

OPEN MEETINGS ACT

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<http://www.house.mi.gov/hfa>

House Bill 6423 as introduced
Sponsor: Rep. Julie Calley
Committee: Rules and Competitiveness
Revised 11-9-22

Analysis available at
<http://www.legislature.mi.gov>

SUMMARY:

House Bill 6423 would amend the Open Meetings Act to revise and reorganize several of its provisions. For the most part, the bill would retain current law, but it would restructure and rephrase those provisions for clarity. Those kinds of changes are not described below. The bill also would make some substantive changes to the act, which are described below, along with proposed new provisions based on court decisions or attorney general opinions regarding the current act. Note that those kinds of changes may not always be flagged as such.

Generally speaking, the Open Meetings Act requires all meetings of a **public body** to be held in a place available to the public and requires all decisions of a public body to be made at a meeting open to the public. The act prescribes rules for posting public notices of meetings and for making minutes available to the public. The act allows meetings of a public body to be held remotely under certain circumstances, and also provides conditions under which a public body can meet in a closed session.¹ The act defines **public body** as any of the following:

- A state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function.
- A lessee of a body described above that is performing an essential public purpose and function under the lease agreement.
- The board of a nonprofit corporation formed by a city under section 40 of the Home Rule City Act. (These are nonprofit corporations generally formed for economic development purposes.)

Defined terms

The bill would add or amend definitions for terms that are used throughout the act. It also would move some definitions around to put the terms in alphabetical order.

The bill would newly define **deliberation** as the act of carefully considering issues and options before making a decision or taking some action. (This definition is based on *Black's Law Dictionary* and has been cited by the Michigan Court of Appeals in the context of the Open Meetings Act. It would also apply to the verbs **deliberates**, **deliberating**, etc.)

The bill would newly define **online** as meaning on a portion of a public body's website that is fully accessible to the public, such as a homepage or separate webpage dedicated to public notices or minutes. (This definition is drawn from language now elsewhere in the act regarding current requirements for the online posting of meeting notices.)

¹ For an overview of the act, see the Attorney General's Open Meetings Act Handbook: https://www.michigan.gov/-/media/Project/Websites/AG/open-meetings/OMA_handbook.pdf

The bill would retain the current definition of **public body** (see above) and would add that public body does *not* include any of the following:²

- A committee or subcommittee that is merely advisory and is capable only of making recommendations concerning the exercise of governmental authority.
- A single person.
- A private, nonprofit corporation.

The bill would retain the current definition of **closed session** (a meeting or part of a meeting closed to the public) and would newly add that closed session includes a quorum of a public body deliberating by email, text message, or other electronic communication during an open session. (Existing references to “closed hearing” in the act would be changed by the bill to “closed session.”)

The bill also would retain the current definition of **meeting**: 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, or any meeting of the board of a nonprofit corporation formed by a city under section 4o of the Home Rule City Act. (Those nonprofit corporations are generally formed for economic development purposes.) The bill would amend this definition to specify that **meeting** includes both formal and informal convenings of a public body. The bill also would add that **meeting** does not include a social, professional, or chance gathering that is not designed to avoid the act. (This provision is current law now elsewhere in the act.) The bill would newly provide examples of such social, professional, or chance gatherings that are not considered **meetings** under the act:³

- Addressing a civic organization.
- Listening to neighborhood concerns.
- Observing demonstrations.
- Attending a workshop, training, seminar, informational gathering, or professional conference as long as the event is designed to convey information about areas of interest common to all participants.

Public notices of meetings

The bill would require public notices to contain the public body’s website and email address, in addition to the currently required name, address, and telephone number.

The bill would delete a provision that now requires a public body to send copies of its meeting notices by first-class mail to any individual, organization, firm, or corporation that requests them and pays an annual fee to cover the costs of printing and mailing them.

A related provision now requires a public body to provide copies of its meeting notices for free to Michigan newspapers, radio stations, and television stations that request them in writing. The bill would refer instead to Michigan “media outlets.”

The bill would add provisions generally requiring public bodies to post meeting notices and minutes online. It would remove a reference to using cable television to post notices, and it

² These exceptions are drawn from court decisions and attorney general opinions.

³ These examples are drawn from attorney general opinions under which, generally speaking, these events are not considered meetings subject to the act *as long as* members of the public body do not deliberate toward a decision of that body or make such a decision.

would remove a requirement that notice of a meeting held in a residential dwelling must be given in a display advertisement in a local newspaper.

Currently, a public body that is part of a larger institution (such as an agency within a state department or a board within a university) must post its public notices at the principal office of that larger entity in addition to its own principal office. The bill would delete this requirement.

Under the bill, in addition to posting public notices at its principal office, online, and anywhere else the public body considers appropriate, a public body in the legislative branch would have to post its notices in the Capitol building and a public body in the judicial branch would have to post its notices in the Hall of Justice.

The bill also would require a public notice to be accessible to the public until the meeting that is the subject of the notice is completed or canceled. It would delete a provision that says, “A durational requirement for posting a public notice of a meeting under this act is the time that the notice is required to be accessible to the public.”

Rules for addressing a public body

The act provides that a person must be allowed to address a meeting of a public body under rules established and recorded by the public body. The bill would retain this provision and add that those rules may not be applied to deny a person the right to address the meeting of the public body (such as by limiting all public comment to one hour).⁴

In addition, the act now prohibits excluding a person from a meeting open to the public, except for a breach of the peace committed at the meeting. The bill would additionally allow a person to be excluded for a threat of criminal violence against a member of the public body.

