

Out of the Sunshine and Into the Open: Understanding the New Open Meeting Law

New Law: Act No. 2005-40

Effective Date: October 1, 2005

Repealed: Sunshine Law, Section 13A-14-2, Code of Alabama, 1975

Who is Covered?

All Governmental Bodies:

1. Municipal governing body
2. All municipal "boards, bodies, and commissions" which "expend or appropriate public funds"; and,
3. All municipal "multimember governing bodies of departments, agencies, institutions, and instrumentalities "including, without limitation, all corporations and other instrumentalities whose governing boards are comprised of a majority of members who are appointed or elected by" the municipality.

Does not include "voluntary membership associations comprised of public employees, counties, municipalities, or their instrumentalities which have not been delegated any legislative or executive functions by the Legislature or Governor."

What Meetings are Covered?

1. "The prearranged gathering of a quorum of a governmental body, a quorum of a committee or a quorum of a subcommittee of a governmental body at a time and place which is set by law or operation of law";
2. "The prearranged gathering of a quorum of a governmental body, a quorum of a committee or a quorum of a subcommittee of a governmental body during which the body, committee or subcommittee of the governmental body is authorized, either by law or otherwise, to exercise the powers which it possesses or approve the expenditure of public funds"; and,
3. "The gathering, whether or not it was prearranged, of a quorum of a governmental body, a quorum of a committee or a quorum of a subcommittee of a governmental body during which the members of the governmental body deliberate specific matters that, at the time of the exchange, the participating members expect to come before the body, committee or subcommittee at a later date."

The term "meeting" does not include:

1. "Social gatherings, conventions, conferences, training programs, press conferences, media events, or other similar gatherings "so long as the governmental body does not deliberate specific matters that, at the time of the exchange, the participating members expect to come before the governmental body at a later date", even if a quorum is present at these events; and

2. "Occasions when a quorum of a governmental body gathers, in person or by electronic communication, with state or federal officials for the purpose of reporting or obtaining information or seeking support for issues of importance to the governmental body."

Meeting Notice

Method: Post notice on public bulletin board at city hall.

When: At least seven (7) days before the date of the meeting.

What about emergencies? The law does contain an exception. For special meetings and for gatherings other than a regular meeting where a quorum will act or consider issues likely to come before the body later:

* Post as soon as practicable, no less than 24 hours before the meeting, unless:

1. Notice cannot be given due to emergency circumstances requiring immediate action to avoid physical injury to persons or damage to property; or
2. The notice relates to a meeting to be held solely to accept the resignation of a public official or employee.

Even in these cases, notice **MUST** be posted at least one hour before the meeting starts.

Direct Notice: If practicable, additional notice must be provided to any member of the public or media who has registered to receive notice. Must be given at the same time as general notice. Contents are the same. Method is up to the entity. **NOTE:** Can require person to pay associated costs, if any, and can establish regulations for payment and distribution.

Contents of Notice

1. Time of meeting
2. Location of Meeting
3. Date of Meeting
4. Agenda, if created. If not, include general description of nature and purpose of Meeting.

Conducting Meetings

- Minutes are required. They are public.
- Entity must adopt rules of parliamentary procedure and follow them.
- No votes during executive sessions.
- No votes by secret ballot.
- All votes must be in open.
- Voice votes are allowed.
- Public may record the public part of the meeting, as long as it is not disruptive. Entity may adopt rules for this.
- Members have an absolute privilege and immunity from suit for statements made during the meeting concerning a pending action.

Executive Sessions

Procedure for Entering:

1. A quorum convenes a public meeting.
2. A majority of the quorum passes on the record a motion calling for the executive session. The motion must state the reason for the executive session. Any required oral or written declaration to justify the executive session must be made prior to the vote.
3. The vote of each member, as well as the written or oral declaration, shall be recorded in the minutes.
4. Prior to calling the executive session to order, the presiding officer shall state whether the governmental body will reconvene after the executive session and, if so, the approximate time the body expects to reconvene.

Reasons for Executive Session:

(1) To discuss the general reputation and character, physical condition, professional competence or mental health of individuals, or to discuss the job performance of certain public employees. The entity may not go into executive session to discuss the job performance of an elected or appointed public official, an appointed member of a state or local board or commission, or any public employee who must file a Statement of Economic Interests with the Alabama Ethics Commission pursuant to Section 36-25-14, Code of Alabama 1975. The salary, compensation, and job benefits of specific public officials or specific public employees may not be discussed in executive session.

(2) To consider the discipline or dismissal of, or to hear formal written complaints or charges brought against a public employee, a student at a public school or college, or an individual, corporation, partnership, or other legal entity subject to the regulation of the governmental body, if an executive session is expressly allowed by federal law or state law.

(3) To discuss with the attorney the legal ramifications of and legal options for:

a) Pending litigation;

b) Controversies not yet being litigated but imminently likely to be litigated or imminently likely to be litigated if the governmental body pursues a proposed course of action; or

c) To meet or confer with a mediator or arbitrator with respect to any litigation or decision concerning matters within the jurisdiction of the governmental body involving another party, group, or body.

Prior to voting to convene an executive session under this exception, an attorney licensed in Alabama must provide a written or oral statement reflected in the minutes that this exception applies to the planned discussion. This declaration does not constitute a waiver of attorney/client privilege. However, any deliberation between the members regarding what action to take relating to pending or threatened litigation based upon the advice of counsel must be conducted in the open portion of the meeting.

