionally-required public hearings on proposed redistricting plans. From all appearances, the 1994 OMA definition of "meeting" was never addressed by the superior court when making these findings. On appeal, the Supreme Court expressly declined to say whether the e-mail exchanges actually violated the OMA, and based on an *assumed* violation of the OMA, concluded the trial court was correct in deciding that there should be no remedy in any event.[41] Therefore, while one superior court judge has implicitly held that serial e-mails can constitute an improper "meeting" under the post-1994 law, the Supreme Court expressly left the issue open.

Such questioned serial communications should be distinguished, however, from other similar communications that are proper. The same superior court decision found that other e-mails relating to procedural and administrative topics and not involving discussion of actual redistricting did not violate the OMA.[42] This finding was affirmed by the Supreme Court.[43] Although the Supreme Court offered no explanation for its conclusion, the distinguishing feature for the superior court

appears to have been that the question of where to hold constitutionally mandated public hearings was a substantive matter of redistricting "board business," while mere procedural and administrative matters were not.

The OMA also authorizes group discussions of substantive business, if limited to less than four members or a majority of a decision-making body. Because by definition a physical gathering of three or fewer members of a body of six or more do not constitute a "meeting" in violation of the OMA, then it seems quite logical to conclude such a number may also communicate by telephone or e-mail without violating the act. If the members are doing nothing more than exchanging views on an issue, then it seems their activity does not circumvent the OMA, and no violation occurs. However, when the private discussions have the *purpose and effect* of eliminating public discussion of the same issues and predetermining the outcome of a vote, then the public policy behind the OMA is frustrated. In this *purposeful* situation the possibility seems greatest that a court may conclude a violation has occurred when a related series of telephone or e-mail communications cumulatively involves the participation of four or more members, even though no single communication involved four or more.

It is settled that a member of the public may privately contact each member of the body without violating the OMA.44 Thus, a constituent may use the telephone to lobby each member of the body, one at a time, and attempt to count the number of votes for and against the issue in question. As long as that individual is not acting as the agent for the public entity or a member of the body there should be no problem. An individual has a right to petition the government and attempt to influence the outcome of decisions. On the other hand, if the individual is, in reality, acting as an agent of the public entity and serving as a go-between among the members of the body, then it appears there is an attempt to circumvent the OMA. In this context the activity stands the same risk of being found to be an illegal serial meeting as the telephone poll conducted by a member of the body or a staff member.

5. Issue: Lobbying by the mayor

What about the mayor of a city or borough lobbying the council or assembly? Is the mayor a member of the body such that it is improper to call all the members of the council or assembly to lobby for a particular matter? In second class cities and some home rule municipalities it is clear the mayor is member of the governing body.45 In these municipalities the mayor's activity presents some risk of being found to be an improper serial meeting if a sufficient number of other members of the body are contacted.

The result of the mayor's lobbying activity is not so clear, however, in boroughs, first class cities, and those home rule municipalities where the mayor is by law not a member of the governing body.46 Although not a member of the governing body, the mayor is nevertheless often the presiding officer of the body or the chief executive officer of the municipality, or both,47 and will sometimes vote with the council or assembly in the case of a tie.48 In these circumstances, some municipalities, especially those without a manager plan of government, consider the mayor's office more like a separate administrative branch of government rather than part of the governing body. There is some justification for this point of view, given the mayor's veto power and other distinctions between the office of mayor and the office of assembly or council member. As a non-member of the governing body, and perhaps a distinct branch of government, may a mayor be allowed to privately contact all members of the governing body and attempt to influence the outcome of governing body decisions? Just how the Alaska Supreme Court will respond to this question is not known. It might conclude the mayor is allowed to do so because the mayor is not a member of the body, but it is also possible the court might view the mayor as simply an agent of the governing body serving as a go-between facilitating an improper serial meeting.49 Such activity by the mayor might have the effect of circumventing the policy that governmental units should conduct deliberations and take actions openly, so there is some risk that a mayor's private lobbying of four or more members or a quorum of the governing body will be found to be a violation of the OMA.

6. Issue: Social gatherings

The OMA does not apply to purely social gatherings of members of a decision-making body. A meeting only occurs when a sufficient number of the members collectively consider a matter of government concern on which they are empowered to act. However, experience suggests it is very difficult to have a purely social gathering of politicians. If the talk turns to public business of the body, the OMA will come into effect if a sufficient number of members are present and engage in collective consideration. The key point to remember is that every step of the body's decision making process must be open to the public and, if a discussion by a sufficient number at a social gathering tends to circumvent that policy, it is possible a violation has occurred. Even if the social gathering is public, a violation can occur when public business is collectively discussed if reasonable public notice and an opportunity to be heard are not given.

B. Meeting-Advisory-Only Body

As noted above, the definition of a "meeting" for a body that only gives advice and recommendations differs from the definition for a decision-making body. For a body that only has authority to advise or make recommendations but has no authority to establish policies or make decisions, a meeting is defined to be:

> a gathering of members of a governmental body when the gathering is prearranged for the purpose of considering a matter upon which the governmental body is empowered to act 50

1. A meeting must be prearranged

For an advisory-only body a meeting occurs when the members gather by prearrangement for the purpose of considering a matter upon which the body is empowered to act. Chance encounters by members of the body do not constitute meetings, even if the members discuss a matter about which the body has authority to give advice or make recommendations. Gatherings for some purpose other than the business of the body are likewise not meetings as defined by the OMA, even if substantive discussions take place.

However, a prearranged gathering for the purpose of any step of the deliberative process will be considered a meeting. As is the case with decision-making bodies, a meeting of an advisory-only body will include every step of the deliberative and decision-making process, including a work session, investigation, fact-gathering, and simple discussion of matters of public business,51 if the gathering is prearranged for one of those purposes.

2. Any number of members can constitute a meeting

Unlike a decision-making or policy-making body, there is no exception for a gathering of a small number of members of an advisory-only body. A gathering of two or more members of an advisory-only body will be a meeting under the OMA when it is prearranged for the purpose of considering the business of the body.

3. Teleconference meetings

Teleconference meetings are authorized for advisory bodies. The discussion in Section III.A.3 about teleconference meetings also applies to advisory-only bodies.

4. Issue: Telephone polling, serial communications, and e-mails

Because of the way "meeting" is defined, telephone polling, serial communications, and e-mails raise greater concerns for advisory-only bodies than for decision-making bodies. A "meeting" for purposes of an advisory-only body occurs whenever a gathering of *any number* of members is prearranged for the purpose of considering a matter on which it is empowered to

act. *Assuming* that a gathering can occur when no members are actually present together in one location, then every time one member intentionally makes a telephone call, e-mail, or other communication to another member to discuss business, it can be said to be prearranged and a "meeting" occurs. However, the issue still seems open as to whether such communications can constitute a "meeting" when no members are present at a gathering in one location. See the discussion in Section III.A.4 above, particularly concerning the e-mails in *In re 2001 Redistricting Cases.*

5. Issue: Social gatherings

A social gathering that includes members of an advisory body will not be considered a meeting, even if the members discuss matters about which the body has authority to give advice. This is so because a social gathering, by common understanding of that term, would be for social purposes and not prearranged for the purpose of conducting the body's business.

However, convening a "social" gathering for the hidden purpose of conducting the body's business will be viewed as a subterfuge, and a court may conclude that such a "social" gathering is, in fact, a prearranged meeting held in violation of the OMA.

IV. PUBLIC PARTICIPATION RIGHTS

A. In General-Public Rights Under OMA

The only rights of public participation in an open meeting expressly granted by the OMA are the rights to be *present* and to *listen* and, if the meeting is by teleconference, the right to have available for review any agency materials (*e.g.*, the agenda packet) to be considered at the meeting. Surely the public's right to review the agency materials under consideration at live meetings will also be implied.

