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SUMMARY

OF THE

OPEN MEETINGS ACT

1976 PA 267, as amended

MCL 15.261 *et seq*.

DATE: October 1, 2022

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I.
Supersession of Prior Regulations and Effective Date of Act

The Open Meetings Act (Act), which became effective on March 31, 1977, superseded all existing local charters, ordinances, or resolutions regarding requirements for meetings of local public bodies to be open to the public. However, nothing in the Act prohibits a public body from adopting an ordinance, resolution, rule, or charter provision which would require a greater degree of openness relative to meetings of public bodies. MCL 15.261-MCL 15.275.

II.
Public Bodies Subject to the Act

The Act applies to any state or local legislative or governing body,[1] including a board, commission, committee,[2] subcommittee, authority,[3] or council, which is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function, or a lessee thereof performing an essential public purpose and function pursuant to the lease agreement. [Section 2(a).]

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[1]An individual acting in an executive capacity is not a public body subject to the Act. *A & E Parking v Detroit Metropolitan Wayne Co Airport Authority*, 271 Mich App 641, 651 (2006). However, an individual or committee that has been delegated decision-making authority by a public body is a public body subject to the Act. Members-elect of a public body do not constitute part of a public body under the Act, and thus are not subject to the restrictions of the Act. *Tuscola Wind III, LLC v Almer Charter Township*, 327 F Supp 3d 1028 (ED Mich, 2018).

[2]A special committee charged with developing a site plan for the conversion of a school to a community center was assigned its duties by the city council. The court held it was a governmental body subject to the Act. *Morrison v City of East Lansing*, 255 Mich App 505, 520 (2003). However, a financial review team appointed by the Governor is not a public body under the Act. *Davis v City of Detroit Financial Review Team*, 296 Mich App 568, 574 (2012).

[3]Medical Control Authorities are subject to the Act according to the Attorney General in 2004 OAG 7165.

III.

Requirements for Members of a Public Body to Participate in a Meeting

There is a strong legal argument that a "physical" presence is required for a quorum during a meeting of a public body.[4] "Meeting" is defined as "the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy."[5] [Section 2(a)] While we could not find any Michigan case law on point, generally, "present" means a physical presence. Thus, a member who participates by telephone or video conference cannot be counted to determine if a quorum is present unless they are absent due to military service.[6]

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[4] There was an amendment to the Act effective March 29, 2019 to accommodate the potential absence of a member of a public body due to military service. The amendment required that, except during a meeting of any state legislative body, a public body shall establish procedures to accommodate the absence of any member of the public body due to military duty, including (1) procedures by which the absent member may participate in, and vote on, business before the public body, including, if feasible, procedures that ensure 2-way communication, and (2) procedures by which the public is provided notice of the absence of the member and information about how to contact that member sufficiently in advance of a meeting to provide input on any business that would come before the public body.

[5]The use of "...overlapping, intercommunicating, subquorum committees of public bodies as a means of directly circumventing the OMA is not legal and is in direct contravention of the objective of the OMA to promote openness and accountability in government." *Booth News v U of M Board of Regents*, 192 Mich App 574, 580 (1992), ***aff'd*** in relevant part 444 Mich 211, 224 (1993).

[6]Qualified persons with a disability may also be able to participate remotely subject to the Americans with Disabilities Act, 42 USC §12131 *et seq.* (ADA). Specifically, the Michigan Attorney General issued Opinion #7318 on February 4, 2022, which addresses the application of the ADA to the Act. Although this may be subject to future legal challenge, we find this Opinion sufficiently persuasive. In this Opinion, the Attorney General determined that the ADA required local boards and commissions to provide reasonable accommodations, including an option to participate virtually, to qualified persons with a disability who request an accommodation to fully participate as a board or commission member. The Opinion's conclusion is notwithstanding the Act's requirement that non-military members of the public body must be physically present to be counted toward a quorum, deliberation, and voting.

