

**MISSOURI
SUNSHINE
LAW: A
REFRESHER**

2019 MML ANNUAL CONFERENCE
SEPTEMBER 10, 2019

Erin P. Seele
CUNNINGHAM, VOGEL & ROSE, P.C.
Legal counselors to local governments
333 South Kirkwood Road, Suite 300 | St. Louis, Missouri 63122
314.446.0800 | erin@municipallm.com | www.municipallm.com

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**TODAY'S
TOPICS:**

- I. Legal Requirements
 - Meetings
 - Notice
 - Voting
 - Minutes
 - Records and Records Requests
- II. Special Rules for Law Enforcement Records
- III. Best Practices
- IV. Questions

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**I. LEGAL
REQUIREMENTS:
MEETINGS**



"Everyone here? Good. Meeting topic: Setting world record for shortest meeting. All in favor say aye. Ayes have it. Meeting over."

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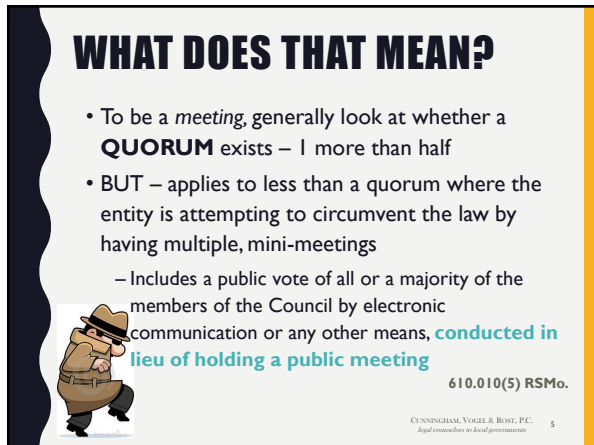
DEFINITION OF PUBLIC MEETING:

Any meeting of a public governmental body subject to sections 610.010 to 610.030 at which any public business is discussed, decided, or public policy formulated, whether corporeal or by means of communication equipment

610.010(5) RSMo.

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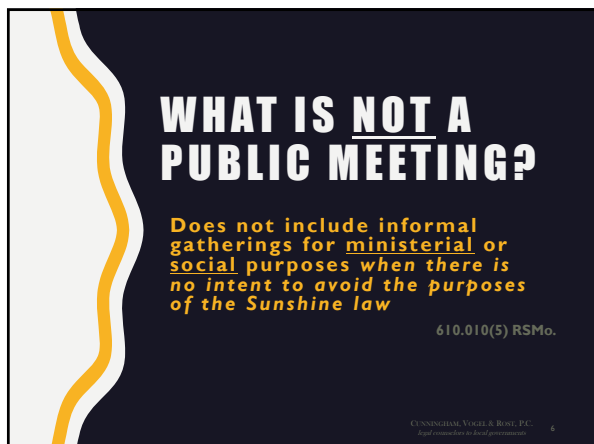
WHAT DOES THAT MEAN?

- To be a meeting, generally look at whether a **QUORUM** exists – 1 more than half
- **BUT** – applies to less than a quorum where the entity is attempting to circumvent the law by having multiple, mini-meetings
 - Includes a public vote of all or a majority of the members of the Council by electronic communication or any other means, **conducted in lieu of holding a public meeting**

610.010(5) RSMo.

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WHAT IS NOT A PUBLIC MEETING?

Does not include informal gatherings for ministerial or social purposes when there is no intent to avoid the purposes of the Sunshine law

610.010(5) RSMo.

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CLOSED MEETINGS – PROCEDURES & LIMITATIONS


- Affirmative roll call vote by the majority of the elected governmental body is required
- **Roll call** and the reason for closure must be included in the open meeting minutes

610.022 RSMo.

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ADDITIONAL CLOSED SESSION REQUIREMENTS



"I hope this bullhorn will make this meeting a little less boring."

