

THE LAW

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FREQUENTLY ASKED QUESTIONS ABOUT VERMONT'S OPEN MEETING LAW

THE LAW

1. What is the Open Meeting Law?

The Open Meeting Law provides that “[a]ll meetings of a public body are declared to be open to the public at all times, except as provided in section 313 of this title [on executive sessions].” 1 V.S.A. § 312(a). The intent of the law is to create transparency in government by requiring advance public notice and an opportunity for public participation in governmental decisions. The law is found in 1 V.S.A. §§ 310-314.

2. What are the requirements of the Open Meeting Law?

- a. Provide advance notice of meetings. 1 V.S.A. §§ 312(c), 310(4);
- b. Create and post an agenda for all regular and special meetings. 1 V.S.A. § 312(d);
- c. Conduct all business in an open meeting (unless an exemption applies). 1 V.S.A. §§ 312(a); 313(a);
- d. Vote by roll call when there is electronic participation. 1 V.S.A. § 312(a)(2)(B);
- e. Allow public comment at meetings. 1 V.S.A. § 312(h);
- f. Take and post minutes. 1 V.S.A. § 312(b); and
- g. Respond to complaints of violation. 1 V.S.A. § 314(b)(2).

3. To whom does the law apply?

The law applies to every “public body” of a municipality. **A public body is any board, council, commission, committee, or subcommittee of a municipality.** 1 V.S.A. § 310(3). This includes bodies that are specifically mentioned in state statute and municipal charter such as selectboards, prudential committees, planning commissions, conservation commissions, cemetery commissions, development review boards, boards of civil authority, boards of health, zoning boards of adjustment, etc. It also includes committees and subcommittees of those groups. The law does not apply to community justice boards or community justice centers. 24 V.S.A. § 1964(b).

4. When does the law apply?

The requirements of the law are triggered whenever a “quorum” of the body is “meeting.” A **quorum** is a majority of the total members of the body. Quorum is determined based on the number of positions on the body, not the number of persons occupying those positions. Therefore, quorum does not change when there is a recusal or a vacancy. **"Meeting"** is defined as a gathering of a quorum of the members of a public body for the purpose of discussing the business of the body or for the purpose of taking any action. 1 V.S.A. § 310(2).

The Law applies regardless of the physical location of the members; the members don't all have to be in the same room at the same time for it to be considered a "meeting" under the Law.

Therefore, a phone conversation between a quorum of the members is a "meeting" for purposes of the law. **Furthermore, time is not a factor.** If a conversation occurs over a period of time (for

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instance in a string of emails) that conversation may still amount to a "meeting" under the Law. This is why public bodies should generally avoid the use of group emails.

a. Does this mean that we can never be in the same room at the same time unless we are in a meeting?

Not necessarily. The law does not prohibit members of a public body from gathering at social functions or discussing topics that do not fall under their official duties. The Law also allows a quorum of the members of a public body to talk about routine administrative matters (such as scheduling meetings) outside of a meeting.

b. The following does not constitute a "meeting" for purposes of the law: "written correspondence or an electronic communication, including e-mail, telephone, or teleconferencing, between members of a public body for the purpose of scheduling a meeting, organizing an agenda, or distributing materials to discuss at a meeting, provided that any such correspondence or communication that results in written or recorded information shall be available for inspection and copying under the Public Records Act." 1 V.S.A. § 310(2).

5. What are the different types of meetings and why does it matter?

There are three types of meetings under the Law. The Law imposes different requirements for notices and agendas depending on the type of meeting that is being held.

- "Regular meetings" are meetings that take place at a regularly occurring, pre-arranged time and day.
- "Special meetings" are meetings that take place at any time or date outside of the "regular" meeting schedule.
- "Emergency meetings" may be held only when necessary to respond to an unforeseen occurrence or condition requiring immediate attention by the public body. 1 V.S.A. § 312(c)(3).

