



# Municipal Law News

March 2013

## DEALING WITH EMPLOYMENT ISSUES AND COMPLYING WITH THE OPEN MEETINGS ACT

- Anne M. Seuryneck

Employment related issues can be sensitive. Often, public bodies are reluctant to talk about issues involving officers and employees openly at meetings. However, generally, meetings of public bodies must be open to the public pursuant to the requirements of the Open Meetings Act ("OMA"). So, how do municipalities balance the requirements of the OMA and handling difficult personnel matters? Many municipalities hold closed sessions.

Sometimes the minutes reflect that the public body went into closed session to discuss "employment" or "personnel" issues. This is a common mistake. The closed sessions permitted by the OMA are more limited than those general descriptions. The OMA allows public bodies to go into closed session to discuss only certain specific employment related issues as set forth more fully in Section 8 of the OMA. The topics permitted in this type of closed session are narrowly defined and the OMA provides a specific procedure for closed sessions. Below is a more comprehensive explanation of the closed sessions specifically involving employment related issues.

### THE "PERIODIC EVALUATION" AND "DISMISSAL, SUSPENSION, DISCIPLINE OR COMPLAINT" EXEMPTION

#### The Exemption

Under Section 8(a) of the OMA, a municipality 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.

Put another way, a municipality may move into closed session only:

1. to discuss the periodic personnel evaluation; or
2. to consider the dismissal, suspension, disciplining of, or to hear complaints or charges against officers, employees, and agents.

Importantly, even when these factors are met, a closed session is permitted only if the named person requests it.

#### The Procedure

The closed session for this exemption may be approved by a majority of the quorum present at a meeting. However, as specifically stated above, the "named" employee, staff member, agent or officer has the authority to determine if the discussion is held in a closed session.

As an illustration, if a township employee has a complaint about the township manager, the township manager has the authority to determine if the discussion is held in closed session. As a "practice pointer," we recommend that the record clearly reflect the consent has been given. For example, if the named employee is not planning on attending the meeting, the township should obtain the consent in writing and enter

continued on page 2 | **OMA**

the consent document into the minutes of the meeting. If the employee attends the meeting, the board should specifically ask the employee for consent and enter that consent into the minutes.

Using the above example, if the township manager requests a closed session, the following applies:

- The township may discuss the evaluation, dismissal, suspension, discipline, charges or complaints in closed session.
- The township has the authority to determine whether the complaining employee or the township manager should be included or excluded from the closed session (the township should seek legal counsel if the complaint involves a member of the public body).
- The township may **not** exclude the employee from the open session portion of the meeting and should not ask or suggest that the employee not attend.
- The township manager may rescind the request for a closed session at any time. For example, if the township manager is told by the board that he or she may not be allowed in the closed session, he or she may decide to rescind the request. The board may then only discuss the evaluation, dismissal, suspension, etc. in open session.

If the employee does not request a closed session, the board may only consider the evaluation, complaint, charge and other specified purposes in open session. The township board may not hold a closed session over the objections or silence of the named employee.

A municipality should be careful about its open session discussions. Closed session minutes, including discussion and testimony, should not be revealed to the public unless ordered by a court. However, as stated more fully below, when dealing with personnel evaluations or other employment matters, the actual evaluation or other personnel documents may not ultimately be "private" or exempt from disclosure after the closed session. The Attorney General points out that under 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).

So, if a municipality intends to discipline or dismiss an employee based on the discussions in closed session, it should consider consulting with legal counsel further in order to determine what statements should be made in public regarding the employment decisions.

### Special Considerations - the Freedom of Information Act.

Even though a municipality has the authority to discuss the dismissal, suspension, disciplining, or hear complaints or charges brought against, or to consider a periodic personnel evaluation of an employee in a closed meeting if requested, 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.*

Most likely, the evaluation and personnel records will be subject to disclosure in whole or in part. Therefore, a municipality should not promise confidentiality of the evaluation or other documents that may be disclosed under FOIA.

## COLLECTIVE BARGAINING AGREEMENTS

### The Exemption

A municipality 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.

Thus, a municipality may meet in closed session to discuss collective bargaining, but only if negotiation of a labor agreement is in progress or about to commence. See *Wexford County Prosecuting Attorney v Pranger*.

