

# The Ohio Open Meetings Act

## Chapter Three: Executive Session

### B. Permissible Discussion Topics in Executive Session

There are very limited topics that the members of a public body may consider in executive session:

#### 1. Certain Personnel Matters<sup>888</sup>

A public body may adjourn into executive session:

- To consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official; and
  - To consider the investigation of charges or complaints against a public employee, official, licensee, or regulated individual,<sup>889</sup> unless the employee, official, licensee, or regulated individual requests a public hearing,<sup>890</sup>
- but**
- A public body may not hold an executive session to consider the discipline of an elected official for conduct related to the performance of the official's duties or to consider that person's removal from office.

A motion to adjourn into executive session must specify which of the *particular* personnel matter(s) listed in the statute the movant proposes to discuss. A motion "to discuss personnel matters" is not sufficiently specific and does not comply with the statute.<sup>891</sup> The motion need not include the name of the person involved in the specified personnel matter.<sup>892</sup>

Appellate courts disagree on whether a public body must limit its discussion of personnel in an executive session to a specific individual, or may include broader discussion of employee matters. At least two appellate courts have held that the language of the Open Meetings Act clearly limits discussion in executive session to consideration of a specific employee's employment, dismissal, etc.<sup>893</sup> These decisions are based on the premise that the plain language in the Act requires that "all meetings of any public body are declared to be open to the public at all times,"<sup>894</sup> thus, any exceptions to openness are to be drawn narrowly. A different appellate court, however, looked to a different provision in the Act that permits the public body to exclude the name of any person to be considered during the executive session as allowing general personnel discussions.<sup>895</sup>

<sup>888</sup> R.C. 121.22(G)(1).

<sup>889</sup> R.C. 121.22(B)(3) (defining "regulated individual" as (a) a student in a state or local public educational institution or (b) a person who is, voluntarily or involuntarily, an inmate, patient, or resident of a state or local institution because of criminal behavior, mental illness or retardation, disease, disability, age, or other condition requiring custodial care).

<sup>890</sup> See *Brownfield v. Bd. of Educ.*, No. 89 CA 26 (4th Dist. 1990) (upon request, a teacher was entitled to have deliberations regarding his dismissal in open meetings). NOTE: This exception does not grant a substantive right to a public hearing. Such a right must exist elsewhere in Ohio or federal law before a person may demand a public hearing under this exception. See *Davidson v. Sheffield-Sheffield Lake Bd. of Educ.*, No. 89-CA004624 (9th Dist. 1990) (citing *Matheny v. Bd. of Educ.*, 62 Ohio St.2d 362, 368 (1980) ("the term 'public hearing' in subdivision (G)(1) of this statute refers only to the hearings elsewhere provided by law"); *State ex rel. Harris v. Indus. Comm'n of Ohio*, No. 95APE07-891 (10th Dist. 1995).

<sup>891</sup> R.C. 121.22(G)(1), (7) (requiring roll call vote and specificity in motion); *State ex rel. Long v. Council of Cardington*, 92 Ohio St.3d 54, 59, 2001-Ohio-130 (respondents violated R.C. 121.22(G)(1) by using general terms like "personnel" and "personnel and finances" instead of one or more of the specified statutory purposes listed in division (G)(1)); *Jones v. Brookfield Twp. Trs.*, No. 92-T-4692 (11th Dist. 1995) (stating that "[p]olice personnel matters" does not constitute substantial compliance because it does not refer to any of the specific purposes listed in R.C. 149.43(G)(1)), 1988 Ohio Atty. Gen. Ops. No. 88-029, 2-120 to 2-121, fn. 1.

<sup>892</sup> R.C. 121.22(G)(1).

<sup>893</sup> *Gannett Satellite Info. Network v. Chillicothe City Sch. Dist.*, 41 Ohio App.3d 218 (4th Dist. 1988); *Davidson v. Sheffield-Sheffield Lake Bd. of Educ.*, No. 89-CA004624 (9th Dist. 1990) (rejecting the argument that an executive session was illegally held for a dual, unauthorized purpose when it was held to discuss termination of a specific employee's employment due to budgetary considerations).

<sup>894</sup> R.C. 121.22(C).

<sup>895</sup> *Wright v. Mt. Vernon City Council*, No. 97-CA-7 (5th Dist. 1997) (finding it permissible for a public body to discuss merit raises for exempt city employees in executive session without referring to individuals in particular positions).

