



Behind Closed Doors: What Can a Public Body Discuss in Closed Session?

Anne M. Seurnyck

Foster Swift Municipal Law News

January 26, 2016

Generally, meetings of public bodies must be open to the public pursuant to the Open Meetings Act ("OMA"), MCL 15.261 *et seq.* However, the OMA allows public bodies to go into closed session to discuss certain specific issues set forth in Section 8 of the OMA. The following is an explanation of the reasons public bodies may go into closed session, the procedure for moving into closed session, and what can be discussed in closed session.

DISCIPLINE, DISCHARGE, COMPLAINTS, CHARGES OR PERIODIC PERSONNEL EVALUATION

The Open Meetings Act provides a public body may move into closed session [t]o consider the ***dismissal, suspension, or disciplining of, or to hear complaints or charges brought against, or to consider a periodic personnel evaluation*** of, a public officer, employee, staff member, or individual agent, if the named person requests a closed hearing. A person requesting a closed hearing may rescind the request at any time, in which case the matter at issue shall be considered after the rescission only in open sessions.

MCL 15.268(a). Put another way, a public body may move into closed session to discuss both (1) the periodic personnel evaluation of an employee and (2) to consider the dismissal, suspension, disciplining of, or to hear complaints or charges against employees. The Attorney General points out that under section 3(2) of the OMA, any actual decisions made by a public body must be made at a meeting open to the public: "Thus, even if a public body meets in closed session to discuss the performance evaluation of an officer or employee, the public body must, upon completing its closed session discussion and deliberations, reconvene in open session to make any final decision regarding the employee." OAG, 1989-1990, No 6668, p 409 (November 28, 1990).

AUTHORS/ CONTRIBUTORS

Anne M. Seurnyck

PRACTICE AREAS

Municipal & Public Entity Law

Open Meetings Act



The public body should also keep in mind that an employee must request a closed hearing and may rescind that request at any time. If the named employee is not planning to attend the meeting, the public body should obtain the consent of the employee in writing and enter the consent into the minutes of the meeting. If the employee attends the meeting, the public body should specifically ask the employee for consent and enter that consent into the minutes. If the employee does not request a closed session or if the employee rescinds the request, the public body may only consider the evaluation, complaint, charge and other specified purposes in open session.

Even though the public body may discuss the periodic personnel evaluation, and complaints in closed session, the written evaluation and other employment related documents may still be subject to disclosure pursuant to the Freedom of Information Act ("FOIA"). See *Bradley v Saranac Community Schools Bd of Educ*, 455 Mich 285, 565 NW2d 650 (1997). Most likely, the evaluation and personnel records will be subject to disclosure in whole or in part. Although the minutes of the closed session will not be disclosed, a public body should not promise confidentiality of the evaluation or other documents that may be disclosed under FOIA to any employee.

COLLECTIVE BARGAINING AGREEMENTS

A public body may also meet in closed session for the following purpose:

For strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement if either negotiating party requests a closed hearing.

MCL 15.268(c). Thus, a public body may meet in closed session to discuss collective bargaining, but only if negotiation of a labor agreement is in progress or about to commence. *Wexford County Prosecuting Attorney v Pranger*, 83 Mich App 197, 204; 128 NW2d 344 (1978). The OMA provides that any "decision" (defined in part as any determination, action, vote or disposition, on public policy) may not be made in the closed session. MCL 15.263(2). Further, the OMA provides that all deliberations shall take place at a meeting open to the public unless permitted by the OMA. MCL 15.263(3). As a result, no motions or actions should be taken in closed session. With that said, the Michigan Court of Appeals has stated that a board must be allowed to deliberate and reach a consensus in closed session about the proper strategy to pursue in connection with collective bargaining. *Moore v Fennville Public Schools Bd of Educ v McMahon*, 223 Mich App 196; 566 NW2d 31 (1997). However, no final decision may be made in closed session. *Id.* If your Board discusses information in closed session, we recommend contacting your legal counsel to discuss any specific questions or concerns regarding what exactly can be discussed in closed session.

PURCHASE OR LEASE OF REAL ESTATE

The OMA also provides that a public body may move into closed session

"[t]o consider the purchase or lease of real property up to the time an option to purchase or lease that real property is obtained." MCL 15.268(d). However, this exemption does not apply to the sale of real property. As a result, a public body must discuss the **sale** of any property at an open session.



SPECIFIC PENDING LITIGATION

A Municipal Board may move into closed session to:

consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial effect on the litigating or settlement position of the public body.

MCL 15.268(e). However, as the statute requires, there must be specific pending litigation; the threat of litigation or settlement negotiations are not sufficient. *People v Whitney*; 228 Mich App 230; 578 NW2d 329 (1998). Similarly, if a consent judgment has been entered or a settlement agreement reached, a public body may not use this exemption to discuss the execution of the judgment or agreement; there must be specific unresolved issues in the litigation. *Detroit News, Inc v City of Detroit*, 185 Mich App 296; 460 NW2d 312 (1990). In addition, to qualify for the exemption, an open, public discussion must have a detrimental financial effect on the public body. The Court of Appeals recently decided that having the opposing party and her attorney in the closed session did not preclude the application of this exemption. *Ader v Delta College Bd of Trs*, unpublished opinion per curiam of the Michigan Court of Appeals, April 21, 2015 (Case No. 320096). Importantly, the attorney representing the public body in the closed session does not have to be the actual attorney litigating the matter; any attorney who has an attorney-client relationship with the public body would suffice.