For the ADA to preempt the requirements of the Act, the member must show that they are a qualified individual with a disability as those terms are defined in the ADA. "Qualified individual with a disability" is defined as "an individual with a disability who, with (Continued)

Throughout the early part of 2020, certain executive orders allowed for "virtual" meetings with remote participation during the COVID-19 pandemic. However, such

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or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 USC §12131(2). "Disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 USC §12102(1)(A).

As noted in the Opinion, requests under the ADA are heavily fact-dependent and managed on a case-by-case basis. A final decision would include the following steps:

1. A request for a reasonable accommodation must be received by the board or commission (or their designee).
2. The requestor must be a qualified individual with a disability, as defined above.
3. The requested accommodation must be appropriate under the "reasonable modifications regulation." *Olmstead v L C ex rel Zimring*, 527 US 581, 581 (1999); 28 CFR §35.130(b)(7). A modification is reasonable "unless it requires 'fundamental alteration in the nature of the program' or imposes 'undue financial and administrative burdens.'" *Smith & Lee Assoc, Inc v City of Taylor*, 102 F3d 781, 795 (CA 6, 1996), quoting *Southeastern Community College v Davis*, 442 US 397, 410, 412 (1979); 28 CFR §35.150(a)(3).

Reasonable accommodations have historically been limited to addressing physical barriers to participation (e.g., ramps and audio aids). The Attorney General found that a reasonable accommodation could also include a hybrid-virtual meeting in the case of an immunocompromised member. In particular, the Attorney General found because "these boards and commissions have successfully gone wholly or partially virtual during the COVID-19 pandemic, it seems unlikely that a request for a hybrid approach of an in-person meeting and telephonic access or a virtual platform would result in an undue administrative or financial burden or constitute a fundamental alteration of a board's or commission's meetings." The use of remote participation as a reasonable ADA accommodation should be extremely rare as it is not intended for mere sickness or medical ailments that would not otherwise prevent the individual from attending other events.

A public body's final decision must be based on (1) whether the individual qualifies for an accommodation, and (2) whether the accommodation is reasonable. This occurs during an interactive dialogue with the individual. The individual would provide information, typically in response to a questionnaire, as to the nature and extent of the disability, and why the requested accommodation is reasonable. The individual could be required to submit a treating physician's opinion confirming the diagnosis and recommending that the required accommodation is necessary.

executive orders were declared unconstitutional. Accordingly, the Michigan Legislature adopted several amendments to the Act. The first amendment was through Senate Bill No. 1108, which passed on October 13, 2020, and was signed by Governor Whitmer on October 16, 2020, as Public Act 228 of 2020. This amendment incorporated many of the prior requirements for electronic meetings and remote participation that were originally contained within the Governor's executive orders that were nullified, and also imposed certain new requirements. The second amendment went into effect December 23, 2020 after the Michigan Legislature passed Senate Bill No. 1246, which Governor Whitmer signed into law as 2020 Public Act 254.

Under 2020 Public Act 254, public bodies were allowed to conduct electronic (or "virtual") meetings, retroactive to March 18, 2020 through March 31, 2021, for any reason. Then, from on or after March 31, 2021 through December 31, 2021, public bodies were only allowed to meet remotely to accommodate absent members of the public body due to (1) military duty; (2) a medical condition defined as an illness, injury, disability, or other health-related condition; or (3) a statewide or local state of emergency or state of disaster declared pursuant to law or charter or local ordinance by the governor or a local official, governing body, or chief administrative officer such that a meeting held in public would risk the personal health or safety of the member of the public or public body (see 1976 Public Act 390; MCL 30.410 for declaring a local state of emergency).[7]

[7] 2020 Public Act 254 revised 2020 Public Act 228 to include a state of disaster or emergency declared pursuant to a local ordinance, in addition to those declared under law or charter. It also replaced a "local official or local governing body" as individuals who may declare a state of emergency with a "local chief administrative officer". Important to note is that 2020 Public Act 254 failed to define who qualified as "a local chief administrative officer", suggesting it was the State Legislature's intention to define the term in line with MCL 141.422b(3).

