



Follow These Rules for a Proper Executive Session

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Questions about the procedures for holding an executive session continue to be common from SDA's members. Fortunately, the statutes¹ set forth clear and fairly easy-to-follow steps for a proper executive session. Be careful, however, because the Colorado Court of Appeals has held that if a governing body does not strictly comply with the statutory requirements for convening an executive session, the records of that session must be opened to public inspection.²

Executive sessions are an exception to the general rule that the proceedings of a public governing body, such as the board of directors of a Colorado special district, are public business and should be conducted in a meeting which is open to the public. Therefore, begin with the presumption that whatever matters your board needs to discuss, it should be done in open session, unless the matter is included on the list of acceptable topics provided in the Open Meetings Law.³

Approved Topics

In order to head off abuses of the process, the Open Meetings Law sets very specific guidelines for the subject matter that is to be discussed in executive sessions. If a board needs to discuss any one or more of the following topics, and there is a legitimate need for privacy or confidentiality, the board may convene an executive session:

1. (§24-6-402(4)(a), C.R.S.), the purchase, acquisition, lease, transfer, or sale of any real, personal, or other property interest;
2. (§24-6-402(4)(b), C.R.S.), conferences with an attorney for the public entity for the purposes of receiving legal advice on specific legal questions;
3. (§24-6-402(4)(c), C.R.S.), matters required to be kept confidential by federal or state law or rules and regulations;
4. (§24-6-402(4)(d), C.R.S.), specialized details of security arrangements or investigations;
5. (§24-6-402(4)(e), C.R.S.), developing strategy for negotiations, instructing negotiators, and determining positions relative to matters that may be subject to negotiations;
6. (§24-6-402(4)(f), C.R.S.), personnel matters (with exceptions and as applied in the discussion below); and
7. (§24-6-402(4)(g), C.R.S.), consideration of any documents protected by the mandatory nondisclosure provisions of the Open Records Act.⁴

While some of these topics seem self-explanatory, others require a little more elaboration. Refer to topics above.

- Topic #1—No executive session may be held for the purpose of concealing the fact that a district board member has a personal interest in the purchase, sale, lease, etc. of the property. A potential conflict of interest or other impropriety cannot be hidden behind the closed doors of an executive session.
- Topic #2—The mere presence or participation of an attorney at an executive session does not constitute a conference with an attorney that would qualify the executive session for purposes of the Open Meetings Law. The attorney must actually be giving the board legal advice on specific legal questions which would reveal confidential matters or compromise a negotiating strategy if discussed in open session.
- Topic #3—In the motion calling the executive session, the board must announce the specific citation of the federal or state statute or rule that is the basis for such confidentiality. Examples of such statutes might include relevant portions of HIPAA, or other statutes designed to protect confidentially of certain persons or actions.
- Topic #4—Applicable to defenses against terrorism and also in circumstances where disclosure of the matters discussed might reveal information that could be used for the purpose of committing a violation of the law, or avoiding prosecution therefor.

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- Topic #6—The rule concerning executive sessions to discuss personnel matters is often invoked, frequently inappropriately. Therefore, a more in-depth discussion of personnel matters follows.

Personnel Matters

An executive session is not appropriate for discussions of general personnel policies that do not require the discussion of matters personal to a particular employee, or discussions of board members, any elected official, or the appointment of any person to fill a vacancy on the board or a vacancy of an elected official.

Similarly, in a search for a new chief executive officer, the search committee of a local public body must establish job search goals, including the writing of the job description, deadlines for applications, requirements for applicants, selection procedures and the timeframe for appointing or employing the chief executive officer of such entity at an open meeting. When the search has narrowed to finalists, the local public body must make public a list of the finalists under consideration for the position no later than fourteen days before a final offer can be made.⁵

The statute provides, however, that it is not to be construed to prohibit a search committee from holding an executive session to consider appointment or employment matters not described in this paragraph and otherwise authorized by §24-6-402, C.R.S.

An executive session is appropriate to discuss personnel matters concerning a specific individual. Because the employee has a statutory right to request an open meeting instead of an executive session, the individual to be discussed must be given advance notice that he or she will be the topic of discussion.⁶ The person being discussed cannot insist upon being present in the executive session, although the board may consent to allow the person to sit in the executive session during the discussion. If such were to happen, the person would be subject to the same rules of confidentiality as board members and other attendees. If a person who is to be discussed objects to the discussion being in executive session, then the board must either hold the discussion in a public meeting, or not hold the discussion of the person.

Procedures to Convene: Announce, Cite, Describe and Vote

An executive session may only be called at a regular or special board meeting where official action may be taken by the board, i.e., not a study session. When it is known in advance that an executive session might be convened, the agenda included in the "24-hour" meeting notice should so indicate, stating the reason or subject of the executive session.

To convene an executive session, the statute requires that the local public body announce to the public in the open meeting the topic to be discussed in the executive session, including specific citation to the statute authorizing the body to meet in an executive session (see statutory sections included with topic list above) and identifying the particular matter to be discussed "in as much detail as possible without compromising the purpose for which the executive session is authorized." If the board plans to discuss more than one of the authorized topics in the executive session, each should be announced, cited and described.