EMAIL, PHONE, AND OTHER ELECTRONIC COMMUNICATION

6. Do group emails violate the Law?

Not necessarily. Group emails may be used to schedule a meeting, create an agenda, or to distribute materials to discuss at a meeting. Group emails should never be used for discussion purposes (which is why you should avoid hitting the "Reply All" button). Emails must generally be available for copying and inspection as public records. 1 V.S.A. § 310(2).

In addition, email may be used in instances where a public body is engaged in a quasi-judicial deliberation – for instance, when a development review board is in the midst of drafting the written decision on a permit application. 1 V.S.A. § 312(e). Before taking advantage of this exception to the Law, the public body must have conducted a quasi-judicial hearing in public

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session, and then entered into deliberative session to discuss the evidence and decide how to proceed. (See #20-21.)

7. If a member is unable to attend a meeting, can that person vote by email or proxy?

No, the law does not allow for voting by email or by proxy. However, the law allows members to attend a meeting by electronic means (e.g., speaker phone or Skype), and to vote at that meeting, so long as the other requirements of the Open Meeting Law are adhered to (see #8, below). 1 V.S.A. § 312(a)(2).

8. Can a member attend a meeting by phone or Skype?

Yes, a member may participate and vote at a meeting by electronic means (e.g., speaker phone, Skype, etc.) as long as that member identifies himself or herself when the meeting is convened, and the member is able to hear and be heard throughout the meeting. Whenever one or more members attend electronically, voting must be done by roll call for any vote that is not unanimous. 1 V.S.A. § 312(a)(2).

a. What if a majority of members are not able to be physically present? Can they still have a meeting?

Yes. A quorum or more members of a public body may participate in a meeting electronically when the agenda that has been posted for such meeting designates at least one physical location where a member of the public can attend and participate in the meeting. At least one member of the body or at least one staff person or other designee must be present at that physical location. Each member that attends electronically must identify himself or herself when the meeting is convened, and must be able to hear and be heard throughout the meeting. Any voting that occurs at the meeting that is not unanimous must be done by roll call. 1 V.S.A. § 312(a)(2).

AGENDAS

9. Does the law require an agenda for every meeting?

A written agenda must be created in advance of every regular or special meeting. 1 V.S.A. § 312(d). There is no requirement for an agenda for an emergency meeting.

10. Do we have to post the agenda?

Yes. At least 48 hours in advance of a regular meeting, and at least 24 hours in advance of a special meeting, an agenda must be posted in or near the municipal office and in at least two other designated public places in the municipality. 1 V.S.A. § 312(d). If it has not already done so, every municipality should officially designate two or more public places in the municipality at which agendas will be posted. Our opinion is that the legislative body can make this designation on behalf of all of the public bodies in the municipality, unless those bodies are independently-elected. In

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addition, agendas for regular and special meetings must be posted to an official website, if one exists that is maintained or has been designated as the official website of the public body. 1 V.S.A. § 312(d).

11. What must be contained in an agenda?

The Open Meeting Law does not contain a definition of "agenda." That being said, it is clear from the intent of the Law that an agenda must be drafted so that it provides actual notice of the specific topics to be addressed and the actions that may be taken at that meeting. An agenda should include specific topics such as "proposed contract with ambulance service," or "discussion of speed limit on town highway 7" rather than general terms such as "contract," or "speed limits" which do not provide notice to the public about what will be discussed and decided.

12. Can we add items to an agenda after it is posted?

A public body may table or otherwise postpone an item on their meeting agenda when necessary, as in situations where additional information is needed before a decision may be made. Other adjustments to an agenda such as changing the order of items may be made at any time during the meeting. 1 V.S.A. § 312(d)(3)(B).

There are more stringent standards for adding items to an agenda. The Law was amended in 2014 to state that an item may only be added or removed from a meeting agenda as the first order of business at that meeting. 1 V.S.A. § 312(d)(3)(A). Our opinion is that the language in 1 V.S.A. § 312(d)(3)(A) does not give a public body free reign to alter a meeting agenda at the last minute. Instead, our advice is that once the deadline for posting an agenda has passed (48 hours in advance of a regular meeting and 24 hours in advance of a special meeting) **items should only be added to that agenda when necessary to deal with an unforeseen occurrence or condition requiring immediate action.** In all other cases, an item that has not been listed on a posted agenda should not be discussed as a last-minute addition. Instead, the body should place the item on the agenda of their next regular meeting or, if necessary, call a duly-noticed special meeting to address that item. Taking this approach will assure that the public has adequate advance notice and an opportunity to be heard on all topics to be discussed and decided by the public body.

