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What School Boards Need to Know About Changes to Georgia's Open Meetings and Open Records Acts

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After two years of active lobbying by Georgia's Attorney General, the 2012 General Assembly passed a comprehensive re-write of the state's Open Meetings and Open Records Acts (HB 397). The bill became effective upon signature by the Governor on April 17, 2012. This article summarizes the substantive changes affecting local school boards. For local boards that want to require all members to sign the executive session affidavit as authorized by an amendment to the law, a sample policy is provided.

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OPEN MEETINGS ACT

What is a "Meeting?"

The new definition in the Open Meetings Act retains a "quorum present" threshold for determining what constitutes a "meeting," defined as the gathering of a quorum of board members at which any "official business, policy, or public matter"... "is formulated, presented, discussed, or voted upon." The definition clarifies that any committee of board members or created by the board is subject to the open meetings law as well.

The new law clarifies that even if a quorum of board members is present, certain gatherings do not constitute a meeting, with the common thread being "so long as no official business, policy, or public matter is formulated, presented, discussed, or voted upon by the quorum." For example, a quorum of board members can meet to inspect board facilities, and now "property," so long as no official business is discussed or action taken. Subject to the same provision, a quorum of board members can attend statewide or regional meetings for training, meet with state or federal legislative or executive officials at their state or federal offices, travel together to meetings or gatherings, or attend social, civic, ceremonial or religious events. However, if it is determined that the primary purpose of the gathering is to avoid the requirements of the law, the gathering is considered a meeting to which all requirements of the law apply.

Several new provisions clarify issues that have caused some confusion in the past. For example, e-mail communication among board members is not a meeting; however, such e-mails are subject to disclosure under the Open Records Act. Similarly, incidental conversation unrelated to board business is not a meeting. Another new provision clarifies that the Act does not apply to mediation of a dispute between the board and any other

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party, but any settlement agreed to by the board at a mediation session will not become effective until it is voted on in a public meeting and its terms disclosed to the public. Any final settlement agreement is subject to disclosure pursuant to the Open Records Act.

The new law answers the frequently-asked question as to whether local boards of education legally can meet by teleconference, authorized only for boards with state-wide jurisdiction under the previous statute. Local board meetings by teleconference are now allowed under very limited circumstances, "necessitated by emergency conditions involving public safety or the preservation of property or public services." Such meetings still must meet the requirements of the Act and there must be a way for the public to have "simultaneous access" to the teleconference. For any other board meeting, as long as a quorum is present in person, a board member may participate by teleconference due to health reasons or absence from the jurisdiction, but, except with a doctor's note that "reasons of health" prevent the member's physical presence or other "emergency conditions," no board member is allowed to meet by teleconference more than twice in one calendar year.

"In one of the most controversial of the new provisions, minutes must now be kept of executive sessions, listing each issue discussed in executive session, but such minutes are not open to the public...."

Notice of Meetings

Under a separate code section applicable only to local boards of education, O.C.G.A. § 20-2-58 has long required each board to "hold a regular meeting during each calendar month for the transaction of business pertaining to the public schools" and to "annually determine the date of its meeting and ... publish it ... for two consecutive weeks following the setting of the date." Under that code section, most local boards determine in January their meeting dates for the entire calendar year, post the schedule at the board office and on its website, and provide notice of the same to the official legal organ and other interested media outlets. Districts that follow this practice have also met all the requirements of the revisions to the Act.

As under previous law, called meetings and emergency meetings are still authorized. Upon written request, notice for any meeting other than a regularly scheduled meeting must be provided at least 24 hours in advance to the legal organ or (depending on the frequency of publication of the local paper) to any requesting media outlet located in the county by phone, fax, or email. Further, notice of emergency meetings with less than 24 hours notice must be provided to local media outlets who requested such in writing within the prior year by fax, email, or mail through a self-addressed, stamped envelope provided by the requestor, although notice by mail in such circumstances seems impractical. Agendas of special and emergency meetings must also be provided to those media outlets requesting them and the Act places on the media an obligation to provide notice of what it receives to any requesting member of the public.

