

Addressing Calls for Transparency

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In an environment where corporate boards have increasingly come under fire, members of some electric distribution cooperatives are now asking for more “transparency” in the form of open board meetings and open access to company documents.

Recently the members of one cooperative went so far as to propose and approve (against the recommendation of the Board and management) the adoption of bylaw amendments requiring the cooperative to follow the state open meetings act and open records act. Another cooperative recently adopted new open meeting and open records policies as the result of the settlement of a class-action suit against the cooperative.

In the private sector, “open access” policies are the exception, rather than the rule, even among nonprofit companies. If a cooperative decides to adopt such a policy, it should be carefully considered and developed by the board of directors, management, and legal counsel. On the other hand, if a cooperative prefers not to adopt such a policy (where there is no state law requiring the cooperative to provide “open access”), the cooperative should be prepared to respond to member questions and discuss why such a policy is not desirable. In any event, the cooperative’s board and management needs to understand how such policies work and what impact such policies would have on cooperative. This article addresses these issues, and also (1) discusses current cooperative practices; (2) examines the state open access and open records laws applicable to governmental entities, and (3) provides guidance on drafting cooperative “open access” policies.

I. Introduction

As with most issues concerning cooperatives, the question of member entitlement to attend board meetings and to obtain cooperative information is

tied to the unique structure of cooperatives and the nature of the relationship between cooperatives and their members. An electric cooperative's members own and have ultimate control over the cooperative. Because a cooperative's purpose is to provide services to its members, and each member has one vote under the democratic control principle, the members have a stronger incentive and ability than shareholders of a for-profit corporation to exercise control over their company.¹ From this perspective, the members need information from and about their cooperative to fulfill their responsibilities.

While the cooperative is controlled by its members, it functions as representative democracy through the election of directors as the elected representatives of the membership.² Although the board of directors typically delegates the daily governance of the cooperative to a management team, the board retains the responsibility for the overall direction of the cooperative.³ Seen from this perspective, the board of directors needs discretion to decide how much information can be provided to the members without impairing or interfering with the business operations of the cooperative, unless a state law requires otherwise. Similarly, the board must decide whether and to what extent members can attend board meetings.

If a cooperative does not have (and does not desire to have) a policy in place, it should be prepared to address member questions and concerns about open meetings and access to company documents. Having a consistent, reasonable response to such questions could help educate the members and perhaps avoid a situation where members obtain passage of "open access" bylaw amendments that might not be in the best interest of the cooperative.

On the other hand, if a cooperative decides to allow broader access to documents and board meetings than provided by state law, the policy controlling such access must strike a balance between openness and the cooperative's business needs for confidentiality. A particular member's desire for information should not be allowed to harm the cooperative's ability to serve the membership as a whole. If a balanced policy is developed and implemented, however, it might

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serve to increase the confidence and faith of the members in the cooperative and its board and management.

Before discussing new policies that could be put in place, it is helpful to understand cooperatives' current practices concerning access to board meetings and company documents.

II. Current Cooperative Practices and Applicable Laws

While some cooperatives are already subject to state open meeting and open records acts, and others have enacted policies under which the cooperative voluntarily provides access, many, if not most, cooperatives maintain closed board meetings and allow members access only to a limited universe of documents. This is, of course, similar to the practices of typical business corporations and many nonprofit corporations, which maintain closed board

meetings and provide shareholders with documents in accordance with the requirements of the applicable state corporations act.

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Some state cooperative statutes require the cooperative to maintain certain records and allow members to obtain or examine some or all of these records.⁴ (In some states such provisions are contained in the nonprofit corporations act but are made

applicable to electric cooperatives.)⁵ Records required to be kept usually include minutes of member meetings and board meetings, member lists, and financial records. Such provisions usually allow members to obtain certain records, such as bylaws and minutes of member meetings, upon request, but require members to show justification for obtaining more sensitive documents. For sensitive documents, the member's request must be made for a proper purpose, and the records must be directly connected with the member's purpose.⁶ Some of these statutes also expressly exclude certain records, such as personnel records and attorney-client communications.⁷ Such provisions are similar to those applicable to for-profit and nonprofit corporations.⁸

