Office of the
Attorney General

Idaho
Open Meeting Law
Manual

Idaho Code §§ 74-201 through 74-208



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INTRODUCTION

Open and honest government is fundamental to a free society. The Idaho Legislature formalized our state's commitment to open government by enacting the Idaho Open Meeting Law in 1974. The Open Meeting Law codifies a simple, but fundamental, Idaho value: The public's business ought to be done in public.

One of my duties as Attorney General is to ensure that state agencies and officials comply with the Idaho Open Meeting Law. The 44 elected county prosecuting attorneys have the same duty with regard to agencies and officials of local government.

My office is committed to assisting Idaho's state and local officials in complying with their obligation under this law. Toward that end, my office regularly conducts training sessions for state and local officials throughout Idaho.

The Office of the Attorney General has prepared this updated manual for your use and reference. Its purpose is to inform government agencies of their obligations, and citizens of their rights, under Idaho's Open Meeting Law.

Sincerely,

RAÚL R. LABRADOR
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POLICY CONSIDERATIONS UNDERLYING THE OPEN MEETING LAW

The Idaho Open Meeting Law[1] was designed to ensure transparency of the legislative and administrative processes within state and local governments. The Legislature articulated this policy in the Act's first section:

> The people of the state of Idaho in creating the instruments of government that serve them, do not yield their sovereignty to the agencies so created. Therefore, the legislature finds and declares that it is the policy of this state that the formation of public policy is public business and shall not be conducted in secret.[2]

Open meetings offer the public a chance to observe the way their government operates and to influence their government in positive and important ways. Closed meetings often can lead to distrust of governmental decisions and acts.

Those who conduct meetings must remember this policy above all when deciding whether a meeting should be open. If a meeting is closed, there must be a compelling reason, supported by the statute itself, or by subsequent court rulings.

Remember, when in doubt, open the meeting.

[1] Idaho Code §§ 74-201 to 74-208.
[2] *Id.* at § 74-201.

QUESTIONS AND ANSWERS

PUBLIC BODIES OR AGENCIES COVERED BY THE OPEN MEETING LAW

Question No. 1: What public bodies or agencies are subject to the Open Meeting Law?

Answer: The Open Meeting Law provides: "[A]ll meetings of a *governing body* of a *public agency* shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act. . . ."[3] "Governing body" is defined to mean the members of any public agency "with the authority to make decisions for or recommendations to a public agency regarding any matter."[4] "Public agency" is defined to encompass various categories of governmental entities and subdivisions at all levels of government.[5] The governing bodies of public agencies that are created by or pursuant to statute, as well as public agencies that are created by the Idaho Constitution, are subject to the Open Meeting Law.[6] The only public agencies that are statutorily exempt from the Open Meeting Law are the courts and their agencies and divisions, the judicial council and the district magistrates commission.[7] Deliberations of the Board of Tax Appeals, the Public Utilities Commission and the Industrial Commission, in a fully submitted contested case proceeding, are also exempted from the requirement that they take place in an open public meeting.[8]

Question No. 2: Does the Open Meeting Law apply to a public agency headed by a single individual as contrasted with a multi-member body?

Answer: No. Section 74-202(5) defines a governing body to mean "the members of any public agency *that consists of two (2) or more members*, with the authority to make decisions for or recommendations to a public agency regarding any matter." (Emphasis added.) By definition, the Open Meeting Law applies only to a governing body which consists of two or more members and thus

[3] Idaho Code § 74-203(1) (emphasis added).
[4] Idaho Code § 74-202(5).
[5] Idaho Code § 74-202(4).
[6] Attorney General Opinion No. 77-30, 1977 Idaho Att'y Gen. Ann. Rpt. 180.
[7] Idaho Code § 74-202(4)(a).
[8] Idaho Code § 74-203.

does not apply to a public agency headed by a single individual.

This also extends to *employees* of a public agency headed by a single individual; meetings held by employees of a department headed by a single individual (or multiple parties, for that matter) do not have to be open to the public. An illustrative example of this principle arose in the 2008 case of Safe Air For Everyone v. Idaho State Dep't of Agriculture.[9] There, the Idaho State Department of Agriculture (ISDA) invited representatives from federal, state, and tribal agencies to a meeting to discuss issues surrounding crop residue burning. The meeting was closed to the public. Several employees of the ISDA attended the meeting, but the director did not.

An environmental group sued the ISDA, arguing that the employees' participation in the meeting constituted a violation of the Open Meeting Law because the director had delegated decision-making authority to the employees, thus making the employees a "governing body." The Supreme Court disagreed, stating that:

> By definition, a 'governing body' [under the Act] must have 'the authority to make decisions for or recommendations to a public agency regarding any matter.' The employees do not have '*the* authority' to make decisions for or recommendations to the ISDA. Any decision they make can be countermanded by a supervisor, and their supervisor can likewise deny them permission to make recommendations. . . . [*T]he authority* to make decisions for an agency or recommendations to an agency must be statutorily based.[10]

Of course, it should be noted that under the Idaho Administrative Procedure Act (IDAPA) various state agencies must hold open public meetings when they adopt rules or when they determine certain contested cases.[11] The open public meeting requirements of the IDAPA apply regardless of whether the public agency is headed by a single individual or by a multi-member body.

[9] 145 Idaho 164, 177 P.3d 378 (2008).
[10] *Id.* at 168, 177 P.3d at 382.
[11] Idaho Code §§ 67-5201 to 67-5292.

Question No. 3: When is a subagency of a public agency subject to the Open Meeting Law?

Answer: A subagency of a public agency is subject to the Open Meeting Law if the subagency itself "is created by or pursuant to statute or executive order of the governor, ordinance or other legislative act."[12] In Cathcart v. Anderson, the Washington Supreme Court interpreted a Washington statute similar to section 74-202(4)(d). The court held that, under the language "created by or pursuant to," it is not necessary that a statute, ordinance or other legislative act expressly create a subagency so long as there is an enabling provision which allows that subagency to come into existence at some future time.

Question No. 4: Are advisory committees, boards and commissions subject to the Open Meeting Law?

Answer: The Open Meeting Law defines "public agency" to include "any subagency of a public agency which is created by or pursuant to statute or executive order of the governor, ordinance, or other legislative act,"[13] and "governing body" to include any body "with the authority to make decisions for or *recommendations* to a public agency regarding any matter."[14] Thus, advisory committees, boards and commissions are subject to the Open Meeting Law if the body is created by or pursuant to statute, ordinance, or other legislative act and if the body has authority to make recommendations to a public agency.

In contrast, an administrative committee, board or commission is not subject to the Open Meeting Law if it is not entrusted with the formation of public policy, but merely carries out the public policy established by a governing body, and if its activities do not constitute the making of "decisions for or recommendations to" a public agency.[15] Likewise, the Open Meeting Law does not apply to voluntary, internal staff meetings if the group is not created by or pursuant to statute, ordinance or other legislative act, even though the

[12] Idaho Code § 74-202(4)(d); Cathcart v. Anderson, 85 Wash. 2d 102, 530 P.2d 313 (1975); Attorney General Opinion No. 7-75, 1975 Idaho Att'y Gen. Ann. Rpt. 22.
[13] Idaho Code § 74-202(4)(d).
[14] Idaho Code § 74-202(5) (emphasis added).
[15] Idaho Water Resources Board v. Kramer, 97 Idaho 535, 572, 548 P.2d 45, 72 (1976).

discussions may lead to recommendations to the governing body.[16] Generally, however, if you are ever unsure of whether a meeting should be open, it is this Office's recommendation to err on the side of opening the meeting.