Effective January 1, 2022, however, the only basis within the Act for a member of a public body to participate in a meeting via telephonic or video conferencing as a member of the public body (i.e., to vote, to be counted toward a quorum, or to deliberate toward a decision), is if that member is absent due to military duty. There is no explicit reference in the Act to remote participation as an ADA accommodation. Rather, this is an interpretation of Federal law in relation to the Act by the Attorney General in Opinion #7318. (An analysis of Attorney General Opinion #7318 is more fully set forth in Footnote 7 above.)

This amendment to the Act eliminates the previously permissive practice of a public body allowing its members to participate and vote remotely if a physical quorum was present. (A public meeting may still have a partial hybrid remote component at the public body's option to allow members of the public and/or staff to attend and participate remotely if they can be heard by all persons attending the meeting.) MCL 15.263a(1)(c).

To further determine the applicability of the Act, one must take into consideration the definitions of "meeting" (defined above), "deliberating," and "decision." "Deliberating" is not statutorily defined, but has been otherwise defined as "the act of *carefully considering* issues and options before making a decision or taking some action,"[8] or "discussing," which in turn is defined as "the act of exchanging views on something."[9] The word "decision" is defined as "a determination, action, vote or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy." MCL 15.262(d).

[8]*Ryant v Cleveland Twp*, 239 Mich App 430, 434 (2000).

[9]*Ryant, supra* at 434.

A public body may not meet informally prior to a public meeting to determine what will be decided formally at the public meeting. [1977 OAG 5183.][10] Further, "a meeting of a standing committee of a county board of commissioners, composed of less than a quorum of the full board, is subject to the OMA when the committee is effectively authorized to determine whether items of county business will or will not be referred for action by the full board." [See 1998 OAG 7000.]

A public body may listen to testimony from the public and administrative staff when it properly notices a meeting under the Act, but lacks a quorum when it actually convenes. The public body may ask questions or make comments, but may not render any decision in the absence of a quorum. [2009 OAG 7235.]

The use of e-mail, texting, or other electronic communications during a meeting among members of a public body may constitute deliberations or decisions in violation of the Act. The use of electronic communications among the members of a public body outside of a meeting that constitutes "deliberations" or an "actual decision" among a quorum of the body could violate the Act.[11]

IV.
Exclusion from Coverage of the Act

The Act does not apply to a meeting which is a social or chance gathering or conference not designated to avoid the Act. MCL 15.263(10).

[10]The Act is not violated where a member of a public body conducts an informal poll of other members to determine how they would vote on a particular issue where no decision regarding the issue is made during the polling and the intent is not to circumvent the requirements of the Act. *St Aubin v Ishpeming*, 197 Mich App 100, 103 (1992). This old case may be legally problematic depending upon the circumstances.

[11]E-mail exchanges among four members of a seven-member elected public body regarding matters of public policy that were set to be considered by the public body were a violation of the Act even though only three of the four members of the group had actively engaged in thoughts and discussion and the fourth member received the messages, but did not actively engage in the discussion. *Markel v Mackley*, unpublished opinion per curiam of the Michigan Court of Appeals, decided November 1, 2016, docket no. 327617.

V.
Rights of the Public to be Present and Address the Meeting

It is now well established that the purpose of the Act is to promote governmental accountability by facilitating public access to official decision making and to provide a method and means through which the general public may better understand issues and decisions of public concern.[12] All meetings of a public body are required to be open to the public unless a closed meeting is held in accordance with Sections 7 and 8 of the Act. Meetings are required to be held in a place available to the general public. All persons shall be permitted to attend any meeting, except as discussed subsequently. The right of a person to attend a meeting of a public body includes the right to tape-record, videotape, broadcast live on radio, and telecast live on television the proceedings of a public body at a public meeting.

A person cannot be required, as a condition of attendance at a meeting, to register or otherwise provide their name or other information. Further, a person shall be permitted to address a meeting of a public body. However, the public body may establish and record rules which regulate the conditions under which the public may address the meeting. These rules should include such conditions as the length of time any one person may be permitted to speak, the place on the agenda set aside for public address,[13] and a requirement that persons desiring to address the public body identify themselves. [1977 OAG 5183.] A person may be excluded from a public meeting only for a breach of peace actually committed at the meeting. MCL 15.263(6). The Act is not violated by removing unruly and disruptive audience members. *Youkhanna v City of Sterling Heights*, 332 F Supp 3d 1058 (ED Mich, 2018).

