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Executive Sessions: What Municipalities Need to Know

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One of the strengths of American government is the right of the public to know and understand the actions of their elected representatives. This includes not merely the right to know a government body's final decision on a matter, but the ways and means by which those decisions were reached. There is great historical significance to this basic foundation of popular government, and our founding fathers keenly understood this principle.

-- THE SUPREME COURT OF OHIO[1]

General Principles of the Open Meetings Act

Ohio law disfavors secret meetings of public bodies. This is consistent with the general notion that government should be transparent. Ohio Revised Code Section 121.22, sometimes referred to as the Open Meetings Act, codifies a strong public policy favoring open meetings and carves out discrete exceptions to the general rule that requires public meetings. The open-meetings requirement is to be "liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law."[2]

The Open Meetings Act allows a public body to hold an executive (i.e., non-public) session at a regular or special meeting only in limited circumstances. To do so, a public body must have the support, by roll-call vote, of a majority of a quorum of the body, and the majority must limit the purpose of the executive session to the consideration of one or more of the seven categories of matters discussed below. To enter into executive session, the public body must state which one (or more) of the approved matters is to be considered. As one Ohio court recently has explained, by disclosing the purpose of the executive session, "the decision-making processes of the public body" remains open.[3] Disclosure of the purpose affords access to the "thematic substance of the issues to be entertained," ultimately furthering the goal of transparency.[4]

Permissible Matters to Be Considered

1. Matters related to public employees, officials, licensees, or regulated individuals
   A public body may hold an executive session to consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee, official, licensee, or regulated individual.[5] A public body also may hold an executive session to consider an investigation of charges or complaints against those individuals, so long as the individual does not request the hearing to be public.[6] This exception does not apply to disciplinary or performance-related matters concerning elected officials. The statute expressly provides that a public body may not hold an executive session to discipline or remove of elected officials.[7] To hold an executive session under this exception, the motion and vote to hold the executive session must clearly state which of the approved purposes is to be discussed.[8] However, it is not necessary to state the name of the person who is to be discussed.[9]

2. Purchase or sale of property by the public body
   A public body may hold an executive session to consider a purchase of property for public purposes or a sale of property at competitive bidding.[10] This exception may be used only if the "premature disclosure" of information would result in an unfair advantage to a person whose interests are adverse to the general public interest.[11] This exception may not be used by a member of the public body as ploy to provide non-public information to prospective buyers or sellers.[12] Any transaction that results from the covert disclosure of non-public information is void.[13]

3. Conferences with an attorney for the public body
   A public body may hold an executive session to confer with the public body's attorney concerning disputes involving the public body.[14] The attorney-client privilege applies when government agencies consult with counsel for legal advice or assistance.[15] The conference-with-attorney exception upholds the longstanding attorney-client privilege and recognizes the fact that "full and frank communication between attorneys and their clients" must be encouraged to "promote broader public interests in the observance of law and administration of justice."[16] The attorney-client privilege "recognizes that sound legal advice or advocacy serves the public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."[17] Although the attorney-client privilege is well recognized and jealously protected in most circumstances, it is not without limitation in the context of open meetings. For the conference-with-attorney exception to apply, the subject matter of such conferences must be limited to the subject of "pending or imminent" court action.[18]

4. Matters related to employee bargaining negotiations
   A public body may hold an executive session to prepare for, conduct, or review negotiations or bargaining sessions with public employees concerning terms and conditions of employment, including compensation.[19] This exception recognizes the importance of non-public labor negotiations allows governmental entities to freely discuss issues pertinent to ongoing employee relations.

5. Matters that must be kept confidential according to federal or state law
   If a public body is considering any matter that has been deemed private or confidential by federal or state law, the public body may enter into an executive session to consider and discuss such matters.[20] For example, in the even that a public body needs to discuss matters that are protected by the Health Insurance Portability and Accountability Act (HIPAA), it may—and in fact must—do so in private. The Open Meetings Act cannot override any other state or federal law that demands secrecy.

6. Details of security arrangements and emergency response protocols
   If disclosure would jeopardize the security of the public body or public office, a public body may hold an executive session to consider details related to security and emergency response.[21] This exception presumably would apply to discussions related to security surrounding public events and public buildings and to protocols for responses to human-caused and natural disasters. Here, the General Assembly has chosen not to allow the principle of transparency to be taken to an illogical end so as to endanger the lives of public officials and employees, or the public at large.