Question No. 5: Does the Open Meeting Law apply to the governor?

Answer: The Open Meeting Law has no application to the governor when he is acting in his official executive capacity, since the Open Meeting Law does not apply to a public agency headed by a single individual.

CHARITABLE ORGANIZATIONS (501C(3)) AND HOMEOWNER'S ASSOCIATIONS

Question No. 6: Do charitable organizations have to comply with the Idaho Open Meeting Law?

Answer: The Open Meeting Law applies only to governmental entities. Typically, charitable organizations are private. Generally, nonprofit organizations are governed by their chartering documents and bylaws. Additionally, title 30, chapter 3 of the Idaho Code, provides the legal foundation for Idaho nonprofits. Consult the chartering documents, bylaws and Idaho Code, title 30, chapter 3, to determine the requirements of corporate records and meetings.

Question No. 7: Do homeowner's associations have to comply with the Idaho Open Meeting Law?

Answer: No. The Open Meeting Law applies only to governmental entities. Homeowner's associations are private entities. Homeowner's associations are generally governed by agreements between the members and the association and their bylaws. Members should consult their association documents and bylaws to determine the association rules for meetings.

[16] *See* Safe Air For Everyone v. Idaho State Dep't of Agriculture, 145 Idaho 164, 177 P.3d 378 (2008); People v. Carlson, 328 N.E.2d 675 (Ill. App. Ct. 1975); Bennett v. Warden, 333 So.2d 97 (Fla. 1976).

PUBLIC ACTIONS OR ACTIVITIES COVERED BY THE OPEN MEETING LAW

Question No. 8: What constitutes a meeting under the Open Meeting Law?

Answer: The Open Meeting Law defines "meeting" to mean "the convening of a governing body of a public agency *to make a decision or to deliberate toward a decision* on any matter."[17] "Decision" is then defined to include "any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, *at any meeting at which a quorum is present. . . .*"[18]

The term "deliberation" is also a defined term and means "the receipt or exchange of information or opinion relating to a decision, but shall not include informal or impromptu discussions of a general nature that do not specifically relate to a matter then pending before the public agency for decision."[19] Note that this does not require any discussion or preliminary decision making. Even the receipt of information relating to a "decision"—i.e., a measure on which the governing body will have to vote—amounts to deliberation, and therefore triggers the definition and requirements of a "meeting" under the Open Meeting Law.

Question No. 9: Does the term "meeting" include such things as informal gatherings, briefing sessions, informal discussions, attendance at social functions, etc.?

Answer: As noted above, a "meeting" is the convening of a governing body to make a decision or deliberate toward a decision. Additionally, a quorum must be present.[20]

The California Court of Appeals discussed the dual facets of deliberation and action in Sacramento Newspaper Guild v. Sacramento County Board of Supervisors:

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[17] Idaho Code § 74-202(6) (emphasis added).
[18] Idaho Code § 74-202(1) (emphasis added).
[19] Idaho Code § 74-202(2).
[20] Idaho Water Resources Board v. Kramer, 97 Idaho 535, 571, 548 P.2d 45, 71 (1976).

> It [California's open meeting law] declares the law's intent that deliberation as well as action occur openly and publicly. Recognition of deliberation and action as dual components of the collective decision-making process brings awareness that the meeting concept cannot be split off and confined to one component only, but rather comprehends both and either. To "deliberate" is to examine, weigh and reflect upon the reasons for or against the choice . . . . Deliberation thus connotes not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision.[21]

The California court then reasoned and ruled:

> An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a non-public pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry in discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices. As operative criteria, formality and informality are alien to the law's design, exposing it to the very evasions it was designed to prevent. Construed in light of the Brown Act's objectives, the term "meeting" extends to informal sessions or conferences of board members designed for the discussion of public business.[22]

A similar result was reached by the Florida Supreme Court in the case of City of Miami v. Berns wherein the Florida court ruled that public officials violate Florida's open meeting law when they meet privately or secretly and transact or agree to transact public business at a future time in a certain manner.[23] The Florida court went on to

[21] Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 69 Cal. Rptr. 480, 485 (Cal. Ct. App. 1968).
[22] *Id*. at 487.
[23] City of Miami v. Berns, 245 So.2d 38 (Fla. 1971).

state that, regardless of whether a meeting or gathering is formal or informal, "[i]t is the law's intent that any meeting, relating to any matter on which foreseeable action will be taken, occur openly and publicly."[24]

The same considerations must be applied with respect to the Idaho Open Meeting Law. Therefore, it is the opinion of the Attorney General that the provisions of the Open Meeting Law must be complied with whenever a quorum of the members of the governing body of a public agency meets to decide or deliberate on matters which are within the ambit of official business. Those meetings can be formal, informal, or social. So long as a quorum is present and the intent is to deliberate or make a decision, then the meeting must be open.

The requirement that the Open Meeting Law be complied with whenever a quorum of a governing body meets to deliberate or to make a decision should not be evaded by holding smaller meetings with less than a quorum present or by having a go-between contact each of the governing body members to ascertain his/her sentiment.

Question No. 10: Since any meeting of two county commissioners constitutes a quorum under Idaho law, are county commissioners prohibited from having any contact with each other outside of a duly organized open meeting?

Answer: While it is the opinion of the Attorney General that the Open Meeting Law must be complied with whenever a quorum of the members of a governing body of a public agency meet to decide or deliberate on matters which are within the ambit of official business, this Office does not believe that the Legislature intended for the Open Meeting Law to act as a bar to all communications between individual county commissioners outside of open meetings.

Question No. 11: Are adjudicatory deliberations exempt from the Open Meeting Law?

Answer: Only for those agencies expressly exempted. The Open Meeting Law excludes the deliberations of certain agencies (the Board of Tax Appeals, the Public Utilities Commission and the Industrial

[24] *Id.* at 41; *see also* Canney v. Bd. of Pub. Instruction of Alachua Cnty, 278 So.2d 260 (Fla. 1973); Bd. of Pub. Instruction of Broward Cnty v. Doran, 224 So.2d 693 (Fla. 1969).

Commission), in fully submitted adjudicatory proceedings, from the requirement of open public meeting.[25] In creating this exemption for adjudicatory deliberations by only these three agencies, it appears the Legislature intended that non-adjudicatory deliberations at these agencies, and all deliberations at all other agencies—i.e., except for the above-described informal or impromptu discussions of a general nature—must be conducted in a public meeting. Of course, the subject matter under adjudication may be separately identified under the Open Meeting Law as justifying a closed executive session.

Question No. 12: Can I still address questions and comments to a commissioner or board member individually related to a pending matter?

Answer: In other words, as representatives, can I still contact members of a governing body with unsolicited "information or opinion relating to a decision" that is pending before the public agency?[26] The Idaho Supreme Court has addressed this specific question.

In Idaho Historic Preservation Council v. City Council of Boise, a divided Court overturned a Boise City Council decision that allowed a corporation to demolish a building in Boise.[27] In reviewing an appeal from the City's Preservation Commission, members of the City Council stated at the public [open] meeting that they had received numerous telephone calls concerning the issue. Although the Court framed the issue in terms of due process, it may also raise open meeting questions.

In overturning the City's decision, the Court stated:

> [W]hen a governing body sits in a quasi-judicial capacity, it must confine its decision to the record produced at the public hearing, and that failing to do so violates procedural due process of law. This Court has also observed that when a governing body deviates from the public record, it essentially conducts a second fact-gathering session without proper notice, a clear violation of due process.