A public body's "address the chair" rule requiring citizens to direct commentary to the chair, rather than other attendees, does not violate a person's First Amendment right to petition the government, and expulsion from a meeting for violation of the "address the

[12] *Kitchen v. Ferndale City Council,* 253 Mich App 115, 125 (2002), overruled on other grounds by *Speicher v. Columbia Twp. Bd. of Trustees*, 497 Mich. 125, 133, 860 N.W.2d 51 (2014)

[13] *Lysogorski v Bridgeport*, 256 Mich App 297, 302 (2003).

chair" rule does not violate a person's First or Fourteenth Amendment rights. *Holeton v City of Livonia,* 2019 WL 2016252 (Mich App, May 7, 2019).

VI.
Notice of Meetings and Location

1. Public notice is required to contain the name of the public body, its telephone number, and its address.

2. Public notice is required to be posted in a prominent and conspicuous place at both the public body's principal office and, if applicable, on a website,[14] together with any other locations considered appropriate by the public body. Cable television may also be utilized for purposes of posting public notice.

3. If a public body is part of a political subdivision (a county), a public notice shall also be posted in the principal office of the political subdivision (courthouse). Where the public body has its own principal office and is a component of another department of government, it is required to have two notices – one at its own office and another at the office of its parent department. [1977 OAG 5183.]

4. If a public body does not have a principal office, the required public notice for the local public body is required to be posted in the office of the county clerk.

5. The statute states that a meeting of a public body shall not be held unless public notice is given as provided in this Section and Sections VII, VIII, and IX of this summary. The board of commissioners and other public bodies must formally designate a person, by resolution, to provide notice.

6. A meeting of a public body may only take place in a residential dwelling <u>if</u> a nonresidential building within the boundary of the local governmental unit is not available without cost to the public body. Thus, this severely restricts the use of a residential

[14]A website posting is required if the public body "directly or indirectly maintains an official internet presence that includes monthly or more frequent updates of public meeting agendas or minutes." The posting must be made on the portion of the website fully accessible to the public, either on (1) the homepage or (2) a separate webpage dedicated to public notices for non-regularly scheduled public meetings that is accessible from a prominent and conspicuous link on the homepage, i.e., the link must clearly describe its purpose. MCL 15.265(4).

dwelling for public meetings.[15] The only time that a residential dwelling may be used for a public meeting is if a nonresidential building is not available free of expense. In the event the above condition is met and a meeting of a public body is to be held in a residential dwelling, notice of the meeting is required to be published as a "display advertisement" in a newspaper of general circulation in the city or township in which the meeting is to be held. The notice is required to be published not less than two days before the day on which the meeting is held. It is required to state the date, time, and place of the meeting. A conspicuous notice must be at the bottom of the display advertisement which states:

> This meeting is open to all members of the public under Michigan's Open Meetings Act.

VII.
Requirements for Posting of Regular Meetings and Changes in Regular Meetings Schedule

1. Public bodies which have a regular meeting schedule must post the schedule of their meetings for the following calendar or fiscal year within ten days after the first meeting of the public body in that calendar year or fiscal year. The notice is required to state the dates, times, and places of the regular meetings in addition to the requirements stated in Section VI above, i.e., address, phone number, name.

2. If there is a change in the schedule of regular meetings of a public body, there is required to be posted within three days after the meeting at which the change is made, a public notice stating the new dates, times, and places of its regular meetings.

VIII.
Rescheduled Regular or Special Meetings of a Public Body

When a regular meeting is rescheduled or if a special meeting is called, a public notice stating the time, date, and place of the meeting is required to be posted at least eighteen hours before the meeting, i.e., the notice must be posted in an area that is

[15]The Attorney General in 1987 OAG 5298 held that party caucuses, consisting of a quorum of a public body, are subject to the Act when matters are discussed which are subsequently considered by the board of commissioners.

available to the public for the full eighteen hours. MCL 15.265(7). County boards of commissioners must adhere to MCL 46.10 when calling for a special board meeting.