POSTING, NOTICING, AND ANNOUNCING MEETINGS

13. What are the requirements for noticing and announcing a meeting?

Regular meetings of a public body (i.e. meetings that occur at a regular date, time, and place) only need to be announced once: in a charter, local ordinance, or resolution. 1 V.S.A. § 312(c)(1). A resolution regarding the regular meeting schedule can be done in the public body's annual organizational meeting (first meeting of the year). However, an agenda must be posted in advance of every regular meeting. 1 V.S.A. § 312(d). (See #9 and 10.)

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Special meetings (meetings that occur outside of the regular schedule) must be publicly announced at least 24 hours in advance. 1 V.S.A. § 312(c)(2). A meeting is "publicly announced" when notice is given either orally or in writing to all the members of the public body; to an editor, publisher, or news director of a newspaper or radio station serving the area; and to any person who has requested notice of such meetings. 1 V.S.A. § 310(4). In addition, notices and agendas must be posted at the municipal clerk's office and in at least two other designated public places in the municipality at least 24 hours in advance. 1 V.S.A. § 312(c)(2).

Emergency meetings There is no specific requirement for announcing and posting notice for emergency meetings (which are held only when necessary to respond to an unforeseen occurrence or condition requiring immediate attention by the public body) although "some public notice must be given as soon as possible before any such meeting." 1 V.S.A. § 312(c)(3).

MEETING MINUTES

14. Do we have to take minutes at every meeting and provide them to the public? Who is responsible?

Yes. Minutes must be taken at every public meeting. Minutes need not be taken in executive session, but if they are, they are not subject to a public records request. 1 V.S.A. § 313(a). Each public body is responsible for creating its own minutes. Minutes must be kept by the secretary or clerk of the public body (which may or may not be the municipal clerk). 1 V.S.A. § 312(b)(1).

15. What must be included in the minutes?

Meeting minutes do not have to be a transcript of the meeting. Minutes must give a "true indication of the business of the meeting" - which may require supplementing the following statutorily-required elements: members present; active participants at the meeting; motions, proposals, and resolutions made, offered, and considered and what disposition is made of the same; the result of any votes taken; and a record of individual votes if a roll call is taken. 1 V.S.A. § 312(b)(1).

16. When must minutes be available/posted?

Minutes must be available for inspection five calendar days after the meeting. 1 V.S.A. § 312(b)(2). In addition, minutes must be posted no later than five calendar days after the meeting to an official website, if one exists, that is maintained or has been designated as the official website of the public body. 1 V.S.A. § 312(b)(2). Except for draft minutes that have been substituted with updated minutes, posted minutes shall not be removed from the website sooner than one year from the date of the meeting for which the minutes were taken. 1 V.S.A. § 312(b)(2).

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a. How can we have time to approve or finalize the minutes if they have to be available within 5 days?

There is nothing in the Open Meeting Law that requires any official finalization, correction, or approval action by the public body. Since there is no law on the subject it is up to each public body to decide whether and how it will deal with corrections, approvals, etc. Many public bodies make it a practice to create a set of minutes labeled "draft" or "unapproved" and subsequently correct and "approve" those minutes at a subsequent meeting. This is done as an acknowledgement that the body has read the draft minutes and agree that they accurately reflect what took place at the meeting.

EXCEPTIONS TO THE OPEN MEETING LAW

17. In what instances can a public body meet in private?

There are limited instances in which a public body can meet in private. These instances are described in the exceptions to the Open Meeting Law which are as follows:

- Site inspections for the purpose of assessing damage or making tax assessments or abatements. 1 V.S.A. § 312(g);
- Clerical Work. 1 V.S.A. § 312(g);
- Work Assignments of staff or other personnel. 1 V.S.A. § 312(g);
- Routine, day-to-day administrative matters that do not require action by the public body, provided that no money is appropriated, expended, or encumbered. 1 V.S.A. § 310(2);
- Deliberative sessions within the context of a quasi-judicial proceeding. 1 V.S.A. § 312(e); and
- Executive sessions. 1 V.S.A. § 312(a).