[25] Idaho Code § 74-203(2).
[26] Idaho Code § 74-202(2).
[27] Idaho Historic Pres. Council v. City Council of Boise, 134 Idaho 651, 8 P.3d 646 (2000).

> Since the substance of the telephone calls received by the members of the City Council was not recorded or disclosed at the public hearing, the Commission had no opportunity to rebut any evidence or arguments the City Council may have received from the callers.

Id. at 654, 8 P.3d at 649 (internal citations omitted).

The Court concluded:

> This decision does not hold the City Council to a standard of judicial disinterestedness. As explained above, members of the City Council are free to take phone calls from concerned citizens and listen to their opinions and arguments prior to a quasi-judicial proceeding. In order to satisfy due process, however, the identity of the callers must be disclosed, as well as a general description of what each caller said.[28]

Therefore, in the event that unsolicited information is received and considered by a governing board member, the appropriate action is to disclose the source of the information and the substance of the information so that it may be included within the public record. In sum, any information that you wish to use to form the basis of your decision must be made a part of the public record.

PROCEDURAL REQUIREMENTS OF THE OPEN MEETING LAW

Question No. 13: Can video and audio recordings of public meetings be made?

Answer: Yes. Open public meetings can be recorded by audio, video, or photographs by electronic, digital, or other means and a governing body shall not prohibit or unreasonably restrict recording of a meeting.[29]

[28] *Id*. at 656, 8 P.3d at 651.
[29] Idaho Code § 74-203(6).

Question No. 14: What are the notice requirements of the Open Meeting Law?

Answer: The Open Meeting Law requires two types of notice: (1) meeting notice and (2) agenda notice. The notice requirements are satisfied by posting meeting notices and agendas in a prominent place at the principal office of the public agency, or, if no such office exists, at the building where the meeting is to be held. The notice for meetings and agendas shall also be posted electronically if the entity maintains an online presence through a website or a social media platform. The Open Meeting Law does not require publication of the notice in a newspaper or advertisement. However, other statutes governing particular entities may require publication of notice.

The Open Meeting Law also requires that notice be posted at specific minimum times prior to the meeting. These times vary, depending on the type of meeting being held. The notice of an executive session must state the authorizing provision of law.

Question No. 15: What are the notice and agenda requirements for a regular meeting?

Answer: For "regular meetings," the Open Meeting Law requires no less than a five (5) calendar day meeting notice and a forty-eight (48) hour agenda notice, unless otherwise provided by statute.[30] Any public agency that holds meetings at regular intervals at least once per calendar month, which are scheduled in advance over the course of the year, may satisfy this notice requirement by posting meeting notices at least once each year of its regular meeting schedule. Agenda notice must still be posted at least 48 hours before the meeting.

Question No. 16: What are the notice and agenda requirements for a special meeting or executive session only meeting?

Answer: For "special meetings," or when only an "executive session" will be held, meeting and agenda notice must be posted at least twenty-four (24) hours before the meeting, unless an emergency exists. An emergency is a situation which involves injury or damage to persons or property, or immediate financial loss, or the likelihood of such injury, damage or loss, when the notice requirements of the section would make such notice impractical, or increase the likelihood

[30] Idaho Code § 74-204.

or severity of such injury, damage or loss, and the reason for the emergency is stated at the outset of the meeting. This notice and an accompanying agenda must be given by the secretary or other designee of each public agency to any representative of the news media who has requested notification of such meetings and the secretary must make a good faith effort to provide such advance notification to them of the time and place of each meeting.[31]

Question No. 17: What must an agenda contain?

Answer: What constitutes an "agenda" to satisfy the posting requirement is not set forth in the Open Meeting Law. However, an "agenda" is defined in Black's Law Dictionary (9th ed.) as a "list of things to be done, as items to be considered at a meeting, [usually] arranged in order of consideration." The agenda notice requirement is not satisfied by merely posting a weekly schedule of the governing board which sets forth the time, place of the meetings, and who is participating. Rather, the notice must specifically set forth the purpose of the meeting and "items of business." Agenda items should be listed with specificity and not buried in catchall categories such as "director's report." An agenda item that requires a vote shall be identified on the agenda as an "action item" to provide notice that action may be taken on that item. Identifying an item as an action item on the agenda does not require a vote to be taken on that item. Multiple agenda items may be grouped together and voted upon as a single action item known as a consent agenda, so long as they are not ordinances, fee resolutions, or items requiring more than a simple majority vote.[32]

Question No. 18: May an agenda be amended after posting?

Answer: Yes. The procedure depends on when the agenda is amended.

More than 48 hours before the start of a meeting (or more than 24 hours before a special meeting), the agenda may be amended simply by posting a new agenda.

Less than 48 hours before the meeting (or less than 24 hours before a special meeting), but before the meeting has started, the agenda may be amended by: (1) posting the new agenda, and (2)

[31] Idaho Code § 74-204(2) and (3).
[32] Idaho Code § 74-204(4).

making and passing a motion at the meeting to amend the original agenda and stating the good faith reason the new items were not included in the original agenda notice.

After commencement of the meeting, the agenda may be amended to accommodate unforeseen issues, provided that: (1) there is a motion made that states the good faith reason the new item was not on the original agenda, and (2) the motion to amend is adopted by the governing body. Final action may not be taken on an agenda item added after the start of the meeting unless an emergency is declared necessitating action at that meeting. The declaration and justification shall be reflected in the minutes.

To sum up, amending an agenda during a meeting or less than 48 hours before the start of a meeting (24 hours for a special meeting) requires: (1) a motion, (2) a good faith reason why the item was not included in the original agenda, (3) a vote adopting the amended agenda, and (4) a record of the motion and vote in the minutes of the meeting.

Question No. 19: May qualifications or restrictions be placed on the public's attendance at an open meeting?

Answer: A public agency may adopt reasonable rules and regulations to ensure the orderly conduct of a public meeting and to ensure orderly behavior on the part of those persons attending the meeting. In Nevens v. City of Chino, a California appellate court nullified a city council measure, which prohibited the use of any tape recorders at city council proceedings.[33] While acknowledging that the city council had an absolute right to adopt and enforce rules and regulations necessary to protect its public meetings, the court held that the rule prohibiting tape recorders was too arbitrary, capricious, restrictive and unreasonable. A similar holding might be reached if a governing body prohibits the use of cameras if their presence is not in fact disruptive of the conduct of the meeting.

Another limitation is that the body cannot make it practically impossible for the public to be present at a meeting. For example, in Noble v. Kootenai County, a board of commissioners conducted a site visit to a proposed subdivision. When arriving at the site, the board intentionally avoided a group that was gathered near the entrance to the site location and conducted its site visit outside the group's

[33] Nevens v. City of Chino, 44 Cal. Rptr. 50 (Cal. Ct. App. 1965).

hearing. The court held that this was a violation, stating that "Idaho's open meeting laws are designed to allow the public to be present during agency hearings. At the very least this means that the public must be permitted to get close enough to the hearing body to hear what is being said."[34]

In any event, the governing standard is the reasonableness of the rules and regulations. Use of a timed agenda, "heavy gavel" and/or compliance with Robert's Rules of Order or some other procedural guideline may serve to facilitate the orderly conduct of a public meeting.

Question No. 20: Does the Open Meeting Law require the governing body of a public agency to accept public comments and testimony during meetings?

Answer: No. While other statutes, such as the Local Planning Act, may require the solicitation of public comments, the Open Meeting Law does not expressly require the opportunity for public comment.[35]

Question No. 21: May the members of a governing body vote by secret ballot at an open meeting?

Answer: No decision at any meeting of a governing body of a public agency may be made by secret ballot.[36]

Question No. 22: If a voice vote is used, must the minutes of the meeting reflect the vote of each member of a governing body by name?

