



Authorities Budget Office

Policy Guidance 26-01: Appropriate Use of Executive Session

ACCOUNTABILITY • TRANSPARENCY • INTEGRITY

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Subject: Appropriate Use of Executive Session

Statutory Citation: Public Officers Law, Article 7

Provisions: Meetings of a public body are to be open to the general public, except when it is appropriate to enter into executive session. The term “executive session” refers to that portion of a public meeting during which the public may be excluded. Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session only for the purposes enumerated below:

- a. Matters which will imperil the public safety if disclosed.
- b. Any matter which may disclose the identity of a law enforcement agent or informer.
- c. Information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed.
- d. Discussions regarding proposed, pending or current litigation.
- e. Collective negotiations pursuant to article fourteen of the civil service law.
- f. The medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation.
- g. The preparation, grading or administration of examinations.
- h. The proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.

At no time may a public authority vote to appropriate public moneys while in executive session.

The public authority may limit attendance at an executive session to any member of the public body and any other persons authorized by the public body.

Minutes of an executive session must be recorded if any action is taken by formal vote. The minutes serve as the record of the determination of the board, including the date and results of that vote. Minutes of an executive session need not include information that may be withheld under the Freedom of Information Law.

Minutes of meetings of all public bodies are to be available to the public in accordance with the provisions of the Freedom of Information Law within two weeks from the date of such meeting, except that minutes taken in executive session are to be available to the public within one week of the date of the executive session.

Authorities Budget Office Policy Guidance: Public authorities should always conduct business in an environment that fosters transparency and public disclosure, and conforms to the intent of the Public Authorities Accountability Act and the Public Officers Law.

The law is clear that a public body may go into executive session only for specific and limited reasons. The board must provide sufficient details on the purpose of the meeting to assure the public that the subject matter meets the statutory test for executive session. While most of these permissible exclusions are self-explanatory, the use of executive session for discussion of personnel issues, audit findings, potential property transactions, and litigation is less clear. The courts have held and opinions and guidance rendered by the Committee on Open Government advise that, when in doubt as to the legality of meeting in executive session, public bodies should honor their fiduciary responsibilities, adopt a narrow interpretation of the statute and conduct business in public. Invoking the use of executive session without providing sufficient justification undermines the public's confidence in the decisions and actions of the board.

When a public body does vote to go into executive session, the motion must include a clear explanation of what will be discussed. For example, a motion that states the board is going into executive session to discuss "personnel" issues is not sufficient. Rather, the board should vote on a motion to discuss "the employment history of an employee", or "potential disciplinary action against an employee". In either case, it is not necessary to identify the individual who is the subject of the executive session. A board may vote to go into executive session to discuss *matters* leading to the hiring or firing of a particular person, and that is what should be reflected in the minutes of the public session.

The use of executive session to discuss the results of an audit is also limited. If the internal auditor appears before the audit committee or the full board to present their findings, that discussion must occur in an opening meeting, since the committee and the board are public bodies. A discussion of the audit findings or a discussion concerning management's cooperation with the auditor (either internal or independent) is not an acceptable justification for adjourning to executive session.

The presentation of the annual independent audit to the audit committee and any general discussion of its findings with the committee or the board must be done in a

public meeting. The independent audit report is a public document. An executive session can only be convened to discuss a finding that is consistent with the exceptions articulated in Public Officers Law. It is appropriate that the details of sensitive or confidential issues be presented to management, rather than to the board. For example, the public audit report can note significant internal control weaknesses with the authority's cash management policies, while the specific weaknesses or implications from the lack of controls can be discussed confidentially with management.

Similarly, a board can vote to go into executive session to discuss a potential property transaction only in limited circumstances. A public body can only convene an executive session if a public discussion of the property transaction would "substantially affect the value of the property." Discussing the merits of selling a piece of property through public bid, or concern about revealing the fair market value of the property, is insufficient justification to adjourn to executive session. As a general rule, if, as a matter of record, the public is aware of the public authority's interest in acquiring, selling or leasing real property, or if the value of the property has already been appraised, then it is not likely that a public discussion of the transaction would substantially affect the value of that property.

Finally, there may be occasions when litigation warrants a vote to convene an executive session. Again, this justification is limited to a discussion by the board of its legal strategy in litigation involving the board or pending before it. The board may not hold an executive session out of concern that a matter raised in public session may provoke a lawsuit, or fear of the threat of potential legal action. In its motion to convene an executive session, the board must be more expansive than "to discuss litigation". It is advisable that the record specifically state the purpose, such as "to discuss litigation issues in the case of XYZ Company vs. [NAME] public authority."

A public authority is advised to consult the Committee on Open Government if it has questions concerning what is appropriate under Public Officers Law. The Committee may be contacted at (518) 474-2518 or by fax at (518) 474-1927. Its website address is: <https://opengovernment.ny.gov/>.



Authorities Budget Office Executive Session Quick Reference Guide

- Do:**
- Conduct most authority business in meetings that are open to the public.
 - Interpret OML exemptions narrowly and err on the side of disclosure.
 - Be as specific as possible and provide as much detail as possible in the motion about which statutory exemption is applicable.
- Do Not:**
- Enter into executive session for any reason other than the eight (8) specific subject-area exemptions provided in OML Section 105.
 - Cite vague reasons such as “litigation” or “personnel” or simply repeat the statutory language in the motion to enter into executive session.

A Non-Exhaustive List of Common Mistakes

<u>Exemption</u>	<u>Don't Say</u>	<u>Do Say</u>
Litigation	“Legal” or “to discuss legal matters” or “to discuss proposed, pending or current litigation” or “to discuss potential litigation”	<ul style="list-style-type: none"> ● “To discuss litigation strategy in XYZ v. Board case.” ● “To discuss litigation strategy in the board’s proposed suit against a particular individual/entity” ● <i>Note:</i> The individual/entity name does not need to be disclosed if it could adversely affect the interests of the Board.
Property Transactions	“To discuss the purchase and sale of certain real property.”	<ul style="list-style-type: none"> ● “To discuss the proposed acquisition of real property where the value could be significantly affected by public disclosure.” ● <i>Note:</i> The specific property does not need to be disclosed.
Personnel	“To discuss personnel” or “personnel matters or decisions,” generally.	<ul style="list-style-type: none"> ● “To discuss matters pertaining to the employment history of a particular person.” ● <i>Note:</i> The person’s name does not need to be disclosed.
Corporations	“To discuss the authority’s own finances.” <i>Note:</i> Discussion of the authority’s finances should be open to the public.	<ul style="list-style-type: none"> ● “To discuss the financial history of a particular third-party corporation.” ● <i>Note:</i> The third-party corporation’s name does not need to be disclosed.
Collective Bargaining	“To discuss contract negotiations.”	<ul style="list-style-type: none"> ● “To discuss collective bargaining negotiations involving XYZ public employee union.” ● <i>Note:</i> The specific union should be disclosed.
Public Safety	“To discuss matters of public safety.”	<ul style="list-style-type: none"> ● “To discuss matters which could endanger public safety if disclosed.”
Misc. issues.	Strategic planning, marketing, contracts, sales, legislation, economic development.	<ul style="list-style-type: none"> ● It is never permitted to utilize executive session for these commonly used reasons as they are not an authorized exemption.