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### 2. Purchase or Sale of Property

A public body may adjourn into executive session to consider the purchase of property of any sort – real, personal, tangible, or intangible.<sup>896</sup> A public body may also adjourn into executive session to consider the sale of real or personal property by competitive bid if disclosure of the information would result in a competitive advantage to the person whose personal, private interest is adverse to the general public interest.<sup>897</sup> No member of a public body may use this exception as subterfuge to provide covert information to prospective buyers or sellers.<sup>898</sup>

### 3. Pending or Imminent Court Action

A public body may adjourn into executive session with the public body’s attorney to discuss a pending or imminent court action.<sup>899</sup> Court action is “pending” if a lawsuit has been commenced and is “imminent” if it is on the brink of commencing.<sup>900</sup> A public body may not use this exception to adjourn into executive session for discussions with a board member who also happens to be an attorney. The attorney should be the duly appointed counsel for the public body.<sup>901</sup> Nor is a general discussion of legal matters a sufficient basis for invoking this provision.<sup>902</sup>

### 4. Collective Bargaining Matters

A public body may adjourn into executive session to prepare for, conduct, or review a collective bargaining strategy.<sup>903</sup>

### 5. Matters Required to be Kept Confidential

A public body may adjourn into executive session to discuss matters that federal law, federal rules, or state statutes require the public body to keep confidential.<sup>904</sup>

### 6. Security Matters

A public body may adjourn into executive session to discuss details of security arrangements and emergency response protocols for a public body or public office, if disclosure of the matters discussed could reasonably be expected to jeopardize the security of the public body or public office.<sup>905</sup>

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<sup>896</sup> R.C. 121.22(G)(2); *see also* 1988 Ohio Op. Att’y Gen. No. 003.

<sup>897</sup> R.C. 121.22(G)(2); *see also* 1988 Ohio Op. Att’y Gen. No. 003.

<sup>898</sup> R.C. 121.22(G)(2).

<sup>899</sup> R.C. 121.22(G)(3).

<sup>900</sup> *State ex rel. Cincinnati Enquirer v. Hamilton County Comm’rs*, 2002-Ohio-2038 (1st Dist.) (determining that “imminent” is satisfied when a public body has moved beyond mere investigation and assumed an aggressive litigative posture manifested by the decision to commit government resources to the prospective litigation); *State ex rel. Bond v. City of Montgomery*, 63 Ohio App.3d 728 (1st Dist. 1989); *but see Greene County Guidance Ctr., Inc. v. Greene-Clinton Cmty. Mental Health Bd.*, 19 Ohio App.3d 1, 5 (2nd Dist. 1984) (a discussion with legal counsel in executive session under 121.22(G)(3) is permitted where litigation is a “reasonable prospect”).

<sup>901</sup> *Awadalla v. Robinson Mem’l Hosp.*, No. 91-P-2385 (11th Dist. 1992) (a board’s “attorney” was identified as “senior vice president” in meeting minutes); *see also Bd. of Trs. of the Tobacco Use Prevention and Control Found. v. Boyce*, 185 Ohio App.3d 707, 2009-Ohio-6993, ¶¶ 66-69 (10th Dist.), *aff’d*, 127 Ohio St.3d 511, 2010-Ohio-6207 (four board members who are also attorneys are not the attorneys for the public body).

<sup>902</sup> *Bd. of Trs. of the Tobacco Use Prevention and Control Found. v. Boyce*, 185 Ohio App.3d 707, 2009-Ohio-6993, ¶¶ 66-69 (10th Dist.) (Executive Director, a licensed attorney, cannot act as “attorney for the public body” for purposes of this provision, because R.C. 109.02 declares Attorney General to be legal counsel for all state agencies).

<sup>903</sup> R.C. 121.22(G)(4); *see also Back v. Madison Local Sch. Dist. Bd. of Educ.*, 2007-Ohio-4218, ¶ 8 (12th Dist.) (a school board’s meeting with a labor organization to renegotiate teachers’ salaries was proper because the meeting was not an executive session but was a “collective bargaining meeting,” which, under R.C. 4117.21, was exempt from the open meeting requirements of R.C. 121.22).

<sup>904</sup> R.C. 121.22(G)(5); *see also State ex rel. Cincinnati Enquirer v. Hamilton County Cmm’r*, 2002-Ohio-2038 (1st Dist.) (R.C. 121.22(G)(5) is intended to allow a public body to convene an executive session to discuss matters that they are legally bound to keep from the public); *J.C. Penney Prop., Inc. v. Bd. of Revision of Franklin County*, Ohio Bd. of Tax Appeals Nos. 81-D-509, 81-D-510 (Jan. 19, 1982) (common law may not be available under R.C. 121.22(G)(5) given the presence of R.C. 121.22(G)(3)); *but see Theile v. Harris*, No. C-860103 (1st Dist. 1986) (public officials have right and duty to seek legal advice from their duly constituted legal advisor).