Answer: If a voice vote is taken, the minutes of the meeting must reflect the results of all votes, but the minutes need not indicate how each member voted, unless a member of the governing body requests such an indication.[37]

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[34] Noble v. Kootenai County, 148 Idaho 937, 943, 231 P.3d 1034, 1040 (2010) (internal citations omitted).

[35] *See* Coalition for Responsible Government v. Bonner County, First Judicial District, Bonner County Case No. CV-97-00107 (May 15, 1997) (on file with the Office of the Attorney General).

[36] Idaho Code § 74-203(1).

[37] Idaho Code § 74-205(1)(c).

Question No. 23: May a vote be conducted by written ballots?

Answer: A vote may be conducted by written ballot, but written ballots would not comply with the Open Meeting Law unless the ballots are made available to the public on request and unless the members casting the ballots are identifiable by signature or other discernible means.[38] The reason identification of the vote of individual members is treated differently between voice votes and votes by written ballot is that, with respect to voice votes, members of the public in attendance can readily ascertain the vote of individual members of the governing body. In contrast, a vote by written ballot is tantamount to a secret vote, unless such ballot is signed or identifies the name of the voting member.

Question No. 24: What types of records must be maintained under the Open Meeting Law?

Answer: The Open Meeting Law requires that the governing body of a public agency must provide for the taking of written minutes of all of its meetings, but it is not necessary to make a full transcript or recording of the meeting, except as otherwise provided by law.[39] These minutes are public records and must be made available to the general public within a reasonable time after the meeting. The minutes must include, at a minimum, the following information:

(a) All members of the governing body present;

(b) All motions, resolutions, orders, or ordinances proposed and their disposition;

(c) The results of all votes and, upon the request of a member of the governing body, the vote of each member by name.

Other statutes may provide more specific requirements for particular entities.

In addition, section 74-205(2) provides that minutes of executive sessions must be kept, but they need contain only sufficient detail to identify the purpose and topic of the executive session and do not need to include the disclosure of material or matters that compromise the

[38] Attorney General Opinion No. 77-13, 1977 Idaho Att'y Gen. Ann. Rpt. 115.
[39] Idaho Code § 74-205(1).

purpose of the executive session. The minutes pertaining to the executive session, however, must include a reference to the specific statutory subsection authorizing the session.

Question No. 25: Are there any prohibitions on where a public meeting may be held?

Answer: Yes. Section 74-203(3) specifically provides: "A governing body shall not hold a meeting at any place where discrimination on the basis of race, creed, color, sex, age or national origin is practiced." Thus, for example, a public meeting may not be held at a private club if the private club excludes women from membership, even if women are allowed entrance for the purpose of attending the meeting.

Question No. 26: Does the Open Meeting Law permit holding a meeting by telephone conference call?

Answer: Yes. The Open Meeting Law specifically authorizes the holding of a meeting by telephone conference call. However, at least one member of the governing body or the director or chief administrative officer must be physically present at the meeting location designated in the meeting notice.[40] Additionally, the communications among the members of the governing body must be audible to all persons attending the meeting. Care should also be taken to ensure that votes are not made in such a way to permit an illegal secret ballot or vote.

Question No. 27: Are discussions conducted via telephones, computers, cell phones (including texting) or other electronic means exempted from the Open Meeting Law?

Answer: As discussed in this manual, the Open Meeting Law applies to the deliberations and discussions between two or more members of a board or commission on some matter which foreseeably will come before that board or commission for action. The use of a telephone to conduct such discussions does not remove the conversation from the requirements of the Open Meeting Law.

Similarly, members of a public board may not use computers or texting to conduct private conversations among themselves about board business. A one-way e-mail or text communication from one city council member to another, when it does not result in the

[40] Idaho Code § 74-203(5).

exchange of council members' comments or responses on subjects requiring council action, does not constitute a meeting subject to the Open Meeting Law; however, such e-mail or text communications are public records and must be maintained by the records custodian for public inspection and copying.

SPECIFIC STATUTORY EXEMPTIONS: EXECUTIVE SESSIONS

Question No. 28: What types of meetings may be closed under the Open Meeting Law?

Answer: A closed meeting—that is, an "executive session"—may be held for the reasons listed in § 74-206(1):

(a) To consider hiring a public officer, employee, staff member or individual agent, wherein the respective qualities of individuals are to be evaluated in order to fill a particular vacancy or need. This paragraph does not apply to filling a vacancy in an elective office or deliberations about staffing needs in general;

(b) To consider the evaluation, dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent, or public school student;

(c) To acquire an interest in real property not owned by a public agency;

(d) To consider records that are exempt from disclosure as provided in chapter 1, title 74, Idaho Code;

(e) To consider preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations;

(f) To communicate with legal counsel for the public agency to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated. The mere presence of legal counsel at an executive session does not satisfy this requirement;

(g) By the commission of pardons and parole, as provided by law;

(h) By the custody review board of the Idaho department of juvenile corrections, as provided by law; or

(i) To engage in communications with a representative of the public agency's risk manager or insurance provider to discuss the adjustment of a pending claim or prevention of a claim imminently likely to be filed. The mere presence of a representative of the public agency's risk manager or insurance provider at an executive session does not satisfy this requirement.

(j) To consider labor contract matters authorized under section 74-206A(1)(a) and (b), Idaho Code.

This provision enumerates specific and not general statutory exemptions to the requirement of conducting an open meeting. It is the Attorney General's opinion that a public agency cannot conduct an executive session to consider general personnel matters, but can only meet in executive session to consider those specifically enumerated personnel matters found at section 74-206(1)(a) and (b); that is, "to consider hiring a public officer, employee, staff member or individual agent" or "to consider the evaluation, dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member, individual agent or public school student." Additionally, Idaho Code section 74-206(2) specifically directs that the exceptions be construed narrowly. No entity should try to "shoehorn" an issue into an executive session exception.

An executive session may be held to consider acquiring an interest in real property that is not owned by a public agency. However, an executive session cannot be held for the purpose of acquiring an interest in real property owned by a public agency.[41]

It should be noted that the Open Meeting Law establishes circumstances where executive sessions are permissible. In other words, the act authorizes, but does not require, closed meetings. In addition, even though certain enumerated matters may be "considered" in an executive session, it must be emphasized that:

[41] Attorney General Opinion No. 81-15, 1981 Idaho Att'y Gen. Ann. Rpt. 161.

"[N]o executive session may be held for the purpose of taking any final action or making any final decision."[42]

It is important to remember that section 74-206(1) sets forth specific procedural steps to be followed to have a valid executive session. *Failure to do so will invalidate any action taken as a result of the executive session. Additionally, it may subject the board members to liability for those actions.* Procedurally, the presiding officer must identify the specific authorization under the Open Meeting Law for the holding of an executive session and at least a two-thirds (⅔) vote in favor of the executive session must be recorded in the minutes of the meeting by individual vote.

Question No. 29: What procedure must be followed before an executive session, closed to the public, may be held?

Answer: It must be noted that executive sessions take place only at meetings. Before any executive session may be held, there must be a valid open meeting and a vote to hold an executive session. Every such "meeting" must satisfy the Open Meeting Law's notice and agenda requirements.[43] If the governing body of a public agency then wishes to consider matters which may legally be considered in a closed meeting, an executive session may be held if two-thirds (⅔) of the members vote to hold an executive session. Prior to such vote, the presiding officer must identify the authorization under the Open Meeting Law for the holding of an executive session. Then, when the vote is taken, the individual vote of each member of the governing body must be recorded in the minutes.[44]

Question No. 30: May legal counsel meet privately with the governing body of a public agency to discuss threatened or pending litigation?