B. The Right To Be Heard

The right of the public to speak and be heard at an open meeting does not come directly from the OMA. The right to speak, if it exists, must come from another source. In the case of municipal governments, that right originates in AS 29.20.020(a), which says, "The governing body shall provide reasonable opportunity for the public to be heard at regular and special meetings."

The right of the public to speak at school board and committee meetings in municipal school districts comes from the same statute. The council or assembly, as the governing body, is required to provide an opportunity for the public to be heard at meetings of all municipal bodies, which would include municipal school boards, and committees.52 As to non-municipal school districts, the right of the public to speak can only be implied; there is no statute that expressly requires it.

The right of the public to speak at public state agency meetings will depend on specific statutes or regulations affecting the action or agency involved. For example, the general statutory provisions concerning public comments about proposed state regulations require the acceptance of written comments, but it is optional whether to accept oral comments.53 In contrast, the procedures for Local Boundary Commission hearings on local boundary changes require one or more public hearings where the commission must receive public comments from all interested persons.54

A reasonable opportunity to be heard, however, does not mean a speaker has a right to disrupt a meeting or to speak endlessly. The body may certainly put reasonable limits on the right to speak. Public speaking may be limited to public hearings and other limited opportunities listed on the agenda. Efficiently run meetings often limit public testimony on agenda items to one slot early in the agenda, after which the governing body may proceed through the agenda without public

interruption, limiting debate to members of the body only. The length of time that any individual or group may speak may also be limited.55 The manner in which a person may speak may also be controlled in order to preserve the decorum of the meeting. Limitations on the content of speech, however, may implicate First Amendment free speech issues, so caution is advised in this area.

C. Implied Reasonable Opportunity to Attend

The right to attend is not often discussed, but it is a significant component implied in the public's right to have a reasonable opportunity to be heard. For example, how reasonable is the public's opportunity to be heard if the meeting is held at a remote location that is difficult or expensive for the public to reach? Telephone conferences for remote public access may be practical and reasonable in some circumstances, such as borough or state-wide meetings, but not practical in other circumstances. A body covered by the OMA does not have the luxury of "getting away" to a remote retreat for "peace and quiet" in order to get its work done. The right of a reasonable opportunity to be heard implies that reasonable access and reasonable accommodations will be made for the public to attend and participate.

V. WHAT NOTICE IS REQUIRED?

A. Reasonable Notice-Timeliness

Generally, the OMA requires that "*reasonable* public notice" be given for all meetings to which it applies.56 An important element of reasonable public notice is its timeliness. Municipal officials sometimes assume that 24 hours' notice of a meeting is sufficient because AS 29.20.160, and many municipal charters and codes, authorize special meetings on 24 hours' notice to the members. Often this assumption will be wrong. It is entirely possible to comply with this *members'* notice requirement and still violate the OMA *public* notice requirement. To determine what public notice is reasonable, all of the circumstances must be considered.

If the public entity or governmental body has set its own reasonable notice requirements that are more specific than the OMA requirements, they should be followed. Failure to meet notice requirements established by internal guidelines or regulations will be evidence of failure to give reasonable notice, and has led at least one court to a finding the OMA was violated.57

One important case for understanding the timeliness component of reasonable notice is *Tunley v. Municipality of Anchorage School District*.58 In *Tunley* the court interpreted the phrase "maximum reasonable public notice" contained in the Anchorage Municipal Charter. The Anchorage School Board gave five days' notice, published in the local newspaper, of a meeting at which it intended to decide to close two specific elementary schools. There had already been much news coverage of the Board's consideration of school closures, including reference to the two schools in question. However, the court said that in light of the impact the decision would have on the children's and the parents' interest in the maintenance of neighborhood schools, "Five days is not sufficient time for appropriate preparation of opposition concerning an issue of this complexity and importance."59

Therefore, the more complex and important an issue is, the more public notice must be given in order to meet the reasonableness standard. Unless a very long period is chosen (three months?), it is impossible to say that any given time period will provide adequate public notice in *all* circumstances. The circumstances surrounding each issue must be judged independently and an appropriate period for reasonable notice chosen.

Applying this standard, under true emergency circumstances the period of reasonable notice may be very short, possibly even no advance public notice, depending on the circumstances and the need for *immediate* action.60 Whether a true

emergency exists, which would make little or no notice reasonable, is a question that will depend on the facts of each case. In the absence of compelling facts, a court will be inclined to find no emergency exists and require advance notice. However, it would seem possible and reasonable, even under the most dire true emergency circumstances, to at least post the required notice and to call the local news media to notify them of the pending meeting.

No specific guidelines can be given to test how much notice is reasonable, but certain general guidelines may be suggested. For instance, if an item is controversial or complicated, more public notice must be given. If an item is likely to be contested (like the granting of a permit or a lease where there are competitors for the same right), then more, rather than less, public notice should be given. Matters that are truly simple or unimportant may be taken up with less public notice, but never without at least advance public notice of the meeting. Emergency matters may be taken up with less notice, depending on the severity of the need to take prompt action.

B. Reasonable Notice-Statutory Minimums

In addition to meeting the general reasonableness standard, the public notice must meet a number of specific statutory requirements.61 The notice must always include the date, time, and place of the meeting. If the meeting will be by teleconference, the location of the teleconference facilities must also be stated.

The notice must be posted at the principal office of the public entity or, if the public entity has no principal office, at a place designated by the governmental body. In addition, notice may be given by print and broadcast media. State agencies are also required to post notice of agency meetings on the Alaska Online Public Notice System.62

The OMA requires that notice should be provided in a consistent fashion for all meetings. Presumably, if notice is provided in an inconsistent manner, the public may become confused about how to find out about meetings of the body, and the court may find such notice to be unreasonable.

C. Reasonable Notice-Agenda Specificity and Clarity

The question of whether a matter to be considered must be listed specifically on a published or posted agenda presents another facet of the requirement of reasonable public notice. Apparently the court's reasonable notice standard requires that some important, complex, or controversial issues must be specifically identified in the advance notice of the meeting and listed on the agenda.

In *Anchorage Independent Longshore Union Local 1 v. Municipality of Anchorage*,63 the court again addressed Anchorage's "maximum reasonable public notice" requirement. In this case, the question was whether the municipal port commission's consideration of a terminal use permit application had to be specifically mentioned on the official agenda posted in advance of the meeting. The issue was taken up by the commission under the agenda category described as "items not on the agenda." The Supreme Court noted that the Anchorage public notice requirement is similar to the OMA's "reasonable public notice" standard and stated, "The timing and specificity of 'reasonable notice' is necessarily dependent upon the complexity and importance of the issue involved."64 The court declined to decide whether the notice was reasonable in that case and instead remanded the matter to the trial court to make factual findings about how complex and important the issuance of that particular permit was. In other words, if the court found the matter was too important or complex to be considered without specifically mentioning it on the agenda, then presumably the court would find that a violation of the OMA had occurred.

It is also important that public notice be given clearly. In *Hickel v. Southeast Conference*65 confusing public notices and display advertisements were a factor leading the court to conclude that notice of a meeting was not reasonable and,

therefore, the meeting violated the OMA. The advertisements were not clear about whether a "meeting" or a "hearing" was going to occur.66

The important point here is that under some circumstances the reasonable notice requirement may be violated by the consideration of complex or important items not specifically and clearly listed on the public notice or the agenda of an otherwise properly called and noticed meeting. Amending the agenda at the beginning of a meeting will not cure a defect of this nature because it will do nothing to provide reasonable and timely advance notice to the public.

