State Attorneys General Powers and Responsibilities

Edited by
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National Association of Attorneys General

Fourth Edition
National Association of Attorneys General

Published by
National Association of Attorneys General
1850 M Street, NW, 12th Floor
Washington, DC 20036
(202) 326-6000

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Library of Congress Control Number: 2018960580

ISBN 978-1-946357-00-7
ISBN 978-1-946357-01-4 (Softcover)

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This book is dedicated to Attorneys General and the men and women who work for them in the 56 jurisdictions. They continue to make an important contribution to state govenment and the American legal system. Without them, there would be no book to write.

Acknowledgments

The editor would like to acknowledge the many individuals who contributed to the preparation of this book.

This book builds on previous editions, which were edited by Lynne Ross. We gratefully acknowledge her hard work and dedication to this project in its early years.

This book is a collaborative effort, in which different authors with expertise in each substantive area contribute their time and talent. The principal authors are noted on each chapter, but we would like to thank them again here for their hard work and dedication. Many thanks to the following authors:

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Chapter 26

Open Meetings

By Emily Myers, Antitrust Chief Counsel, NAAG

Legislative policy across the country favors open government, on the grounds that "The liberties of a people never were, nor ever will be, secure when the transactions of their rulers may be concealed from them."[1] Assurances of open government exist in the common law, in territorial laws in the west and even in state constitutions. In Massachusetts, for example, statutory provisions relating to public records go back over 130 years.[2] All states have passed laws requiring openness, often in direct response to scandals spawned by government secrecy. Legislatures have implemented this policy in open meetings laws and public records disclosure laws. As the states' chief law officers, attorneys general interpret, apply, and often enforce these important laws.

Open meetings laws require public bodies to take final actions and conduct deliberations in sessions open to public attendance.[3] These laws generally prohibit private official meetings of governmental boards, commissions, and councils to ensure that the public is aware of not only those decisions and deliberations but also the information on which those actions are based. Public records disclosure laws (also known as Freedom of Information Acts) foster the same policy. They grant members of the public the right to inspect almost all government records that relate to the conduct of the public's business. Public records typically include "any information kept, held, filed, produced or reproduced by, with or for an

1 Patrick Henry, Speech to Virginia Ratifying Convention, Jun. 5, 1788.

2 *See* St. 1851 c. 161, §§ 4 which provided that "[a]ll county, city or town records and files shall be open to public inspection."

3 "Public bodies " may include any entity that conducts public business and performs a governmental function for a state, for an agency of the state, or for cities, counties, towns, villages, school districts, city councils, town boards, village boards of trustees, school boards, commissions, legislative bodies, and committees and subcommittees consisting of members of those groups." New York State Department of State, Committee on Open Government, Frequently Asked Questions.

agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."[4]

Open meetings and records disclosure laws provide limited exceptions for situations in which the public interest in open government may be outweighed by public interest favoring confidentiality in governmental operations. Every day, and at all levels of government within a state, questions arise as to whether an open government law excepts a particular type of closed or executive session or a particular type of public record from the general rule that the public shall have access to the business of government. In these situations, state laws often give the attorney general the responsibility to resolve the issue. Many attorneys general have the power to direct a public body to comply with the attorney general's interpretation of an open meetings or records disclosure law.

At the same time, the attorney general, as chief legal officer of the state, also must seek to preserve the confidentiality of advice given to his state agency clients when they are sought under open records laws. The attorney general's law enforcement function also requires that documents prepared or received by the attorney general's office in connection with an investigation or litigation be protected from disclosure where appropriate.

