

Demystifying executive sessions: A guide for school boards

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As this month's Journal discusses, Ohio school districts function as the hearts of their communities. Making sure that parents, students, school employees and citizens within the community can access information about board of education activities is an important part of "heart health" for districts. One key element is compliance with the laws governing public meetings, including executive sessions.

Ohio Revised Code (RC) 121.22, the Open Meetings Act (OMA), contains many of the requirements for meetings of public bodies, including school boards, in Ohio. OMA includes terms and definitions and establishes the basics for meetings. The law applies to any public body, including any school district board of education, and any committee or subcommittee of the board (RC 121.22(B)(1)). OMA applies to any "meeting" of the board, which is defined as a prearranged discussion of the public business of the board by a majority of its members.

Members of a public body must be present in person at a meeting to be considered in the count for quorum and to vote. The default requirement is "(a)ll meetings of any public body are declared to be public meetings open to the public at all times" (RC 121.22(C)).

If a school board meeting must be "open to the public at all times," how can the board ever have an executive session? The answer is within OMA.

What is an executive session?

RC 121.22(G) states that the members of a public body may hold an executive session at an open meeting "only after

a majority of a quorum" determines "by a roll call vote" to hold the executive session. Executive sessions can occur only at regular or special meetings of the board. That means there are three key prerequisites for executive session: They can be held only after a majority vote of the board's quorum; the vote must be taken by roll call; and they can occur only at a regular or special meeting of the board. Be sure to check your policies and practices to make sure that they reflect each of these prerequisites.

What are the permissible reasons for an executive session?

RC 121.22(G) allows executive session for the "purpose of the consideration" of eight kinds of matters, most of which are applicable to school boards. These are the only legally permissible reasons for an executive session. If the board wants to go into executive session for more than one reason, its motion and vote must include all those reasons.

The first part of the statute names multiple personnel matters that a board can consider in executive session. The board can go into executive session to "consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official." The board can also go into executive session to consider "the investigation of charges or complaints against a public employee, official, licensee, or regulated individual, unless the public employee, official, licensee, or regulated individual requests a public hearing." However, OMA prohibits a school board from holding an executive session for the discipline of elected officials for conduct related to the performance of their official duties

or to remove elected officials from office.

For example, a school board can go into executive session to consider appointing a person to a vacant position on the board, hiring a superintendent or setting compensation or determining discipline for a district employee. Each of the items listed in this portion of the law is a separate purpose, and the board must be careful to identify which of these purposes it is using in the motion and vote to hold the executive session. The motion and vote can't say that the board is going into executive session "for personnel reasons." The motion and vote also can't simply read the entire section of the law or include a laundry list of all the items in it. OMA requires that a school board "state which one or more of the approved purposes listed in (G)(1) ... are the purposes for which the executive session is to be held."

A recent Supreme Court of Ohio decision concluded that if the board might consider more than one of the reasons listed in RC 121.22(G)(1) in executive session, it can list all those reasons it "reasonably might discuss" in its motion and vote on the executive session. For example, a board may be considering discipline for an employee. While in executive session, the board reasonably might discuss the dismissal, discipline, demotion and compensation of that employee. The court concluded that listing each of these "approved purposes" in the motion for the executive session is permissible, even if the body doesn't end up considering all of them. Again, this doesn't mean a board should include every reason listed in the law in its motion and vote on the

executive session, but it can include all of those it reasonably might discuss.

The second set of permissible topics that boards can consider in executive session are the purchase of property for public purposes, the sale of property at competitive bidding, or the sale or other disposition of unneeded, obsolete or unfit-for-use property in accordance with RC 505.10, if premature disclosure of that information would give an unfair competitive or bargaining advantage to a person whose interests are adverse to the general public interest. OMA specifically prohibits any member of a school board from using this executive session as a subterfuge for providing covert information to prospective buyers or sellers of property. If a seller or buyer has received information from a member of the board that was not disclosed to the public in sufficient time for other prospective buyers or sellers to prepare or submit offers, the purchase or sale of the property is void.

The third permissible reason a board of education can hold an executive session is to have a conference with an attorney concerning disputes involving the district that are the subject of pending or imminent court action. This purpose requires that the board is in conference with its attorney for the executive session. A court action is pending if a lawsuit has been commenced; it is imminent if it is on the brink of commencing, such as when litigation has been threatened.