D. Notice To Specific Individuals

Although not an OMA requirement, in some matters notice should be provided to specific persons whose individual rights are at stake in the issue to be considered. For example, participants in a quasi-judicial hearing on a zoning application or an appeal of any kind must receive reasonable notice of the meeting. To satisfy constitutional due process requirements, advance notice must be given to one whose rights stand to be terminated or revoked (e.g., an employment agreement, lease, contract, permit or license.)

E. Notice To Certain Individuals Who Are Subjects Of Executive Sessions

The topic of executive sessions is discussed in more detail in Section VI below, but, on the issue of notice, there is a special requirement that applies only to executive sessions called to discuss subjects that may tend to prejudice the reputation and character of a person.67 A body's right to hold an executive session on such a matter is subject to the superior right of the person in question to demand public consideration instead of an executive session. In *University of Alaska v. Geistauts*68 the court found the OMA implies an obligation to provide adequate notice of the meeting to the individual whose reputation and character are to be the subject of the executive session. The purpose of the notice is to afford that person the opportunity to demand a public discussion instead of an executive session. Furthermore, in order to adequately protect that right, the individual must be specifically advised of the right to request that the meeting be open to the public. If the person requests an open meeting, an executive session may not be held.

On the other hand, the failure to notify a person of his right to demand that the discussion about him be held publicly was harmless when he had actual notice that his employment would be discussed by the city council, he was invited to attend the executive session but chose not to, and he stated he did not want the matter discussed publicly, *Ramsey v. City of Sand Point*.69

F. Notice Of Teleconference Meetings

If a meeting will be held by teleconference, the meeting notice must state the location of any teleconferencing facilities that will be used. Of course, this means that if a remote location is being used at which the public may gather and participate, notice of such a location must be given.

The Alaska Supreme Court has recognized a distinction between a true teleconference meeting and the situation in which one person, *i.e.,* a citizen, participates in the meeting by telephone. The practice of allowing a citizen to phone in comments to a meeting held at a single location was approved because it had the effect of expanding public participation consistent with the goals of the OMA.70 No particular notice can be given of the locations from which such calls can be made because they may be made from anywhere. However, if such call-ins are going to be accepted, it would seem reasonable that public notice should be given of that fact, with instructions on how a person may properly place such a call.

VI. EXECUTIVE SESSIONS

It seems that no other facet of the OMA generates more questions than the subject of executive sessions. An executive session is a portion of a public meeting from which the public is excluded because of the nature of the subject matter to be discussed. Implicit in the legislative conclusion that certain subjects qualify for executive session is the judgment that the danger of harm to public or private interests that may result from public discussion of such subjects outweighs the public benefits of a public discussion.

It is important to distinguish an executive session from a private or secret meeting. An executive session must begin and end in a public meeting. The public will be excluded only from the executive session portion of an otherwise public meeting. The body itself will determine who, if anyone, will be invited into the executive session along with the members of the body.

A. What Subjects Qualify For Executive Session?

1. In general

AS 44.62.310(c)(1) describes the subjects that may be discussed in executive session as follows:

> (a) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit;
>
> (b) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;
>
> (c) matters which by law, municipal charter, or ordinance are required to be confidential;
>
> (d) matters involving consideration of government records that by law are not subject to public disclosure.

The court has also held that some attorney-client communications qualify for executive session treatment.[71]

It is very interesting to note that a municipality cannot by ordinance or charter narrow the list of exceptions that qualify for executive session. *Walleri v. City of Fairbanks*[72] held that the effect of AS 29.20.020 ("meetings of all municipal bodies shall be public as provided in AS 44.62.310") was to preempt municipal enactments that provide for a narrower list of executive session subjects than as provided in the OMA. The ramifications of the court's conclusion that the OMA preempts inconsistent municipal ordinances are yet to be discovered.

2. Adverse financial impact

The first category of eligible subjects, matters having an adverse financial impact, has several limiting qualifiers attached. The statue requires that it be *clear* that *immediate* public knowledge of the discussion will adversely affect government finances. A mere possibility of adverse effect on government finances does not suffice.

One example that appears to qualify under this test is the consideration of offers to settle litigation. A government body cannot candidly discuss settlement offers and potential counter offers publicly without great risk of letting opposing litigants know how much the government is willing to pay or accept in settlement. All opportunities to bargain for a more favorable settlement will be lost when everyone knows what the government's bargaining position and points of weakness are. The only way to discuss settlement offers without harming the public financial interest is in executive session.

However, it is not enough to qualify for an executive session to merely say the matter is one of "pending litigation" or a "financial matter," as is often heard. As a practical matter, for an adverse financial impact executive session to withstand a court challenge, there must be facts in the record to enable the court to conclude it was clear that immediate public knowledge of the particular issue to be discussed would harm the government's financial interests. A court is directed to construe the law narrowly to avoid unnecessary executive sessions,[73] so an informative on-the-record statement of the facts justifying an executive session seems necessary.

3. Reputation and character

Subjects that tend to prejudice the reputation and character of any person may be discussed in executive session. The person in question does not have to be a government employee or job applicant, but often it is.

In *City of Kenai v Kenai Peninsula Newspapers, Inc.*,[74] the court reviewed a legal challenge to an executive session held to discuss the applicants for a city manager position. The court said, "Ordinarily an applicant's reputation will not be damaged by a public discussion of his or her qualifications relating to *experience*, *education* and *background* or by a comparison of them with those of other candidates."[75] The court recognized an exception, however, for the discussion of *personal characteristics*, especially in the context of comparing several applicants, acknowledging that such discussion would "carry a risk that the applicant's reputation will be compromised."[76]

Our court shed more light on the meaning of this exception in *University of Alaska v. Geistauts*[77] where a university tenure committee held executive sessions to consider whether a professor should be granted tenure status. The court recognized such meetings are appropriate for executive sessions. Such a meeting was "likely to focus on perceived deficiencies in the candidate's qualifications. Tenure committee members may raise concerns for the purpose of discussion which would damage the applicant's reputation if aired publicly."[78] This statement shows not only a concern to protect the individual from damages, but also a realization that an executive session will encourage a full and candid discussion of important concerns that should be addressed.

In a footnote to the *Geistauts* decision, the court discussed this exception in a general employment context, observing that AS 44.62.310(c)(2) was designed to serve the same function as other states' exemption of employment matters from open meeting law requirements. "The reasoning behind the 'personnel matters' exception in other jurisdictions appears to be the avoidance of embarrassment to employees whose strengths and weaknesses will be evaluated."[79]

In the context of considering whether the stated grounds for recall of a school board member sufficiently described misconduct in office or failure to perform prescribed duties, the court stated in *Von Stauffenberg v. Committee For An Honest And Ethical School Board* that "there is no law which precludes public officials from discussing sensitive personnel matters in closed door executive sessions."[80]

It should be remembered, however, that the person whose reputation or character is in issue is entitled to specific notice of the executive session and of the right to demand that the discussion be public. If a demand for a public discussion is made by that person, then an executive session may not be held on that ground.[81]

4. Matters required to be kept confidential

The third exception is a catch-all for other subjects that are *required* by law, municipal charter, or ordinance to be kept confidential. Note that this language leaves open the question of whether laws, charters, or ordinances authorizing, but not requiring, confidentiality will satisfy this exception.

In addition to federal and state constitutions and laws, this exception specifically recognizes municipal charters and ordinances as valid sources of law requiring confidentiality. However, many municipalities have few, if any, charter provisions or ordinances requiring confidentiality, even though there are some subjects that would easily qualify for required confidential treatment, such as juvenile and individual student matters, collective bargaining and similar negotiations, settlement negotiations, and certain attorney advice (discussed further below).82

There has not been any Supreme Court decision in which the validity of a local ordinance requiring confidentiality has been challenged in the Open Meetings Act context. It is possible such an ordinance might be challenged on the basis that the ordinance unduly restricts the public's right to know about the affairs of the government. Such a challenge might be successful if the court concludes the local government does not "need" the confidentiality when the interest of the public in knowing outweighs the governmental interest in keeping confidentiality. The Supreme Court already uses that balancing test in the public records context to determine the validity of local exemptions from the state law requiring disclosure of records.83 Because of this possibility, ordinances requiring confidentiality should be based on a legitimate need for confidentiality that outweighs the public's interest in knowing what is going on with the government.