Legal Authority

All attorneys general are mandated by law to advise public bodies on the requirements of open meetings and public records disclosure laws. Some attorneys general are authorized to give such advice to all levels of government. For example, in Wisconsin, "[a]ny person may request advice from the attorney general as to the applicability of [the Open Meetings law] under any circumstances."[5] Others, such as the Oregon attorney general, may give legal advice on public records and open meetings only to state officials.[6] This restriction does not prohibit an attorney general from giving local officials and local government attorneys information on the requirements of the law. Some attorneys general

4 N.Y. Pub. Officers Law, art. 6, §§ 84-90.

5 Wis. Stat. § 19.98.

6 Or. Rev. Stat. § 180.060.

provide training sessions for state or local officials to ensure that they know the requirements of the law.[7]

Many attorneys general inform the public of their interpretation of public records and meetings laws by publishing manuals and newsletters on these topics and some are required by law to do so.[8] For example, the attorneys general of California, Florida, Maryland, Massachusetts, Missouri, Nevada, Ohio, Texas, Washington and Wisconsin periodically publish manuals outlining and annotating the state's public records and open meetings laws for use by Assistant attorneys general, state and local officials, representatives of the media, interested members of the public and courts.[9] These manuals are typically available on the attorney general's website.

Specific open government issues often are the subject of published opinions of an attorney general. The attorney general of Texas, for example, issues both formal Open Records Decisions, which may be cited as precedent, and thousands of Open Records Letter Rulings which are informal, non-precedential rulings applicable only to the specific documents and circumstances surrounding them. Attorneys general in other states, including Colorado, have also used opinions to provide general information on open government questions.[10] In Kentucky, the attorney general receives complaints that open records laws have been violated, reviews the request and the response, and issues a written decision stating whether the agency violated the provision.[11] If the decision is not appealed, it has

7 For example, elected and appointed officials in Texas are required by state law to receive training, and the attorney general of Texas is required to ensure that such training is available. Tex Gov't Code § 551.005. Training videos are available on the attorney general's website. See also, Ohio Rev. Code § 109.43 (attorney general must "develop, provide and certify" training for public officials about Ohio public records laws).

8 *E.g.,* La. Rev. Stat. Ann. § 44:31.2, "The attorney general shall establish a program for educating the general public, public bodies, and custodians regarding the provisions of this Chapter. Such program may include brochures, pamphlets, videos, seminars, and Internet access to information which provides training on the provisions of this Chapter, including the custodian's responsibilities in connection with a request for records and the right of a person to institute court proceedings if access to a record is denied by the custodian."

9 *See, e.g., Californians Aware v. Joint Labor/Management Benefits Committee*, 200 Cal. App. 4th 972; 133 Cal. Rptr. 3d 766; (Cal. App. 2d Dist. 2011) (attorney general opinion on open meetings law entitled to great weight because attorney general regularly advises many local agencies about the meaning of the [open meetings]Act and publishes a manual designed to assist local governmental agencies in complying with the Act's open meeting requirements.)

10 Colorado Open Records Act Nineteen Frequently Asked Questions, Op. Atty. Gen. 01-1 (July 5, 2001).

11 KRS 61.880(2)(a).

the force of law, and may be enforced in state court, although it is not binding on the court if appealed.[12]

Most requests for advice about public records and open meetings focus on the exceptions to the general rules favoring public access. Public records disclosure laws typically exempt from mandatory disclosure private personal information,[13] records compiled for litigation,[14] certain criminal investigatory materials,[15] student records,[16] and trade secret information,[17] but this listing is by no means comprehensive. Individual state statutes exempt a wide variety of records, including suicide notes,[18] adoption records,[19] public utility records, real estate appraisals,[20] information regarding food security[21] and records of 911 calls.

Through opinions and litigation, the attorneys general have helped to shape these exemptions. For example, the attorney general of Kentucky held that blanket exemptions for 911 tapes were no longer permitted, stating, "Some 911 calls do not implicate clearly recognized personal privacy concerns."[22]

Attorney general offices themselves are also subject to open records requests, but their documents are frequently protected from disclosure through investigatory privilege[23] or attorney-client privilege.[24] The attorney-client privilege protected documents shared with other state attorney general offices by the New Hampshire attorney general in the context of considering whether to sign on to a multistate amicus brief. The New Hampshire Supreme Court held that the documents were protected by the work-product and attorney-client privileges, and the fact that the New Hampshire attorney general had decided not to join the amicus

12 *Courier Journal, Inc. v. Lawson,* 307 S.W.3d 617, 621 (Ky. 2010).

13 *See, e.g.*, Me. Rev. Stat. Ann. tit.1, § 402-3O.