Fourth, a board of education may hold an executive session to prepare for, conduct or review negotiations or bargaining sessions with public employees concerning their compensation or other terms or conditions of their employment.

Fifth, a board of education can go into executive session to consider matters that are required to be kept confidential by federal law or regulations or by state statutes. Before relying on this reason, the board may want to consult with its

legal counsel to make sure that it applies.

Sixth, a board of education can hold an executive session to consider details relative to its security arrangements and emergency response protocols if disclosure of those items “could reasonably be expected” to jeopardize the security of the board of education or district.

Finally, a board of education can go into executive session to consider confidential information related to economic development assistance if certain requirements are met. A unanimous quorum of the board, by roll call vote, must determine that this executive session is necessary. Again, if the board is thinking of relying on this reason for an executive session, it should consult with its legal counsel to ensure that it meets the law’s requirements.

How does the board go into executive session?

One board member must make a



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motion to go into executive session. As discussed above, the motion must include the specific permissible reason or reasons for the executive session. The motion requires a second and must be followed by a roll-call vote. A show of hands or vote by affirmation is not sufficient. A majority of the quorum must vote in favor of the executive session for the motion to pass.

What can the board talk about while in executive session?

The board must be careful to confine its discussion within executive session to those matters that are listed in the motion to enter it. RC 121.22(G) provides that a board may hold an executive session for the “sole purpose” of the consideration of the permissible matters listed in the statute. If the board members stray from those matters, the board president should remind them of the stated purpose or purposes of the executive session and refocus discussion on permissible matters.

In a recent decision, the Supreme Court of Ohio discussed the “presumption of regularity,” which means that, in absence of evidence to the contrary, courts will presume that, when acting within their

official capacity, public officers have properly performed their duties and acted lawfully. “Under the presumption of regularity, courts should presume that a public body in executive session discussed the topics stated in its motion to enter executive session and did not discuss any matters not stated in the motion” (*State ex rel. Hicks v. Clermont Cty. Bd. of Commrs.*, 2022-Ohio-4237, ¶22). However, this presumption can be challenged.

Can the board vote during executive session?

No. RC 121.22(H) provides: “A resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body.” For this reason, a board of education cannot vote or take any other formal action during its executive session. However, it is permissible for a vote or other formal action adopted in an open meeting to result from deliberations in executive session “for a purpose specifically authorized in” RC 121.22(G) provided that the executive session was conducted in compliance with the law.

What are the record-keeping requirements while the board is in executive session?

The board is not required to keep minutes of its discussions in executive session. RC 121.22(C) requires that a public body must promptly prepare, file and maintain the minutes of any public meeting. However, the law also states: “The minutes need only reflect the general subject matter of discussions in executive session under division (G) of this section.”

Who is entitled to attend an executive session?

Because an executive session is a private discussion among the members of a public body, the only individuals entitled to enter the board’s executive session are the members of the board. The Ohio Ethics Commission concluded, in a 2008 advisory opinion, that a public board member should not attend an executive session of the board when matters affecting the board member’s employer will be discussed. The same

restriction would likely apply if the board were to discuss, in executive session, matters affecting the board member, their family members, business associates or others with whom they have close ties. If a board member knows matters affecting these parties will be discussed in executive session, the board member should consult with the board’s legal counsel or the ethics commission about whether to attend the executive session.

Can the board invite other people to the executive session?

Yes. Boards can — and most do — invite others to attend their executive sessions. The district superintendent and treasurer are commonly invited to attend board of education executive sessions.

How does the board get out of executive session?

An executive session is part of an open meeting, which means that the board must go back into the open meeting after executive session. No motion, second or vote is required to leave executive session. Instead, the board should simply return to open session. The board president can say something like, “The board is now back on the record,” or “We have now returned to the open meeting,” which should be reflected in the board’s minutes.

Executive sessions are an important tool for school boards. However, like all tools, they should be handled properly to ensure that they are being used safely and consistently with the manufacturer’s instructions — or in this case, OMA. Boards with general questions about executive sessions or other OMA provisions or requirements may contact the OSBA Division of Legal Services at (855) OSBA-LAW. For answers to specific questions, boards are encouraged to contact their legal counsel. ■

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