The confidential-by-law category was the basis for the Alaska Supreme Court holding that the common law attorney-client privilege justifies executive session treatment of some attorney-client communications.84 This attorney-client privilege exception is discussed below in Section VI.A.6. Other common law privileges might also provide a basis for additional executive session treatment under the court's analysis.

There is also the constitutional right of privacy,85 another "law" that requires confidential treatment of a subject when the individual in question has an expectation of privacy that society recognizes as reasonable. The full extent of the constitutional right of personal privacy is not well defined, and a complete discussion of the issue is beyond the scope of this paper.

5. Confidential records

Matters involving government records that are protected from public disclosure by law may also be discussed in executive session. As a general rule, records of public agencies (which include municipalities and school districts86) are subject to public disclosure unless the law provides an exception.87

A number of confidential records are listed in AS 40.25.120(a), including records pertaining to juveniles (unless disclosure is authorized by law), medical and related public health records, records required to be kept confidential by a federal law or regulation or by state law, and certain records compiled for law enforcement.

Our court has been willing to consider whether municipal ordinances concerning confidential records qualify for common law (i.e., nonstatutory) exceptions from disclosure. The court's analysis focuses on the need for the exception, which requires weighing the public interest in favor of disclosure against the governmental interests and individual privacy interests favoring nondisclosure.88 However, the government will bear the burden of justifying the exception, and public policy favors public access.89 Under these constraints, new exceptions to the general rule of public disclosure may be approved by the court, but probably not frequently.

An interesting case now pending in the Alaska Supreme Court, *Fuller v. City of Homer*,90 should answer the question of whether a city manager is entitled to the same deliberative process privilege for documents that is granted to the governor.91 If so, this will establish another category of documents that are required by law to be confidential and, therefore, may be discussed in executive session under this exception.

6. Attorney-client privilege

Under limited circumstances communications between a governmental body and its attorney qualify for executive session treatment, according to *Cool Homes, Inc. v. Fairbanks North Star Borough*.92 This exception is based on the attorney-client privilege, but for Open Meetings Act purposes, the privilege is defined narrowly.

This executive session exception is not available for general legal advice or opinion. It applies only when the revelation of the communication will injure the public interest or there is some other recognized purpose in keeping the communication confidential. It is not even enough that the public body is involved in pending litigation.93 Rather, the specific communication must be one that the confidentiality rationale for the privilege deems worthy of protection. The court cited a number of examples of attorney-client communications that might qualify for executive sessions: candid discussions of facts and litigation strategies; a conference on a decision to appeal; a conference about settlement; and advice about how a body and its members might avoid legal liability. A discussion generally about the "ins and outs and status" of litigation, and "what has happened in the year . . . as to court findings" did *not* qualify for executive session.94

B. Procedure For Executive Sessions

An executive session cannot be an unannounced, secret meeting. Except in very limited circumstances,95 an executive session is only a part of a public meeting. Several steps must be followed in calling an executive session.

1. Public meeting

Before an executive session may be held, the meeting must first be convened as a public meeting. In the public meeting, a motion to hold an executive session must be considered and decided by a majority vote of the body. As at any public meeting, the public has a right to attend and, to a certain extent, participate. At least at municipal public meetings, this includes a reasonable opportunity to be heard under AS 29.20.020 during the public portion, but not during the confidential portion of the meeting.96

2. Notice

Because an executive session occurs at a public meeting, reasonable notice of the meeting must be given to the public according to the same requirements for any public meeting.97 This applies whether the executive session is to be held at a regular or a special meeting. That does not mean, in this author's view, that the public notice must specifically state that an executive session will be held. It is enough if reasonable public notice of the meeting has been given, including any reasonable subject matter notice that might be required. Even if the meeting notice and agenda do not mention the words "executive session," an executive session may be held if the body deems it necessary and the public has sufficient reasonable notice of the meeting and the subject matter.

However, specific advance notice of the executive session is required in at least one circumstance. If it is anticipated in advance that an executive session will be required to discuss a topic that might prejudice the reputation and character of a person, that person must be personally notified of the meeting and the contemplated executive session so the individual may exercise the right to demand a public discussion.98 If it is not known in advance that such a discussion will occur, it will be necessary to postpone that discussion until the individual in question has been advised of his or her rights.

3. Motion calling for executive session

The motion calling for an executive session must "clearly and with specificity describe the subject of the proposed executive session without defeating the purpose of addressing the subject in private."99 A well-stated motion will also identify the legal grounds being relied upon. A mere recitation of the statutory language (*e.g.*, "a matter that would prejudice a person's reputation") may not satisfy the "clearly and with specificity" standard.

In the case where an individual's reputation or character may be at issue, it may be appropriate to name the individual in some cases but not in other cases. For example, when a city council is about to discuss the personal characteristics of a short list of candidates for city manager, there is no likelihood that stating the names of these individuals would cause any harm at all. On the other hand, if the purpose of the executive session is to consider confidential information concerning allegations about a dishonest police officer, it would not be appropriate to say that the purpose of the executive session is "to consider allegations of dishonesty involving Officer Smith." Identifying the individual in these circumstances would entirely defeat the purpose of holding the discussion in private by causing damage to his reputation before the discussion even starts.

Clearly identifying the specific topic and, where possible without causing harm, naming the specific individual under consideration is important for several reasons. If an executive session is challenged, the court will need to know what subject was to be discussed and why it qualified for executive session treatment. Furthermore, it is important to properly describe the subject matter to be discussed in the motion because anything not mentioned in the motion cannot be discussed in the executive session, unless it is auxiliary to the main question.100 Finally, even though the public may not have a right to hear what is said in executive session, the state's public policy indicates that the public does have a right to know what the session is about and why it is justified.

Because both the public and the court have an interest in knowing why an executive session is warranted, either the motion or the debate preceding the vote on the motion should explain how the matter legally qualifies as a legitimate executive session subject. For example, during debate on the motion for the executive session a member of the body should describe how knowledge of the matter will clearly have an immediate adverse effect on the government finances, or mention the particular law that requires confidentiality. A proper discussion on the record will minimize the chances of a successful legal challenge.

It is inadequate when the motion contains only short-hand phrases, such as "pending litigation" or "attorney-client privilege" or "personnel matter." None of these phrases describes the *subject matter* "clearly and with specificity," nor do they accurately describe subjects that are within the lawfully allowable executive session categories. Further, they fail to give adequate notice to the public or to the courts about what is to be discussed and why it qualifies. The courts are compelled to give a narrow construction to the executive session exceptions so unnecessary executive sessions may be avoided,101 and such short-hand phrases fail to show that an executive session is necessary.

4. Recording and minutes

There is no statutory requirement to take minutes or make a recording of the discussions in executive session.102 However, at least one superior court judge has observed that one reason why he was unable to determine whether an executive session in question was legal was that no recording had been made of the session.103

Some public bodies do record executive sessions (the tapes are not released to the public) while others do not. Municipal attorneys and public officials in this state disagree about whether an executive session should be recorded. Until the law is clarified by the legislature or the Supreme Court, it seems likely there will continue to be inconsistency in the practices of various public entities on this issue.

C. Limitations On Executive Sessions

1. Only main and auxiliary issues may be discussed

The discussion in executive session must be limited to those subjects described in the motion calling for the session and those subjects "auxiliary" to the main question.104 The OMA does not attempt to define "auxiliary," and the Supreme Court has not done so either. According to *Webster's Third New International Dictionary* (1981), "auxiliary" means "functioning in a subsidiary capacity."