18. Is there an exception for "work sessions"?

No. The only exceptions to the law are those that are listed in #17, above.

19. What falls under the exception for "routine administrative matters"?

This exception is mainly only used by the town listers and auditors who engage in routine administrative matters when they update listers cards, examine the treasurer's spread sheets, etc. On the other hand, this exception does not apply to the actions taken by the listers and auditors that are specifically required by statute (such as lodging the grand list, making decisions about the annual auditors' report, etc.) therefore, such actions may only be taken in the context of a duly-warned open public meeting that meets all of the requirements of the Open Meeting Law.

20. What is a "deliberative session"?

A deliberative session occurs only in conjunction with a quasi-judicial proceeding. These are situations where a public body (such as a selectboard or development review board) is acting like a judge or jury in that it takes evidence or testimony, and then weighs, examines, and discusses the

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reasons for or against an act or decision based on that evidence. 1 V.S.A. § 310(5). Examples include tax appeal hearings before the board of civil authority; vicious dog hearings and employment termination hearings before the selectboard; and zoning and subdivision hearings before a planning commission, zoning board of adjustment, or development review board. The exception for deliberative session is limited to quasi-judicial proceedings and does not apply simply because the public body wants time to deliberate in private.

21. Do we have to come out of deliberative session to issue or adopt a decision?

Generally, no. The law allows a public body to make a decision in deliberative session so long as the decision is issued in writing and the writing is a public record. 1 V.S.A. § 312(f). This means that after the public body has heard all of the evidence in a hearing, it may adjourn the public portion of the hearing, privately discuss and determine the merits of the case, and then circulate drafts of an opinion for comment and approval prior to issuing its formal written decision.

22. What about executive session? When can we use that exception?

Rarely. An executive session is a closed portion of a public meeting and is allowed only in certain limited situations. Those that apply to municipal bodies are as follows:

- a. Negotiating or securing real estate purchase or lease options. 1 V.S.A. § 313(a)(2)
- b. The appointment or employment or evaluation of a public officer or employee (**but** the public body must make a final decision to hire or appoint in an open meeting **and** it must explain the reasons for its final decision). 1 V.S.A. § 313(a)(3)
- c. A disciplinary or dismissal action against a public officer or employee (**but** such officer or employee has the right to a public hearing if formal charges are brought). 1 V.S.A. § 313(a)(4)
- d. A clear and imminent peril to the public safety. 1 V.S.A. § 313(a)(5)
- e. Discussion or consideration of records or documents that are exempt from the public records laws (**but** that does not give authority to discuss the general subject to which the document pertains). 1 V.S.A. § 313(a)(6)
- f. Municipal or school security or emergency response measures, the disclosure of which could jeopardize public safety. 1 V.S.A. § 313(a)(10)
- g. When (and only when) the public body has made a specific finding that premature general public knowledge (see #23) would clearly place the state, municipality, other public body, or a person involved at a substantial disadvantage, it may go into executive session to discuss one of the following:

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- contracts;
- labor relations agreements with employees;
- arbitration or mediation;
- grievances, other than tax grievances;
- pending or probable civil litigation or a prosecution, to which the public body is or may be a party; or
- confidential attorney-client communications made for the purpose of providing professional legal services to the body. 1 V.S.A. § 313(a)(1)

23. What is “premature general public knowledge” and how could that place someone at a substantial disadvantage?

In order to go into executive session to discuss one of the subjects listed in 1 V.S.A. § 313(a)(1), there must be a reason that the subject cannot be discussed in open session at that time. For instance, if the municipality is in the midst of a contract negotiation, the selectboard would not want to discuss its proposed terms as that would give the other side an advantage at the bargaining table. In that instance, premature public knowledge of the subject would place the municipality at a substantial disadvantage.