- **All** votes taken in closed session must be by roll call
- Only discuss the topic for which the meeting was authorized to be closed

610.022 RSMo.

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AUTHORIZED REASONS TO CLOSE



- **Litigation/legal advice** (1)
- **Leasing, purchase or sale of real estate** (2)
- **Hiring, firing, disciplining or promoting of particular employees** (3)
- **Individually identified personnel records** (13)
- **Labor Negotiations** (9)
- **Otherwise protected by law** (14)

610.021 RSMo.

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HIRING, FIRING, DISCIPLINING OR PROMOTING OF PARTICULAR EMPLOYEES

- Elected officials are not "employees"
AG Opinion No. 77-92
- Appointments of **volunteers** to citizen boards are not eligible for closed session
AG Opinion No. 184-89

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II. LEGAL REQUIREMENTS: NOTICE

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NOTICE REQUIREMENTS

- time, date, place, tentative agenda
- if conducted by phone/electronically, must identify mode and designate location where public may observe/attend
- if meeting by Internet chat, message board, or other computer link, must also post notice on your web site and notify public how to access meeting

- Agenda provides a tentative description of what will be discussed at the open meeting
- If planning on going into closed session, place notice of such on the agenda with citation to specific authority authorizing the closed session


610.020 RSMo.

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TIME OF NOTICE REQUIREMENTS

- Section 610.020.2 – Notice “shall be given at least 24-hours, exclusive of weekends and holidays when the facility is closed”
- Section 89.050 – 15 day hearing notice requirement for zoning matters
- Section 67.2725 – 4 days notice for meetings where eminent domain or taxes are discussed



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NOTICE
THANK YOU FOR
NOTICING THIS
NEW NOTICE
YOUR NOTICING IT
HAS BEEN NOTED
AND WILL BE REPORTED TO A NOTARY

EXCEPTION

- 610.020.4 allows meetings on *less than* 24 hours notice for “good cause”

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III. LEGAL REQUIREMENTS: VOTING



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VOTES, HOW TAKEN?



- ... All votes taken by **roll call** in meetings of a public governmental body consisting of members who are all elected shall be cast by members of the public governmental body **who are physically present and in attendance at the meeting or who are participating via videoconferencing**

610.015 RSMo.

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WHAT WAS THE CHANGE?

Section 610.015 of the Sunshine Law amended in 2013 states:

"All votes taken by roll call in meetings of a public governmental body consisting of members who are all elected, ... shall be cast by members of the public governmental body who are physically present and in attendance at the meeting or who are participating via videoconferencing."


Previous and still existing language not amended in 2013 states:

"When it is necessary to take votes by roll call in a meeting of the public governmental body, due to an emergency of the public body, with a quorum of the members of the public body physically present and in attendance and less than a quorum of the members of the public governmental body participating via telephone, facsimile, internet, or any other voice or electronic means, the nature of the emergency of the public body justifying that departure from the normal requirements shall be stated in the minutes."

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WHEN IS ROLL CALL REQUIRED?



- To go in closed session
- Any vote taken in closed
- Generally to pass an ordinance to pass an ordinance
- Whenever specified number of votes are required
- Issue is important

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IV. LEGAL REQUIREMENTS: MEETING MINUTES

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MINUTES – OPEN & CLOSED

- “A journal or minutes of open and closed meetings shall be taken and retained by the public governmental body, including, but not limited to, a **record of any votes** taken at such meeting.”
- “shall include the **date, time, place, members present, members absent...**”
- “When a **roll call vote** is taken, the minutes shall attribute **each “yea” and “nay” vote or abstinence** if not voting to the name of the individual member of the public governmental body.”

610.020 & 610.015 RSMo.

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“Oh, so you do keep track of where you have those.”


I. RECORDS AND RECORD REQUESTS

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WHAT IS A “PUBLIC RECORD?”

- **610.010. Definitions.** As used in this chapter, unless the context otherwise indicates, the following terms mean:
- **(6) “Public record”,** any record,
 - whether written or electronically stored,
 - retained by or of any public governmental body
 - including any report, survey, memorandum, or other document or study prepared for the public governmental body by a consultant or other professional service paid for in whole or in part by public funds,
 - including records created or maintained by private contractors under an agreement with a public governmental body or on behalf of a public governmental body;




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WHAT IS NOT A “PUBLIC RECORD?”

