

1 **STATE OF ARIZONA**  
2 **OPEN MEETING LAW ENFORCEMENT TEAM**

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5 In the Matter of: )  
6 )  
7 Yavapai Community College Board ) **CONSENT AGREEMENT**  
8 )  
9 Members Herald Harrington, Edward )  
10 )  
11 Harris, Paul Madden, and Donna )  
12 )  
13 Michaels; James Holt, former member. )  
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16 **Background: The Complaint and Investigation**

17 1. The Arizona Attorney General’s Office Open Meeting Law Enforcement  
18 Team (“OMLET”) is the entity responsible for investigation and enforcement of the Open  
19 Meeting Law pursuant to A.R.S. §§ 38-431.06 and 38-431.07(A). OMLET conducted  
20 its investigation relating to complaints filed August 12, 2004 against Yavapai Community  
21 College Board Members Herald Harrington, Edward Harris, Paul Madden, and Donna  
22 Michaels and former member James Holt. (“YCC Board members”). OMLET’s  
23 investigation covered the time period from March 2003 through October 2004. OMLET  
24 having completed its investigation and finding that violations of the Open Meeting Law  
25 were committed by the YCC Board members during the time period between March  
2003 and October 2004, in lieu of filing an enforcement action in superior court and  
seeking the penalties authorized by A.R.S. § 38-431.07(A), OMLET and the YCC  
Board members agree to a full and final settlement of the matters investigated by  
OMLET and contained in the document entitled “Yavapai Community College District

1 Governing Board Open Meeting Law Investigation Report, Findings, Conclusions and  
2 Recommendation” dated March 23, 2005 attached hereto and incorporated by  
3 reference as Exhibit A.

#### 4 **Violations**

5 2. OMLET and the YCC Board members agree that the YCC Board  
6 members violated the Open Meeting Law when a quorum of the board held meetings  
7 via email, in violation of A.R.S. § 38-431.01(A) (meetings of public bodies shall be open  
8 to the public) and A.R.S. § 38-431(4) (meeting includes an gathering of a quorum  
9 through technological devices at which they discuss, propose or take legal action).

10 Specific violations include the following:

11 a. On October 9, 2003, Mr. Harrington sent two e-mail messages to Mr.  
12 Madden, Dr. Harris and Dr. Michaels with an attachment concerning the  
13 swimming pool that was a draft titled “Proposed Resolution 2003-05”. The first e-  
14 mail message contained the subject: “Updated resolution #2;” the second:  
15 “Resolution Version 3 or 4 or something like that.” Mr. Harrington began the first  
16 e-mail message with “Hi all, Here is an updated resolution that we would like you  
17 to consider.” In the second e-mail message, Mr. Harrington stated, “Hi everyone,  
18 Ed asked me to change the first paragraph to match the exact wording in the  
19 public documents.”

20 b. On April 27, 2004, Mr. Madden sent an e-mail message to all Board  
21 members with the subject line: PERSONAL AND CONFIDENTIAL. Mr. Madden  
22 wrote, “Dear Ed, Jim, Donna & Herald” and described a phone call he received  
23 from attorney Chris Jensen in which Mr. Jensen questioned the legality of  
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1 projects financed by general obligation bonds. In response to Mr. Jensen's  
2 proposal that the matter be raised at a Board meeting, Mr. Madden wrote, "I then  
3 suggested to him that if he has the best interest of the college in mind that he  
4 could present the matter quietly to the board by a letter addressed to Board  
5 members. He ultimately agreed to do so and upon his asking about board  
6 member addresses I volunteered to send him a list of names and addresses for  
7 his use." Mr. Madden went on to state "I do not believe that any improper use of  
8 funds has occurred and it is best that upon receiving his letter that we keep the  
9 matter confidential at least until we have received an opinion of bond counsel."  
10 During the following two days, Dr. Harris and Mr. Harrington replied to Mr.  
11 Madden's e-mail. Dr. Harris described an interview with a local radio station  
12 reporter and indicated that Mr. Jensen had already gone "public." Mr. Harrington  
13 replied with "Hi Everybody" and stated, "It sounds to me like we need to have the  
14 public information folks put together an information piece explaining this issue to  
15 the community pretty soon." He added, "It might be a good time to start  
16 broaching the issue of the runaway steel costs we are facing and let people know  
17 how the remainder of the bond money will be allocated." Mr. Madden and Mr.  
18 Harrington continued to communicate and agreed that in addition to presenting a  
19 public relations concern, the Board should not respond until bond counsel  
20 rendered an opinion.  
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23 c. On June 9, 2004, Mr. Harrington sent an e-mail message to all other  
24 Board members with the subject line: "Herald's executive limitations." Mr.  
25 Harrington stated, "Hi Everyone, Here is my current cut of the executive

1 limitations. Please give me your feed back on them.” A draft of a Board policy  
2 was attached to the e-mail. Mr. Madden responded to the e-mail with his  
3 suggested changes and stated, “If you have any questions, please give me a  
4 call.”