24. When can we enter into executive session to discuss legal matters?

The Law sets out two reasons to discuss legal issues in executive session once there has been a finding that premature general public knowledge would place a person or entity at a substantial disadvantage. First, you may discuss “pending or probable civil litigation or a prosecution, to which the public body may be a party.” Second, you may discuss “confidential attorney-client communications made for the purpose of providing professional legal services to the body.” 1 V.S.A. §§ 313(a)(1)(E) and (F). In addition, the law allows a public body to have its attorney, among others, present during executive sessions. 1 V.S.A. § 313(b) (“Attendance in executive session shall be limited to members of the public body, and, in the discretion of the public body, its staff, clerical assistants and legal counsel, and persons who are subjects of the discussion or whose information is needed.”) In addition to the above, the Law also allows a public body to discuss correspondence from the municipal attorney under 1 V.S.A. 317(c)(4). This provision of law exempts from the general rule of disclosure “records which, if made public ... would cause the custodian to violate any statutory or common law privilege.” The attorney-client privilege falls within this exemption.

25. What are the logistics of entering into executive session?

A motion to go into executive session must be made during the open portion of a meeting and must indicate the nature of the business to be discussed. 1 V.S.A. §§ 313(a). We recommend that you state the specific statutory provision that gives authority to enter into such session (“Title 1, Section 313, Subsection ____ of the Vermont Statutes”). We also recommend that you provide in your motion as much information as you can, without giving away the details that necessitate the

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executive session. The motion must get the vote of a majority of the members present to pass. 1 V.S.A. §§ 313(a).

26. How do we make a motion to enter into executive session?

The contents of the motion to enter into executive session depend on the reason for entering that executive session. To enter into executive session for the reasons noted in 1 V.S.A. §§ 313(a)(2)-(a)(10) (listed in #22, parts a-f), the motion merely needs to identify the topic of discussion and the specific statutory provision that gives authority to enter into such session. We also recommend that you provide in your motion sufficient information without giving away the details that necessitate the executive session. For instance: "Because it is time for our annual evaluation of the town manager, I move that we go into executive session to discuss the evaluation of a public officer or employee under the provisions of Title 1, Section 313(a)(3) of the Vermont Statutes."

To enter into executive session for the reasons noted in 1 V.S.A. §§ 313(a)(1) (listed in #22, part g), you must make a finding that premature general public knowledge would place the public body or a person involved at a substantial disadvantage. 1 V.S.A. §§ 313(a)(1). Therefore, we recommend that you make **two separate motions**:

The **first motion** is to find that premature public discussion of the subject would cause the municipality or a person to suffer a substantial disadvantage. For instance, in the case of a contract under negotiation, the motion might be:

"I move to find that premature general public knowledge regarding the town's contract with ABC Company would clearly place the town at a substantial disadvantage, because the selectboard risks disclosing its negotiation strategy if it discusses the proposed contract terms in public."

In this hypothetical situation, the "substantial disadvantage" is the risk of losing the competitive edge in the negotiations by talking about the specific contract terms in public. For instance, once ABC Company hears the selectboard talk about the maximum price it can afford to pay, ABC Company may refuse to take anything less than that amount.

The **second motion** follows from the first and should recite the specific statutory provision that gives authority to enter into such session. For instance:

"I move that we enter into executive session to discuss the town's contract with ABC Company under the provisions of Title 1, Section 313(a)(1)(A) of the Vermont Statutes."

It is important that the minutes show that there was a careful analysis of the need to enter into executive session before the first motion was made. The Vermont Supreme Court has stated:

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It is not unworkable for a public body to make a careful analysis of need before deciding to go into executive session. In fact, in the absence of a case-by-case determination, the legislative policy of openness would be frustrated by the impossibility of describing in categorical terms, without being over-inclusive, the permissible subjects of executive sessions. The exercise of judgment is inevitable.

Trombley v. Bellows Falls Union High School Dist. No. 27, 160 Vt. 101, (1993). Given the Court's opinion in *Trombley*, the first motion described above should only be made after a discussion (careful analysis) in general terms (otherwise the purpose of entering executive session would be defeated) of why "premature general public knowledge would clearly place the public body, or a person involved at a substantial disadvantage."