- (6) “Public record”, ...The term “public record” shall **not** include any internal memorandum or letter received or prepared by or on behalf of a member of a public governmental body consisting of advice, opinions and recommendations in connection with the deliberative decision-making process of said body, **unless** such records are **retained** by the public governmental body **or** presented at a public meeting.



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RECORD RETENTION

- Not governed by the Sunshine Law
- Section 109.255 RSMo. designates authority for determining document retention schedules to the Local Records Board
- A “public record” under the Sunshine Law and a “record” falling under the retention requirements are not necessarily the same thing
- Record retention schedules available online at the Secretary of State’s website: <http://www.sos.mo.gov/archives/localrecs/schedules/>
- No penalty for violating record retention policies

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E-MAIL COMMUNICATIONS



- Any member of a public governmental body who transmits any message relating to public business by electronic means shall also concurrently transmit that message to either the member's public office computer or the custodian of records in the same format
- Only applies to "messages sent to 2 or more members of that body so that, when counting the sender, a majority of the body's members are copied. Any such message received by the custodian or at the member's office computer shall be a public record subject to the exceptions of section 610.021"

610.025 RSMo.

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TEXT MESSAGES/EMAILS DURING MEETING?


- Are they public records?
 - Private phone/account versus City phone/account
- Law settled in some other states
- Law unsettled in Missouri

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RELEVANT CLOSED RECORDS

- Vote or settlement agreement related to legal actions, cause of actions, or litigation (1)
 - But such shall be made public upon final disposition of the matter
- Real estate contract (if being made public will affect negotiation)
 - Real estate contracts (purchase, sale or lease) must be made public on execution (2)
- Individually identified personnel records, performance ratings, etc. (13)
 - Only exceptions:
 - Name, position, length of service and salary
 - Final decision to fire, hire, promote or discipline employee – must be made public within 72 hours
- Sealed Bids (12)
 - Until opened, then public
- Confidential or privileged communications with auditor (17)
 - Final audit reports are public



610.021 RSMo.

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Personal identification numbers and credit card numbers (22)

Specifications for competitive bidding (11) Until such are published for bid or officially approved

Software codes for electronic data processing, operational guidelines and policies developed for law enforcement, existing or proposed security systems and structural plans (21)

Records relating to scientific and technological innovations in which owner has proprietary interest (15)

Confidential or privileged communications with attorney; attorney work product in anticipation of litigation (1)

Records protected by disclosure of law (14)

RELEVANT CLOSED RECORDS CONTINUED

610.021 RSMo.

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SOCIAL SECURITY NUMBERS

Redact SSNs?


42 USC 405 (c)(2)(c)(viii)(I) states:
Social security account numbers and related records that are obtained or maintained by authorized persons pursuant to any provision of law enacted on or after October 1, 1990, shall be confidential, and no authorized person shall disclose any such social security account number or related record

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CUSTODIAN ISSUES

- Must appoint a custodian to be responsible for records and make available records for inspection/copying
- Therefore, at the very least, must have a policy designating a custodian of records. Should also:
 - Designate closed records
 - Provide method of responding to requests
 - Provide method for records management



610.023 RSMo.

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RECORD REQUESTS

- Must act upon request for access to the public record "as soon as possible, but in no event later than the end of the third business day following the date the request is received..."
- However... if access is not granted immediately, can give a "detailed explanation of the cause for further delay" and state the time and date the record will be made available
- Requires records to be provided in the format requested if available

610.023 RSMo.

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EXEMPT/NONEXEMPT MATERIALS

- If record contains information that is both exempt **and** non-exempt from disclosure, **there is a duty to separate out the exempt and make the non-exempt material available**

610.024 RSMo.

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RECORDS REQUEST TIPS


- Have requester or City Clerk fill out a request form
- Attach request form to response so no confusion what request City is responding to
- You do not have to create a new record
 - Under Sunshine, a compilation of information must already exist in public records – you do not have to create it
- You do not have to answer questions
- You do not have to "certify" records
- "reasonable clerk standard" *Anderson v. Village of Jackson*, 103 S.W.3d 190 (Mo.App. 2003)

