

File: B12

EXECUTIVE SESSIONS

While all meetings of public bodies must be open to the public, certain topics may be discussed in executive, or closed, session. Before going into an executive session, the chair of the public body must:

- First convene in open session.
- State the reason for the executive session, stating all subjects that may be revealed without compromising the purpose for which the executive session was called.
- State whether the public body will reconvene at the end of the executive session.
- Take a roll call vote of the body to enter executive session.

While in executive session, the public body must keep accurate records and must take a roll call vote of all votes taken and may only discuss matters for which the executive session was called

The law defines ten specific Purposes for which an executive session may be held, and emphasizes that these are the only purposes for which a public body may enter executive session. The ten Purposes for which a public body may vote to hold an executive session are:

1. To discuss the reputation, character, physical condition or mental health, rather than professional competence, of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual. The individual to be discussed in such executive session shall be notified in writing by the public body at least 48 hours prior to the proposed executive session; provided, however, that notification may be waived upon written agreement of the parties.

This Purpose is designed to protect the rights and reputation of individuals. Nevertheless, it appears at least that where a public body is discussing an employee evaluation, considering applicants for a position, or discussing the qualifications of any individual, these discussions should be held in open session to the extent that that the discussion deals with issues other than the reputation, character, health, or any complaints or charges against the individual. An executive session called for this Purpose triggers certain rights on the part of an individual who is the subject of the discussion. The individual's right to choose to have his or her dismissal considered at an open meeting takes precedence over the general right of the public body to go into executive session.

While the proposed imposition of disciplinary sanctions by a public body on an individual fits within this Purpose, this Purpose does not apply if, for example, the public body is deciding whether to lay off a large number of employees because of budgetary constraints.

2. To conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel;
Collective Bargaining Sessions: These include not only the bargaining sessions but also include grievance hearings that are called for under a collective bargaining agreement.

3. To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body and the chair so declares;

Collective Bargaining Strategy: Discussions with respect to collective bargaining strategy include discussions of proposals for wage and benefit packages or working conditions for union employees. The public body, if challenged, carries the burden of proving that an open meeting might have a detrimental effect on its bargaining position to justify an executive session on the basis of this Purpose. The showing that must be made is that the open discussion may have a detrimental impact on the collective bargaining process; the body is not required to demonstrate or specify a definite harm that would have arisen. At the time that the executive session is proposed and voted on, the chair must state on the record that having the discussion in an open session may be detrimental to the public body's bargaining or litigating position.

Litigation Strategy: Discussions concerning strategy with respect to ongoing litigation obviously fit within this Purpose, but only if an open meeting may have a detrimental effect on the litigating position of the public body. Discussions relating to potential litigation are not covered by this exemption unless that litigation is clearly and imminently threatened or otherwise demonstrably likely. That a person is represented by counsel and supports a position adverse to the public body's does not by itself mean that litigation is imminently threatened or likely. Nor does the fact that a newspaper reports a party has threatened to sue necessarily mean imminent litigation.

Note: A public body's discussions with its counsel do not automatically fall under this or any other Purpose for holding an executive session.

4. To discuss the deployment of security personnel or devices, or strategies with respect thereto;

5. To investigate charges of criminal misconduct or to consider the filing of criminal complaints;
This Purpose permits an executive session to investigate charges of criminal misconduct and to consider the filing of criminal complaints. Thus it primarily involves discussions that would precede the formal criminal process in court. Purpose 1 is related, in that it permits an executive session to discuss certain complaints or charges, which may include criminal complaints or charges, but only those that have already been brought. Also, unlike Purpose 5, Purpose 1 confers certain rights of participation on the individual involved, as well as the right for the individual to insist that the discussion occur in open session. To the limited extent that there is

overlap between Purposes 1 and 5, a public body has discretion to choose which Purpose to invoke when going into executive session.

6. To consider the purchase, exchange, lease or value of real property if the chair declares that an open meeting may have a detrimental effect on the negotiating position of the public body;

Under this Purpose, as with the collective bargaining and litigation Purpose, an executive session may only be held where an open meeting may have a detrimental impact on the body's negotiating position with a third party. At the time that the executive session is proposed and voted on, the chair must state on the record that having the discussion in an open session may be detrimental to the public body's negotiating position.

7. To comply with, or act under the authority of, any general or special law or federal grant-in-aid requirements;

There may be provisions in certain statutes or federal grants which require or specifically allow that a public body consider a particular issue in a closed session. Additionally, as the following section discusses, where Purpose (8) does not apply, Purpose (7) may nevertheless apply to the initial stage of a hiring process.

8. To consider or interview applicants for employment or appointment by a preliminary screening committee if the chair declares that an open meeting will have a detrimental effect in obtaining qualified applicants; provided, however, that this clause shall not apply to any meeting, including meetings of a preliminary screening committee, to consider and interview applicants who have passed a prior preliminary screening;

This Purpose permits a hiring subcommittee of a public body or a preliminary screening committee to conduct the initial screening process in executive session. This Purpose does not apply to any stage in the hiring process after the screening committee or subcommittee votes to recommend a candidate or candidates to its parent body. At the time that the executive session is proposed and voted on, the chair must state on the record that having the discussion in an open session will be detrimental to the public body's ability to attract qualified applicants for the position. If the public body opts to convene a preliminary screening committee, the committee must contain fewer than a quorum of the members of the parent public body. The committee may also contain members who are not members of the parent public body.

9. To meet or confer with a mediator, as defined in section 23C of chapter 233, with respect to any litigation or decision on any public business within its jurisdiction involving another party, group or entity, provided that:

- (i) any decision to participate in mediation shall be made in an open session and the parties, issues involved and purpose of the mediation shall be disclosed; and

(ii) no action shall be taken by any public body with respect to those issues which are the subject of the mediation without deliberation and approval for such action at an open session

10. To discuss trade secrets or confidential, competitively-sensitive or other proprietary information that has been provided under the following circumstances:

- a. in the course of activities conducted by a governmental body as an energy supplier under a license granted by the department of public utilities pursuant to G.L. c. 164 § 1F,
- b. in the course of activities conducted as a municipal aggregator under G.L. c. 164 § 134, or
- c. in the course of activities conducted by a cooperative consisting of governmental entities organized pursuant to G.L. c. 164 § 136, and
- d. when such governmental body, municipal aggregator or cooperative determines that such disclosure will adversely affect its ability to conduct business in relation to other entities making, selling or distributing electric power and energy

Public bodies are not required to disclose the minutes, notes or other materials used in an executive session where the disclosure of these records may defeat the lawful purposes of the executive session. Once disclosure would no longer defeat the purposes of the executive session, minutes and other records from that executive session must be disclosed unless they are within an exemption to the Public Records Law, G.L. c. 4, § 7, cl. 26, or are attorney-client privileged. The public body is also required to periodically review the executive session minutes to determine whether continued non-disclosure is warranted, and such determination must be included in the subsequent meeting minutes. A public body must respond to a request to inspect or copy executive session minutes within 10 days of request and promptly release the records if they are subject to disclosure. If the body has not performed a review to determine whether they are subject to disclosure, it must do so prior to its next meeting or within 30 days, whichever is sooner.

Items requiring a public vote after an executive session will be placed on the next meeting agenda unless otherwise authorized by the committee.

Reference.: Atty. General's Open Meeting Law Guide

1st reading: Reg SC Mtg 12/21/2011

2nd reading: Reg SC Mtg 12/21/2011