



Education Law

Behind Closed Doors:

Executive Sessions and the Open Meetings Law

Anyone who has attended a meeting of their local school board may have noticed a strange procedure in which the board of education members leave the meeting to retire to a private room. Although this may seem like a random or spontaneous event, it is actually a well-established procedural device which allows public bodies to discuss certain sensitive subjects outside of public view. Despite appearances, the occasions which public bodies may retire to a private meeting are strictly regulated by law, and may only occur under certain circumstances.

Article 7 of the New York State Public Officers Law, also known as the Open Meetings Law ("OML"), creates important obligations for public bodies when conducting their meetings which cannot be ignored. One such obligation is for public bodies, such as boards of education, to conduct the business of the public body in an "open and public manner."¹ To achieve this purpose, the statute requires that "[e]very meeting of a public body shall be open to the general public."² However, the law also provides that, under certain circumstances, a public body may transact business in a proceeding closed to the public known as an "executive session."³



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An executive session must be convened by following a specific procedure, and may only be convened for a limited number of purposes, all of which are individually set forth in the OML. Failure to comply with the requirements of the OML can have serious and costly consequences for those who choose to ignore them. Specifically, under the statute, any "aggrieved person" may bring a special proceeding against a public body pursuant to Article 78 of the Civil Procedure Law and Rules to complain about alleged violations of the OML. The statute of limitations for such a proceeding does not begin to run until the day when the minutes of the executive session have been made available to the

public.⁴

If the court determines that a violation of the law has occurred, the court is empowered to choose from a menu of consequences. First, the court may declare any action that was taken in violation of the OML to be "void, in whole or in part, without prejudice to reconsideration in compliance with [the OML]."⁵ Second, the court may require the members of the public body who violated the OML to participate in a training session to educate them regarding

their obligations under the law.⁶ Finally, and perhaps most significantly, the court is empowered to impose a financial consequence for failure to comply with the OML, by awarding costs and attorney's fees to the party who brought the successful challenge.⁷

In order to avoid these consequences of noncompliance, public bodies should understand the nuances of the OML, particularly with regard to issues related to executive sessions. It is important that they understand what matters may be properly addressed in an executive session, the procedure which must be followed when calling an executive session, and what a public body is permitted to do after entering into an executive session. To avoid the consequences of a violation, public bodies should consult with their legal counsel to ensure that their executive sessions are noticed and held in compliance with the law. Another source for guidance on this subject is the New York State Committee for Open Government, which issues and posts advisory opinions regarding the OML at www.dos.ny.gov/coog.

Under the OML, the reasons for which a public body may go into execu-

tive session are limited. Some of the reasons specified in the OML include: "matters which will imperil the public safety if disclosed;" "discussion regarding proposed, pending or current litigation;" "collective negotiations pursuant



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to Article 14 of the Civil Service Law;" "the medical, financial, credit or employment promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;" and the "preparation, grading or administration of examinations."⁸

The OML specifically exempts certain types of meetings from its coverage. These include "judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning boards of appeal;" "deliberations of political committees, conferences and caucuses;" and "any matter made confidential by federal or state law."⁹ An example of a matter made confidential by federal or state law would be attorney-client communications. Such communications are considered confidential under CPLR 4503. Consequently, since the communication is confidential under state law, it is exempt under the

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OML. The Committee for Open Government has stated in an advisory opinion that, "When an exemption applies, the [OML] does not, and the requirements that would operate with respect to executive sessions are not in effect."¹⁰

In addition to the reasons set forth in the OML, additional authority is given to school district audit committees to conduct an executive session. Specifically, Education Law § 2116-c authorizes such an executive session to allow the audit committee to "meet with the external auditor prior to the commencement of the audit;" to "review and discuss with the external auditor any risk assessment of the district's fiscal operations;" and to "receive and review the draft annual report and accompanying draft management letter and, working directly with the external auditor, assist the trustees or board of education in interpreting such documents."

Once a determination is made that a particular matter may be properly addressed in executive session, the public body must then follow a specific procedure prior to commencing an executive session. First, a motion must be made during a public meeting, and adopted by a majority vote of the total board membership, to enter into executive session.¹¹ That motion must identify the subject or subjects to be considered during the proposed executive session.¹² Unfortunately, although the OML requires that such a motion be made, it fails to provide any guidance as to how the specific motion should read.

However, it has been recently illustrated that simply reciting the language of the statute is insufficient. In *Zehner v. Board of Education of the Jordan-Elbridge Central School District*,¹³ the court found that a board of education violated the OML by entering into executive session based upon a motion that amounted to only "merely reciting statutory categories for going into executive session without setting forth more precise reasons for doing so."

Furthermore, although the motion to convene an executive session may seem like a formality, it should not be viewed as a foregone conclusion. The OML requires that the motion and vote take place at the open meeting during which the executive session is to take place. Accordingly, the executive session cannot be scheduled in advance.¹⁴ However, it is permissible to place a notation on the meeting agenda that there will be a "proposed executive session, subject to board approval," or that the public body "anticipates that the board will act upon a resolution to convene an executive session."¹⁵ Although "technically" a public body cannot schedule an executive session in advance of a meeting, a board may provide notice of an "intent to enter into an executive session as an appropriate way of alerting the public that an executive session is likely to be held (rather than scheduled), and implicitly, that there may be no overriding reason for arriving at the very beginning of a meeting."¹⁶ Also, because the OML specifically defines an executive session as "that portion of a meeting not open to the general public" an executive session may not be held prior to the beginning of a public meeting.¹⁷

Once an executive session has been

properly called, the type of business a public body may actually conduct is limited. Although the Committee for Open Government has previously expressed its opinion that most public bodies may take action during an executive session, this does not apply to school boards.¹⁸ In fact, the general rule is that a school board may not take action in an executive session.¹⁹ This limitation has one notable exception. School boards are permitted to discuss disciplinary charges against a tenured teacher, and vote on whether probable cause exists to commence disciplinary charges against that employee.²⁰

The OML, and in particular those aspects of the law that pertain to executive sessions are easily overlooked by public bodies. However, the failure to adhere to these provisions can result in needless litigation, expense, and public embarrassment. Accordingly, public bodies should familiarize themselves with the provisions of the OML and consult with their attorneys to ensure that OML violations are avoided.

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1. Pub. Off. L. § 100.
2. Pub. Off. L. § 103(a).
3. *Id.*
4. Pub. Off. L. § 107(3).
5. Pub. Off. L. § 107(1).
6. *Id.*
7. Pub. Off. L. § 107(2).
8. A complete list of those matters for which an executive session may be called can be found at Pub. Off. L. § 105(a)-(h).
9. Pub. Off. L. § 108.
10. OML-AO-5265.
11. Pub. Off. L. § 105(1).
12. *Id.*
13. *Zehner v. Board of Education of the Jordan-Elbridge Central School District*, 91 A.D.3d

- 1349 (4th Dept. 2012).
14. OML-AO-4889.
15. OML-AO-2426.
16. OML-AO-4889.
17. *Id.*
18. OML-AO-2209.
19. *Matter of Crapster*, 22 Ed. Dept. Rep. 29.
20. Education Law § 3020(a). *Sanna v. Lindenhurst Bd. of Educ.*, 85 A.D.2d 157 (2d Dept. 1982); *aff'd* 58 N.Y.2d 626 (1987).

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