Answer: Yes. Section 74-206(f) expressly provides that an executive session may be held "[t]o communicate with legal counsel for the public agency to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated."

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[42] Idaho Code § 74-206(3); Attorney General Opinion No. 77-44, 1977 Idaho Att'y Gen. Ann. Rpt. 226; Attorney General Opinion No. 81-15, 1981 Idaho Att'y Gen. Ann. Rpt. 161.

[43] Idaho Code § 74-204.

[44] Idaho Code § 74-206(1).

Question No. 31: Must the governing body's attorney be present during an executive session?

Answer: Generally, the governing body's attorney need not be present when the governing body meets in executive session. An exception is an executive session authorized under Idaho Code section 74-206(1)(f): "To communicate with legal counsel for the public agency to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated. The mere presence of legal counsel at an executive session does not satisfy this requirement." (Of course, the attorney's "presence" may be facilitated via a telecommunications device.) An executive session under this subsection is solely for the purpose of communicating with legal counsel on pending or probable litigation.

Question No. 32: If a more specific statute requires open meetings and has no provision for executive sessions, is the executive session provision of the Open Meeting Law still applicable?

Answer: Yes. The executive session provision takes precedence over other statutes that may apply to a particular entity. Thus, even if a statute requires all meetings of a governing body to be open, executive sessions may still be held.[45]

PENALTIES FOR NONCOMPLIANCE

Question No. 33: What is the validity of action taken in violation of the Open Meeting Law?

Answer: If an action, or any deliberation or decision making that leads to an action, occurs at any meeting that fails to comply with the provisions of the Open Meeting Law, such an action may be declared null and void by a court.[46]

Any member of the governing body taking such an action, who participates in any such deliberation, decision making, or meeting, is subject to a civil penalty not to exceed two hundred fifty dollars ($250).[47] The maximum civil penalty for a subsequent violation is

[45] Nelson v. Boundary County, 109 Idaho 205, 706 P.2d 94 (Ct. App. 1985).
[46] Idaho Code § 74-208(1).
[47] Idaho Code § 74-208(2).

two thousand five hundred dollars ($2,500).[48]

Any governing body member who knowingly violates a provision of the Open Meeting Law is subject to a civil penalty of not more than one thousand five hundred dollars ($1,500).[49]

It is the opinion of the Attorney General that the Idaho Legislature intended that such fines be paid by the individual member of the governing body, not the governing body itself.

Question No. 34: Who enforces the Open Meeting Law?

Answer: The Attorney General enforces the Open Meeting Law in relation to the public agencies of state government. County prosecuting attorneys enforce the Open Meeting Law in relation to the local public agencies within their respective jurisdictions.[50]

Any person affected by a violation of the Open Meeting Law is entitled to bring a lawsuit in the magistrates' division of the county in which the public agency normally meets for the purpose of requiring compliance with the provisions of the Open Meeting Law. The lawsuit would ask the court to declare any improper actions void and to enjoin the governing body from violating the Open Meeting Law in the future. Such a lawsuit must be commenced within thirty (30) days of the time of the decision or action that results, in whole or in part, from a meeting that failed to comply with the provisions of the Open Meeting Law. Any other lawsuit must be commenced within one hundred eighty (180) days of the time of the violation.[51]

Question No. 35: If there is a violation of the Open Meeting Law at an early stage in the process, will all subsequent actions be null and void?

Answer: Yes. Section 74-208(1) clearly indicates that an action or any deliberation or decision making that leads to an action, which occurs at any meeting not in compliance with the provisions of the Open Meeting Law, will be null and void. The 1992 Legislature added the "deliberation or decision making that leads to an action" language to the provisions of section 74-208(1). This language

[48] Idaho Code § 74-208(4).
[49] Idaho Code § 74-208(3).
[50] Idaho Code § 74-208(5).
[51] Idaho Code § 74-208(6).

clarifies the consequences of a violation under the previous requirement.

The Idaho Supreme Court has held that the procedure for voiding actions taken in violation of the Open Meeting Law must be read literally. Thus, any action may not be declared void if it is not challenged within the thirty-day time limit established by section 74-208(6).[52]

Question No. 36: If a violation of the Open Meeting Law occurs, what can a governing body do to correct the error?

Answer: The governing body should follow the steps outlined in Idaho Code § 74-208(7) to "cure" the violation. A violation is cured by repealing any action taken at an illegal meeting or disregarding deliberations made in violation of the Open Meeting Law. Should it choose to, a governing body may, in a properly noticed meeting, repeat the deliberation or decision that occurred at the illegal meeting.

Question No. 37: Are members of the governing body of a public agency criminally liable for violations of the Open Meeting Law in which they knowingly participate?

Answer: The Open Meeting Law specifically provides civil monetary penalties for violations. The Open Meeting Law does not provide for criminal liability.

Question No. 38: Do school boards have to comply with the Open Meeting Law?

Answer: Yes. Each school district is governed by a board of trustees or "board"[53] and all school districts in Idaho, including specially chartered school districts, are under the supervision and control of the State Board of Education.[54] State boards and school districts are defined in the Open Meeting Law as a "public agency,"[55] and as such, are subject to the Open Meeting Laws.[56]

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[52] Petersen v. Franklin County, 130 Idaho 176, 938 P.2d 1214 (1997).
[53] Idaho Code § 33-501.
[54] Idaho Code § 33-101.
[55] Idaho Code §§ 74-202(4)(a) and 74-202(4)(c).
[56] Idaho Code § 74-203(1).

THE STATUTE

(Idaho Code §§ 74-201 to 74-208)

74-201. Formation of public policy at open meetings. The people of the state of Idaho in creating the instruments of government that serve them, do not yield their sovereignty to the agencies so created. Therefore, the legislature finds and declares that it is the policy of this state that the formation of public policy is public business and shall not be conducted in secret.

74-202. Open public meetings – Definitions. As used in this chapter:

(1) "Decision" means any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting at which a quorum is present, but shall not include those ministerial or administrative actions necessary to carry out a decision previously adopted in a meeting held in compliance with this chapter.

(2) "Deliberation" means the receipt or exchange of information or opinion relating to a decision, but shall not include informal or impromptu discussions of a general nature that do not specifically relate to a matter then pending before the public agency for decision.

(3) "Executive session" means any meeting or part of a meeting of a governing body that is closed to any persons for deliberation on certain matters.

(4) "Public agency" means:

(a) Any state board, committee, council, commission, department, authority, educational institution or other state agency created by or pursuant to statute or executive order of the governor, other than courts and their agencies and divisions, and the judicial council, and the district magistrates commission;

(b) Any regional board, commission, department or authority created by or pursuant to statute;

(c) Any county, city, school district, special district, or other municipal corporation or political subdivision of the state of Idaho;

(d) Any subagency of a public agency created by or pursuant to statute or executive order of the governor, ordinance, or other legislative act; and

(e) Notwithstanding the language of this subsection, the cybersecurity task force or a committee awarding the Idaho medal of achievement shall not constitute a public agency.

(5) "Governing body" means the members of any public agency that consists of two (2) or more members, with the authority to make decisions for or recommendations to a public agency regarding any matter.

(6) "Meeting" means the convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter.

(a) "Regular meeting" means the convening of a governing body of a public agency on the date fixed by law or rule, to conduct the business of the agency.

(b) "Special meeting" is a convening of the governing body of a public agency pursuant to a special call for the conduct of business as specified in the call.

