

Effective February 2, 2012: Disclosure of Records Scheduled for Discussion at Open Meetings

Members of the public have on many occasions complained that they cannot fully understand discussions among members of public bodies, even though the discussions occur in public. For example, a board member might refer to the second paragraph of page 3 of a record without disclosing its content prior to the meeting. Although the public has the right to be present, the ability to understand or contribute to the decision-making process may be minimal and frustrating.

Effective February 2, 2012, a new section 103(e) is added to the Open Meetings Law. The purpose of the legislation is simple: those interested in the work of public bodies should have the ability, within reasonable limitations, to see the records scheduled to be discussed during open meetings prior to the meetings. The language of the amendment appears in the text of the Open Meetings Law.

The amendment addresses two types of records: first, those that are required to be made available pursuant to FOIL; and second, proposed resolutions, law, rules, regulations, policies or amendments thereto. When either is scheduled to be discussed during an open meeting, the law requires that they be made available to the public, to the extent practicable, either prior to or at the meeting.

To comply with the new provisions, copies of records must be made available to the public prior to or at the meeting for a reasonable fee, or by posting them online prior to the meeting. The amendment authorizes an agency to determine when and what may be “practicable” in making records available.

It is important to stress that the amendment involves an effort to take advantage of today’s information technology to promote transparency and citizens’ participation in government, and to reduce waste. If the agency in which a public body functions (i.e., a state department, a county, city, town, village or school district) “maintains a regularly and routinely updated website and utilizes a high speed internet connection,” the records described above that are scheduled to be discussed in public “shall be posted on the website to the extent practicable as determined by the agency...”

Posting records online can reduce an agency’s costs associated with requests made under FOIL. Staff does not have spend time retrieving paper records, photocopying the records, or carrying out the administrative tasks involved with charging fees for copies.

The phrase quoted twice in section 103(e), “to the extent practicable as determined by the agency,” is intended to ensure that the amendment is implemented reasonably and without undue burden or cost to an agency. Many units of government are small and lack information technology resources or the knowledge or expertise to implement the new provision. If that is so, and they do not have the ability to give effect to the amendment with reasonable effort, they

are not required to do so. In recognition of fiscal realities, the new provision specifies that an agency “may, but shall not be required to, expend additional moneys to implement the provisions of this subdivision.”

We emphasize that the potential obligation to make records available on request or online is limited to records that are “scheduled to be the subject of a discussion” during an open meeting. If there is a basis for conducting an executive session, a portion of a meeting that may be closed, records scheduled to be discussed during the executive session would not be required to be disclosed. Further, if, for example, a proposed policy offered by the head of an agency, a mayor, a town supervisor or a superintendent of schools was preceded by recommendations or opinions expressed by staff or members of a public body, those recommendations, opinions or similar materials fall outside the coverage of the amendment and (may but) need not be disclosed (see FOIL, section 87(2)(g)).

Through the disclosure of records scheduled to be discussed during open meetings, the public can gain the ability to better understand and appreciate the issues faced by government. Interested and civic-minded citizens can offer information and points of view that can assist in improving the operation of government to the benefit of our communities.