<sup>905</sup> R.C. 121.22(G)(6).

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### 7. Hospital Trade Secrets

A public body may adjourn into executive session to discuss trade secrets of a county hospital, a joint township hospital, or a municipal hospital.<sup>906</sup>

### 8. Veterans Service Commission Applications

A Veterans Service Commission must hold an executive session when considering an applicant's request for financial assistance, unless the applicant requests a public hearing.<sup>907</sup> Note that, unlike the previous seven discussion topics, discussion of Veterans Service Commission applications in executive session is mandatory.

### C. Proper Procedures for Executive Session

A public body may only hold an executive session at a regular or special meeting, and a meeting that includes an executive session must always begin and end in an open session.<sup>908</sup> In order to begin an executive session, there must be a proper motion approved by a majority of a quorum of the public body, using a roll call vote.<sup>909</sup>

#### 1. The Motion

A motion for executive session must specifically identify “which one or more of the approved matters listed...are to be considered at the executive session.”<sup>910</sup> Thus, if the public body intends to discuss one of the matters included in the personnel exception in executive session, the motion must specify which of those specific matters it will discuss (e.g., “I move to go into executive session to consider the promotion or compensation of a public employee.”).<sup>911</sup> It is not sufficient to simply state “personnel” as a reason for executive session.<sup>912</sup> The motion does not need to specify by name the person whom the public body intends to discuss.<sup>913</sup> Similarly, “reiterating the laundry list of possible matters from R.C. 121.22(G)(1) without specifying which of those purposes [will] be discussed in executive session” is improper.<sup>914</sup>

#### 2. The Roll Call Vote

Members of a public body may adjourn into executive session only after a majority of a quorum of the public body approves the motion by a roll call vote.<sup>915</sup> The vote may not be by acclamation or by show of hands, and the public body must record the vote in its minutes.<sup>916</sup>

Although a proper motion is required before entering executive session, a motion to end the executive session and return to public session is not necessary because the closed-door discussion is “off the record.” Similarly, a public body does not take minutes during executive session. The minutes of the meeting need only document a motion to go into executive session that properly

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<sup>906</sup> R.C. 121.22(G)(7).

<sup>907</sup> R.C. 121.22(J).

<sup>908</sup> R.C. 121.22(G).

<sup>909</sup> *Vermillion Teachers' Ass'n v. Vermillion Local Sch. Dist. Bd. of Educ.*, 98 Ohio App.3d 524 (6th Dist. 1994); 1988 Ohio Op. Att'y Gen. No. 029 (detailing proper procedure for executive session).

<sup>910</sup> R.C. 121.22(G)(1), (7).

<sup>911</sup> *Jones v. Brookfield Twp. Trs.*, No. 92-T-4692 (11th Dist. 1995); 1988 Ohio Op. Att'y Gen. No. 029; *State ex rel. Long v. Council of Cardington*, 92 Ohio St.3d 54, 59, 2001-Ohio-130.

<sup>912</sup> *State ex rel. Long v. Council of Cardington*, 92 Ohio St.3d 54, 59, 2001-Ohio-130 (by using general terms like “personnel” instead of one or more of the specified statutory purposes is a violation of R.C. 121.22(G)(1)); *Jones v. Brookfield Twp. Trs.*, No. 92-T-4692 (11th Dist. 1995) (“a reference to ‘police personnel issues’ does not technically satisfy [the R.C. 121.22(G)(1)] requirement because it does not specify which of the approved purposes was applicable in this instance”); 1988 Ohio Op. Att'y Gen. No. 029, 2-120 to 2-121, fn. 1.

<sup>913</sup> R.C. 121.22(G)(1); *Beisel v. Monroe County Bd. of Educ.*, No. CA-678 (7th Dist. 1990).

<sup>914</sup> *State ex rel. Long v. Council of Cardington*, 92 Ohio St.3d 54, 59, 2001-Ohio-130.

<sup>915</sup> R.C. 121.22(G).

<sup>916</sup> R.C. 121.22(G); 1988 Ohio Op. Att'y Gen. No. 029; see *Shaffer v. Vill. of W. Farmington*, 82 Ohio App.3d 579, 584 (11th Dist. 1992) (minutes may not be conclusive evidence as to whether roll call vote was taken).