Given the strong public policy favoring open meetings and *Webster's* definition, it seems likely the court will require that any auxiliary issues discussed have a fairly close degree of subsidiary relationship to the main question. Thus, the OMA gives the public body only limited flexibility to address subsidiary issues. This still enables the public to have a fair idea about the subjects the governing body is discussing so the public may retain appropriate control over the government it created.105

Court interpretations of the OMA suggest that as much of the subject matter as possible should be discussed publicly. It may be that on a given subject some details should be discussed in executive session, while other facets of the same subject matter should be discussed in public session. The Supreme Court pointed to this result in *City of Kenai v. Kenai Peninsula Newspapers, Inc.*106 when it observed that public discussion of a city manager applicant's experience, education and background would not ordinarily endanger a reputation, while discussion of personal characteristics and habits might very well carry such a risk. The court's ruling authorized executive sessions only for "discussing the personal characteristics of the applicants."107 The same kind of direction was given in *Cool Homes, Inc. v. Fairbanks North Star Borough*108 (borough attorney's general status report about litigation does not qualify for executive session, but legal advice about avoiding liability does qualify.) So far, the court has not attempted to explain why these other matters are not "auxiliary to the main question," which would allow them to also be discussed in the executive session.

2. Generally, no action may be taken in executive session

Generally, no action may be taken in executive session.109 Except as discussed below, the body may only **discuss** matters in executive session, and if any action must be taken on the subject, the body must reconvene in a public session to do so. The taking of "straw votes" in an executive session would probably be held to be a violation of this rule, as it tends to circumvent the policy of the OMA to require governmental body actions to be taken openly.110 Reconvening in public session to announce a decision made in executive session violates the OMA, unless one of the following exceptions or exemptions applies.

3. Exceptions: directions on legal matters and labor negotiations

As exceptions to the rule that no action may be taken in executive session, the OMA authorizes a public body to give directions in executive session on two kinds of matters. First, the body may direct its attorney about the handling of a specific legal matter. This makes it clear that the attorney may be instructed in executive session about things like negotiating positions and legal strategies for a specific legal matter. Second, direction may be given to a labor negotiator about the handling of pending labor negotiations. This allows the body to instruct the negotiator in executive session about such things as bargaining positions and negotiating points.

4. Exemption: quasi-judicial decision-making

When a governmental body acting quasi-judicially meets solely to make a decision in an adjudicatory proceeding, it is entirely exempt from the OMA.111 This means the decision-making may be done in private.112 Logically, this should mean

that it is also permissible to conduct such decision-making in an executive session convened during an otherwise public meeting. Surely it is proper to make a decision in executive session that could lawfully have been made in total privacy. Therefore, a court should approve using an executive session to make a final decision while functioning quasi-judicially in an adjudicatory matter.

VII. REMEDIES AND PENALTIES FOR VIOLATIONS

Prior to the 1994 amendments, the law declared simply that "action taken contrary to [the Open Meetings Act] is void." The effect of declaring an action void is to treat it as though it had never happened. From time to time, the court found that to be a harsh and impractical remedy,113 and it struggled to find a way to manipulate the inflexible law to mesh with practical realities.114

Major legislative revisions to the remedy portion of the OMA were adopted in 1994. The length of the remedy provisions was increased from one sentence to an entire page, and its complexity increased accordingly. Now the remedy portion of the act provides that an action in violation of the OMA is voidable only after a court carefully considers many factors and concludes the public interest in complying with the OMA outweighs the harm resulting to the public interest and the public entity that would flow from voiding the action. Procedural and other requirements were also introduced.

There is a huge difference in the statutory remedy provisions for violations by decision-making bodies compared with violations by advisory-only bodies. These two types of bodies will be discussed separately.

A. Decision-Making or Policy-Making Body-Remedies

Not all governmental bodies have the authority to make decisions or policies for the public entity.115 This part of this paper addresses remedies available for violations of the OMA only when committed by those bodies that do have such authority.

An action taken in violation of the OMA by a decision-making or policy-making body is **voidable**.116 In other words, a court might declare that the action had no legal effect, but such a declaration is by no means automatic. Many factors must be considered before the court may void the action.

1. When a violation is alleged, a body may attempt an informal cure

A governmental body that has violated or is alleged to have violated the OMA may attempt to cure the violation by holding another meeting that complies with the OMA.117 At that meeting the body must conduct a "substantial and public reconsideration" of the matters considered at the allegedly improper meeting.

One of the factors a court must consider when it decides whether an action resulting from an improper meeting should be declared void is whether, and to what extent, the body engaged in such public reconsideration. Interestingly, even reconsideration that occurs after a lawsuit is filed will be taken into account by the court. Presumably, if the court determines that a reconsideration was not sufficiently substantial or public, then it may find the attempted cure was inadequate and proceed to consider the appropriate remedy for the violation.

2. Improper action is voidable by court action

The OMA says that "action taken contrary to [the OMA] is voidable."118 Thus, the court has the power to declare the action void, but it is not required to do so in all cases. A lawsuit to void an action for violation of the OMA must be brought within 180 days after the date of the action. The purpose of this short statute of limitations is apparently to reduce delay and

uncertainty about the finality of governmental actions. Furthermore, in an action to enforce the OMA, the members of the governmental body may not be named in a personal capacity; they may only be named in an official capacity.

According to the OMA, "if the court finds the action is void, the governmental body may discuss and act on the matter at another meeting held in compliance with [the OMA]."[119] Exactly what that means about the status of the voided action between the time of the improper meeting and the reconsideration meeting is yet to be determined by the courts.

3. Action is voidable only after a public interest analysis

The OMA says that a court may declare an action void because of an OMA violation only after the court completes a public interest balancing test. Before declaring the action void, the court must find that

> considering all the circumstances, the public interest in compliance with [the OMA] outweighs the harm that would be caused to the public interest and to the public entity by voiding the action.[120]

Only if the court finds the good to be accomplished by voiding the action outweighs the harm that it would cause may the court declare the action void. In making that determination, AS 44.62.310(f) requires the court to consider at least the following nine factors:

(1) the **expense** that may be incurred by the public entity, other governmental bodies, and individuals if the action is voided,

(2) the **disruption** that may be caused to the affairs of the public entity, other governmental bodies, and individuals if the action is voided,

(3) the degree to which the public entity, other governmental bodies, and individuals may be exposed to **additional litigation** if the action is voided,

(4) the extent to which the governing body, in meetings held in compliance with [the OMA], has **previously considered** the subject,

(5) the amount of **time** that has passed since the action was taken,

(6) the degree to which the public entity, other governmental bodies, or individuals have come to **rely on** the action,

(7) whether and to what extent the governmental body has, before or after the lawsuit was filed to void the action, engaged or attempted to engage in the **public reconsideration** of matters originally considered in violation of [the OMA],

(8) the degree to which violations of [the OMA] were **wilful, flagrant, or obvious,** [and]

(9) the degree to which the governing body failed to adhere to the **policy** under AS 44.62.312(a).

In *Revelle v. Marston*,[121] a case interpreting the OMA as in effect prior to the 1994 amendments, the court identified other factors to be considered when weighing the public interest in disclosure against the public harm resulting from voiding an action taken in violation of the OMA for purposes of fashioning a remedy:

- whether the goal of maximizing **informed and principled decision-making** has been met,

- whether invalidation is necessary to **deter** future violations,
- whether the goal of encouraging **public participation** and input in the operation of government has been met, and
- the strength of the link or closeness, *i.e.,* the **nexus** between the violation of the OMA and the challenged action.122

Even though most of the *Revelle* factors are not stated in the 1994 amendments, it is quite possible the court will continue to apply these factors to cases brought after the 1994 amendments, for at least two reasons. First, these factors derive from the public policy behind the OMA, which remains unchanged. Second, the list of factors in the 1994 amendments is not exclusive - the court is directed by the OMA to consider "all of the circumstances," including "at least" the factors identified in the statute. These additional factors based on the policy supporting the OMA may still be appropriate considerations.

