

West Virginia Ethics Commission Committee on Open Governmental Meetings



The Open Meetings Act and Executive Sessions Q&A

Introduction: The Open Meetings Act defines “executive session” as “any meeting or part of a meeting of a governing body which is closed to the public.”¹ While an executive session is closed to the public, a government agency must still comply with the Open Meetings Act by properly noticing its meetings and sufficiently describing on its agenda the matters that will be considered.

Question: If an item is expected to be discussed in an executive session, must the public agency list that item on its agenda?

Answer: Yes.

Question: What items may be discussed in an executive session?

Answer: The Open Meetings Act lists the items that may be discussed in an executive session. Common topics for executive sessions are the purchase or sale of real estate or personnel matters affecting a specific employee versus a group of employees. A link to W. Va. Code § 6-9A-4, containing the statutory exceptions for executive sessions, is [here](#).

Question: What are the requirements for describing or listing an item on an agenda that may be discussed in an executive session?

Answer: The agenda item must be descriptive enough to reasonably place the public on notice of the particular item that is being discussed or voted upon. Discussions relating to that item may occur outside the presence of the public in an executive session, but the agenda item must still describe with specificity the topic being discussed.

¹ W. Va. Code § 6-9A-2(3)

Examples of agenda items that comply with the Open Meetings Act are:

- “Consider and vote on hiring a new street supervisor”
- “Consider and vote on hiring a new street supervisor (executive session pursuant to the personnel exception in the Open Meetings Act is anticipated)”

Examples of agenda items that do not comply with the Open Meetings Act are:

- “Personnel”
- “Property” or “Real estate transaction”

Question: What is a common misconception about agenda items relating to executive sessions?

Answer: Some public agencies mistakenly believe that agenda items such as the examples in the preceding question or other items like “executive session to meet with agency attorney” or “executive session to discuss a personnel matter pursuant to W. Va. Code § 6-9A-4(b)(2)(A)” are okay. The Open Meetings Act, however, requires more.

Question: What should the members of a governing body, such as a city council, county commission, state board, or other public agencies, do when they reach an agenda item that may be discussed in an executive session because it meets one of the exceptions in the Open Meetings Act?

Answer: When the public agency reaches the agenda item/topic that qualifies for an executive session, the public agency may only convene an executive session if a majority of the members present vote to convene an executive session. If the agenda item states, “Consider and vote on hiring a new street supervisor,” a proper executive session motion would be, “I move that we go into an executive session to discuss this agenda item pursuant to the personnel exception in the Open Meetings Act,” or “I move that we go into an executive session to discuss this agenda item pursuant to the personnel exception in the Open Meetings Act at W. Va. Code § 6-9A-4(b)(2)(A).”

Question: May a governing body take official action in an executive session?

Answer: The general answer is “no.” Any vote on the issue being discussed in an executive session must occur in public. There are limited exceptions. For example, the Open Meetings Act states that a governing body may approve the settlement of a lawsuit in executive session, but the governing body must report the terms of the settlement and enter the settlement agreement into its minutes within a reasonable time after the settlement is concluded. W. Va. Code § 6-9A-4(b)(11).

A board of education may also deliberate and decide student disciplinary actions in an executive session unless the student requests an open meeting. [Open Meetings Advisory Opinion 1999-05](#).

Question: Must a governing body vote on a matter discussed in an executive session in the open portion of the meeting if it involves an employee? What about the privacy rights of employees?

Answer: The Open Meetings Act does not shield the names of public officials or public employees from disclosure when a *motion* is being made that directly impacts them. The Committee has ruled, however, that the name of an employee does not have to be included in the *agenda*. An agenda item may, therefore, state: "Consider and vote on terminating a teacher at Northside School." [Open Meetings Advisory Opinion 2000-12](#). If a motion is made after the executive session to terminate the teacher, the motion must contain the teacher's name. The Committee discusses other rules governing privacy rights in [Open Meetings Advisory Opinion 2018-02](#). Agencies should consult with their attorneys on whether any other laws implicate the privacy rights of an agency's employee. [Open Meetings Advisory Opinion 2009-05](#) discusses the right of an employee to request an open meeting.

Question: What if we are considering hiring a new employee and it is unknown whether the employee will accept the job?

Answer: At times, more general motions are appropriate, particularly when a public agency does not know whether the candidate being considered is going to accept the position. In those instances, it would be appropriate to make a motion such as, "I move that we offer the position to the candidate we discussed in executive session, and if he or she declines to accept the position, that we offer the position to the next candidate discussed." The governing body should make it clear to the public that the name of the candidate who accepts the position will be disclosed within a reasonable period after the candidate has the opportunity to inform his or her present employer.

Question: How does a governing body end an executive session?

Answer: A governing body should follow its procedural rules. Normally, a member of the governing body may make a motion that the governing body end the executive session and reconvene in an open session, or the decision may be made by consensus.

Question: Does the Open Meetings Act ban a member of the governing body from tape recording the executive session?

Answer: No, but the governing body may adopt a rule banning it. [Open Meetings Advisory Opinion 2021-01](#)

Question: Is everything that is said in executive session confidential?

Answer: The Open Meetings Act does not make information discussed during executive sessions confidential; nor does it create an executive session privilege. Other rules and laws may create a duty of confidentiality. [Open Meetings Advisory Opinion 2022-01](#). Public agencies may also adopt a rule establishing that executive session discussions are confidential unless disclosure is required by law such as a court order.

Question: Does a governing body have to take minutes in an executive session?

Answer: No. The Open Meetings Act does not require governing bodies to take minutes in an executive session.

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