In several states, cooperatives fall under open meeting and open records provisions similar to those applicable to government agencies. The open records provisions of such statutes allow members to inspect and copy any records

of the cooperative for any purpose, except for records that are proprietary or confidential or that are prepared for or during an executive session.⁹ The open meetings provisions provide a general right of attendance for members at board meetings but provide an exception for certain subject areas that may be discussed in an executive session.¹⁰ For example, the Minnesota statute requires any electric cooperative with more than 50,000 members to open all regular and special board meetings to the members, subject to certain exceptions for personnel matters, litigation, and proprietary information.¹¹ The Alaska statute provides that members of the cooperative may attend board meetings, and that except when voice votes are authorized, any vote must be conducted so that members will know the vote of each director. The Alaska statute specifies those subjects that can be discussed in an executive session in broad terms; for example, matters that would adversely affect the finances of the cooperative may be considered in executive session.¹²

Some of these statutes go further and give access rights to non-members. For example, the Colorado statute provides that all meetings of an electric cooperative, including board meetings, are open to members, consumers and news media unless two-thirds of board members present vote to go into executive session.¹³ Some statutes also allow members to participate in meetings. Colorado's statute allows members to address the board at every regular board meeting on "any matter concerning the policies and business of the association," although the board can place reasonable restrictions on the amount and length of such comments.¹⁴

Having discussed the types of state statutes that might apply, we now turn to a discussion of state open meetings and records laws applicable to governmental entities. Some cooperatives have used these laws as guidance in developing their policies where there is no statute governing access to cooperative records. The members of at least one cooperative have required the cooperative to follow the provisions of the state open meetings and records laws. The discussion below illustrates issues to evaluate when cooperatives consider steps to enhance transparency.

III. Open Meeting and Open Records Acts

Open meetings and records laws, commonly referred to as "Sunshine Laws," are laws enacted to bring more openness to government proceedings and documents.¹⁵ As to records, the federal Freedom of Information Act¹⁶ and similar state laws allow access to many of the documents in the possession of

the federal and state governments and agencies. Many states also have open meetings laws that allow access to government meetings. Many of these laws were enacted in the 1970s against the backdrop of Watergate and the Vietnam war with the intention of restoring the public's faith in government, protecting the public from secret decision-making and holding government officials to greater accountability.¹⁷

The purpose of such laws is to promote accountability and openness in government and to discourage government agencies from handling important public issues in secret. For example, the New Jersey statute states that because

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“secrecy in public affairs undermines the faith of the public in government,” all citizens should be able to “witness in full detail all phases of the deliberation, policy formulation, and decision-making of public bodies.”¹⁸ A Georgia court has explained that Georgia’s open meetings act “was enacted in the public interest to

protect the public - both individuals and the public generally - from ‘closed door’ politics and the potential abuse of individuals and the misuse of power such policies entail.”¹⁹

Because such laws are premised on the policies that taxpayers are entitled to know the purposes for which their tax dollars are spent, and that government should be more open and accessible to citizens, the legislatures enacting them and the courts interpreting them have stated that such laws should be broadly interpreted and liberally construed in favor of openness.²⁰ Cooperatives “adopting” such acts or modeling their policies after such acts might find that their policies will be interpreted with the same presumption of openness. Cooperatives might also find that the court decisions interpreting the various aspects of the state open records and meetings acts might be applied to any disputes concerning similar cooperative policies.

What are the basic elements of the state acts applicable to state and local governments and agencies? Open meetings acts typically require that:

- Meetings of public bodies are open to the public.
- Reasonable notice of such meetings must be published.
- Minutes of such meetings must be taken and recorded.
- All meetings are presumed to be open unless the body claims that an

exception applies for which a closed meeting can be held, such as for employee decisions, evaluations and disciplinary actions, discussions concerning litigation, and business negotiations.