5 d. On June 30, 2004, Mr. Madden sent an e-mail message to all other  
6 Board members with the subject line: “Second Draft of Policy Revisions.” Mr.  
7 Madden stated, “Dear Folks: Enclosed please find Second drafts of proposed  
8 Board Policies Ed assigned to me for writing or rewriting. The first draft was  
9 emailed to you on June 25, 2004.”

10 e. On August 2, 2004, Dr. Michaels sent an e-mail message to all other  
11 Board members with the subject line: “ABOR Plan-Visit with Tom O’Halleran.” Dr.  
12 Michaels began the e-mail with “Hello Fellow Board Members” and described a  
13 meeting with State Representative Tom O’Halleran at which they discussed the  
14 Arizona Board of Regents proposal to restructure higher education. She further  
15 stated, “I believe that we must significantly increase our communication  
16 effectiveness with our elected officials before we consider composing an advisory  
17 group or ‘cabinet’ with whom we necessarily need to regularly communicate and  
18 ‘tend.’ This situation also suggests a need for policy in our executive limitations  
19 that would prevent lack of communication from occurring in the future. I spoke at  
20 length with our Chair, Dr. Harris, and I am available to speak to you individually  
21 concerning these issues.” Mr. Madden responded to this e-mail on August 3,  
22 2004 to express his concerns and viewpoint with respect to creating an advisory  
23 board.  
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1 f. After receiving Open Meeting Law training on August 10, 2004, which  
2 included training on the use of e-mail, on August 17, 2004, Dr. Michaels sent an  
3 e-mail message to all other Board members with the subject line: "AADGB  
4 Meeting August 18, 2004." Dr. Michaels began the e-mail with "Hello Fellow  
5 Board Members" and described a meeting she was going to attend on the  
6 following day to obtain an analysis of fourteen alternative proposals submitted to  
7 the Arizona Board of Regents. She promised to forward the same to other Board  
8 members. Attached to the e-mail is a document titled "Request For  
9 Qualifications" from the Arizona Community College Association that solicits a  
10 consultant to author a white paper to frame the public policy debate for  
11 redesigning higher education in Arizona. Mr. Madden responded to this e-mail on  
12 the same day to express his thoughts on the "Request For Qualifications" and  
13 how to mobilize the public to lobby the Governor and the Legislature to oppose  
14 the Arizona Board of Regents' plan.

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16 g. On August 31, 2004, Dr. Harris sent two e-mail messages to Mr.  
17 Madden that described a cover letter and mediation contract. On September 1,  
18 2004 Dr. Harris sent another e-mail message to Mr. Madden with the subject line:  
19 "FW: Changes in ACCT letter nd (sic) contract." Embedded in the e-mail is the  
20 original message Dr. Harris sent to Mr. Harrington and Dr. Michaels. Dr. Harris  
21 wrote, "The word 'mediation' has been removed from the letter and the whole  
22 sentence beginning with words 'in addition' has been deleted." On September  
23 30, 2004 Mr. Harrington sent an e-mail message to Mr. Madden with the subject  
24 line: "ACCT Cover Letter." The body of the e-mail contains a cover letter from  
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1 Narcisa Polonio accepting an agreement to perform Board and CEO leadership  
2 analysis and the development of a resolution/mediation process. Embedded in  
3 the e-mail is the original message from Dr. Harris to Mr. Harrington and Dr.  
4 Michaels. Also on September 30, 2004, a similar e-mail was sent to the same  
5 persons that contained a copy of the ACCT contract.

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7 h. On September 17, 2004, Mr. Harrington sent an e-mail to YCC's media  
8 consultant, Mr. Jonathan Bernstein, Dr. Dailey and three other Board members  
9 with the subject line; "RE: Daily Courier 8-17-04." The e-mail is a reply to Mr.  
10 Bernstein's e-mail to the same persons commenting on a newspaper article that  
11 apparently was critical of the Board. In Mr. Harrington's reply, he criticized Mr.  
12 Holt's "unacceptable behavior" and expressed dissatisfaction with Mr. Holt's  
13 allegations that the Board was "suppressing information" and conducting "secret  
14 meetings."

15 i. There are other emails between YCC board members and a quorum of  
16 the board relating to board members.

17 j. Former member James Holt received emails sent by other YCC board  
18 members to a quorum of the board but did not generate emails from himself to a  
19 quorum of the board.

