STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL September 29, 2008	No. I08-008 (R08-036) Re: Application of Open Meeting Law to Meetings of Public Bodies Conducted Online

To: A. Dean Pickett, Esq.
Mangum, Wall, Stoops & Warden, P.L.L.C.

Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-253(B), you submitted for review your opinion to the Superintendent of the Camp Verde Unified School District Governing Board (the "Board") regarding the Board's ability to conduct a meeting through the Internet during which the Board would engage in deliberations and discussion. This Office concurs with your conclusion that, after providing proper notice and an agenda in accordance with the Open Meeting Law and implementing procedures designed to safeguard the public's access to the meeting, a public body can conduct an online meeting to allow deliberation and discussion about matters within the public body's jurisdiction. We issue this Opinion to provide guidance concerning this matter to all public bodies subject to the Open Meeting Law. *See* Ariz. Att'y Gen. Op. I06-003.

Question Presented

Does the Open Meeting Law, A.R.S. §§ 38-431 to 38-431.09, allow the governing board of a school district to conduct deliberations and discussion in an online meeting when the Board provides proper notice under the law and facilitates public access to the online meeting through the Internet?

Summary Answer

Yes. The definition of "meeting" under A.R.S. § 38-431 includes the gathering of a quorum of a public body through technological devices and would encompass serial communications of a quorum of the public body through the Internet or other online medium. Measures must be taken, however, to provide clear notice to the public about when the Board will be deliberating in its online meeting and to facilitate the public's access to the meeting.

Analysis

You have asked this Office to evaluate your opinion regarding a proposal by the Board to conduct online meetings to discuss and edit documents. The Board does not propose to take any legal action during the online meeting. The Board meeting would be conducted online for a defined time period with members accessing the document over the Internet to comment and propose changes. Board members would not necessarily be editing or commenting on the document simultaneously. The public could also access the document over the Internet, but could only review changes and comments made by the Board members.[1] The public would be able to see which Board member proposed each change or submitted a comment. The Board proposes to offer free computer access at or near its offices during the online meeting. After

[1] Under the Open Meeting Law, the Board is not required to offer editing or commenting rights to the public. The public has the right to attend and observe the Board's proceedings, but no right to participate in the proceedings unless the Board allows it. A.R.S. § 38-431.01.

the online meeting for comment and revision ends, the Board would conduct a traditional meeting at its office to take legal action to adopt the final version of the document. At this meeting, the Board would include a call to the public so that members of the public could address comments about the document to the Board. Under these circumstances, is a "virtual meeting" in which Board members participate through serial communications over the Internet in compliance with the requirements of the Open Meeting Law?

Construed in a fashion most favorable to open and public meetings, as directed by the Legislature in A.R.S. § 38-431.09, the Open Meeting Law allows the Board to hold a virtual meeting through technological devices if it otherwise complies with the requirements of the statute. Under the Open Meeting Law, "all meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings." A.R.S. § 38-431.01. A "meeting" consists of "the gathering, in person *or through technological devices*, of a quorum of members of a public body at which they discuss, propose, or take legal action, including any deliberations by a quorum with respect to such action." A.R.S. § 38-431(4) (emphasis added). The Open Meeting Law clearly contemplates the ability of the Board to hold meetings through the use of technological devices, such as telephones, video-cameras, or even web-cameras, in which all members of the body are present simultaneously to discuss the Board's business.

Additionally, the statute allows the Board to meet through serial communications to discuss and deliberate about Board business if accomplished in compliance with the terms of the Open Meeting Law. This Office previously opined that serial e-mail communications without notice or public access between a quorum of a public body's members about public business constituted a meeting through technological devices that violated the Open Meeting

Law. Ariz. Att'y Gen. Op. I05-004. In that opinion, the Attorney General noted that "even if communications on a particular subject between members of a public body do not take place at the same time or place, the communications can nonetheless constitute a 'meeting.'" *Id.* at 4. Thus, the Board can conduct a virtual meeting in which a quorum of Board members contribute comments and edits to a document posted on the Internet through serial communications if the Board complies with the notice requirements, minute-keeping requirements, and other provisions of the Open Meeting Law.[2] To comply with the statute, the public must be able to access the entire course of discussion or deliberation between the Board members and be able to identify which Board members contributed which edits or comments. In addition, the Board must ensure that it creates a document retention policy under the public records statute to govern the maintenance and preservation of electronic documents created in this process.

Although using technology may provide broader access to the public than would otherwise be possible, virtual meetings such as those proposed by the Board also provide potential obstacles for public access based on uncertainty about the timing of the meeting, lack of equipment necessary to access the meeting, or unfamiliarity with operating such equipment. To offset these risks, this Office encourages the Board to strictly comply with the notice and minute-keeping requirements of the Open Meeting Law and to facilitate the public's access to

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[2] We note that under A.R.S. § 38-431.01(A), any member of the public who so desires must be permitted to "attend *and listen* to the deliberations and proceedings" in an open meeting. (Emphasis added.) It is unlikely that this provision restricts the requirements of the Open Meeting Law to only allow meetings in which every person can hear the proceedings. In the case of an agency like the Arizona Commission for the Deaf and Hard of Hearing, some members of the public 'listen" to proceeding by observing sign language interpreters. It would be inconsistent with the purpose of the Open Meeting Law to find a violation of the statute because not every member of the public can listen to an audible meeting. *See* A.R.S. § 38-431.09. We conclude that the mandate to interpret the Open Meeting Law in favor of open and public meetings requires an interpretation of "listen" that includes other methods of observing deliberations and proceedings of a board, including non-audible methods.

the virtual meeting. Because not all citizens own a computer or have Internet access, the Board should take measures at its facility to allow public access to the on-line meeting. Your suggestions that the Board provide free Internet access at or near the Board office and maintain regular print-outs of the results of the on-line meeting for public review provide valid solutions to address these concerns. Regarding the notice for the on-line meeting, the Board should provide clear notice of when the meeting will begin and end, as well as clear instructions on how to access the meeting or to operate any software used by the Board to host the on-line meeting. The notice should also indicate to the public how the Board intends to facilitate public access, including the location of any free Internet access offered by the Board or printouts of the results of the on-line meeting. In addition, the notice should also include the proposed date and time of the meeting at which the Board intends to take final action adopting the proposed document. The Board must also offer reasonable accommodations to any member of the public with a disability that requests accommodation, as required by federal law.[3]

Conclusion

The Board can lawfully hold a virtual meeting, including one comprised of serial communications through the Internet, under the Open Meeting Law. Continuing developments in telecommunications technology offer the promise of widening the public's access to meetings held by public bodies, whether by web-casting meetings or allowing other forms of virtual meetings. This promise, however, is counterbalanced by the potential for abuse or technological obstacles for some citizens to access the meeting. Thus, any public body

[3] The Civil Rights Division of the Department of Justice offers a helpful guide to state and local government entities seeking to create a website that complies with the Americans with Disabilities Act. The document can be found at www.ada.gov/websites2.htm.

choosing to use technological means to conduct its meetings must scrupulously comply with the notice and minute-keeping requirements imposed by the Open Meeting Law and must further make all reasonable efforts to facilitate public access to the meeting, whether through explicit instructions on using the technology or by providing access to the meeting at the public body's own facilities.

Terry Goddard
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