IX.
Reconvened or Recessed
Meetings and Emergency Meetings

If a public body recesses a meeting for more than thirty-six hours, the meeting may only be reconvened if notice has been posted at least eighteen hours before the meeting. MCL 15.265(5).

The Act does not prohibit a public body from meeting in emergency session in the event of a severe and imminent threat to the health, safety, or welfare of the public, if two-thirds of the members serving on the body decide that delay would be detrimental to the efforts to lessen or respond to the threat. MCL 15.265(5).

If such an emergency situation occurs, a public notice of the emergency session must be made available to the public at the emergency meeting that expressly includes the reasons the public body cannot comply with the eighteen hour posted notice requirement. This public notice explanation must be fact specific to the nature of the threat and the necessity of holding the emergency meeting, and may not simply restate the statutory terms that a threat is imminent or there is a danger to public welfare or safety. This public notice is also to be posted and placed on the public entity's website. Within forty-eight hours of the emergency session/meeting, the public body involved is then also required to forward official correspondence to the respective county board of commissioners[16] informing the county board that the emergency meeting was held with less than the eighteen hour public notice and the correspondence is required to include the public notice that was posted and distributed concerning the emergency session.

Based on the foregoing, a number of steps are required including, as the first order of business on the agenda in the emergency session, motions and a confirmation that (1) two-thirds of the members have called the meeting, and (2) that the public notice distributed and posted online accurately reflects the public body's determination that the emergency session is necessary. Thus, as an initial step at the emergency session, the

[16] This requirement does not apply to the county board of commissioners itself.

board needs to approve the call of the emergency session and the public notice, and authorize the same to be posted and distributed by the entity's clerk in accordance with the Act.

In any event, a county board of commissioners must adhere to MCL 46.10 when calling for a special meeting.

X.
Request for Notices

Upon the written request of an individual, organization, firm, or corporation, and upon the requesting party's payment of a yearly fee to cover the cost of printing and mailing, a public body shall send to the requesting party, by first class mail, a copy of the notice. A newspaper, radio, or television station may, upon written request, receive mailed copies of public notices without charge. MCL 15.266.

XI.
Closed Sessions

MCL 15.267 provides that upon a two-thirds roll call vote of the members of a public body elected or appointed and serving, a public body may meet in closed session for any of the following reasons:

1. To consider the purchase or lease of real property up to the time an option to purchase or lease that real property is obtained. [Section 8(d)][not the sale of real estate owned by the public body.]

2. To consult with its attorneys regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial effect on the litigating or settlement position of the public body. [MCL 15.268(e).][17] The attorney must be present in person or by telephone. A public body must state on the record the name of the specific pending litigation that it would be discussing in closed session prior to commencing closed session. *Vermilya v Delta College Board of Trustees*, 325 Mich App 416 (2018).

[17]The county board of commissioners' discussions regarding strategy or settlement of grievance arbitrations would fall within this exception. *See People v Whitney*, 228 Mich App 230, 251-252 (1998), citing *Michigan Millers Mutual Ins Co v Bronson Plating Co*, 445 Mich 558, 570 (1994).

3. To review and consider the contents of an application for employment or appointment to a public office if the candidate requests that the application remain confidential. All interviews of a public body for employment or appointment to a public office shall be held in an open meeting pursuant to this Act except as otherwise provided in this subdivision. [MCL 15.268(f)] [*See* Section XIV, question 8, of this outline for further discussion.]

4. To consider material exempt from discussion or disclosure by State or Federal statute. [MCL 15.268(h).] Section 8(h) has been interpreted to permit a public body to hold a closed session for consideration of a written legal opinion within the attorney-client privilege, but a closed session may not be held for consideration of an oral opinion. [*Booth Newspapers v Wyoming*, 168 Mich App 459, 468 (1988).] The attorney is not required to be present.