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21 3. The YCC Board members also violated the Open Meeting Law by failing  
22 to create minutes for "Work Session" and "retreat" meetings in violation of A.R.S. § 38-  
23 431.01(B).

## Remedy

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2           4.     All current YCC Board members<sup>1</sup> agree that they shall, at the next  
3 regularly scheduled Board meeting after execution of this Agreement, place on the  
4 Agenda the item “Yavapai Community College District Governing Board Open Meeting  
5 Law Investigation Report, Findings, Conclusions and Recommendation” (“Report”). At  
6 the meeting, the current YCC Board shall discuss the results of this investigation and  
7 invite the public during a Call to the Public segment to comment on the investigation or  
8 any other Open Meeting Law concerns. Any issues identified by the public that  
9 demonstrate an ongoing or unresolved Open Meeting Law matter shall be placed on a  
10 future Regular Meeting Agenda for discussion and resolution. Also at the next regularly  
11 scheduled meeting, the current YCC Board shall, as part of the same agenda item,  
12 inform the public of the Board’s current and future remedial measures enacted to  
13 ensure compliance with the Open Meeting Law. The YCC Board shall make a sufficient  
14 number of copies of the Report and all exhibits attached thereto available to the public  
15 prior to the meeting and at any time after the meeting.

16           5.     YCC Board members Herald Harrington, Edward Harris, Paul Madden,  
17 and Donna Michaels shall each pay a penalty of five hundred dollars (\$500.00) from  
18 their personal funds, which shall be deposited into the general fund of the YCC.

19           6.     All current YCC Board members shall participate in Open Meeting Law  
20 training within ninety (90) days from the date of execution of this Agreement. The  
21 training shall be provided by an attorney who is knowledgeable of and has expertise  
22 with Open Meeting Law issues. The training shall cover all requirements of the Open  
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24 <sup>1</sup> Current member Patricia McCarver replaced former member Holt after his resignation in October 2004.  
25 Ms. McCarver did not participate in any of the violations discovered in the investigation. She will,  
however, participate in training and the other requirements set out in this Agreement so that all current  
members of the board have the same knowledge and understanding of the requirements of the Open  
Meeting Law.

1 Meeting Law with particular emphasis on conducting meetings through technological  
2 devices, recording meeting minutes and making them available to the public. Prior to  
3 the training, the YCC Board shall submit to the OMLET for approval, the name of  
4 the trainer, the trainer's outline or syllabus and any materials the trainer intends to use  
5 as part of the training.

6 7. Before the training, all current YCC Board members, as part of an Agenda  
7 item at a public meeting, shall sign a written statement attesting that he or she shall not  
8 use e-mail or direct staff to use e-mail to communicate with any other YCC Board  
9 member for any reason. The Board Chairman, or his designee, shall perform random  
10 audits of the YCC e-mail system of no less than once per month to verify that YCC  
11 Board members are not using e-mail or directing staff to use e-mail to communicate with  
12 other YCC Board members for any reason. The Chairman, or his designee, shall  
13 provide a written report of audit findings to the YCC Board's counsel who shall promptly  
14 notify the Open Meeting Law Enforcement Team of any audit that reveals a YCC Board  
15 member communicated with another YCC Board member via e-mail or directed staff to  
16 communicate with YCC Board members via e-mail. The audits shall continue until the  
17 Board's counsel certifies the completion of the e-mail policy described in ¶ 8 below.

18 8. Within 6 months following completion of the Open Meeting Law training,  
19 the YCC Board, as part of an Agenda item at a public meeting, shall develop an e-mail  
20 policy that governs YCC Board member e-mail communication and communication by  
21 the YCC Board's staff with board members that complies with the requirements of the  
22 Open Meeting Law. This policy shall be reviewed by the YCC Board's counsel who  
23 shall certify to OMLET that the policy conforms to all applicable requirements of the  
24 Open Meeting Law. The e-mail policy shall be incorporated into the YCC Board's  
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1 current Policy Manual and shall be reviewed and discussed annually as part of the YCC  
2 Board's Open Meeting Law training.

3 9. In the event the YCC Board fails to comply with the terms of this  
4 Agreement, OMLET reserves the right to file an action in Superior Court pursuant to  
5 A.R.S. § 38-431.07(A) seeking penalties for each violation set out in this Agreement,  
6 including monetary penalties for each violation, removal from office, costs and  
7 attorneys' fees.

8 DATED this \_\_\_\_ day of \_\_\_\_\_ 2005.

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12 Herald Harrington, Chair

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14 Edward Harris

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16 Paul Madden

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18 Donna Michaels

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20 Patricia McCarver

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24 Robert J. Sorce  
25 Assistant Attorney General  
Member of OMLET

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Date

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