



## Closed Sessions: What Townships Can Do Behind Closed Doors

Administrative & Municipal Practice Group

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### **PRACTICE AREAS**

Open Meetings Act

Generally, meetings of public bodies must be open to the public pursuant to the requirements of the Open Meetings Act ("OMA"), MCL 15.261 *et seq.* However, the OMA allows townships to go into closed session to discuss certain issues. Because the topics permitted in closed session are narrow and the OMA provides a specific procedure for closed sessions, townships must pay particular attention to these requirements. The following are a few facts about closed sessions that every township should know.

### **WHEN CAN THE TOWNSHIP BOARD MEET IN CLOSED SESSION?**

The OMA provides a closed session may be called by a majority vote for the following purposes:

1. To consider the dismissal, suspension, or discipline of, or to hear complaints or charges brought against, or to consider a periodic personnel evaluation of, a public officer, or employee, staff member, or individual agent, if the named person requests a closed hearing; or
2. For strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement, if either party requests a closed hearing.

For other closed sessions, the public body must conduct a 2/3 roll call vote of members **elected or appointed and serving**. MCL 15.267(1). For example, with a five (5) member board, at least four (4) members must approve the motion to go into closed session. Thus, if four members appear at the meeting but only three (3) members vote to approve the closed session, there will not be enough votes to have a closed session. Similarly, if a township has a seven (7) member board, five (5) members must appear and vote for the closed session. The closed sessions relevant to township that must be called by a two-thirds roll call vote of the members are as follows:

1. To consider the purchase or lease of real property up until the time an option to purchase or lease is acquired;
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2. To consult with the municipal attorney regarding trial or settlement strategy in connection with specific pending litigation, if an open meeting would have a detrimental financial effect on the litigating or settlement position of the public body;
3. To consider material exempt from discussion or disclosure by state or federal statute; or
4. To review and consider the specific contents of an application for employment or appointment to a public office, if the candidate requests that the application remain confidential. All interviews by a public body for a public office must be open, however.

### **CAN WE DISCUSS OUR LAWYER'S OPINION LETTERS IN CLOSED SESSION?**

Yes. Among the exemptions permitted by the OMA, Section 8(h) authorizes a public body to 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 by statute pursuant to Section 13(1)(g) of the Michigan Freedom of Information Act. MCL 15.243(1)(g).

Michigan Courts have also confirmed 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**. The Court of Appeals in *People v Whitney*, 228 Mich App 230; 578 NW2d 329 (1998), 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.

*Id.* at 246-247. (Internal Citations Omitted). Thus, townships must not discuss any matters outside the legal advice presented in attorney-client privileged letter. Moreover, any "decision," (defined in part as any determination, action, vote or disposition), on public policy may not be made in the closed session. Put another way, no motions or board actions should be taken in closed session.

### **CAN TOWNSHIPS DISCUSS THE SALE OF TOWNSHIP PROPERTY IN CLOSED SESSION?**

No. A township board may meet in closed session to "consider **the purchase or lease** of real property up to the time an option to purchase or lease that real property is obtained" but not to consider the **sale** of real property. MCL 15.268(d). The Attorney General provided the reasoning as follows:

There is, it will be noted, a difference between a purchase of real property and a sale of real property which forms a logical basis for a different open-meeting treatment. The principal reason that public bodies are permitted to discuss the purchase of property at a closed session is to avoid giving prospective sellers of real property an unfair advantage in negotiating for the sale of their property. If sellers are permitted to attend sessions during which the acquisition of their property is being discussed, they will be able to determine the best strategy for obtaining the highest possible price. On the other hand, no such policy consideration need be the concern of the public body when it is offering publicly-owned property for sale. In such cases, it is advantageous to the public interest to disclose all information concerning the proposed sale so that other prospective purchasers may have an opportunity to present additional offers.

OAG, 1979-1980, No 5284, p 389 (March 21,1978). As a result, the township board must discuss the **sale** of township property in open session.

**CAN A TOWNSHIP BOARD DISCUSS A PERIODIC PERSONNEL EVALUATION IN CLOSED SESSION WITHOUT NOTIFYING THE EMPLOYEE?**

No. The township may not discuss a personnel evaluation in closed session without permission of the employee. Although a township board may move into closed session to discuss the "periodic personnel evaluation of an employee," the employee who is the subject of such evaluation must request a closed session. In addition, the employee may rescind the request at any time. If the employee does not want to have the evaluation held in a closed session or if the employee rescinds the request, the township must discuss the evaluation in open session.

If the employee at issue is not planning on attending the meeting, we recommend that the township obtain the consent of the employee in writing and enter it into the minutes of the meeting. If the employee attends the board meeting, the board should specifically ask the employee for consent and enter that consent into the minutes.

**WHAT ARE THE REMEDIES AVAILABLE TO A PLAINTIFF IF THE TOWNSHIP VIOLATES THE OMA?**

If a public body is found to violate the OMA, the Courts could award damages (if the violations were found to be intentional), provide injunctive relief, or declare that any decisions that were made in violation of the OMA are void. In addition, intentional violations of the OMA are considered a misdemeanor and could result in criminal penalties. Further, if the Court finds that a public body has violated the OMA, the Court may award attorneys fees to the person bringing the action. As a result, townships can avoid costly litigation by adhering to the requirements of the OMA and its closed session rules.