74-203. Governing bodies – Requirement for open public meetings.

(1) Except as provided below, all meetings of a governing body of a public agency shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act. No decision at a meeting of a governing body of a public agency shall be made by secret ballot.

(2) Deliberations of the board of tax appeals created in chapter 38, title 63, Idaho Code, the public utilities commission and the industrial commission in a fully submitted adjudicatory proceeding in which hearings, if any are required, have been completed, and in which the legal rights, duties or privileges of a party are to be determined are not required by this act to take place in a meeting open to the public. Such deliberations may, however, be made and/or conducted in a public meeting at the discretion of the agency.

(3) Meetings of the Idaho life and health insurance guaranty association established under chapter 43, title 41, Idaho Code, the Idaho insurance guaranty association established under chapter 36, title 41, Idaho Code, and the surplus line association approved by the director of the Idaho

department of insurance as authorized under chapter 12, title 41, Idaho Code, are not required by this act to take place in a meeting open to the public.

(4) A governing body shall not hold a meeting at any place where discrimination on the basis of race, creed, color, sex, age or national origin is practiced.

(5) All meetings may be conducted using telecommunications devices which enable all members of a governing body participating in the meeting to communicate with each other. Such devices may include, but are not limited to, telephone or video conferencing devices and similar communications equipment. Participation by a member of the governing body through telecommunications devices shall constitute presence in person by such member at the meeting; provided however, that at least one (1) member of the governing body, or the director of the public agency, or the chief administrative officer of the public agency shall be physically present at the location designated in the meeting notice, as required under section 74-204, Idaho Code, to ensure that the public may attend such meeting in person. The communications among members of a governing body must be audible to the public attending the meeting in person and the members of the governing body.

(6) Except as otherwise provided in this subsection, no person attending open public meetings shall be prevented or prohibited from recording such meetings. For purposes of this subsection, "recording" means the capturing of audio, video, or photographs by electronic, digital, or other means. A governing body may take measures to ensure the orderly conduct of its open public meetings but shall not prohibit or unreasonably restrict recording as provided under this subsection. No person shall be removed or excluded from meetings for recording pursuant to the provisions of this subsection. The provisions of this subsection shall not apply to:

(a) Executive sessions;

(b) Any meetings or hearings in a facility owned or operated by the Idaho department of correction;

(c) Any meetings or hearings in a facility owned or operated by the Idaho department of juvenile corrections; or

(d) Any meetings or hearings conducted by the Idaho commission of pardons and parole.

74-204. Notice of meetings – Agendas.

(1) Regular meetings. No less than a five (5) calendar day meeting notice and a forty-eight (48) hour agenda notice shall be given unless otherwise provided by statute. Provided however, that any public agency that holds meetings at regular intervals of at least once per calendar month scheduled in advance over the course of the year may satisfy this meeting notice by giving meeting notices at least once each year of its regular meeting schedule. The notice requirement for meetings and agendas shall be satisfied by posting such notices and agendas in a prominent place at the principal office of the public agency or, if no such office exists, at the building where the meeting is to be held. The notice for meetings and agendas shall also be posted electronically if the entity maintains an online presence through a website or a social media platform.

(2) Special meetings. No special meeting shall be held without at least a twenty-four (24) hour meeting and agenda notice, unless an emergency exists. An emergency is a situation involving injury or damage to persons or property, or immediate financial loss, or the likelihood of such injury, damage or loss, when the notice requirements of this section would make such notice impracticable or increase the likelihood or severity of such injury, damage or loss, and the reason for the emergency is stated at the outset of the meeting. The notice required under this section shall include at a minimum the meeting date, time, place and name of the public agency calling for the meeting. The secretary or other designee of each public agency shall maintain a list of the news media requesting notification of meetings and shall make a good faith effort to provide advance notification to them of the time and place of each meeting.

(3) Executive sessions. If only an executive session will be held, a twenty-four (24) hour meeting and agenda notice shall be given according to the notice provisions stated in subsection (2) of this section and shall state the reason and the specific provision of law authorizing the executive session.

(4) An agenda shall be required for each meeting. The agenda shall be posted in the same manner as the notice of the meeting. An agenda may be amended, provided that a good faith effort is made to include, in the original agenda notice, all items known to be probable items of discussion. An agenda item that requires a vote shall be identified on the agenda as an "action item" to provide notice that action may be taken on that item. Multiple agenda items may be grouped together and voted upon as a single action item known as a consent agenda, provided the agenda items are not ordinances, fee resolutions, or items requiring more than a simple majority

of the members present. During the meeting, if any member of the governing body requests an item or items be removed from the consent agenda, such item or items shall, prior to the vote on the consent agenda, be removed from the consent agenda and considered as a separate action for discussion and vote. Identifying an item as an action item on the agenda does not require a vote to be taken on that item.

(a) If an amendment to an agenda is made after an agenda has been posted but forty-eight (48) hours or more prior to the start of a regular meeting, or twenty-four (24) hours or more prior to the start of a special meeting, then the agenda is amended upon the posting of the amended agenda.

(b) If an amendment to an agenda is proposed after an agenda has been posted and less than forty-eight (48) hours prior to a regular meeting or less than twenty-four (24) hours prior to a special meeting but prior to the start of the meeting, the proposed amended agenda shall be posted but shall not become effective until a motion is made at the meeting and the governing body votes to amend the agenda.

(c) An agenda may be amended after the start of a meeting upon a motion that states the reason for the amendment and states the good faith reason the agenda item was not included in the original agenda posting. Final action may not be taken on an agenda item added after the start of a meeting unless an emergency is declared necessitating action at that meeting. The declaration and justification shall be reflected in the minutes.

74-205. Written minutes of meetings.

(1) The governing body of a public agency shall provide for the taking of written minutes of all its meetings. Neither a full transcript nor a recording of the meeting is required, except as otherwise provided by law. All minutes shall be available to the public within a reasonable time after the meeting, and shall include at least the following information:

(a) All members of the governing body present;

(b) All motions, resolutions, orders, or ordinances proposed and their disposition;

(c) The results of all votes, and upon the request of a member, the vote of each member, by name.

(2) Minutes pertaining to executive sessions. Minutes pertaining to an executive session shall include a reference to the specific statutory subsection authorizing the executive session and shall also provide sufficient detail to identify the purpose and topic of the executive session but shall not contain information sufficient to compromise the purpose of going into executive session.

74-206. Executive sessions – When authorized.

(1) An executive session at which members of the public are excluded may be held, but only for the purposes and only in the manner set forth in this section. The motion to go into executive session shall identify the specific subsections of this section that authorize the executive session. There shall be a roll call vote on the motion and the vote shall be recorded in the minutes. An executive session shall be authorized by a two-thirds (⅔) vote of the governing body. An executive session may be held:

(a) To consider hiring a public officer, employee, staff member or individual agent, wherein the respective qualities of individuals are to be evaluated in order to fill a particular vacancy or need. This paragraph does not apply to filling a vacancy in an elective office or deliberations about staffing needs in general;

(b) To consider the evaluation, dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent, or public school student;

(c) To acquire an interest in real property which is not owned by a public agency;

(d) To consider records that are exempt from disclosure as provided in chapter 1, title 74, Idaho Code;

(e) To consider preliminary negotiations involving matters of trade or commerce in which the governing body is in competition with governing bodies in other states or nations;

(f) To communicate with legal counsel for the public agency to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated. The mere presence of legal counsel at an executive session does not satisfy this requirement;

(g) By the commission of pardons and parole, as provided by law;

(h) By the custody review board of the Idaho department of juvenile corrections, as provided by law;

(i) To engage in communications with a representative of the public agency's risk manager or insurance provider to discuss the adjustment of a pending claim or prevention of a claim imminently likely to be filed. The mere presence of a representative of the public agency's risk manager or insurance provider at an executive session does not satisfy this requirement; or

(j) To consider labor contract matters authorized under section 74-206 (1)(a) and (b), Idaho Code.