Open records laws typically provide that:

- A broad scope of public records is available for inspection unless an exemption applies that protects the records from disclosure.
- Public records are documents and information maintained, prepared or received by a public office or agency in the course of its operations as well as documents received or maintained by officials, employees and firms on behalf of public offices and agencies.
- Once a records request is made, the agency must disclose unless it can meet the burden of showing that an exemption clearly applies. Agencies typically have a short time to respond to requesters; three business days is common.
- Exemptions are generally intended to exempt documents the disclosure of which would substantially interfere with government functions or cause substantial damage to the privacy rights of citizens.
- Exemptions typically include medical records, certain law enforcement and investigative records, certain employee records, certain personal information of individuals.

These laws contain numerous detailed exemptions and exceptions. Failure of the government to meet the statutory requirements can lead to the invalidation of agency actions or, in the case of open records laws, to the assessment of penalties or attorneys fees in favor of parties making requests. Such laws also cause concern for companies doing business with state governments and agencies, as confidential information and trade secret information disclosed by companies during the course of the contracting process could potentially be subject to public inspection.

As one might expect, such laws generate numerous lawsuits. With open meetings acts, clashes arise over issues such as the types of meetings that are covered (are advisory committee meetings or informal discussions among Board members covered?), whether the notice given for a meeting is sufficient or was made sufficiently public, and whether actions taken that violate such laws are valid or invalid. Some acts explicitly state that actions adopted at a meeting not open to the public as required are not binding.²¹ Litigation over open records requests typically revolves around the exemptions that allow governments and agencies to deny access.

Such acts also typically include enforcement mechanisms and claim-resolution procedures. Such laws are often amended to provide for additional exceptions or to include or exclude certain kinds of meetings or documents. Because of the complexities involved in addressing the various types of meetings and records, in many states the attorney general's office publishes lengthy manuals that provide guidance for citizens, government agencies and public officials on how such acts might apply and be enforced.

IV. Considering Alternatives

The above discussion supports the conclusion that cooperatives should avoid the "short cut" of basing policies on the open records and meetings laws applicable to public bodies. These laws are designed for state governments and agencies and likely provide more access than the cooperative will want to offer. Such laws likely contain exemptions and procedures that will not be applicable to cooperatives, and will lack exceptions that cooperatives will require. Such laws typically incorporate complex procedures for requesting documents and providing notice of meetings and for resolving disputes over access. In addition, as discussed above, state "open access" laws typically provide that all meetings and documents should be available to the public, unless an exception applies, and are interpreted broadly by the courts in favor of access. In short, simply referring to the state act will likely cause logistical and administrative headaches for the cooperative.

Having concluded that adopting policies based on open records and meetings laws may not be the best solution to achieving greater transparency, the question remains: should cooperatives adopt policies that generally provide members with open access to board meetings and records? If a cooperative is not required and is not inclined to offer "open" access," it may well have valid business reasons for maintaining this practice. Although cooperatives are nonprofit corporations, in their business operations they are more akin to investor-owned utilities that limit access to board meetings and records on the basis of confidentiality concerns. Cooperatives, while owned by and operated for their members, are still businesses that maintain confidential and proprietary information, engage in sensitive discussions with counterparties, and deal with confidential employee matters, such as discipline and termination.

There are valid reasons both for and against offering wider access to meetings and documents, and the purpose of this article is not to advocate that cooperatives change their current practices. However, if a cooperative is not

inclined to provide greater transparency, it needs to be prepared to explain to its members how its current policy works and why its current policy is preferable and is beneficial for the membership. Taking no action without explanation could lead members to advocate for transparency bylaw amendments or could result in legislative efforts to impose open access requirements on cooperatives.

If a cooperative decides that more transparency would benefit the cooperative and the membership, it is unlikely to face any member resistance to policies that result in more access. If a cooperative is undecided on whether to change its policies, but can forecast that member or legislative efforts to increase transparency may lie ahead, a policy crafted by the cooperative is clearly preferable to one imposed upon it. A policy drafted by the board with input from management allows the cooperative to carefully consider the elements necessary to maintain the balance between openness and business-related confidentiality concerns.