EMPLOYMENT APPLICATION EXEMPTION

Pursuant to Section 8(f) of the OMA, a public body may meet in closed session to consider the contents of a specific application if the candidate requests confidentiality:

To review and consider the contents of an application for employment or appointment to a public office if the candidate requests that the application remain confidential. However, except as otherwise provided in this subdivision, all interviews by a public body for employment or appointment to a public office shall be held in an open meeting pursuant to this act. This subdivision does not apply to a public office described in subdivision (j).

MCL 15.268(f). The Michigan Supreme Court examined this provision in *Booth Newspapers v University of Michigan Board of Regents*, 444 Mich 211, 507 NW2d 422 (1993). In that case, the board used this "application exemption" to justify a closed session to compare the qualifications of candidates and to reduce the list of viable candidates. *Booth, supra*, at 230. The *Booth* Court determined that the OMA permitted only closed sessions to consider personal matters contained in an application. Thus, a public body could not meet in closed session to compare qualifications or make decisions on candidates. The public body should keep in mind that the exemption may only be used if the candidate requests that the application remain confidential. In addition, the OMA clearly provides that a public body may not conduct its interviews in closed session. Thus, this exemption is very narrow.



MATERIAL EXEMPT FROM DISCLOSURE BY STATUTE

Pursuant to Section 8(h) of the OMA, a public body may meet in a closed session to “consider material exempt from discussion or disclosure by state or federal statute.” MCL 15.268(h). Thus, any document or topic that is specifically exempt or deemed confidential by state or federal law may be discussed in closed session.

One of the more commonly cited reasons is to discuss written opinions subject to the attorney-client privilege. Attorney-client privileged written communications are exempt by statute pursuant to Section 13(1)(g) of the Michigan Freedom of Information Act (“FOIA”). MCL 15.243(1)(g). As a result, Michigan Courts have also found that a public body may go into closed session to consider material subject to attorney-client privilege. *Booth Newspapers, Inc v Wyoming City Council*, 168 Mich App 459; 425 NW2d 695 (1988). However, the closed session must be limited to the discussion of confidential legal advice presented in a written legal opinion. Thus, the public body must not discuss any matters outside the legal advice presented in the written opinion or verbal legal opinions from an attorney. Moreover, any “decision,” (defined in part as any determination, action, vote or disposition, or public policy) may not be made in the closed session. Put another way, no motions or Board actions should be taken in closed session. No discussion of public policy should be made in closed session under this exemption.

However, this exemption is not limited to attorney-client privileged communications. Some additional topics are exempt from the FOIA or otherwise confidential by statute that may be discussed in closed session are as follows; however, this is not an exclusive or exhaustive list:

- **FOIA:** Documents exempt under FOIA are exempt by statute (except the “frank communication” exemption). This can include information that is private, medical information, certain appraisals, and other information that is routinely exempt under the FOIA.
- **Library Privacy Act.** Any document that is considered a “library record” as defined by the Library Privacy Act.
- **Open Meetings Act.** Closed Session minutes are exempt from disclosure by statute, Section 7(2) of the OMA. The Attorney General has opined that the public body may go into closed session to discuss closed session minutes.
- **Tax Tribunal Mediation.** Statements, written submissions or materials, or communications between the parties or counsel of the parties and the mediator related to the mediation. MCL 205.747.
- **METRO Act.** MCL 484.3106(5) provides that route maps in the application are considered confidential, proprietary information.
- **Uniform Video Services Local Franchise Act.** Except under the terms of a mandatory protective order, trade secrets and commercial or financial information submitted under this act to the franchising entity or commission are exempt from disclosure under FOIA. MCL 484.3311
- **Michigan Telecommunications Act.** Except under a protective order, trade secrets and commercial or financial information submitted under the act are exempt under the FOIA. MCL 484.2210(1)
- **Law Enforcement Information Network.** LEIN information shall not be disclosed to the public.



So, any time these topics could be discussed at a meeting, the public body should consider whether a closed session to discuss the information or document would be appropriate.

PROCEDURE:

In order to move into closed session under Section 8(d) for the purchase or lease of real property, 8(e) for specific pending litigation, 8(f) for applications and 8(h) for material exempt by statute, a public body must conduct a 2/3 roll call vote of members ***elected or appointed and serving***. MCL 15.267(1). Thus, with a seven (7) member board, at least five (5) members must approve the motion to go into closed session. If only four (4) members appear at a meeting, there may be enough members for a quorum, but not to go into closed session. For closed sessions under section 8(a) for employment complaints, charges, periodic personnel evaluations and other specifically listed purposes and under section 8(c) involving collective bargaining, a vote of the majority of the quorum is required. The roll call vote and the purpose or purposes for calling the closed session must be entered into the minutes of the meeting at which the vote is taken. MCL 15.267(1).

The exemptions noted above could be used by public bodies to discuss the enumerated topics in closed session. Because the OMA provides relief and attorneys' fees to plaintiffs who succeed in OMA cases, the public body should consult with legal counsel if you have any questions about the appropriateness or procedure involved with any closed session. Also, the public body should make sure it's following the correct procedure and is accurately and completely citing the reason for the closed session in the minutes. If you have any further questions or concerns, please contact us.