Meeting Minutes

As has always been the case, the minutes of a regular meeting must be promptly recorded and open to public inspection once approved by the board. Minutes must include, at a minimum, the names of the members present at the meeting, a description of each motion or other proposal made, a record of all votes, and, now "the identity of the persons making and seconding the motion or other proposal" and "the name of each person voting for or against a proposal."

In one of the most controversial of the new provisions, minutes must now be kept of executive sessions, listing each issue discussed in executive session, but such minutes are not open to the public. The minutes must be kept and preserved for inspection by an appropriate court should a dispute arise as to the propriety of any executive session.

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Executive Sessions

Executive sessions to consult with the board attorney concerning pending or potential litigation, settlement, claims, administrative proceedings, or other judicial actions brought or to be brought by or against board officials or employees remain largely unchanged, but a new provision clarifies that the settlement of such matters in executive session is not binding until a public vote is taken where the parties and principal settlement terms are disclosed before the vote.

For school boards, the most commonly used executive session reason allowed by law has been for "meetings when discussing or deliberating upon the appointment, employment, compensation, hiring, disciplinary action or dismissal, or periodic evaluation or rating of a public officer or employee." That provision is now expanded to allow for "interviewing applicants for the position of the executive head of an agency," which would apply to superintendent searches. The Act further clarifies that this exception does not apply to the "receipt of evidence or when hearing argument on personnel matters, including whether to impose disciplinary action or dismiss an employee or when considering or discussing matters of policy regarding the employment or hiring practices of the agency." For example, a board cannot go into executive session to discuss whether employees subject to a reduction in force will get first consideration for filling future vacancies, but it could go into executive session to discuss whether a specific third grade teacher would be allowed to transfer to the fifth grade.

The previous Act permitted executive sessions to discuss "the future acquisition of real estate," while the new Act also addresses "property," a much boarder term, and permits executive sessions for a broad range of discussions related to property or real estate, including authorizing negotiations, ordering appraisals, entering into contracts or options to purchase, and similar matters related to acquiring, selling, or leasing. As with previously mentioned matters, no vote in executive session to acquire, dispose of, or lease real estate is binding on the board until a subsequent vote is taken in an open meeting where the identity of the property and the terms of the acquisition, disposal or lease are disclosed before the vote.

Another new provision allows the board to go into executive session for "portions of meetings during which that portion of a record made exempt from public inspection or disclosure... is to be considered by the board and there are no reasonable means by which the board can consider the record without disclosing the exempt portions if the meeting were not closed." This particular provision would apply to all issues related to the educational records of individual students and possibly when reviewing bid documents containing trade secrets or confidential bids before a decision is made as to which bid to accept.

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The previous law provided that when the board went into executive session, the chairperson or other person presiding over the meeting had to execute and file with the official minutes a notarized affidavit stating under oath that the closed portion was devoted to matters within the exceptions provided by law and identifying the specific relevant exception. A new provision states that "if the agency's policy so provides, each member of the governing body of the agency attending the meeting" must sign the affidavit. Having each board member sign the affidavit may already be a practice of the board; however, having a board policy could be an advantage if needed to compel a board member who otherwise may balk at signing the affidavit. A sample policy is provided for boards requiring all members to sign; otherwise, the presiding officer signs, as required by law, and a policy is not needed. According to the new law, if a board member in executive session begins discussing matters not authorized by law, the presiding officer must immediately rule the discussion out of order and everyone present must stop the conversation. If board members continue or try to continue to discuss the matter, the presiding officer is to immediately adjourn the executive session.

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Violations

Any action taken at a meeting not open to the public as required by law will not be binding and violators face increased penalties. Legal action must be commenced within 90 days of the contested meeting, or within 90 days from the date the alleging party knew or should have known of the alleged violation. There is a six month limitation period under any circumstances to bring suit from the date of the contested meeting.

Any board member who knowingly and willfully conducts or participates in a meeting in violation of the Act is subject to a misdemeanor fine up to $1,000 rather than $500. A court can impose a civil penalty for negligently violating the Act, with a fine up to $1,000 for the first violation, with higher fines for multiple violations. A civil penalty or criminal fine can be levied up to $2,500 per violation for each additional violation within a twelve month period from the date the first penalty or fine was imposed. There is a good faith defense in criminal, but not civil, actions.