Closed sessions may also be held by public bodies for the following reasons without a two-thirds roll call vote:

1. To consider the dismissal, suspension, or disciplining of, or to hear complaints or charges brought against or to consider a periodic personnel evaluation of, a public officer, employee, staff member, or individual agent, if the named person requests a closed hearing. A person requesting a closed hearing may rescind the request at any time, in which case the matter at issue shall be considered thereafter only in open sessions. [MCL 15.268(a).]

2. To consider the dismissal, suspension, or disciplining of a student when the public body is part of the school district, intermediate school district, or institution of higher education which the student is attending, when the student or student's parent or guardian requests a closed hearing. [MCL 15.268(b).]

3. For strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement when either negotiating party requests a closed hearing. [MCL 15.268(c).][18]

4. Partisan caucuses of members of the State Legislature. [MCL 15.268(g).]

5. For a compliance conference conducted by the department of commerce before a complaint is issued. [MCL 15.268(i).]

[18]Section 8(c) of the Act has been interpreted to permit closed strategy sessions only when negotiation of a labor agreement is in progress or about to commence. *Wexford Prosecutor v Pranger*, 83 Mich App 197, 204 (1978).

A roll call vote and the purpose or purposes for calling the closed session is required to be entered into the minutes of the meeting at which the vote is taken. During the closed session, a separate set of minutes is required to be taken.[19] The minutes are required to be retained by the clerk of the public body. However, they are not to be made available to the public and shall only be disclosed as required by a civil action.[20] The minutes are permitted to be destroyed one year and one day after approval of the minutes of the regular meeting at which the closed session was approved. A public body may call a second closed meeting to approve the minutes of a closed session to ensure they are not disseminated to the public. [1986 OAG 6365.]

XII.
Minutes of Meetings

Each public body is required to keep minutes of each meeting, whether closed or open, showing the date, time, place, members present, members absent, and any decisions made. [*See* Section XI regarding minutes for closed meetings.] The minutes are required to include all roll call votes taken at the meeting. Corrections to minutes of public meetings are required to be made not later than the next meeting after the meeting to which the minutes refer. For example, if a meeting was held on January 5, and the next meeting was held on February 5, corrections are required to be made at the February 5 meeting. In addition, the corrected minutes are required to be made available no later than the next meeting after the corrections. Thus, in the above example, if after the February 5 meeting, the next meeting is March 5, the corrected minutes must be available on March 5. The corrected minutes must show both the original entry and the correction. Minutes are public records open to public inspection. They are required to be available at the address designated on posted notices. Copies of minutes are required to be made

[19]Deficiencies in the minutes do not provide grounds for invalidating action taken by a public body going into closed session. The board could reenact the decision to meet in closed session when alerted to a deficiency in the minutes. *Wills v Deerfield Township*, 257 Mich App 541, 554 (2003).

[20]Minutes of a closed session of a public body are exempt from disclosure under the Freedom of Information Act. *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 143 (2004).

available to the public at the reasonable estimated cost for printing or copying. Proposed minutes of open meetings shall be available for public inspection within eight business days after the meeting to which the minutes refer. Approved minutes are required to be available for public inspection within five business days after the meeting at which the minutes are approved by the public body.

XIII.
Penalties

There are provisions in the Act dealing with the right of the public to challenge the validity of a decision of a public body made in violation of the Act. Further, if a public body is not complying with the Act, any person may commence a civil action against a public body to invalidate a decision,[21] or for injunctive relief to compel compliance with the Act or to prevent further Act violations. A person seeking injunctive relief is entitled to recover court costs and attorney fees for the action if they prevail.[22]

A public official who intentionally violates the Act is guilty of a misdemeanor. In addition, a public official who intentionally violates the Act is held personally liable in a civil action for actual and exemplary damages, as well as court costs and actual attorney fees.[23]

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[21]However, the public body may reenact a disputed decision at a subsequent meeting in order to ensure validity of the decision, and to avoid liability exposure for costs and attorney fees. MCL 15.270(5); *Lockwood v Twp of Ellington*, 323 Mich App 392 (2018).