(2) The exceptions to the general policy in favor of open meetings stated in this section shall be narrowly construed. It shall be a violation of this chapter to change the subject within the executive session to one not identified within the motion to enter the executive session or to any topic for which an executive session is not provided.

(3) No executive session may be held for the purpose of taking any final action or making any final decision.

(4) If the governing board of a public school district, charter district, or public charter school has vacancies such that fewer than two-thirds (2/3) of board members have been seated, then the board may enter into executive session on a simple roll majority vote.

74-206A. Negotiations in open session.

(1) All negotiations between a governing body and a labor organization shall be in open session and shall be available for the public to attend. This requirement also applies to negotiations between the governing body's designated representatives and representatives of the labor organization. This requirement shall also apply to meetings with any labor negotiation arbitrators, fact finders, mediators or similar labor dispute meeting facilitators when meeting with both parties to the negotiation at the same time. Provided, however, a governing body or its designated representatives may hold an executive session for the specific purpose of:

(a) Deliberating on a labor contract offer or to formulate a counteroffer; or

(b) Receiving information about a specific employee, when the information has a direct bearing on the issues being negotiated and a reasonable person would conclude that the release of that information would violate that employee's right to privacy.

(2) All documentation exchanged between the parties during negotiations, including all offers, counteroffers and meeting minutes, shall be subject to public writings disclosure laws.

(3) Any other provision of law notwithstanding, including any other provisions to the contrary in sections 33-402 and 74-204, Idaho Code, the governing body shall post notice of all negotiation sessions at the earliest possible time practicable. This shall be done by the governing body by immediately posting notice of the negotiation session on the front page of its official website. If time permits, the governing body shall also post notice within twenty-four (24) hours at its regular meeting physical posting locations.

(4) Public testimony, if any, shall be posted as an agenda item.

74-207. Open legislative meetings required. All meetings of any standing, special or select committee of either house of the legislature of the state of Idaho shall be open to the public at all times, except in extraordinary circumstances as provided specifically in the rules of procedure in either house, and any person may attend any meeting of a standing, special or select committee, but may participate in the committee only with the approval of the committee itself.

74-208. Violations.

(1) If an action, or any deliberation or decision making that leads to an action, occurs at any meeting which fails to comply with the provisions of this chapter, such action shall be null and void.

(2) Any member of the governing body governed by the provisions of this chapter, who conducts or participates in a meeting which violates the provisions of this act shall be subject to a civil penalty not to exceed two hundred fifty dollars ($250).

(3) Any member of a governing body who knowingly violates the provisions of this chapter shall be subject to a civil penalty not to exceed one thousand five hundred dollars ($1,500).

(4) Any member of a governing body who knowingly violates any provision of this chapter and who has previously admitted to committing or has been previously determined to have committed a violation pursuant to subsection (3) of this section within the twelve (12) months preceding this subsequent violation shall be subject to a civil penalty not to exceed two thousand five hundred dollars ($2,500).

(5) The attorney general shall have the duty to enforce this chapter in relation to public agencies of state government, and the prosecuting attorneys of the various counties shall have the duty to enforce this act in relation to local public agencies within their respective jurisdictions. In the event that there is reason to believe that a violation of the provisions of this act has been committed by members of a board of county commissioners or, for any other reason a county prosecuting attorney is deemed disqualified from proceeding to enforce this act, the prosecuting attorney or board of county commissioners shall seek to have a special prosecutor appointed for that purpose as provided in section 31-2603, Idaho Code.

(6) Any person affected by a violation of the provisions of this chapter may commence a civil action in the magistrate division of the district court of the county in which the public agency ordinarily meets, for the purpose of requiring compliance with provisions of this act. No private action brought pursuant to this subsection shall result in the assessment of a civil penalty against any member of a public agency and there shall be no private right of action for damages arising out of any violation of the provisions of this chapter. Any suit brought for the purpose of having an action declared or determined to be null and void pursuant to subsection (1) of this section shall be commenced within thirty (30) days of the time of the decision or action that results, in whole or in part, from a meeting that failed to comply with the provisions of this act. Any other suit brought under the provisions of this section shall be commenced within one hundred eighty (180) days of the time of the violation or alleged violation of the provisions of this act.

(7) [Curing a violation.]

(a) A violation may be cured by a public agency upon:

(i) The agency's self-recognition of a violation; or

(ii) Receipt by the secretary or clerk of the public agency of written notice of an alleged violation. A complaint filed and served upon the public agency may be substituted for other forms of written notice. Upon notice of an alleged open meeting violation, the governing body shall have fourteen (14) days to respond publicly and either acknowledge the open meeting violation and state an intent to cure the violation or state that the public agency has determined that no violation has occurred and that no cure is necessary. Failure to respond shall be treated as a denial of any violation for purposes of proceeding with any enforcement action.

(b) Following the public agency's acknowledgment of a violation pursuant to paragraph (a)(i) or (a)(ii) of this subsection, the public agency shall have fourteen (14) days to cure the violation by declaring that all actions taken at or resulting from the meeting in violation of this act void.

(c) All enforcement actions shall be stayed during the response and cure period but may recommence at the discretion of the complainant after the cure period has expired.

(d) A cure as provided in this section shall act as a bar to the imposition of the civil penalty provided in subsection (2) of this section. A cure of a violation as provided in subsection (7)(a)(i) of this section shall act as a bar to the imposition of any civil penalty provided in subsection (4) of this section.

SUMMARY OF DECISIONS INTERPRETING THE IDAHO OPEN MEETING STATUTE

IDAHO ATTORNEY GENERAL'S OFFICE

REPORTED DECISIONS

1. Petersen v. Franklin County, 130 Idaho 176, 938 P.2d 1214 (1997) (actions that violate Open Meeting Law that are not challenged within the time limit established by Idaho Code § 67-2347(4) are not void).

2. Student Loan Fund of Idaho, Inc. v. Payette County, 125 Idaho 824, 875 P.2d 236 (Ct. App. 1994) (merely alleging violation of Open Meeting Law, without additionally alleging a specific "palpable injury," is insufficient to confer standing).

3. Gardner v. Evans, 110 Idaho 925, 719 P.2d 1185 (1986) (an aggrieved party will not prevail in a claim for improper notice under the Open Meeting Law when they cannot demonstrate any disadvantage stemming from the deficient notice).

4. Nelson v. Boundary County, 109 Idaho 205, 706 P.2d 94 (Ct. App. 1985) (Open Meeting Law's provisions authorizing executive sessions preempt Idaho Code § 31-713's requirement that all meetings of county commissioners must be public).