OPEN RECORDS ACT

School districts have encountered problems with record requests coming into the central office and languishing on the desk of someone who was unaware that a three-day clock was ticking. Other difficulties often occurred because of the mistaken impression that record requests were not valid unless they were in writing. Adding to the complexity in responding to record requests is the pervasiveness of electronic records.

Most of the changes to the Open Records Act are administrative in nature and attempt to address the issue of electronic records. When revising the ORA, the General Assembly wrote into the Act a "strong presumption that public records should be made available for public inspection without delay," that the Act should be "broadly construed to allow the inspection of governmental records," and that exceptions should be "interpreted narrowly to exclude only those portions of records addressed by such exception."

The definition of "public record" was revised to include "data" and "data fields," which practically speaking, means that if an agency has the ability to create a record with its data system, it is required to do so.

"If the district chooses to designate who should receive record requests, it must make sure the public knows about its designation by notifying the county's legal organ and posting it on the district's website."

Records still must be produced within 3 business days if possible, and if not, the district must respond within 3 days advising the requestor as to when the records will be produced. Districts now have the opportunity to designate a person who will receive all record requests. This provision is particularly helpful because the 3-day response clock does not start ticking until the district's designated records official receives the request. If the district chooses to designate who should receive record requests, it must make sure the public knows about its designation by notifying the county's legal organ and posting it on the district's website. If the district designates one or more records officers, it is essential that they be trained on the requirements of the law and what to do when record requests are received.

The cost that can be charged for production has changed, reduced from .25 per page to .10 per page, but other production provisions remain largely unchanged. Requestors now can come to where the district maintains the records and make their own copies using their own portable devices, a practice likely to become more popular now that many people have their own scanners on devices such as smart phones. However, the district has the discretion to provide copies instead of access if the records contain confidential information that must be redacted. There is some resolution to problems that districts have encountered with large requests. If the costs will exceed $25, the district may give an estimate within three days and defer

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the search and retrieval until the requestor agrees to pay the estimated cost. If costs will exceed $500, the district may require pre-payment before starting search and retrieval, and if the requestor has outstanding debts for prior requests, the district can require pre-payment for all requests until all costs are paid and any dispute regarding payment is resolved.

Under the old law, school districts are accustomed to redacting employees' personal information such as home address, home telephone numbers, social security numbers, birthdates, credit card information, bank account information, insurance and medical information and similar personal data, but that exception is now extended to former employees as well. The list of items to be redacted before release now includes individuals' personal email addresses, unlisted phone numbers, and cell phone numbers.

Attorney-client privilege and attorney work product still are protected, but such protection applies only to legal conclusions and does not extend to factual findings of an investigation an attorney conducts on behalf of the board, so long as the investigation does not pertain to pending or potential litigation, settlement, claims or other judicial actions. Where records are withheld under this provision, the requestor may ask the court to review the records to determine whether the records were legally withheld.

Electronic recordkeeping cannot be used to "evade" public access to records. If electronic records exist, the district must provide electronic copies, if that is what the requestor prefers. As to requests for electronic messages, whether in the form of e-mail, text messages or other format, they must contain information about the messages that is "reasonably calculated to allow the recipient of the request to locate the messages sought, including if known, the name, title, or office of the specific person or persons whose electronic messages are sought and, to the extent possible, the specific data base to be searched for such messages."

The Act now has 47 enumerated exemptions to production, many of which already existed but are now reorganized, renumbered or even slightly revised. School administrators responsible for responding to records requests are encouraged to read the Act and consult with legal counsel for training and advice regarding specific questions surrounding the implementation of the new Act.

Violations

Fines for violating the Open Records Act are the same as those for the Open Meetings Act, but enforcement mechanisms and fines are not available for oral requests. However, deliberately destroying records for the purpose of preventing their disclosure may be prosecuted under O.C.G.A. § 45-11-1, a felony statute covering stealing or altering of public documents, with a penalty of two to ten years in prison. Most board members, who rarely are charged with responding to a request, will be much more interested in understanding what records are covered by the Act and avoiding any allegation under this section. ■

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JULY POLICY ALERT:

Litigation: No policy implications

Legislation: No policy Implications

State Board Rules: No policy Implications

AUGUST POLICY ALERT:

Litigation: No policy implications

Legislation: No policy Implications

State Board Rules: No policy Implications