

Open Meetings

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Overview

- What meetings must be open?
- What meetings are prohibited?
- What are the notice requirements?
- What is the right of access?
- What are the basic rules for closed sessions?
- What happens if the law is violated?

The Basics: Open Meetings

Official meetings of public bodies must be noticed and open to the public unless the subject falls within an exception allowing a closed session meeting.



What's a public body?

- Must have at least two people
- Must be created by a governmental person or body with authority to create it
- Must carry out any of these functions:
 - Legislative, policy-making, quasi-judicial, administrative, or advisory
- In other words, doing any aspect of government work

Statutory Exception for Staff Only

- Does not apply to meetings only of employees
- But note: an employee group with final decision-making authority may be covered



What's an Official Meeting?

- Majority of the members of the public body
- Gather together simultaneously, in person or electronically
- For the purpose of:
 - Conducting a hearing
 - Deliberating (including receiving information)
 - Voting on public business
 - Otherwise transacting public business
- In other words, doing any aspect of government work

Majority vs. Quorum

- In most cases, a majority for purposes of “official meetings” is the same as a quorum under G.S. 160A-74 and 153A-43.
- Note special case for cities:
 - Five member board plus mayor: quorum is four
 - Three members can take action if non-voting mayor
 - Three is a functional majority for an official meeting under the open meetings law

Social gatherings are OK!



There must be no discussion of public business among a majority of the public body

More on Public Bodies

- A committee of a public body is itself a separate public body
- Advisory committees entirely composed of private citizens are public bodies
- Note that small public bodies are particularly challenging.
 - A two-person or three person committee conducts an official meeting when two people are talking (or emailing or texting) each other about the business of the body.

Is This an Illegal Meeting?



Answer: Members elect are not yet members of a public body, so there is no official meeting.

Three members elect – not yet sworn in - meet with two members of the current five member board.

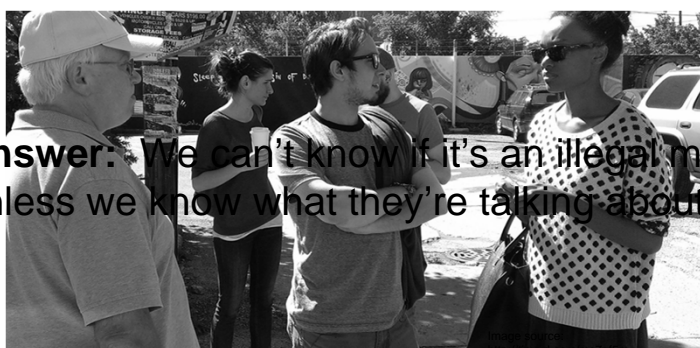
Is This An Illegal Meeting?



Answer: Members are running for office, not transacting the business of the public body.

Three members of a five member board participate in a candidate forum.

Is This An Illegal Meeting?

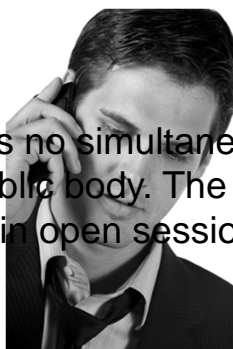


Answer: We can't know if it's an illegal meeting unless we know what they're talking about.

After a board meeting has adjourned, a majority of the board is seen continuing to talk in the parking lot.

Is This An Illegal Meeting?

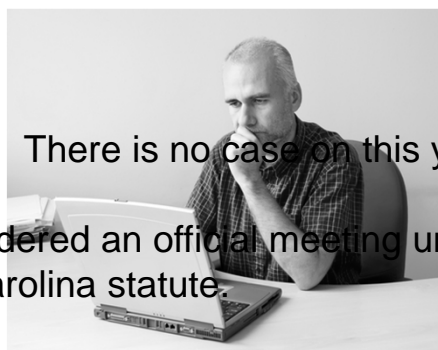
Answer: There is no simultaneous gathering of a majority of the public body. The board will still have to act as a board in open session to make a decision.



A board member calls each other member individually to discuss a matter that will come before the board and to urge them to support his proposed approach.

Is This An Illegal Meeting?

Answer: There is no case on this yet, but this could be considered an official meeting under the North Carolina statute.



A majority of board members engage in an email discussion, responding directly to each other in a nearly real time electronic conversation.

Note On Group Email

- There is no problem with a single email that includes all or a majority of a public body.
- The open meetings law issue arises only if there is an electronic simultaneous exchange of emails – analagous to a conversation.
- Note that the emails are public records (unless an exception applies).

What Happens When a Majority Shows Up?

- Board members attend a local meeting or event.
- Three member committee of a five-member board; fourth member attends a meeting.
- Majority of board attends a partisan political meeting.