[22]A Court is not required to award actual attorney fees to a plaintiff that prevailed in an Open Meetings Act lawsuit. *Zoran v Twp of Cottrellville*, 322 Mich App 470 (2017). Attorney fees are awardable to a prevailing plaintiff only where injunctive relief is requested and obtained, *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125, 144 (2014), or where there has been an intentional violation of the Act. MCL 15.271(4). Attorney fees are not awardable in an action to invalidate a decision, and no relief can be granted, where the disputed decision was reenacted. *Leemreis v Sherman Twp*, 273 Mich App 691, 709 (2007). The Act does not provide for declaratory relief. *Citizens For A Better Algonac Community Schools v Algonac Community Schools*, 317 Mich App 171 (2016).

[23]An attorney appearing *in pro per* in an Open Meetings Act lawsuit is not entitled to an award of attorney fees when the prevailing party; non-attorney plaintiffs appearing *in pro per* cannot obtain an award of attorney fees. *Omdahl v West Iron County Bd of Ed*, 478 Mich 423, 431 (2007).

XIV.
Specific Questions Regarding Open Meetings Act

1. What is a Quorum?

   The term "quorum" is not defined in the Act. Black's Law Dictionary (8th ed) provides a general definition of a “quorum” as “the minimum number of members (usually a majority of all the members) who must be present for a deliberative assembly to legally transact business.”24

   With respect to a county board of commissioners, MCL 46.3(1) states: “a majority of the members of the county board of commissioners of a county constitutes a quorum for the transaction of the ordinary business of the county.” (Emphasis Added).

   MCL 46.3(2) provides that a county board of commissioners may act based on the votes of the majority of members present. However, there is an exception to this provision when there is a vote on the final passage or adoption of a measure or resolution or the allowance of a claim against the county. In order to pass, in that case, the vote must be of a majority of the members elected and serving.

2. May a public body require individuals wishing to speak or address the body to identify themselves at the time they request recognition?

   The Attorney General held that it is reasonable to require a person to identify themselves and give advance indication that their wish to speak. This would facilitate the orderly conduct of meetings and communications between persons who wish to address the public body. [1977 OAG 5183, p 26.]

3. May a public body limit the time that a public attendee can address the body?

   A public body may limit the time that a person may address the public body. However, the regulation must be reasonable, flexible, and applied in a manner which will encourage greater public participation rather than discourage the exercise of the right of the public to address the meeting. Further, a rule concerning

[24] Members who are excused from being physically present at a public meeting due to military duty or an ADA accommodation, but are still able to participate in the public meeting electronically, may be counted toward a quorum.

the right of a person to address the public body is required to be adopted by the body prior to it becoming effective. Therefore, rules should be promulgated by the public body which specifically indicates that a person wishing to address the public body is limited in time. [1977 OAG 5183.]

4. Does the Act apply to the occasion where members of the public body are invited to address a civic organization and a sufficient number of members of a public body are present to constitute a quorum?

   The Attorney General held that the situation described is neither the "convening" of a public body, nor is a quorum present "for the purpose of deliberating toward or rendering a decision." Therefore, the answer is no. [1977 OAG 5183, at 24-25.]

5. Does the Act require a formal resolution appointing a specific person to post the notice required by Section 5 of the Act?

   The Attorney General held that a person is required to be designated to post the public notices and that such person must be formally chosen by resolution noticed in the minutes of the public body. Therefore, the board of commissioners and other public bodies should formally select a designee by resolution. [1977 OAG 5183.]

6. If a public body does not hold regular meetings at predetermined times, does the Act require that these public bodies establish a schedule of regular meetings?

   In response to this issue, the Attorney General held that organizations are not required to establish a regular meeting schedule as a result of the Act. However, the Attorney General stated that public bodies may not avoid the notice requirements by refusing to establish a regular meeting schedule. The Attorney General held that public bodies which meet only when necessary may continue to meet on this basis and are not subject to the ten day notice requirements of Section 5(2) of the Act. However, they must observe the requirements of the eighteen hour notice for special meetings provided for in Section 5(4) of the Act. [1977 OAG 5183.]

7. For purposes of calling a closed meeting under Section 7(1) of the Act, must there be a two-thirds roll call vote of all members of the public body, or only a two-thirds roll call vote of members attending (assuming the existence of a quorum)?