14 *See, e.g.,* Okla. Stat. tit. 51, § 24A.12

15 *See, e.g.,* N.C. Gen. Stat. §§ 1321.4(a)

16 Mich. Comp. Laws § 15-243(1)(q).

17 *See, e.g.,* Md. Code Ann., State Gov't § 10-617(d)

18 Ohio Rev. Code § 313.10(A)(2)(c).

19 Wyo. Stat. Ann. § 16-4-203(c)(2).

20 Wash. Rev. Code § 42.56.260.

21 Utah Code Ann. § 63G-2-305(47).

22 Opinion of the Attorney General of Kentucky, 94-ORD-133.

23 *See, e.g., St. Mary's Med. Ctr. Inc. v. Steel of West Virginia*, 809 S.E.2d 708 (W.Va. 2018) ("A denial of the full import of the Attorney General's statutory exemption would place investigations of illegal conduct under the Antitrust Act at a disadvantage and would be contrary to the public's interest in the enforcement of the law.")

24 *See, e.g., Aland v. Mead*, 327 P.3d 752 (Wyo. 2014) (memo describing advice from deputy attorney general to governor's office was privileged because attorney general's office is legal advisor to all elected and appointed state officers.)

brief that was the subject of the communications did not waive the privilege. The court held, "[W]e cannot say that the exchange of e-mail messages between the AG and such offices in other states was inconsistent with keeping those messages, and the documents they referenced, from the [opposing parties].[25]

Several states exempt "unpublished memoranda, working papers, and correspondence of the attorney general" or similar documents.[26] In Arkansas, the courts have held that this includes those documents if prepared by attorney general staff or by consultants to the attorney general.[27] The Massachusetts supreme court addressed the interplay between the open records law and attorney-client privilege when it held that communications between a state agency and its legal counsel were protected from disclosure:

> The attorney-client privilege 'creates an inherent tension with society's need for full and complete disclosure . . .' But that is the price that society must pay for the availability of justice to every citizen, which is the value that the privilege is designed to secure." (citations omitted)[28]

On the other hand, the Kentucky attorney general released a "proffer" of information from a party accused of rigging state highway contracts after the Kentucky Court of Appeals found that the proffer did not contain "personal" information, and that the party had no expectation of privacy in the proffer because he agreed to testify to the same matters in open court if necessary. The statutory exemption for material that protects information relating to criminal investigations applies only if revealing the information would harm the law enforcement agency (for example, by revealing informants). In this case, the investigation was long closed, and the attorney general did not allege any potential harm to its operations.[29]

An exemption for records relating to criminal investigation or prosecution may also apply to attorney general records. A South Dakota decision upheld the attorney general's withholding of documents. The attorney general

25 *New Hampshire Right to Life v. Director, New Hampshire Charitable Trusts Unit,* 169 N.H. 95 (N.H. 2016).

26 Ark. Code Ann. § 25-19-105(b).

27 *Bryant v. Mars,* 309 Ark. 480, 830 S.W.2d 869 (Ark. 1992).

28 *Suffolk Construction Co. v. Div. of Capital Asset Mgt.*, 449 Mass. 444; 870 N.E.2d 33 (Mass. 2007).

29 *Lawson v. Office of Attorney General,* 2012 Ky. App. LEXIS 44 (Ky. Ct. App. March 2, 2012).

was investigating potential criminal financial misconduct in state government, and concluded that there was evidence of criminal wrongdoing, but the individual involved had died of a self-inflicted gunshot wound. Plaintiff made a public records request for reports on the death. The attorney general denied the request and the plaintiff appealed, arguing that since the death was not a crime, there was no basis to withhold the information. The court held that "the general public and press do not have a recognized constitutional right of access to documents held by law enforcement agencies." According to the court, the legislature intended to allow law enforcement agencies the ability to conduct investigations free from mandatory disclosure.[30]

The criminal investigation exemption does not always apply. In a case in Louisiana, requester sought documents that were held by state health agencies, but that had been requested by the attorney general through an interagency agreement to collect information in a potential criminal case. The attorney general argued that this agreement made the documents exempt from disclosure under a statutory provision that exempts records "pertaining to reasonably anticipated criminal litigation." The court held that this provision, which explicitly applied only to documents held by the attorney general, district attorneys, sheriffs and other law enforcement agencies, did not apply to documents that would not have been exempt if held by the original agency. Although the attorney general argued that this would eviscerate the criminal investigation exemption, the court explained that the documents of interest to the attorney general could not be discerned from the large group of requested documents.[31]

Similarly, open meetings laws may authorize governing bodies to hold executive sessions closed to the general public for the limited purpose of deliberating on matters such as personnel actions, labor negotiations, sales or acquisitions of public property, attorney-client communications regarding litigation, and records exempt from disclosure under a companion public records law.