Key Question: Are they gathering together to transact the business of the public body?

Does The Law Apply?

Answer: The law generally does not apply to private entities, even if they receive significant public funding.
The contract can require it.



The volunteer fire department is a private nonprofit organization, which receives a majority of its funding from the a dedicated tax levied by the county. Is it subject to the open meetings law?

Private Organizations

- North Carolina Courts have applied transparency requirements to private entities only when they are substantially controlled by a governmental body.
- Key Factors in control analysis
 - Appointment and removal of board members
 - Oversight and control of fiscal affairs
 - Transfer/residual rights in assets
- Other factors:
 - Created by government
 - Staffed by government
 - Carrying out mandated function

Prohibited Meetings

- Open meetings law requires notice and access
- In effect, it prohibits meetings if notice and access is not possible
 - Email communications (even if emails are publicly available)
 - Meetings at inaccessible locations

The Public Agency's Obligation

- Provide notice and opportunity to attend
 - Regular meetings: notice filed, posted, on website
 - Special meetings: 48 hour notice to “sunshine list”; posted on website
 - Emergency meetings: notice to news media who have requested it, in same manner as given to members of the public body
 - Recessed meetings: post on website
- Create and retain minutes of meetings and general accounts of closed sessions.

Limited Authority for Special and Emergency Meetings

- Special meetings
 - Must state the purpose of the meeting
 - Probable violation of the law to take up matters not covered by the notice, even if all members are present and consent
- Emergency meetings
 - Must be a matter that cannot wait for 48-hour special meeting notice
- Must comply with additional notice requirements for governing board members in 153A-40 and 160A-71.

The Right of Access

- Attend the meeting
- May record or video tape
- No right to speak except at monthly public comment period



Meeting Location

- Must be of reasonable size and must be accessible, but there is no legal obligation to accommodate everyone if there is a larger than expected crowd.
- Problems:
 - Restaurants
 - Private homes
 - Gated communities
 - Site visits
- Note limitation on county governing board meetings outside of the county

Closed Sessions

Limited authority to meet in closed session



Process: Motion in open session, stating general purpose of closed session

Closed Session Purposes*

- Preserve confidentiality of records
- Preserve attorney client privilege
- Discuss economic development
- Discuss bargaining position for property acquisition
- Consider performance, qualifications, appointment, of public employees and public officers (not members of the board itself or other boards)
- Matters involving alleged criminal misconduct

**Partial list: See G.S. 143-318.11 for complete description.*

Motions for Closed Session

- Must state the authorized purpose of the closed session (need not cite the statute)
- Special Rules for:
 - Preservation of confidential records: Must cite the law that makes the record confidential.
 - Attorney-client privilege: If there is litigation, must identify the parties.

Talking about closed sessions

- No prohibition in the open meetings law
- Can't disclose information that is confidential under some other law



Minutes and General Accounts

- Required for every official meeting, including committees.
- Minutes:
 - document legal requirements for valid meeting (quorum present)
 - Record of actions taken
 - Need not contain summary of discussion
- General Accounts:
 - Summary of meeting; a person who did not attend can have a reasonable understanding of what transpired

Violations of the Law: What Happens?

- Board takes action in a closed session to increase the manager's salary.
- Email records indicate that a majority of the board discussed a pending rezoning matter in a near real time exchange.
- Board members take up a matter not included in a special meeting notice.

Are they automatically void?

Remedies Under the Statute

- Requires a person who is denied access to the meeting to file a lawsuit:
 - Court declaration that a violation has occurred
 - Injunction to prevent future violations
 - Invalidation of action taken, based on factors set out in the statute, in the trial judge's discretion
 - Court may order payment of attorneys fees to prevailing party. Individual board members may be liable if knowingly and intentional. No liability if acting upon advice of attorney

Opportunity to Cure?

- Actions are not automatically invalid, but there is a risk of challenge.
- Technical defects may be curable by taking action in a proper meeting.

Aspects of Meetings That Are Not Governed by the Open Meetings Law

- Public hearings
- Quorum
- Rules of procedure
- Voting Rules
- Public Comment Periods

Remote Participation In Meetings

- Open Meetings Law: requires notice and access to electronic meeting, but does not authorize them for any specific public body.
- County and city governing board have specific quorum requirements.
- Legal issue: Must a board member be physically present to count toward quorum?
- Board can authorize for appointed boards

Practical Implications

- Can be a legal risk if the person is necessary for a quorum or is the deciding vote
- Otherwise, probably no legal risk
- Board must decide whether to allow, and under what circumstances
- Make sure technology works before the call
- Local Government Law Bulletin on Remote Participation