The only Supreme Court case to date dealing with the remedy provisions enacted in 1994 summarily affirmed a superior court decision that no remedy was appropriate for a redistricting board's *assumed* OMA violation (using e-mails to privately decide where to hold required public hearings). The Supreme Court agreed that the superior court properly applied the factors set out in AS 44.62.310(f) in concluding the public harm that would result from voiding the entire 2001 redistricting plan outweighed the public interest in compliance with the OMA.123

B. Advisory-Only Body-Remedies

The discussion in this part of this paper applies only to those advisory-only governmental bodies that have no authority to make decisions or policy for the public entity.124

Concerning advisory-only bodies, the OMA says simply that subsection (f), describing the remedy of voiding actions of decision-making bodies, "does not apply."125 The act fails to say what remedies, if any, do apply. However, because, by definition, an advisory-only body cannot make decisions or policies, there will be no significant decision or policy to void.

Of more interest here is the question of whether a violation of the OMA by an advisory-only body can lead a court to declare void a subsequent action taken by a decision-making or policy-making body in reliance on the advice of the advisory-only body. Under the act prior to the 1994 amendments it is apparent that in some circumstances subsequent actions taken by the public entity in reliance on such advice from an advisory-only body could be voided.126 However, when the public entity's decision in another case was arrived at independently from the advisory body's advice, there was substantial opportunity for public input despite the violations, and the damage that would result from voiding the action was great, the court was reluctant to void the action.127 Thus, even before the 1994 amendments the court was considering all the circumstances and weighing the public benefit against the public harm.128 Therefore, a decision-making body's reliance on procedurally defective advice of an advisory-only body might or might not result in voiding the action. Whether the Supreme Court will continue to follow this line of analysis in cases arising after 1994 remains to be decided.

C. Remedies Fashioned By The Courts-Damages

If the court declares an action void, as the pre-1994 OMA prescribed for all violations, then the court may attempt to fashion a remedy that attempts to approximate the status quo at the time of the violation.129 The courts have indicated considerable willingness to be flexible in fashioning specific remedies. While open meetings laws are "not primarily intended as vehicles for individuals displeased with governmental action to obtain reversals of substantive decisions,"130 the Supreme Court has nevertheless approved an award of damages to an individual harmed by an OMA violation. In employment cases, for example, the court ordered reinstatement with back pay and reconsideration of a tenure application in one case,131 but in different circumstances held that reinstatement without back pay might be the proper remedy, depending on further analysis of the nexus between the OMA violation and the employee's termination.132

D. Injunctive Relief

Although not mentioned in the OMA, the Supreme Court has also noted that an injunction may be issued forbidding future violations of the act. "This brings to bear the coercive judicial power in subsequent cases, in addition to the remedies otherwise provided by the statute."133

E. Recall of Elected Officials

An elected official's violation of the OMA constitutes failure to perform the prescribed duties of office,134 one of the lawful grounds for recall of an elected official. The mere allegation of facts sufficient to establish a violation of the OMA is adequate ground to subject elected officials to a recall election under AS 29.26.250 (municipal officials, including municipal school board members) and AS 14.08.081 (regional school board members).135

F. Attorney's Fees

In many cases a person who brings a law suit alleging an OMA violation will be found to be a public interest litigant.136 If the public interest litigant prevails, all allowable costs and actual, reasonable attorney's fees will be awarded against the public entity.137 On the other hand, it is generally an abuse of discretion for a court to award costs and attorney's fees against a losing public interest litigant who raises an issue in good faith.138

It appears that an award of actual attorney's fees might also be an appropriate remedy for some non-public interest litigants. In discussing remedies for an OMA violation arising prior to the 1994 amendments, *Revelle v. Marston* suggests that in some circumstances the OMA's remedial goal of deterrence might warrant the remedy of an award of actual costs and attorney's fees to a harmed individual, even when invalidation of the improper action is not in the public interest and circumstances do not warrant an award of back pay for the individual's employment termination.139

APPENDIX

Alaska Open Meetings Act

(Current as of October 2002)

Sec. 44.62.310. Government meetings public.

(a) All meetings of a governmental body of a public entity of the state are open to the public except as otherwise provided by this section or another provision of law. Attendance and participation at meetings by members of the public or by members of a governmental body may be by teleconferencing. Agency materials that are to be considered at the meeting shall be made available at teleconference locations if practicable. Except when voice votes are authorized, the vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote. The vote at a meeting held by teleconference shall be taken by roll call. This section does not apply to any votes required to be taken to organize a governmental body described in this subsection.

(b) If permitted subjects are to be discussed at a meeting in executive session, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss matters that are listed in (c) of this section shall be determined by a majority vote of the governmental body. The motion to convene in executive session must clearly and with specificity describe the subject of the proposed executive session without defeating the purpose of addressing the subject in private. Subjects may not be considered at the executive session except those mentioned in the motion calling for the executive session unless auxiliary to the main question. Action may not be taken at an executive session, except to give direction to an attorney or labor negotiator regarding the handling of a specific legal matter or pending labor negotiations.

(c) The following subjects may be considered in an executive session:

(1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the public entity;

(2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;

(3) matters which by law, municipal charter, or ordinance are required to be confidential;

(4) matters involving consideration of government records that by law are not subject to public disclosure.

(d) This section does not apply to

(1) a governmental body performing a judicial or quasi-judicial function when holding a meeting solely to make a decision in an adjudicatory proceeding;

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff;

(5) meetings of the governmental body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges or discipline;

(6) staff meetings or other gatherings of the employees of a public entity, including meetings of an employee group established by policy of the Board of Regents of the University of Alaska or held while acting in an advisory capacity to the Board of Regents; or

(7) meetings held for the purpose of participating in or attending a gathering of a national, state, or regional organization of which the public entity, governmental body, or member of the governmental body is a member, but only if no action is taken and no business of the governmental body is conducted at the meetings.

(e) Reasonable public notice shall be given for all meetings required to be open under this section. The notice must include the date, time, and place of the meeting and, if the meeting is by teleconference, the location of any teleconferencing facilities that will be used. Subject to posting notice of a meeting on the Alaska Online Public Notice System as required by AS 44.62.175(a), the notice may be given by using print or broadcast media. The notice shall be posted at the principal office of the public entity or, if the public entity has no principal office, at a place designated by the governmental body. The governmental body shall provide notice in a consistent fashion for all its meetings.

(f) Action taken contrary to this section is voidable. A lawsuit to void an action taken in violation of this section must be filed in superior court within 180 days after the date of the action. A member of a governmental body may not be named in an action to enforce this section in the member's personal capacity. A governmental body that violates or is alleged to have violated this section may cure the violation or alleged violation by holding another meeting in compliance with notice and other requirements of this section and conducting a substantial and public reconsideration of the matters considered at the original meeting. If the court finds that an action is void, the governmental body may discuss and act on the matter at another meeting held in compliance with this section. A court may hold that an action taken at a meeting held in violation of this section is void only if the court finds that, considering all of the circumstances, the public interest in compliance with this section outweighs the harm that would be caused to the public interest and to the public entity by voiding the action. In making this determination, the court shall consider at least the following:

(1) the expense that may be incurred by the public entity, other governmental bodies, and individuals if the action is voided;

(2) the disruption that may be caused to the affairs of the public entity, other governmental bodies, and individuals if the action is voided;

(3) the degree to which the public entity, other governmental bodies, and individuals may be exposed to additional litigation if the action is voided;

(4) the extent to which the governing body, in meetings held in compliance with this section, has previously considered the subject;

(5) the amount of time that has passed since the action was taken;

(6) the degree to which the public entity, other governmental bodies, or individuals have come to rely on the action;

(7) whether and to what extent the governmental body has, before or after the lawsuit was filed to void the action, engaged in or attempted to engage in the public reconsideration of matters originally considered in violation of this section;

(8) the degree to which violations of this section were wilful, flagrant, or obvious;

(9) the degree to which the governing body failed to adhere to the policy under AS 44.62.312(a).