In determining whether a particular situation qualifies for an exception from an open meetings or records disclosure law, attorneys general are guided by the public policy favoring public accessibility and court decisions that frequently construe exceptions quite narrowly.

30 *Mercer v. South Dakota Attorney General Office*, 32 CIV 14-120 (6th Jud. Cir., S.D. Cir. Ct. Sept. 2, 2014).

31 *McKay v. State*, 143 So. 3d 510 (La.App.1 Cir. 2014).

Enforcement Function

Enforcement of the policy of open government is often the responsibility of the attorney general. In many states, the attorney general may enforce compliance with the state's public records law by all governmental bodies. In some states such as Oregon, the attorney general supervises the public records law compliance of state agencies.[32]

In Delaware, if a requestor petitions the attorney general to determine whether a public body has violated the open meetings law, the attorney general must first decide if the attorney general is obligated to represent that public body. If not, the attorney general determines whether there is a FOIA violation, and if there is a violation, the requester may file suit or may request that the attorney general do so. If the attorney general is required to represent that public body, the chief deputy attorney general, rather than the attorney general, makes the determination. If there is a violation, the attorney general may not represent the public body in any appeal of the chief deputy's decision. The decision may be appealed to superior court.[33]

In other states, the attorney general has no enforcement authority under the public records disclosure law, and citizens denied inspection of public records must pursue a civil suit to enforce the law.[34] In Texas, a state agency receiving a request for records must seek a ruling from the attorney general as to whether the records are exempt from disclosure; if it does not, the records are presumed to be available to the public.[35]

The majority of states provide for criminal penalties in the event of a willful violation. In addition to possible fines, a criminal conviction is punishable by up to 30 days imprisonment in Arkansas, up to 90 days in Colorado, up to six months in Texas and up to a year in Oklahoma.[36] Willful failure to provide public

32 "[A]ny person denied the right to inspect or to receive a copy of any public record of a state agency may petition the attorney general to review the public record to determine if it may be withheld from public inspection." Ore. Rev. Stat. § 192.450.

33 Del. Code Ann. tit. 29 § 10005.

34 "The sole remedy for a person aggrieved by the denial of a request for disclosure is to institute proceedings in the district court of the county where the records or some part thereof are located, to compel the public agency or independent public body corporate and politic to make the information available for public inspection . . ." Idaho Code § 9-343. *See also, e.g.,* Ariz. Rev. Stat. § 39-121.02.

35 Tex. Gov't Code Ann. § 552.302.

36 Ark. Code Ann. § 25-19-104; Colo. Rev. Stat. § 24-72-206; Tex. Gov't Code Ann §§ 552.353(a), (e); Okla. Stat. tit. 51, § 24A.17.

records may be the basis for disciplinary action against, or dismissal of, public employees.[37] In Georgia, elected officials may be subject to recall for violation of the Open Records Act,[38] and in Nebraska, officials violating the public records statutes are subject to removal or impeachment.[39]

Similarly, the enforcement responsibilities of attorneys general under state open meetings laws vary widely. In Oregon, the attorney general has no open meetings enforcement responsibility to match the public records authority. In Michigan and Nevada, the attorney general may sue to enforce the Open Meetings law, but enforcement of the Open Records statute is left to the requestor.[40]

Several states, including Illinois, provide for criminal prosecution for open meetings violations with punishment by fines as high as $500 and by 30 days imprisonment.[41] In Iowa and Minnesota, sanctions include forfeiture of office for the third open meetings violation by the same individual serving on the same board.[42] In Alaska, officials violating the open meetings law are subject to recall.[43]