Closed sessions

Currently, a school-related public body can meet in closed session to consider the dismissal, suspension, or disciplining of a student if the student or the student’s parent or guardian requests a closed hearing. The bill would instead require the public body to meet in closed session unless the student or the student’s parent or guardian requests an open session. The person requesting an open session also could later rescind the request, after which the matter would have to be considered in closed session.

In addition, a public body now may meet in closed session to consider the purchase or lease of real property, up to the time the public body obtains an option to purchase or lease the property. The bill would allow a public body to meet in closed session to consider the *sale*, purchase, or lease of real property, and would retain the requirement that the matter be considered in open session once an option to purchase or lease the property has been obtained.

The bill would require the minutes for a closed session of the public body to show (as do open session minutes) the date, time, place, members present, members absent, decisions, actions, roll call votes, and the reason or reasons for which a closed session is held.

The bill also would newly provide that a majority vote of the members elected or appointed and serving is required to leave a closed session. (The act is currently silent on this matter. The

⁴ This proviso is drawn from an opinion of the attorney general.

Attorney General's Open Meetings Act Handbook suggests as best practice recommending a majority vote of members present to end the closed session.)

Venue for suing state public body

Except for suits that must be brought before the court of appeals, the act now provides that lawsuits brought under the act against a state public body must be filed in the circuit court for Ingham County. The bill would instead require those suits to be brought before the Court of Claims.⁵

Frivolous suits

In two sections that allow a public body to be sued for not complying with the act (to challenge a tainted decision or action of the body or to get a court order addressing the noncompliance), the bill would add a provision saying that if the court finds that the lawsuit was *frivolous*, the court must award to the *prevailing party* reasonable costs and attorney fees.

For purposes of the above provisions, the terms *prevailing party* and *frivolous* would have the meanings given them in section 2591 of the Revised Judicature Act (which generally allows the award of costs and fees to the prevailing party in a civil lawsuit found to be frivolous):

Prevailing party would mean a party who wins on the entire record.

Frivolous would mean that at least one of the following conditions is met:

- The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
- The party had no reasonable basis to believe that the facts underlying its legal position were in fact true.
- The party's legal position was devoid of arguable legal merit.

Fines and damages

Currently, a member of a public body who intentionally violates the act is guilty of a misdemeanor punishable by a fine of up to \$1,000. If a member intentionally violates the act more than once in the same term, they are guilty of a misdemeanor punishable by a fine of up to \$2,000 or imprisonment for up to one year, or both. In addition, a member of a public body who intentionally violates the act is personally liable in a civil action for actual and exemplary damages of up to \$500 total, plus *reasonable costs and actual attorney fees*.

The bill would increase all of the above dollar amounts fivefold, as follows:⁶

- Misdemeanor fine for intentional violation: up to \$5,000.
- Misdemeanor fine for second intentional violation in same term: up to \$10,000.
- Personal liability for actual and exemplary damages for intentional violation: up to \$2,500 total. (The bill also would change the description of awardable costs and fees to *reasonable costs and attorney fees*.)

⁵ The Court of Claims generally has jurisdiction over all civil actions brought against the state or its departments or agencies, including constitutional claims, prisoner litigation, tax-related suits, highway defect actions, medical malpractice suits, contract disputes, and other claims for monetary damages. The Michigan Supreme Court assigns four judges of the Court of Appeals to serve on the Court of Claims, where each case is heard by a single judge.

⁶ Note that these amounts have not been increased since 1976, when the Open Meetings Act was first enacted. According to the U.S. Bureau of Labor Statistics, \$1,000 in January 1977 has the same buying power as \$5,074 in September 2022. See https://www.bls.gov/data/inflation_calculator.htm

The “rule of lenity”

The bill would add a new provision to prohibit a court from using the “rule of lenity” to interpret the act. The rule of lenity is a principle available for use by courts in interpreting criminal law. The rule provides that when a criminal statute is unclear or could have more than one interpretation, the court should apply it in the way that is most favorable to the person accused of the crime. The bill would prohibit application of this guideline by the courts in interpreting the act.⁷

Provisions concerning the legislature

The bill would remove some current provisions that pertain to the legislature, including those that do the following:

- Allow the legislature or a house of the legislature to limit the right to address the body to prescribed times at hearings and committee meetings.
- Provide an exception from public notice requirements when either house is adjourned or recessed for less than 18 hours.
- Prescribe unique posting requirements for the meeting notices of legislative conference committees.

Meetings held electronically or with remote attendance

The bill does not include the section of the Open Meetings Act that primarily deals with meetings held remotely, and it would remove some provisions addressing that subject from the sections that it does include. According to House committee testimony on October 13, 2022, those remote meeting provisions are addressed in a separate bill in a different committee.

Obsolete provisions

Finally, the bill would remove some provisions from the act that are no longer effective (for example, social distancing requirements that took effect December 22, 2020, and applied only through March 31, 2021).

MCL 15.261 et seq.

FISCAL IMPACT:

House Bill 6423 would have an indeterminate fiscal impact on the state and on local units of government. The number of violations that would occur under provisions of the bill is not known; therefore, it is not possible to estimate the amount of additional revenue that would be collected. Under the bill, penal fines for misdemeanor offenses would be increased from \$1,000 to \$5,000 and from \$2,000 to \$10,000 for a second offense in the same term. Any increase in penal fine revenue would increase funding for public and county law libraries, which are the constitutionally designated recipients of those revenues.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.

⁷ This prohibition is drawn from a 1998 decision of the Michigan Court of Appeals that held that the rule of lenity does not apply in interpreting the Open Meetings Act.