The Attorney General held that where there is uncertainty, the Act should be read to favor open meetings. The Attorney General further held that this principle leads to a reading of Section 7(1) to mean that the two-thirds vote must be of the members of the public body appointed to and serving, and not merely those attending that particular meeting. In other words, if a quorum of the public body is present, but two-thirds of the public body's members are not present, then the public body is incapable of calling a closed session at that meeting. [1977 OAG 5183.]

8. Must all interviews with respect to employment applications be held in public?

This issue was presented specifically in reference to the Michigan Employment Security Commission. However, the same can be analogized to other public bodies. The Attorney General held that if a public body either voluntarily or by mandate of its enabling statute reserves final decision for employment to certain levels of employment to itself, there is no exception which would allow such considerations to be held in a closed session. Section 8(f) of the Act allows a closed session to review and consider the specific contents of an application for employment or appointment to a public office when the candidate requests that the application remain confidential. The contents of the application may be reviewed in closed session, but all interviews for employment or appointment to a public office must be held in an open meeting. However, in reference to lower level employment applications, the Attorney General held:

> To require a public body to conduct all interviews for all positions in public and attach thereto all of the requirements for public notice is beyond the contemplation of the Act. Such a requirement would occupy an inordinate amount of the time of the public body in conducting employment interviews. Therefore, it is my opinion that the holding in the previous question is limited to those cases where employment interviews must be held by the body itself, either because of the enabling statute or as a matter of policy adopted by that body. In all other cases, where the public body is not required to interview the applicant, interviews for employment may be conducted in private by staff of the public body.

To summarize, the Section 8(f) requirements do not apply to all lower level employment situations. It applies only to applications for employment or

appointment in a public office where the interview, for one reason or another, is conducted by the public body. [1977 OAG 5183.]

Regarding public office candidates, a Supreme Court decision addressed the issue of screening and interviewing candidates by a committee. In *Herald Company v City of Bay City*, 463 Mich 111, 135-136 (2000), the city manager interviewed and screened applicants for the position of fire chief in private, and then recommended a single candidate to the city commission, who summarily appointed the candidate. The Supreme Court held that the city manager was not a "public body" as defined by the Act, but was an individual executive making a recommendation to the city commission based on the authority given to him under the city charter. Since the Legislature did not include an "individual" in the definition of "public body," there was no violation of the Act.

9. Does the Act apply only to committees and subcommittees composed of members of the public body, or to any group of persons appointed as a committee/subcommittee by the public body?

The Act applies where the "recommendation" of a committee constitutes a decision. For example, a committee is given authority to review all applicants for a position. The committee is to only refer the top three candidates to the full board. There are ten applicants. This constitutes a decision because only a limited number of applicants are referred. In such a situation, the full board does not have the opportunity to deliberate on matters on which the standing committee made a "decision." The Act applies to this committee because the committee has been "empowered to act on matters in such a fashion as to deprive the full body of the opportunity to vote on the matter" and because the committee's decisions are "an exercise of governmental authority which effectuates public policy." *Booth News v U of M Board of Regents,* 444 Mich 211, 216-219 (1993); 1998 OAG 7000.

As this area of law is complex and can hinge on small details, it is best to comply with the Act if there is any doubt. Very often a discussion can become a "deliberation" toward a decision and the meeting would then be subject to the Act. MCL 15.263(3).

10. Does the Act permit a member of a public body to participate in a meeting by telephone?

Yes, so long as a quorum is physically present for the meeting, additional board members may participate by telephone conference call.[25] *Goode v DSS*, 143 Mich App 756, 759-760 (1985). The off-site member should be on speaker phone so that the public may hear all members conduct the business of the public body. Participation by telephone includes the ability to make motions and vote on motions if excused for military leave or under the ADA. However, the Act does not permit proxy voting by an absent member, i.e., where one member delegates to another member of a public body that member's power to vote. [2009 OAG 7227.]

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[25] A Board member who participates by telephone or video conference could be paid or denied payment by Board policy. There could also be maximum per diems per year for participating by telephone or video conference. Whatever decision is made should be included in the Board rules.