In Kansas, only the attorney general and district and county attorneys may seek voiding of public action where the open meetings law has been violated. Citizens must persuade the government officials to bring an action if they seek to void actions taken in violation of the Kansas Open Meetings Act. As one Kansas court stated, "It would be most difficult for government to function if every person was vested with the remedy of voiding governmental action for a violation .... Such actions, even though possibly ultimately unsuccessful, would unreasonably tie up government."[44]

While most attorneys general provide general advice to state agencies on the requirements of government-in-the-sunshine laws, an attorney general's role in open government may be much more active. If a state agency refuses to abide by an attorney general's interpretation of the open meetings law or the public

37 Minn. Stat. § 13.09, Md. State Gov't Code § 10-623(e).

38 *Steele v. Honea*, 409 S.E.2d 652 (Ga. 1991).

39 Neb. Rev. Stat. § 84-712.09.

40 Mich. Comp. Laws § 15.271; Nev. Rev. Stat. § 241.037. *See also, Stockmeier v. Nevada Dept. of Corrections Psychology Review Panel,* 135 P.3d 220 (Nev. 2006) (Nevada open meetings laws "do not create an attorney-client relationship with persons who complain to the attorney general about an open meeting violation, nor do they require the attorney general to assist such persons in lawsuits").

41 5 Ill. Comp. Stat. § 120/4.

42 Iowa Code § 21.6; Minn. Stat. § 13D.06.

43 *Meiners v. Bering Strait School District*, 687 P.2d 287, 301 (Alaska 1984).

44 *Krider v. Bd. of Trustees,* 277 Kan. 244; 83 P.3d 17 (Kan. 2004), citing *Stoldt v. City of Toronto,* 234 Kan. 957, 678 P.2d 153 (Kan. 1984).

records disclosure law, the attorney general may choose to vindicate in a court of law the public interest in open government.

For example, a number of newspapers sought documents related to the bid packages for the NASCAR Hall of Fame that were put together by officials for Georgia, the City of Atlanta and two other groups, Central Atlanta Progress and the Metro Atlanta Chamber of Commerce. The latter two groups refused to release the documents, which had been shared with public officials, but returned to the groups at the end of each meeting. After the groups refused to abide by the attorney general's ruling that the documents were public records, the attorney general sued to enforce the Open Records Act. The Georgia Court of Appeals held that the substantial public involvement in terms of monetary pledges and staff resources mandated the bid records be open to the public. In addition, the Court criticized the scheme to take back the documents at the end of each meeting, ruling that the Open Records Act "clearly does not condone evasive efforts such as those practiced here."[45]

Nebraska's Open Records law establishes a system in which the attorney general must determine whether access should be granted within 15 calendar days of submission of a petition from a requester whose request has been denied by a public body. If it is determined that the record may not be withheld, the attorney general must order the public body to immediately disclose the record. If the public body continues to withhold the record, the requester may bring suit or demand, in writing, that the attorney general bring suit in the name of the state. If such demand is made, the attorney general must bring suit within 15 calendar days. The requester has an absolute right to intervene in any suit brought by the attorney general.[46]

In Massachusetts, a requester must first seek to resolve an Open Meetings Law complaint with the public body. If there is no resolution after 30 days, the requester must file the original complaint with the attorney general, who has the authority to receive and investigate complaints, bring enforcement actions, issue advisory opinions, and promulgate regulations, if necessary.[47] On the other hand, in Kansas, only the attorney general or the district attorney may seek penalties or ask the court to void the actions of a public body.[48]

Perhaps the most important contribution the attorney general can make to open government is the establishment of policies and procedures to be applied

45 *Central Atlanta Progress v. Baker*, No. A06A1028 (Ga. Ct. App. 2006).
46 Neb. Rev. Stat. § 84-712.03.
47 Mass. G.L. chap. 30A, § 19(a).
48 Kan. Stat. Ann. § 75-4320(a).

by staff attorneys when agencies seek legal advice on the requirements of public records and open meetings laws. The ultimate sanction of refusing legal representation to a recalcitrant state agency may never have to be suggested if state officials and employees are on notice that the attorney general actively will enforce the requirements of open meetings and public records acts to the extent authorized by law.