### The Procedure

To move into closed session for the collective bargaining exemption, the motion may be approved by a majority of the quorum present at a meeting. 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.

Further, the OMA provides that all deliberations shall take place at a meeting open to the public unless permitted by the OMA. Put another way, no motions or Board 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. See *Moore v Fennville Public Schools Bd of Educ v McMahon*.

As stated before, no final decision may be made in closed session. If a municipality desires to use this exemption, we suggest contacting legal counsel to discuss any specific questions or concerns regarding what exactly can be accomplished in closed session.

## EMPLOYMENT APPLICATION EXEMPTION

### The Exemption

According to the OMA, a municipality 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).<sup>1</sup>

The Michigan Supreme Court examined this provision in *Booth Newspapers v University of Michigan Board of Regents*. 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. 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. In addition, the OMA clearly provides that a public body may not conduct its interviews in closed session.

### The Procedure

In order to move into closed session for the application exemption, a municipality must conduct a 2/3 roll call vote of members elected or appointed and serving.

## CONCLUSION

Closed session is permitted under certain circumstances for discussion of:

1. dismissal, suspension, or disciplining of, or to hear complaints or charges brought against, or to consider a periodic personnel evaluation;
2. collective bargaining; or
3. applications.

However, not every employment-related issue falls into these exemptions.

For example, a city may not meet in closed session to negotiate a new employment contract (except for a

continued on page 4 | OMA

<sup>1</sup>“Subdivision (j)” relates to institutions of higher education and would not apply to other public bodies.



## Municipal Law News

March 2013

OMA | continued from page 3

collective bargaining agreement) for a city manager. Similarly, a village may not meet in closed session to discuss budget cuts that may result in layoffs or the reduction of employment benefits.

To avoid an OMA violation, the municipality should only discuss the topics specifically allowed by law. Also, be sure to make motions that identify the authorized closed session exemption; avoid general motions such as "to discuss personnel issues."

To protect a municipality's credibility, it is a good investment to ask a lawyer about the appropriateness of a closed session prior to its occurrence. If the circumstances are unclear, please contact [Anne Seurnyck](#) or a member of the Foster Swift Municipal Team.

## UPCOMING WEBINAR

### Public Sector Employment Law - The Basics

**SPEAKER:** Michael R. Blum

**DATE/TIME:** April 18, 2013 11am-12pm

This webinar will focus on the basic employment issues facing public sector employers. Topics will include:

- The at-will doctrine and how it applies to the employer-employee relationship.
- Anti-discrimination laws that apply to municipalities.
- How to conduct an investigation into claims of workplace harassment or other claims of a hostile environment.
- Best practices for managing and disciplining employees to avoid legal challenges.
- How to properly utilize the services of independent contractors.
- Wage and hour requirements placed.

**REGISTER:** [bit.ly/Employmentwebinar](http://bit.ly/Employmentwebinar)



**Anne M. Seurnyck**  
Attorney

P: 616.726.2240

E: [aseurnyck@fosterswift.com](mailto:aseurnyck@fosterswift.com)

### MUNICIPAL ATTORNEYS

#### PRACTICE GROUP LEADER

**Anne M. Seurnyck**

616.726.2240

[aseurnyck@fosterswift.com](mailto:aseurnyck@fosterswift.com)

Michael R. Blum | 248.785.4722

Karl W. Butterer | 616.726.2212

Nichole J. Derks | 517.371.8245

James B. Doezema | 616.726.2205

Laura J. Genovich | 616.726.2238

Brian G. Goodenough | 517.371.8147

Richard L. Hillman | 517.371.8129

Michael D. Homier | 616.726.2230

John M. Kamins | 248.785.4727

Thomas R. Meagher | 517.371.8161

Brian J. Renaud | 248.539.9913

Ronald D. Richards | 517.371.8154

LANSING

FARMINGTON HILLS

GRAND RAPIDS

DETROIT

MARQUETTE

HOLLAND

Foster Swift Collins & Smith, PC **Municipal Law News** is intended for our clients and friends. This newsletter highlights specific areas of law. This communication is not legal advice. The reader should consult an attorney to determine how the information applies to any specific situation.

**IRS Circular 230 Notice:** To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication is not intended to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code, or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed in this communication.

Copyright © 2013 Foster Swift Collins & Smith, PC