5. Gardner v. School Dist. No. 55, 108 Idaho 434, 700 P.2d 56 (1985).

6. Baker v. Ind. School Dist. of Emmett, 107 Idaho 608, 691 P.2d 1223 (1984).

7. State v. City of Hailey, 102 Idaho 511, 633 P.2d 576 (1981).

8. Idaho Water Resources Board v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976).

9. Nelson v. Boundary County, 109 Idaho 205, 706 P.2d 94 (Ct. App. 1985).

10. Idaho Historic Preservation Council v. City Council of Boise, 134 Idaho 651, 8 P.3d 646 (2000).

11. Farrell v. Lemhi County Board of Commissioners, 138 Idaho 378; 64 P.3d 304 (2002).

12. State v. Yzaguirre, 144 Idaho 471, 163 P.3d 1183 (2007).

13. Safe Air For Everyone v. Idaho State Dep't. of Agri., 145 Idaho 164, 177 P.3d 378 (2008).

14. City of McCall v. Buxton, 146 Idaho 656, 201 P.3d 629 (2009).

15. Idaho Press Club, Inc. v. State Legislature of the State, 142 Idaho 640, 132 P.3d 397 (2006).

16. Fox v. Estep, 118 Idaho 454, 797 P.2d 854 (1990).

17. Acheson v. Klauser, 139 Idaho 156, 75 P.3d 210 (Idaho Ct. App. 2003).

18. Noble v. Kootenai County ex rel. Kootenai County Bd. of Comm'rs, 148 Idaho 937, 231 P.3d 1034 (2010), reh'g denied (May 19, 2010).

UNREPORTED DECISIONS
(On File with the Office of Attorney General)

1. Coalition for Responsible Government v. Bonner County, First Judicial District, No. CV-97-00107 (1997)

2. State v. Thorne, et al.; Idaho Fourth Judicial District No. 3L-97763 (1994).

3. Playfair v. S. Lemhi Sch. Dist. 292 Bd. of Trustees, CIV. 09-375, 2010 WL 1138958 (D. Idaho Mar. 20, 2010).

4. Kline v. Power County Board of Commissioners, Idaho Sixth Judicial District No. CV-2011-0248 & CV-2011-0279 (2012).

ATTORNEY GENERAL'S OFFICE ANALYSES

1. Attorney General Opinion No. 08-3, 2008 Idaho Att'y Gen. Ann. Rpt. 42, 2008 WL 4360202.

2. Attorney General Opinion 85-9, 1985 Idaho Att'y Gen. Ann. Rpt. 50, (December 31, 1985) 1985 WL 167852.

3. Attorney General Opinion 89-7, 1989 Idaho Att'y Gen. Ann. Rpt. 61, 1989 WL 4084.

State of Idaho
Office of the Attorney General

OPEN MEETING LAW CHECKLIST

Regular Meetings

Meeting Date and Time: _____

Meeting Location: _____

_____

_____

[Idaho Code § 74-203(4) and (5)]

Before Meeting

- ❑ Meeting Notice posted 5 or more calendar days prior to the meeting date. [Idaho Code § 74-204(1)]
- ❑ Agenda Notice posted at least 48 hours prior to the meeting. [Idaho Code § 74-204(1)]
- ❑ Posting of Amended Agenda [Idaho Code § 74-204(4)]

During Meeting

- ❑ First: Any agenda amendments? [Idaho Code § 74-204(4)(b) and (c)]
- ❑ Secretary or other person appointed to take minutes. [Idaho Code § 74-205(1)]

After Meeting

- ❑ Minutes available to the public within a reasonable time after the meeting. [Idaho Code § 74-205(1)]

State of Idaho
Office of the Attorney General

OPEN MEETING LAW CHECKLIST

Special Meetings

Meeting Date and Time: _____

Meeting Location: _____

_____

_____

[Idaho Code § 74-203(4) and (5)]

Before Meeting

- ❑ Meeting and Agenda Notice posted **at least 24 hours** prior to the meeting. [Idaho Code § 74-204(2)]
- ❑ Notification provided to the news media. [Idaho Code § 74-204(2)]
- ❑ Posting of Amended Agenda [Idaho Code § 74-204(4)]

During Meeting

- ❑ First: Any agenda amendments? [Idaho Code § 74-204(4)(b) and (c)]
- ❑ Secretary or other person appointed to take minutes. [Idaho Code § 74-205(1)]

After Meeting

- ❑ Minutes available to the public within a reasonable time after the meeting. [Idaho Code § 74-205(1)]

State of Idaho
Office of the Attorney General

OPEN MEETING LAW CHECKLIST

Executive Sessions

Session Date and Time: _____

Session Location: _____

_____

_____

[Idaho Code § 74-203(4) and (5)]

Executive Session Only

- ❑ Meeting and Agenda Notice posted **at least 24 hours** prior to the session. [Idaho Code § 74-204(3)]
- ❑ Posting of Amended Agenda [Idaho Code § 74-204(4)]

Executive Session During Regular or Special Meeting

- ❑ Motion to enter Executive Session to discuss one of the exemptions listed in Idaho Code § 74-206.
- ❑ ⅔ vote to enter Executive Session reflected in regular/special meeting minutes. [Idaho Code § 74-206(1)]

During Session

- ❑ First: Any agenda amendments? [Idaho Code § 74-204(4)(b) and (c)]
- ❑ Secretary or other person appointed to take minutes. [Idaho Code § 74-205(1)]

After Session

- ❑ Minutes must reference statutory subsection authorizing executive session and identify purpose and topic of session. [Idaho Code § 74-205(2)]
- ❑ Minutes available to the public within a reasonable time after the meeting. [Idaho Code § 74-205(1)]

>> SAMPLE FORM <<

Public Agency: _____, Idaho
(name of county, city, district, etc.)

Governing Body: _____
(i.e., "Board of County Commissioners", "City Council", etc.)

Meeting Date, Time and Location: _____

EXECUTIVE SESSION MOTION AND ORDER

_____ (print name), _____ (print title), MOVES THAT THE BOARD, PURSUANT TO IDAHO CODE § 74-206, CONVENE IN EXECUTIVE SESSION TO: (identify one or more of the following)

- ❑ Consider personnel matters [Idaho Code § 74-206(1)(a) & (b)]
- ❑ Deliberate regarding an acquisition of an interest in real property [Idaho Code § 74-206(1)(c)]
- ❑ Consider records that are exempt from public disclosure [Idaho Code § 74-206(1)(d)]
- ❑ Consider preliminary negotiations involving matters of trade or commerce in which this governing body is in competition with another governing body [Idaho Code § 74-206(1)(e)]
- ❑ Communicate with legal counsel regarding pending/imminently-likely litigation [Idaho Code § 74-206(1)(f)]
- ❑ Communicate with risk manager/insurer regarding pending/imminently-likely claims [Idaho Code § 74-206(1)(i)]

Purpose/Topic summary (required): _____
AND THE VOTE TO DO SO BY ROLL CALL.

CONVENE AT: _____ ADJOURN AT: _____

	YES	NO	ABSTAIN
_____, Chair (print name)	_____	_____	_____
_____, Member (print name)	_____	_____	_____
_____, Member (print name)	_____	_____	_____

Clerk/Deputy Clerk: _____
(Signature)

>> SAMPLE FORM <<

Public Agency: _____, Idaho
(name of county, city, district, etc.)

Governing Body: _____
(i.e., "Board of County Commissioners", "City Council", etc.)

Meeting Date, Time and Location: _____

MOTION AND ORDER TO AMEND AGENDA

(less than 48 hours before regular meeting or 24 hours before special meeting)

_____ (print name), _____ (print title), MOVES THAT THIS GOVERNING BODY, PURSUANT TO IDAHO CODE § 74-204, AMEND THE AGENDA FOR THIS MEETING AS FOLLOWS:

_____

_____

_____

_____

_____

Good faith reason item not included in posted agenda (required):

_____

_____

_____

_____

	YES	NO	ABSTAIN
_____, Chair (print name)	_____	_____	_____
_____, Member (print name)	_____	_____	_____
_____, Member (print name)	_____	_____	_____

Clerk/Deputy Clerk: _____
(Signature)

Curing Process – Idaho Code § 74-208(7)