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PENALTIES FOR VIOLATIONS


- If court finds City violated the Sunshine Law, court may declare the action taken void
- If court finds the governing body or member violated the Sunshine Law, the court **shall**:
 - Subject member up to \$1,000 fine
 - If court finds it was a **knowing violation**, **may** order the member to pay all costs and reasonable attorney fees
- If court finds that governing body or member **purposefully** violated the Sunshine Law:
 - Subject member up to \$5,000 fine
 - **Shall** order the member of governing body to pay all costs and reasonable attorney fees



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II. SPECIAL RULES FOR LAW ENFORCEMENT RECORDS



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UNIQUE ATTRIBUTES OF LAW ENFORCEMENT RECORDS

- Law Enforcement (“L.E.”) agencies are **required** to maintain records of all reported incidents, investigations, and arrests made (§ 610.100.2)
- It is a **crime** to **knowingly** violate certain Sunshine Law provisions relating to L.E. agency records (§ 610.115)
- **MOST critical** distinction is the three “special types” of records:
 - Arrest reports
 - Incident reports
 - Investigative reports

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ARREST REPORTS

- An "arrest report" is a record of a L.E. agency of an arrest and any detention or confinement and the charge
- "Arrest" is an actual restraint of a person or his or her submission to the custody of an officer for a criminal violation that results in issuance of summons or person being booked (cf. § 544.180)


610.100.1 RSMo.

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INCIDENT REPORTS

- A record of a L.E. agency pertaining to a "crime or incident" that consists of:
 - Date,
 - Time,
 - Specific location,
 - Name of victim, and
 - Immediate facts and circumstances surrounding the initial report of the "crime or incident"
- Includes the daily "logbook"



610.100.1 RSMo.

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INVESTIGATIVE REPORTS

- "Investigative report": a record that is:
 - Not an arrest or incident report and
 - Prepared by personnel of L.E. agency inquiring into a crime or suspected crime, either in response to incident report or in response to "evidence developed by [LEOs] in the course of their duties"



610.100.1 RSMo.

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WHY IT MATTERS

- The type of record, along with other factors, determines whether it is open or closed
- Arrest reports are generally OPEN
 - Unless person is not charged within thirty days, then only the "disposition portion of the record may be accessed" and subject to § 610.120; also closed if found not guilty, SIS, etc.
- Incident reports are generally OPEN
- Investigative reports are generally CLOSED, unless and until the investigation is "inactive"

610.100.1 RSMo.

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BUT WAIT — OTHER CLOSURES

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- In some cases, required to redact information / close the record (§ 610.1003 RSMo.)
- Defendant found not guilty, receives SIS, or case is dismissed (§ 610.105 RSMo.)
 - *State ex rel. Pulitzer v. Seay*, 330 S.W.3d 823 (Mo. App. 2011)
- 911 calls and information (§ 610.150 RSMo.)
 - Except such info as would constitute an incident report

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IV. BEST PRACTICES



Best Practices
Learn from the mistakes of others!

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SUGGESTED BEST PRACTICES

1. Keep Sunshine Book with you at meetings
 - Here is where can order for [free](http://ago.mo.gov/sunshinelaw/): 573-751-8844; <http://ago.mo.gov/sunshinelaw/>
2. Have a clear, strong policy; review periodically
 - Any member or employee of the public governmental body who complies with a written policy is not guilty of a violation of the Sunshine Act or subject to civil liability for any act arising out of following the written policy (610.028.2 RSMo.)
 - Policy should close the records authorized to be closed under Sunshine and provide for opening by board action
3. Adopt practice of writing time of posting on agenda to prove 24-hour compliance
4. When posting agenda, if must amend, label the agenda as amended and label any changed ordinance with new name or amendment so no dispute which version was considered by the board
5. Do not answer questions under the Sunshine Law; never answer legal questions

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SUGGESTED BEST PRACTICES

6. Do not create new records to respond to a request
7. Use forms to avoid disagreement about request – clerk may fill out if necessary, to confirm request
8. Get payment up front for large requests to ensure understand costs and encourages requester to limit scope of request to reduce costs
9. Redact social security and personal information
10. Remember the "reasonable clerk standard"
11. Only go into closed session when really need to not just because could be an authorized reason

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V. QUESTIONS



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St. Louis, Missouri 63122
314.446.0800
erin@municipalfirm.com

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