(g) Subsection (f) of this section does not apply to a governmental body that has only authority to advise or make recommendations to a public entity and has no authority to establish policies or make decisions for the public entity.

(h) In this section,

(1) "governmental body" means an assembly, council, board, commission, committee, or other similar body of a public entity with the authority to establish policies or make decisions for the public entity or with the authority to advise or make recommendations to the public entity; "governmental body" includes the members of a subcommittee or other subordinate unit of a governmental body if the subordinate unit consists of two or more members;

(2) "meeting" means a gathering of members of a governmental body when

(A) more than three members or a majority of the members, whichever is less, are present, a matter upon which the governmental body is empowered to act is considered by the members collectively, and the governmental body has the authority to establish policies or make decisions for a public entity; or

(B) the gathering is prearranged for the purpose of considering a matter upon which the governmental body is empowered to act and the governmental body has only authority to advise or make recommendations for a public entity but has no authority to establish policies or make decisions for the public entity;

(3) "public entity" means an entity of the state or of a political subdivision of the state including an agency, a board or commission, the University of Alaska, a public authority or corporation, a municipality, a school district, and other governmental units of the state or a political subdivision of the state; it does not include the court system or the legislative branch of state government. (§ 1 art VI (ch 1) ch 143 SLA 1959; am § 1 ch 48 SLA 1966; am § 1 ch 78 SLA 1968; am § 1 ch 7 SLA 1969; am §§ 1, 2 ch 98 SLA 1972; am § 2 ch 100 SLA 1972; am § 1 ch 189 SLA 1976; am §§ 2, 3 ch 54 SLA 1985; am § 2 ch 201 SLA 1990; am § 7 ch 74 SLA 1991; am §§ 2-8 ch 69 SLA 1994; am § 7 ch 54 SLA 2000)

Sec. 44.62.312. State policy regarding meetings.

(a) It is the policy of the state that

(1) the governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the people's business;

(2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;

(3) the people of this state do not yield their sovereignty to the agencies that serve them;

(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

(5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created;

(6) the use of teleconferencing under this chapter is for the convenience of the parties, the public, and the governmental units conducting the meetings.

(b) AS 44.62.310(c) and (d) shall be construed narrowly in order to effectuate the policy stated in (a) of this section and to avoid exemptions from open meeting requirements and unnecessary executive sessions. (§ 3 ch 98 SLA 1972; am § 4 ch 54 SLA 1985; am § 9 ch 69 SLA 1994)

Footnotes

1 *Horowitz v. Alaska Bar Ass'n*, 609 P.2d 39 (Alaska 1980).

2 AS 44.62.310(a).

3 AS 44.62.312(a).

4 AS 44.62.312(b).

5 AS 44.62.310(h)(3).

6 AS 44.62.310(h)(1).

7 AS 29.20.020(b).

8 See Section III below.

9 See Section IV below.

10 *University of Alaska v. Geistauts*, 666 P.2d 424 (Alaska 1983).

11 *Brookwood Area Homeowners Ass'n v. Municipality of Anchorage*, 702 P.2d 1317, 1323 n.6 (Alaska 1985).

12 *Hammond v. North Slope Borough*, 645 P.2d 750 (Alaska 1982).

13 *Horowitz v. Alaska Bar Ass'n*, 609 P.2d 39 (Alaska 1980).

14 AS 08.08.100.

15 AS 08.08.075.

16 *Brookwood Area Homeowners Ass'n v. Municipality of Anchorage*, 702 P.2d 1317, 1323 n.7 (Alaska 1985).

17 *Krohn v. State, Dept. of Fish and Game*, 938 P.2d 1019 (Alaska 1997).

18 AS 44.62.310(d)(6).

19 *KILA, Inc. v. State*, 876 P.2d 1102 (Alaska 1994).

20 AS 44.62.310(d)(1).

21 *Griswold v. City of Homer*, No. S-10321, slip opinion at 18 (Alaska, September 20, 2002).

22 AS 44.62.310(a); *and see Malone v. Meekins*, 650 P.2d 351 (Alaska 1982).

23 AS 44.62.310(d)(7).

24 AS 44.62.310(d)(5).

25 *Abood v. League of Women Voters*, 743 P.2d 333 (Alaska 1987).

26 Section 10, chapter 69 SLA 1994 (Temporary and Special Acts).

27 AS 42.40.920.

28 AS 42.40.150(b).

29 See Section V below.

30 Compare AS 42.40.170(b) with AS 44.62.310(c).

31 See Section VI below.

32 AS 44.62.310(h)(2)(A).

33 *Brookwood Area Homeowners Ass'n v. Municipality of Anchorage*, 702 P.2d 1317, 1323 (Alaska 1985).

34 AS 44.62.310(a).

35 *Hickel v. Southeast Conference*, 868 P.2d 919 (Alaska 1994).

36 *Cahill v. City and Borough of Juneau*, Case No. 1JU-81-1048 Civil (Alaska Super. Ct., Nov. 10, 1982) (Memorandum of Decision and Order). *See also, Stockton Newspapers, Inc. v. Members of the Redevelopment Agency of the City of Stockton*, 171 Cal. App. 3d 95, 214 Cal. Rptr. 561 (1985).

37 868 P.2d 919 (Alaska 1994).

38 *Brookwood Area Homeowners Ass'n v. Municipality of Anchorage*, 702 P.2d 1317, 1323 n.6. This comment by the Court was not necessary to its decision, and could be considered *dicta*. Nevertheless, it reflected the attitude of the Court when interpreting the law before the 1994 amendments.

39 AS 44.62.310(h)(2)(A), defining "meeting" for a policy-making or decision-making body.

40 *In re 2001 Redistricting Cases*, Case No. 3AN-01-8914 Civil (Alaska Super. Ct., February 1, 2002) (Memorandum and Order, Part V.A.1.) This memorandum and order is available at http://www.alaskabar.org/opinions/ACF4D1D.htm.

41 *In re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002).

42 *In re 2001 Redistricting Cases*, Case No. 3AN-01-8914 Civil (Alaska Super. Ct., February 1, 2002) (Memorandum and Order, Part V.A.1.)

43 *In re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002) ("We further conclude that the superior court did not err by failing to find additional violations of the Act.")

44 *Brookwood Area Homeowners Ass'n v. Municipality of Anchorage*, 702 P.2d 1317, 1323 n.7 (Alaska 1985).

45 *E.g.,* AS 29.20.230(b).

46 *See* AS 29.20.130; AS 29.20.230(a); AS 29.20.240(a); AS 29.20.250(b); and AS 29.20.280(b).

47 *See* AS 29.20.160(a); AS 29.20.220; and AS 29.20.250.

48 AS 29.20.250(b).

49 This comment assumes that serial communications can constitute a "meeting" when there is no gathering where members of the governing body are present, but that is still an open question. *See* AS 44.62.310(h)(2(A) and the discussion in part III.A.3 above.

50 AS 44.62.310(h)(2)(B).

51 *Brookwood Area Homeowners Ass'n v. Municipality of Anchorage*, 702 P.2d 1317, 1323 (Alaska 1985).

52 AS 44.62.310,AS 14.12.010, and AS 29.20.300.

53 AS 44.62.210(a).

54 3 AAC 110.550-.560.