7. Trade secrets
   By statute, certain political subdivisions may establish and operate hospitals. The Open Meetings Act provides that county hospitals, joint township hospitals, and municipal hospitals may hold executive sessions to consider trade secrets.[22] This exception recognizes the vital role intellectual property plays in the operation of a hospital, particularly in the area of research and development. County hospitals, joint township hospitals, and municipal hospitals are not forced to operate at what would be a competitive disadvantage simply because they are governmentally run.

Formal Action Must Be the Result of an Open Meeting

Although a public body may deliberate concerning the approved matters in a non-public meeting, it cannot take any formal action during the executive session. To further the end of transparent government, any formal action that is not adopted in an open meeting is invalid.[23] Similarly, if the public body does not strictly follow the procedures and limitations for holding executive sessions, any formal action adopted in an open meeting that resulted from "deliberations" in a non-public meeting is invalid.[24] For example, the court invalidated the action of a village council in *Myers v. Hensley*.[25] There, the court held that the passage of a resolution by a village council was invalid when then council improperly deliberated on the merits of the resolution during an executive session. The council held an executive session after taking a voice vote and did not state which one of the statutory exceptions were to be discussed.[26] Under those circumstances, the council was not permitted to deliberate on the merits of a pending resolution. Accordingly, the resolution was declared invalid, even though it was formally passed in open session.[27]

Significantly, however, members of a public body are not required to perform every step of the decision-making process in public. " 'Deliberations' involve more than information gathering, investigation, or fact-finding. They involve the weighing and examining of reasons for and against a course of action. Deliberations involve a decisional analysis, i.e., an exchange of views on the facts in an attempt to reach a decision."[28] Therefore, a public body may gather information in private, even though it cannot deliberate privately without a statutorily authorized purpose.[29]

Conclusion

It is imperative for any public body to remain familiar with the requirements and limitations associated with the Open Meetings Act. The Ohio General Assembly and Ohio courts unambiguously have declared that the process of government must be transparent, but the Ohio Revised Code balances competing interests related to particularly sensitive information and allows public bodies to deliberate privately concerning certain matters. In fact, in certain circumstances related where disclosure of confidential information is prohibited by law, a public body could subject itself to liability. In this context, members of a public body should take steps to educate themselves through the body's legal counsel, with particular emphasis on the types of exceptions that might apply to their particular body. A prudent, fully-informed approach will allow the members of public bodies to ensure that the ultimate goal of governmental transparency is achieved.

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(1) *White v. Clinton County Bd. of Comm'rs* (1996), 76 Ohio St. 3d 416, 419.
(2) O.R.C. 121.22(A).
(3) *Weisbarth v. Geauga Park District*, 11th Dist. No. 2007-G-2780, 2007-Ohio-6728, ¶ 3 fn. 1.
(4) *See id.*
(5) O.R.C. 121.22(G)(1).
(6) *Id.*
(7) *Id.*
(8) *Id.*
(9) *Id.*
(10) O.R.C. 121.22(G)(2).
(11) *Id.*
(12) *Id.*
(13) *Id.*
(14) O.R.C. 121.22(G)(3).
(15) *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St. 3d 261, 2005-Ohio-1508, ¶ 30.
(16) *Upjohn Co. v. United States* (1981), 449 U.S. 383, 389.
(17) *Id.*
(18) *Id.*

(19) O.R.C. 121.22(G)(4).
(20) O.R.C. 121.22(G)(5).
(21) O.R.C. 121.22(G)(6).
(22) O.R.C. 121.22(G)(7).
(23) O.R.C. 121.22(H).
(24) *Id.*
(25) *Myers v. Hensley* (Sept. 23, 1999), Third Dist. No. 6-99-02, 1999 Ohio App. LEXIS 4376
(26) *Id.* at *5-6.
(27) *Id.* at *6-7.
(28) *Piekutowski v. South Central Ohio Educational Service Center Governing Board*, 161 Ohio App.3d 372, 2005-Ohio-2868, ¶ 14 (citations omitted).
(29) *Id.*