

Participation in Executive Session

Prepared for the Massachusetts Municipal Association Meeting, January 2020

The Open Meeting Law [G.L. c. 30A, §§18-25] permits municipal boards and committees to convene in executive session for certain specific and enumerated reasons. The purpose of this memorandum is to address the often asked question of who may be present in an executive session in addition to the members of the board or committee that has convened the meeting.

This question arises most frequently when a board meets in executive session to discuss strategy with respect to litigation, value of real property, and collective bargaining and non-union contract negotiations. In addition, this memorandum will address the right of an individual to be present if the board convenes an executive session to discuss the reputation or character of an individual or to hear complaints or charges against that individual.

As a brief reminder, when entering the executive session portion of a public meeting, several procedures must be followed. The chair of the public body must (1) convene the meeting in open session (and the meeting notice must so provide if the executive session is the only matter to be undertaken at the meeting), (2) state the reason for the executive session, including the subjects to be discussed without compromising the purpose of the executive session, (3) take a roll call vote of the body to enter executive session, (4) declare whether open session will be resumed following the executive session, and (5) cause accurate records of the executive session to be maintained. G.L. c. 30A, §21(b). In the absence of authorized use of remote participation, members of the public body who wish to participate must be physically present at the meeting location. If remote participation has been authorized, the member must state at the beginning of the executive session that no other individual is present or able to hear the discussion at the remote location, or seek approval from the public body that such an individual may be present. 940 CMR 29.10(7)(d).

Litigation Strategy

The Open Meeting Law permits a public body to convene in executive session to “discuss strategy with respect to ... litigation if an open meeting may have a detrimental effect on the litigating position of the public body and the chair so declares...” G.L. c. 30A, §21(a)(3). [emphasis added]. Under this exemption, the public body may invite the participation of municipal employees, consultants, or others who may be in a position to assist the board in its deliberations. Such individuals may include attorneys, expert witnesses, and other consultants representing the municipality. In addition, the body convening the executive session may, at its discretion, invite other boards to participate in executive session (of course, such boards must also post their meeting in compliance with the Open Meeting Law).

A public body may **not**, however, invite into the executive session opposing parties to the litigation, or opposing counsel, for the purpose of conducting settlement discussions or for any other purpose. As the Open Meeting Law only permits an executive session to discuss strategy with respect to litigation, it is plain that such conversations cannot be had in the presence of an opposing party to the litigation. Remember that in order to enter executive session under this exception, the chair must declare that a discussion in open session would jeopardize the litigation position of the municipality.

Some may argue that if the public body is unable to have a frank closed-door session with the opposing party, this rule may hamper or impede settlement discussions. In order to pursue settlement, however, the board, as part of its executive session, may formulate and/or evaluate settlement proposals and then appoint counsel, a single member of the board (such as the chair), or a staff employee to meet with the opposing side to actually conduct settlement discussions. These discussions can even occur simultaneously. However, the public body should avoid appointing more than one of its own members to negotiate a settlement, however, because even if the appointees do not constitute a quorum of the public body, they would constitute a subcommittee subject to the Open Meeting Law.

Collective Bargaining and Non-Union Contract Negotiations

Under this exemption, a public body may convene in executive session either to discuss strategy with respect to negotiations, or actually conduct negotiations, with union representatives or non-union personnel. If a public body is meeting to consider strategy with respect to such matters, the union or non-union personnel may not be invited to participate in the executive session because in order to be in executive session, a declaration must be made that having the discussion in open session would be detrimental to the interests of the public body. However, any other person that may be useful to the public body may be invited to join such strategy session. If there is a breach of confidentiality or any other issue related to the executive session procedures or protocols that requires discussion, the municipal body must resume open session. See AG-OML-2013-129.

Note that when meeting for strategy purposes, the public body need not name the particular union or non-union personnel at issue if doing so would undermine the public body's negotiating position. However, when the executive session is held for the purpose of actually conducting negotiations, the union or the non-union personnel must be identified by name on the meeting notice.

This exemption is often misunderstood and asserted in the context of contract negotiations generally. However, the exemption applies only to collective bargaining contracts and contracts with non-union personnel. Thus, this exemption does not permit a municipal board to convene in executive session to conduct contract negotiations with vendors or other firms or individuals providing goods or services to the municipality.

Value of Real Property

A municipal board may convene in executive session "to consider the purchase, exchange, taking, 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." G.L. c. 30A, § 21(a)(6). [emphasis added].

This exemption allows for executive session discussions of strategy with respect to land acquisition or disposal, or with respect to the value of real property only when an open meeting may have a detrimental effect on the negotiating position of the body. Thus, a municipal board may not meet in executive session with the “other side” to negotiate a sale or acquisition of real estate. Thus, a municipal board may not meet in executive session with private developers or landowners to negotiate the terms of a land acquisition or disposal; however, as discussed above, a public body may designate counsel or a single member of the body to negotiate with the landowner or developer.

Note, further, that the Division has indicated that a municipality may not meet in executive session simply to consider the purchasing of land in the absence of a negotiation process or position to protect. See AG-OML-2016-47.

Complaints Against Individual Public Employees

A municipal board may enter executive session to discuss the “reputation, character, physical condition or mental health... 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.” G.L. c. 30A, § 21(a)(1). This purpose includes discussing employee matters if such discussion will involve the “reputation, character, physical condition or mental health” of the individual, but it is important to distinguish such discussions from those simply pertaining to the individual’s “professional competence,” which should still be held in open session.

This purpose triggers a number of notice and hearing requirements with respect to the individual being discussed. G.L. c. 30A, §21(a)(1). The individual to be discussed must be provided written notice that they will be discussed at the meeting no less than 48 hours before the proposed executive session and that they will be provided with the opportunity to present information on their own behalf. The individual also has the right to have the discussion held in open session, and may waive the notification requirement or the right to be heard. The individual may also have counsel or a representative (i.e. union representative) present during the executive session to advise the individual, but counsel or the representative may not “automatically” participate in the deliberations. The individual may also record the meeting at the individual’s discretion. Typically, if the subject of the executive session intends to record the meeting, the municipal body should also consider recording. While the individual to be discussed must receive notice, the municipal body is not required by the Open Meeting Law to provide the individual with specific information regarding the complaints submitted, although certain due process rights may nevertheless be implicated depending on the situation. OML-2016-15. Finally, if a particular individual has submitted a complaint against the municipal employee, that individual may also be present, at the public body’s discretion, to provide information and details relating to the complaint. OML-2017-49.

In the event that a preliminary screening committee is considering an applicant for employment, it may enter executive session under G.L. c. 30A, §21(a)(8). Separately, if a complaint involves criminal allegations, the municipal body may invoke the fifth listed purpose for entering executive session, investigation of “charges of criminal misconduct.” G.L. c. 30A, §21(a)(5). In these circumstances, however, the individual at issue has no right to notice of the meeting, to attend the meeting or to speak on their own behalf.

Summary

As the above discussion highlights, there are many factors to consider before entering executive session. Importantly, the reason for entering executive session may dictate that certain persons or representatives may not participate in such session. It is important to identify the particular purpose for executive session, therefore, to ensure that persons prohibited from participation are not inadvertently allowed to attend that portion of the meeting.

Please contact Attorney Brian W. Riley (briley@k-plaw.com) or any other member of our Government Information and Access group at 617-556-007 for further information about the use of executive session and the Open Meeting Law generally.

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