

May 19, 2010

Good Morning,

I have been noticing on several agendas recently "Executive Session" listing a number of reasons for entering such, and that several times it is listed as the first item on an agenda. Please be advised that you may NOT start a meeting in Executive Session, you must convene first, cite the reason for entering Executive Session (I will list the reasons below), and by ROLL CALL , vote to enter executive session, stating whether or not you will re-convene in open session.

("[n]o executive session shall be held until the governmental body has first convened in an open session for which notice has been given, a majority of the members have voted to go into executive session, and the vote of each member is recorded on a roll call vote and entered into the minutes, the presiding officer has cited the purpose for an executive session, and the presiding officer has stated before the executive session if the governmental body will reconvene after the executive session." Mass. Gen. L. ch. 39, § 23B.

The reasons for convening in Executive Session are as follows:

Exceptions. The Law provides nine purposes or exceptions to holding a meeting in executive session. Where there is an express exception to a statute, it comprises the only limitation on the operation of the statute and **no other exceptions will be implied.** District Attorney for the Plymouth District v. Board of Selectmen of Middleborough, 395 Mass. 629 (1985).

1. **Exception One** - To discuss the "reputation, character, physical condition or mental health rather than professional competence" of a particular individual. This exception is designed to protect individuals' rights and reputation. Thus, where a governmental body is considering applicants for a professional job position, the applicant's professional competence cannot be discussed in an executive session based on this exception. This exception is designed to enable a public body to engage in candid discussion about the character and reputation of an individual who is the subject of potential action by that public body. If the public body wishes to discuss an individual's character and reputation, the individual is entitled to the following rights:
 - a. The right to be present during discussions or considerations that involve him or her;
 - b. The right to have counsel present to advise the individual, but not to participate actively in the executive session;
 - c. To speak in his/her own behalf;
 - d. To receive written notice at least forty-eight hours in advance of the proposed executive session; and
 - e. To request that the meeting be open rather than closed.
2. **Exception Two** - "To consider the discipline or dismissal of, or to hear complaints or charges brought against, a public officer, employee, staff member, or individual, provided that the individual involved in such executive session pursuant to this clause has been notified in writing by the governmental body at least forty-eight hours prior to the proposed executive session."

As with the first exception, this exception is designed to balance individuals' privacy rights with the public's right of access. The Law provides an individual whose discipline or dismissal is to be discussed with the same rights listed in Exception One, above.

3. **Exception Three** - "To discuss strategy relating to collective bargaining or to litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the governmental body, to conduct strategy sessions in preparation for negotiations with nonunion personnel, to conduct collective bargaining sessions or contract negotiations with nonunion personnel."

a. To determine whether a governmental body may discuss collective bargaining or litigation strategy in executive session, the test is whether the discussion is directly related to the governmental body's collective bargaining position in ongoing or imminent negotiations. If challenged, the governmental body must show that an open meeting might have a "detrimental effect" on its bargaining or litigating position.

b. For purposes of the Law, "collective bargaining sessions" include not only the bargaining sessions but also any grievance hearings that are called for under the terms of a collective bargaining agreement.

4. **Exception Four** - "To discuss the deployment of security personnel or devices. "

5. **Exception Five** - "To investigate charges of criminal misconduct or to discuss the filing of criminal complaints."

General complaints or charges against individuals are governed by the second exception to the open meeting law. Governmental bodies must carefully distinguish between instances which are covered by exception two rather than exception five.

Example: *A school committee meets to discuss the discipline of a student who has assaulted another student. If the committee is meeting to discuss exclusion of the student without intending to explore a criminal option, the school committee should not use exception five to go into executive session.*

6. **Exception Six** - "To consider the purchase, exchange, lease or value of real property, if such discussions may have a detrimental effect on the negotiating position of the governmental body and a person, firm or corporation."

This exception recognizes that public discussion of negotiations might increase the eventual price paid by the government. As with the collective bargaining and litigation exception, the governmental body must show that an open meeting might have an adverse impact on the body's negotiating position with a third party.

7. **Exception Seven** - "To comply with the provisions of any general or special law or federal grant-in-aid requirements."

Certain statutes or the conditions in certain federal grants require that particular issues be discussed in executive session. This exception is intended to prevent the Law from disqualifying cities and towns from obtaining such grants if the terms of the grant require confidentiality.

8. **Exception Eight** - "To consider and interview applicants for employment by a preliminary screening committee or a subcommittee appointed by a governmental body if an open meeting will have a detrimental effect in obtaining qualified applicants; provided, however, that this clause shall not apply to any meeting,

including meetings of a preliminary screening committee or a subcommittee appointed by a governmental body, to consider and interview applicants who have passed a prior preliminary screening."

a. In order to enter into executive session under exception eight, the subcommittee must satisfy two requirements: first, the subcommittee must demonstrate that an open meeting will have a detrimental effect in obtaining qualified applicants. This can be accomplished in one of two ways: the subcommittee may go into executive session if an applicant indicates his/her preference that the meeting not be held in open session or if the subcommittee speaks with the candidates and asks them whether they object to holding the meeting in open session. Second, the subcommittee must demonstrate that applicants to be interviewed in executive session have not already "passed a prior preliminary screening." This means that once the subcommittee has completed its screening, which may include more than one step and may or may not include interviews, and has voted to recommend a candidate or candidates to the full committee, the process may not be repeated in executive session by the full committee. *Gerstein v. Superintendent Search Screening Committee*, 405 Mass. 465 (1989).

b. However, where a superintendent appoints a selection committee for a new high school principal to assist him in nominating candidates, courts have determined that the Law does not apply because the selection committee is not a "governmental body" within the meaning of the Law. The court determined that the Law did not extend to committees which were not appointed by a "governmental body" and not otherwise constituted pursuant to statute, ordinance or by-law. *Connelly v. School Committee of Hanover*, 409 Mass. 232 (1991). Note: Connelly should not be broadly construed. If the facts in Connelly were altered slightly, the result might well be different.

9. Exception Nine - "To meet or confer with a mediator, as defined in section twenty-three C of chapter two hundred and thirty-three, with respect to any litigation or decision on any public business within its jurisdiction involving another party, group or body, provided that: (a) any decision to participate in mediation shall be made in open meeting session and the parties, issues involved and purpose of the mediation shall be disclosed; and (b) no action shall be taken by any governmental body with respect to those issues which are the subject of the mediation without deliberation and approval for such action at an open meeting after such notice as may be required in this section. "

This exception, passed in December, 1994, exempts mediation sessions from the Open Meeting Law's requirements provided that the decision to enter into mediation is made in open session and that the governmental body does not take any action concerning the issue or issues submitted to mediation until it has deliberated and approved such action in an open meeting.

THESE EXECPTIONS AND ONLY THESE EXCEPTIONS are valid to enter Executive Session. No matter how touchy a subject, or confidential a matter you may believe it to be, if it does not meet one of the above, it is NOT a valid reason to enter Executive Session. Please do not try and "bend" any of the exceptions to suit your particular circumstance. If you are in any doubt about the validity, please consult me or the Attorney Generals Office.

I also must reiterate my reservations to agendas that list "Executive Session" as an agenda item. As you must vote to enter Executive Session, there is no way of knowing ahead of time if it actually will happen, by listing it ahead of time, it may amount to a defacto breaking of the Open

Meeting law. If the possibility of executive session exists, please put something like “Potential Executive Session” and list which of the nine exemptions it could possibly convene under.

Thank You.

Take Care,
Jeremy