Below we discuss the elements that cooperatives should consider when crafting policies aimed at increasing member access to board meetings and company records.

V. Policy Components

When drafting a policy, the cooperative will need to consider procedural elements that can strike the appropriate balance between openness and confidentiality. In the absence of controlling state law, the cooperative has great flexibility in drafting the policy. Such flexibility will require the board to think through the cooperative/member relationship. As one example, in developing an open meetings policy, the board must decide whether members will be allowed to make comments or presentations at board meetings and if so, whether time limitations should be imposed. Our observations and recommendations for open meetings and records policies are below.

(A) Open Meetings Policies

If the cooperative is subject to a state open meetings statute, the statute must be considered when drafting the policy.

- The policy should define what meetings constitute “board meetings” that are open to members. Although this may seem unnecessary, some of the open meetings laws applicable to public bodies have been interpreted as requiring notice of any gathering of members of the board or assembly at which business is discussed, even if the gathering is at a social event or a workshop.

- The policy can provide procedures for members attending board meetings, such as the ability to place time limitations on presentations and recommendations by members. The policy should also give the board discretion to remove persons who are disruptive and interfere with the meeting.
- The policy can specify if there are limitations on members' right to attend board meetings. For example, the policy might state that a member cannot attend or can be removed from the meeting if his or her purpose for attending is not reasonably related to or is inimical to the cooperative's business.
- The policy should also specify how and in what form notice of meetings will be given to members, and whether an agenda will be provided. For example, notice could be given on the cooperative's web site and newsletter at least ten days in advance of each meeting.
- Rather than simply allow all members to attend each board meeting, the policy should require members to submit a written request in advance of the meeting verifying that the member is attending for a purpose allowed by the policy. This also has the advantage of giving the cooperative notice of how many members plan on attending a particular board meeting.
- If a member intends to (and is allowed to) bring a recommendation or complaint before the board, the policy should require the member to submit the recommendation or complaint to management in advance of the board meeting and to provide advance notice that the member intends to speak at the meeting.
- Having procedural requirements for advance submittal of written materials will give the cooperative a reasonable, objective basis for excluding members from board meetings if such conditions are not met.
- The policy must provide the board with the ability to conduct an executive session and exclude members from such sessions. In the absence of any controlling state law, the policy can include broad areas that can be covered in executive session, such as personnel issues, and include a general statement that an executive session can also be convened when the board deems doing so to be in the cooperative's best interest. An alternative is to limit the use of executive sessions to specific issues, although this could lead to debate over the extent of such exceptions.
- While some cooperative open meetings acts specifically allow non-members to attend meetings, many cooperatives will likely want to restrict

non-members and the media from attending meetings. Some cooperative policies do, however, allow credentialed members of the media to attend meetings, and even to make audio recordings of the proceedings.

- The policy could provide a dispute resolution mechanism if there is any dispute about the member's ability to attend meetings. Alternatively, the policy could remain silent concerning disputes, and the member's remedy would thus be to go to court.
- If meeting minutes are to be made available to the members, the policy should specify how and when they will be made available. Some cooperative policies require the cooperative to provide meeting minutes on the cooperative's web site, while others provide minutes upon a member's request. If minutes are to be provided, the policy should provide an exception for matters addressed in executive session.

(B) Open Records Policies

The suggestions below assume that the cooperative has decided to adopt a policy that allows member access to most cooperative documents. If there is a controlling state statute, the statute must of course be considered when drafting the policy.

- Some information, such as articles of incorporation, bylaws, Forms 990 and financial statements, could be made readily available without the need for a written request. If an open meetings policy is adopted, board meeting minutes could be made available as well. Such information could be made available on the cooperative's website.
- Information that is more sensitive, but not confidential or proprietary, such as member lists, could be provided to members that submit a written request and state the purpose of such request. The policy should state what constitutes a "proper purpose" and give the board or management the discretion to determine whether the request meets this requirement. The policy could go one step further and require members to sign a nondisclosure agreement as to certain information, such as member lists.
- Requiring a written request gives management time to consider the nature of the request and evaluate the request against policy requirements. The policy could also include a dispute resolution process in the event the request is denied.
- Confidential and proprietary information should not be made available. Management should be given wide discretion in determining what

information falls within this category; otherwise, disputes could arise over whether particular documents are protected.