(4) To discuss security plans, procedures, assessments, measures, or systems, or the security or safety of persons, structures, facilities, or other infrastructures, the public disclosure of which could reasonably be expected to be detrimental to public safety

or welfare. If the discussion involves critical infrastructure or critical energy infrastructure information, the owners and operators of such infrastructure must be given notice and an opportunity to attend the session.

(5) To discuss information that would disclose the identity of an undercover law enforcement agent or informer or to discuss the criminal investigation of a person, other than a public official, who is alleged or charged with specific criminal misconduct allegations or against whom charges of specific criminal misconduct have been made or to discuss whether or not to file a criminal complaint. Prior to entering executive session for any of these purposes, the entity must obtain a written or oral declaration entered on the minutes that the discussions would imperil effective law enforcement if disclosed outside of an executive session from a law enforcement officer with authority to make an arrest or a district or assistant district attorney or the attorney general or an assistant Attorney General.

(6) To discuss the consideration the governmental body is willing to offer or accept when considering the purchase, sale, exchange, lease, or market value of real property. However, the material terms of the contract must be disclosed in the public portion of a meeting prior to the execution of the contract. Only persons representing the interests of the governmental body in the transaction may be present during an executive session held pursuant to this exception. The entity cannot hold an executive session for this purpose if:

a. Any member of the entity involved in the transaction has a personal interest in the transaction and attends or participates in the executive session concerning the real property; or

b. A condemnation action has been filed to acquire the real property involved in the discussion.

(7) To discuss preliminary negotiations involving matters of trade or commerce in which the entity is in competition with private individuals or entities or other governmental bodies in Alabama or other states or foreign nations, or to discuss matters or information defined or described in the Alabama Trade Secrets Act. Prior to holding an executive session pursuant to this exception, a person involved in the recruitment or retention effort or who has personal knowledge that the discussion will involve matters or information defined or described in the Alabama Trade Secrets Act must advise the governmental body in writing or by oral declaration entered into the minutes that the discussions would have a detrimental effect upon the competitive position of a party to the negotiations or upon the location, retention, expansion, or upgrading of a public employee or business entity in the area served by the governmental body if disclosed outside of an executive session, or would disclose information protected by the Alabama Trade Secrets Act.

(8) To discuss strategy in preparation for negotiations between the governmental body and a group of public employees. Prior to holding an executive session pursuant to this exception, a person representing the interests of a governmental body involved in the negotiations must advise the governmental body in writing or by oral declaration entered into the minutes that the discussions would have a detrimental effect upon the negotiating position of the governmental body if disclosed outside of an executive session.

(9) To deliberate and discuss evidence or testimony presented during a public or contested case hearing and vote upon the outcome of the proceeding or hearing if the governmental body is acting in the capacity of a quasi-judicial body, and either votes upon its decision in an open meeting or issues a written decision which may be appealed to a hearing officer, an administrative board, court, or other body which has the authority to conduct a hearing or appeal of the matter which is open to the public.

Enforcement

- Civil Action
- Brought by any member of public, media, Attorney General, local District Attorney.
NOTE: No member of the governing body can sue another member of the same body.

Timing: Within 60 days of the violation or when the plaintiff should have learned of the violation.

Statute of Limitations: Two (2) years.

Reasons:

1. That the defendants disregarded the notice requirements for holding the meeting, as spelled out above.
2. That the defendants disregarded the provisions of the Act during a meeting, other than during an executive session.
3. That after voting to go into executive session, the defendants discussed during the executive session matters other than those subjects included in the motion.
4. That the defendants intentionally violated some other provision of the Act.

Process:

1. Member must respond to complaint within 7 business days.
2. Preliminary hearing held no later than 10 business days after response filed, or if no response, no later than 17 business days after complaint filed. Court can set another date.
 - a. At the hearing, the plaintiff must show by a preponderance of the evidence that the meeting occurred and that the defendants attended. Plaintiff must also present substantial evidence proving a violation.
 - b. If plaintiff satisfies this, court sets a discovery schedule and sets a hearing. If the plaintiff shows that an executive session was improper, at the hearing on the merits, the defendants bear the burden of proving that the discussions at the executive session were appropriate.
 - c. Court may conduct an in camera proceeding (or some other method) to protect the confidentiality of executive session discussion.
 - d. Court must issue final order within 60 days of the preliminary hearing unless all parties and the court consent to a delay.
 - e. Final order must state which claim or claims the ruling is based on.

Penalties

- Civil fine, up to \$1,000 or half the defendant's monthly entity salary, whichever is less.
 - If the claim relates to an improper executive session discussion, monetary

penalties may only be assessed against those who voted to go into the session and remained during an improper discussion.

Penalties cannot be paid or reimbursed by the entity. These are personal penalties. The entity may pay legal expenses to defend.

- Court may invalidate actions if:
 - The complaint is filed within 21 days of the date when the action is made public,
 - The violation was not the result of mistake, inadvertence, or excusable neglect, and
 - Invalidating the action taken will not unduly prejudice third parties who have changed their position or acted in good faith reliance upon the challenged action of the governmental body.

No action taken at an open meeting conducted in a manner consistent with the Act shall be invalidated because of a violation that took place PRIOR to the meeting.