Following the announcement of the intent to convene an executive session, a motion must then be made and seconded.

A sample motion might sound like this; "I move that we enter into executive session to discuss a personnel matter pursuant to §24-6-402(4)(f), C.R.S., and to discuss the purchase of certain real property pursuant to §24-6-402(4)(a), C.R.S., as a possible location for the district's new administration building."

An affirmative vote of two-thirds (⅔) of the quorum present is required to go into executive session. That's at least four "yes" votes if five board members are in attendance. Three out of five members present is only 60%, not the requisite 66%.

Gumina Case

It's important to strictly follow the steps to convene an executive session, and in the order prescribed. In the Gumina case, the Sterling City Council made numerous errors in calling an executive session for the purpose of discussing the employment of the Assistant City Manager. First, the Council announced its intent to convene an executive session. The Council minutes indicate that the Council then voted unanimously to convene an executive session before any topic of discussion was announced. After the vote, the Mayor distributed a written form which stated, "At this time it is the intent of the City Council to recess the public meeting currently in progress and convene an executive session which will be closed to the public. The topics for discussion in the executive session will be [Topics # 1, 5 and 6]." The statement did not include the specific statutory citations, and it did not name the employee who was the subject of the "personnel matter," nor did the Council provide any advance notice to Pamela Gumina, the Assistant City Manager, that she would be the topic of discussion at the meeting. The appellate court determined that this violated Gumina's statutory right to call for an open meeting. Finally, the appellate court concluded that,

"because the Council failed to strictly comply with requirements of the statute for convening [the challenged executive sessions], the trial court must open the records of those sessions to public inspection."

Behind Closed Doors

Assuming your board has properly called the executive session as discussed above, there are additional limitations on the session itself.

- Limit discussion to only those topics announced in the open session. Do not digress into other issues.
- Do not take any formal action. Do not take any straw polls or ask your fellow board members how they will vote once you return to open session. The public will feel that the public vote was only a rubber-stamping of a decision already made in secret session, and a court will probably agree with them.
- You must electronically record (tape, digital, etc.) the discussion in your executive session, regardless of the manner in which your district keeps minutes of its open sessions.
- Handwritten or typed records will no longer be acceptable.
- If, in the opinion of the district's attorney (who is in attendance at the executive session) all or a portion of the discussion during the executive session constitutes a privileged attorney-client communication, the electronic recording may be suspended and no record kept for that portion of the discussion. The attorney may either state such opinion for the record, or provide a signed statement attesting that the portion of the executive session that was not electronically recorded constituted a privileged attorney-client communication. On the other hand, nothing prevents the district from recording even the privileged discussion and letting a judge determine what was privileged, if the record is challenged.
- All board members are entitled to be present in any executive session. Other than board members, only those others who are considered essential to the discussion at hand should be present, and then only with the invitation of the board. The district manager and attorney will normally be present, and such others as an appraiser, consultant, or investigator, if deemed by the board to be necessary to the discussion. It should be remembered that anyone present in the executive session is under the same obligation of confidentiality as are board members. Anyone, including board members, breaking the confidentiality of the session will be in breach of their duty of loyalty to the district.

Record Retention and Requests for Inspection

Members of the public have ninety days following the executive session to file a challenge and an open records request that the records be released to public inspection on the grounds that the executive session was improperly called, or that the discussion went beyond the purposes for which the session was called, or that formal action was taken.

Therefore, the tapes should be preserved for at least ninety days, after which, assuming no Open Records Act request has been filed, they may be erased or otherwise destroyed, provided the district's policy so permits. Most attorneys recommend destruction of the tapes after ninety days if no public request is received.

If a person seeks access to the record of the executive session pursuant to the Open Records Act during the 90-day period, the electronic recording must be preserved so that a judge may review the record (in private) and determine whether all or a portion of it should be made public. The district's Custodian of Records, acting on behalf of the board, may feel that the need for confidentiality has passed, and open the record, or may deny the request, in which case the requesting party will forward the request to the District Court.

If, in response to a formal request by a member of the public, the judge determines that: (i) substantial discussion on matters not authorized by the executive session laws or outside the scope of the motion for the executive session took place, (ii) a policy, position, resolution, rule, regulation or formal action was adopted by the board,⁷ or (iii) the executive session was improperly convened,⁸ the improper portion of the record will be open to public inspection. In addition, the court has jurisdiction to issue injunctions to enforce the purposes of the Open Meetings Law and to award a prevailing citizen costs and reasonable attorney fees.⁹

1. See part 4 of article 6 of title 24, Colorado Revised Statutes (the "Open Meetings Law").
2. See *Gumina v. City of Sterling, Colorado*, 119 P.3d 527 (Colo. Ct. App. 2004), cert. denied.
3. See Section 24-6-402(4), C.R.S.
4. See part 2 of article 72 of title 24, C.R.S.
5. See §24-6-402(3.5), C.R.S.
6. See §24-6-402(4)(f)(I), C.R.S. and the Gumina case.

7. See §24-6-402(2)(d.5)(II)(C), C.R.S.
8. See the *Gumina* Case.
9. See §24-6-402(9), C.R.S.

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