- The policy should allow the cooperative to charge copying fees and research fees for locating and providing documents to members.
- Open records laws contain time requirements for responding to document requests. If the cooperative decides to include a specific time requirement, it must be prepared to respond on time. If such a requirement is included, it might be preferable to state that requests will receive a response (either the documents requested or the reason why the documents cannot be provided) within a reasonable time, subject to the availability of personnel to handle the request.
- Finally, the policy will have to be worded carefully to ensure that the scope of records is not greater than the cooperative desires. For example, state open records acts are worded broadly and have been interpreted to apply to work-related email messages contained on officials' personal computers and documents and notes maintained by such officials in their homes.

VI. Conclusion

Member transparency concerns can develop into a divisive issue unless the cooperative works to educate the members about the cooperative's policies and the reasons for those policies. If state law allows the cooperative to hold closed board meetings and provide limited access to records and the cooperative elects to do so, it should provide training for its board and management on how to respond to member questions and complaints. If, on the other hand, the cooperative decides to implement an open records policy and/or open meetings policy, it should involve its board, management, and counsel in the drafting process and ensure that the policies will not allow "open access" to impede the business of the cooperative. Although whether such policies are desirable is a decision for the individual cooperative, adopting such policies can enhance the trust of the members in their cooperative and its board and management and might help forestall members and legislators from imposing requirements that might not be in the cooperative's best interest.

Footnotes

¹Charles T. Autry & Roland F. Hall, *The Law of Cooperatives* 56 (2009).

²Id.

³Id. at 57.

⁴Ga. Code Ann. § 46-3-271.

⁵Ariz. Rev. Stat. Ann. § 10-11602.B; Minn. Stat. §§ 216B.027(3) and 302A.461.

⁶Minn. Stat. § 302A.461(4).

⁷See, e.g., Ariz. Rev. Stat Ann. § 10-11602.F.

⁸See Model Bus. Corp. Act § 16.02; Model Nonprofit Corp. Act § 16.02.

⁹Alaska Stat. § 10.25.235; Fla. Stat. § 425.045(2);

¹⁰Alaska Stat. § 10.25.175; Colo. Rev. Stat. § 40-9.5-108; La. Rev. Stat. Ann. § 12:409; Minn. Stat. §§ 216B.027 & 308A.327.

¹¹Minn. Stat. § 308A.327

¹²Alaska Stat. § 10.25.175.

¹³Colo. Rev. Stat. § 40-9.5-108.

¹⁴Id. § 40-9.5-108(2)(b).

¹⁵See, e.g., *Schill v. Wisconsin Rapids School Dist.*, 786 N.W.2d 177 (Wis. 2010) (“Open records and open meetings laws, that is, “Sunshine Laws,” “are first and foremost a powerful tool for everyday people to keep track of what their government is up to The right of the people to monitor the people’s business is one of the cord principles of democracy.”); *Consumers Education and Protective Ass’n v. Nolan*, 368 A.2d 675, 682-83 (Pa. 1977).

¹⁶5 U.S.C. § 552.

¹⁷See *Rivers v. Young*, 892 N.Y.S.2d 747, 748 (N.Y. Sup. 2009);

¹⁸N.J. Stat. Ann. § 10:4-7.

¹⁹*Atlanta Journal v. Hill*, 359 S.E.2d 913 (Ga. 1987).

²⁰See, e.g., N.J. Stat. Ann. § 10:4-21; Ohio Rev. Code Ann. § 121.22(A); *Schauer v. Grooms*, 786 N.W.2d 909 (Neb. 2010); *Lafalier v. Lead-Impacted Communities Relocation Assistance Trust*, 237 P.3d 181 (Ok. 2010).

²¹See, e.g., Ga. Code Ann. § 50-14-1(b).



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