55 *E.g.*, not more than five minutes per person at Local Boundary Commission hearings. 3 AAC 110.560(b).

56 AS 44.62.310(e).

57 *Hickel v. Southeast Conference,* 868 P.2d 919 (Alaska 1994).

58 631 P.2d 67 (Alaska 1981).

59 *Id*. at 81.

60 *See Taylor v. Van Brocklin*, Case No. 3CO-90-46 Civil (Alaska Super. Ct., July 25, 1991) (Findings of Fact and Conclusions of Law and Order).

61 AS 44.62.310(e).

62 AS 44.62.175(a)(2) and AS 44.62.310(e).

63 672 P.2d 891 (Alaska 1983).

64 *Id*. at 895.

65 868 P.2d 919 (Alaska 1994).

66 *Id.* at 929, n.15.

67 AS 44.62.310(c)(2).

68 666 P.2d 424 (Alaska 1983).

69 936 P.2d 126 (Alaska 1997).

70 *Hickel v. Southeast Conference,* 868 P.2d 919 (Alaska 1994). The court did not consider the practice perfect, however, and stated it would have been more meaningful had the citizen callers been provided with the materials under consideration.

71 *Cool Homes, Inc. v. Fairbanks North Star Borough*, 860 P.2d 1248 (Alaska 1993), discussed in Section VII.A.6 below.

72 964 P.2d 463 (Alaska 1998).

73 AS 44.62.312(b).

74 642 P.2d 1313 (Alaska 1982).

75 *Id*. at 1326. (Emphasis added.)

76 *Id*.

77 666 P.2d 424 (Alaska 1983).

78 *Id*. at 429.

79 *Id*. at 429, n.7.

80 903 P.2d 1055, 1061 n.15 (Alaska 1995).

81 See Section V.E above.

82 See, e.g., AS 42.40.170 for a list of executive sessions subjects authorized for the board of the Alaska Railroad Corporation.

83 *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584 (Alaska 1990); *City of Kenai v. Kenai Peninsula Newspapers*, 642 P.2d 1316 (Alaska 1982).

84 *Cool Homes, Inc. v. Fairbanks North Star Borough,* 860 P.2d 1248 (Alaska 1993).

85 Alaska Const., Art. I, Sec. 22.

86 AS 40.25.220(2); and *Anchorage School District v. Anchorage Daily News,* 779 P.2d 1191 (Alaska 1989).

87 AS 40.25.110(a) and AS 40.25.120.

88 *City of Kenai v. Kenai Peninsula Newspapers, Inc.,* 642 P.2d 1316 (Alaska 1982).

89 *Municipality of Anchorage v. Anchorage Daily News,* 794 P.2d 584 (Alaska 1990).

90 Supreme Court No. S-10079, argued on December 11, 2001.

91 *E.g., Gwich'in Steering Committee v. State*, 10 P.3d 572 (Alaska 2000).

92 860 P.2d 1248 (Alaska 1993).

93 From the *Cool Homes* opinion it is not clear if the court intends to limit the scope of the attorney-client privilege exception to pending litigation. The case involved pending litigation, and the opinion does recognize that some other states do limit the exception to pending litigation, but the specific communications the court found justified the executive session, *i.e.*, how to avoid threatened legal liability, may be just as worthy of protection when litigation is not pending, but is merely threatened or anticipated. Other non-litigation matters are also generally deemed worthy of protection by the attorney-client privilege, such as strategy sessions and candid discussions of the facts and issues concerning negotiations in commercial transactions. The *Cool Homes* decision dealt only with litigation, and made no comment about non-litigation contexts, so the privilege's application in non-litigation contexts remains unresolved. It is clear, however, that mere involvement in pending litigation will not justify having all communications about that litigation in executive session.

94 *Id.* at 1259, 1261-1262.

95 See Section II.D.3 above.

96 *Griswold v. City of Homer*, No. S-10321, slip opinion at 18 (Alaska, September 20, 2002).

97 See Section V above.

98 See Section V.E above.

99 AS 44.62.310(b).

100 AS 44.62.310(b); *see also Cool Homes, Inc., v. Fairbanks North Star Borough, 860 P.2d 1248,* at 1259 n.18 (Alaska 1993).

101 AS 44.62.312(b).

102 AS 29.20.160(e) requires only that a journal of official proceedings be kept.

103 *Pioneer Printing Co. v. Skannes*, 1KE-86-494 Civil (Alaska Super. Ct., Dec. 19, 1986) (Memorandum of Decision).

104 AS 44.62.310(b).

105 AS 44.62.312(a).

106 642 P.2d 1316 (Alaska 1982).

107 *Id.* at 1326.

108 860 P.2d 1248 (Alaska 1993).

109 AS 44.62.310(b).

110 AS 44.62.312(a)(2).

111 AS 44.62.310(d)(1).

112 See Section II.D.3 above.

113 The court noted that the rule declaring actions void is "generally short, mechanistic, and inadequate to deal with the difficulties involved." *Alaska Community College Federation of Teachers v. University of Alaska*, 677 P.2d 886, 890 n.8 (Alaska 1984), quoting Comment, *Invalidation as a Remedy for Open Meeting Law Violations*, 55 Or. L. Rev. 519, 524 & n.25 (1976).

114 *See, e.g., Hammond v. North Slope Borough*, 645 P.2d 750 (Alaska 1982); and *Alaska Community College Federation of Teachers v. University of Alaska*, 677 P.2d 886 (Alaska 1984).

115 The distinction between decision or policy-making bodies and advisory-only bodies is discussed in Section II.C above.

116 AS 44.62.310(f).

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.*

121 898 P.2d 917 (Alaska 1995).

122 *Id.* at 924.

123 *In re 2001 Redistricting Cases*, 44 P.3d 141 (Alaska 2002), *affirming In re 2001 Redistricting Cases*, Case No. 3AN-01-8914 Civil (Alaska Super. Ct., February 1, 2002) (Memorandum and Order, Part V.A.1.) (available at http://www.alaskabar.org/opinions/ACF4D1D.htm.)

124 The distinction between decision-making or policy-making bodies and advisory-only bodies is discussed in Section II.C above.

125 AS 44.62.310(g).

126 *E.g., Revelle v. Marston*, 898 P.2d 917 (Alaska 1995).

127 *E.g., Hammond v. North Slope Borough*, 645 P.2d 750 (Alaska 1982).

128 Also see *Alaska Community College Federation of Teachers v. University of Alaska*, 677 P.2d 886 (Alaska 1984).

129 *Id.*

130 *Id.* at 891.

131 *University of Alaska v. Geistauts*, 666 P.2d 424 (Alaska 1983).

132 *E.g., Revelle v. Marston*, 898 P.2d 917 (Alaska 1995).

133 *Alaska Community College Federation of Teachers v. University of Alaska*, 677 P.2d 886, 889 n.5 (Alaska 1984).

134 *Meiners v. Bering Strait School District*, 687 P.2d 287 (Alaska 1984).

135 *Von Stauffenberg v. Committee For An Honest And Ethical School Board,* 903 P.2d 1055 (Alaska 1995), affirmed that a violation of the OMA is grounds for recall, but held that the recall petition in that case did not allege facts sufficient to establish a violation of the act.

136 *E.g., Brookwood Area Homeowners Ass'n. v. Municipality of Anchorage*, 702 P.2d 1317 (Alaska 1985).

137 *E.g., Hickel v. Southeast Conference*, 868 P.2d 919 (Alaska 1994), in which the superior court's award of costs and attorney's fees totaled $966,567.33 to be paid by the state to five public interest litigants.

138 *Gilbert v. State,* 526 P.2d 1131, 1136 (Alaska 1974).

139 *Revelle v. Marston*, 898 P.2d 917, 924-925 (Alaska 1995).