Maintaining Attorney-Client Privilege in Public Meetings

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PRACTICE AREAS
Administrative Law
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Generally, meetings of public bodies must be open to the public according to the requirements of the Open Meetings Act ("OMA"), 1976 PA 267. So, how can a public body maintain the confidentiality of attorney-client privileged information that must be discussed by the board, council or commission?

The OMA provides exemptions to allow public bodies to go into closed session to discuss certain specific types of legal advice.

A. WRITTEN OPINIONS

A public body may go into closed session to consider legal advice presented in a **written** legal opinion. However, looking at the express exemptions contained in Section 8 of the OMA, there is no specific mention of written legal opinions. The authority comes from Section 8(h) of the OMA, which states 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).

Material subject to the attorney-client privilege is exempt according to Section 13(1)(g) of the Michigan Freedom of Information Act ("FOIA"). MCL 15.243(1)(g). Because FOIA deals with public records, only written legal opinions may be discussed in closed session. This exemption does not allow for the discussion of merely oral opinions from an attorney. Michigan Courts have confirmed that a public body may go into closed session to consider written material subject to attorney-client privilege. See *Booth Newspapers, Inc v Wyoming City Council.*

However, the closed session must be limited to the consideration of confidential legal advice presented in a written legal opinion. The Court of Appeals in *People v Whitney* explained the exemption as follows:

"It would be illogical to construe the attorney-client privilege exemption as authorizing a public body to evade the open meeting requirements of the OMA merely by involving a written opinion from an attorney in

the substantive discussion of a matter of public policy for which no other exemption in the OMA would allow a closed meeting.

To avoid this illogical result, we conclude that proper discussion of a written legal opinion at a closed meeting is, with regard to the attorney-client privilege, limited to the meaning of any strictly legal advice presented in the written opinion. The attorney-client-privilege exemption does not extend to matters other than the provision of strictly legal advice."

Thus, a public body must not discuss any incidental, non-legal matters outside the legal advice presented in the opinion. Moreover, any "decision" may not be made in the closed session. In order to move into closed session under Section 8(h), a Board must conduct a 2/3 roll call vote of members elected or appointed and serving. MCL 15.267(1). For example, with a seven member board or council, at least five members must approve the motion to go into closed session.

So, if five of the seven members appear at the meeting but only four members vote to approve the closed session, there will not be enough votes to call a closed session. The roll call vote and the purpose for calling the closed session must be entered into the meeting minutes. MCL 15.267(1). The public body should make it clear that the discussion involves a written legal opinion.

B. SPECIFIC PENDING LITIGATION

A public body may also meet in 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).

As the statute requires, there must be specific pending litigation. The threat of litigation or settlement negotiations are not sufficient. See *People v Whitney*; supra.

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. See *Detroit News, Inc v City of Detroit.*

In addition, to qualify for the exemption, an open, public discussion must have a detrimental financial effect on the public body.

Please note that 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. *Manning v East Tawas*.

Like the written legal opinion exemption, the public body must conduct a 2/3 roll call vote of members elected or appointed and serving. Again, the roll call vote and the purpose for calling the closed session must be entered into the meeting minutes.

We recommend consulting an attorney about the content of the motion in advance of the meeting to ensure the language of the motion complies with FOIA.

If you have questions regarding attorney-client privilege in public meetings, contact Anne Seurynck at 616.726.2240 or at aseurynck@fosterswift.com.

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