VIOLATIONS OF THE OPEN MEETING LAW

27. What are the consequences of violating the Law?

Either the Attorney General or "any person aggrieved by a violation of the law" can bring an action in Superior Court for injunctive relief or declaratory judgment. Prior to instituting such action, the Attorney General or person must provide the public body with written notice of the alleged violation and an opportunity to "cure" that violation. (See #_29.)

In addition, a person who knowingly and willfully violates the Open Meeting Law, or who knowingly and willfully violates the Open Meeting Law on behalf of or at the behest of a public body, or who knowingly and intentionally participates in the wrongful exclusion of any person or persons from any relevant meeting may be guilty of a misdemeanor, punishable with a fine up to \$500. 1 V.S.A. § 314(a).

28. What must the public body do if it receives written notice of an alleged violation of the Law?

Immediately contact your town attorney or the Municipal Assistance Center! A public body must respond publicly within ten calendar days after receiving written notice alleging a violation. Logistically, this means that it must immediately call a special meeting if a regularly-scheduled meeting does not fall within this timeframe and provide adequate notice and warning of that meeting, including an agenda. During the meeting, the body should publicly discuss the situation and determine whether there was an **inadvertent** violation of the law. Based on this determination, it should issue a statement that either denies the allegation and states that no cure is necessary, or acknowledges that there was an **inadvertent** violation that will be cured within 14 calendar days. The public body should **not** publicly acknowledge a violation that is anything other than "inadvertent" without specific legal advice to do so. Failure to respond to the allegation within ten calendar days is treated as a denial. 1 V.S.A. § 314(b). In the event that the public body is sued

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for a violation of the law the court will assess attorneys' fees and costs based in part on whether there was a timely response to a notice of violation. 1 V.S.A. § 314(d).

29. Can someone sue the municipality for a violation of the law?

Yes, but that person must first give the public body a chance to respond to the allegation of violation. After the public body issues an acknowledgement or denial of the alleged violation, and after allowing 14 calendar days for the body to cure the violation, either the Attorney General or any person aggrieved by the alleged violation may bring suit against the public body in Superior Court. Such a suit must be brought within one year from the date of the alleged violation. 1 V.S.A. § 314(a).

30. Is the public body liable for attorneys' fees if it is sued for a violation of the law?

The law is unclear on this point. It states that a public body is not liable for attorneys' fees arising from litigation over an inadvertent violation of the law that is cured by the public body. 1 V.S.A. § 314(b)(1). However, the law also allows a court to assess attorneys' fees against a public body found to have violated the law. Before making this assessment, however, the court must consider whether the public body had a reasonable basis in fact and law for its position and that it acted in good faith, which includes responding to the notice of violation in a timely manner. 1 V.S.A. § 314(d).

31. When does the clock start ticking? When has the public body "received" an allegation of violation?

Receipt of a complaint or allegation starts the ten calendar day timeline for response. Unfortunately, the statute does not define when the "receipt" takes place. We therefore advise that you take the most conservative approach and consider that the public body has received an allegation when any member of the public body, or any municipal official who acts in an administrative capacity for the public body, receives a written complaint or allegation of violation. At that point, the public body has ten calendar days in which to respond.

32. How does the public body "cure" an inadvertent violation?

An inadvertent violation must be cured within 14 calendar days after a public body acknowledges an inadvertent violation. A inadvertent violation is cured when the public body either ratifies or declares as void, any action taken at or resulting from a meeting that was not noticed in accordance with the Law; or a meeting that a person or the public was wrongfully excluded from attending; or an executive session or portion thereof that was not authorized under the Law. The public body must also adopt specific measures to prevent future violations of the law. 1 V.S.A. § 314(b)(4). Such measures should be geared toward addressing the particular violation and might include, for example, training regarding the requirements of the Open Meeting Law, or implementation of internal procedures to assist the public body in future Open Meeting Law

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compliance, such as VLCT's "Revised Model Rules of Procedure," which are available on our website (www.vlct.org).

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