

EXECUTIVE SESSION UNDER ALABAMA'S OPEN MEETINGS LAW

WHAT IS AN EXECUTIVE SESSION?

An executive session is a meeting by the governmental body held in private “behind closed doors” to discuss a confidential matter under circumstances authorized by Alabama’s Open Meetings Law. *Ala. Code* § 36-25A-2(2) defines “executive session” as:

That portion of a meeting of a subcommittee, committee, or full governmental body from which the public is excluded for one or more of the reasons prescribed in Section 36-25A-7(a).

A detailed description of these “reasons” or purposes is provided below.

When a governmental body meets in executive session, all members of the press, all members of the public, and all employees except those participating in the discussion are cleared from the meeting chambers so that the meeting can be held in private. Alternatively, the governmental body may leave the meeting chambers and move to a room where the discussion can take place in private.

WHEN CAN AN EXECUTIVE SESSION BE CONVENED?

An executive session can only be convened during a **meeting of the governmental body in which notice of the meeting has been properly given to the public and the media** as required by law. In other words, an executive session can only be convened at a prearranged gathering of a quorum at a time and place which is set by law or operation of law (the “regular” county commission meeting) or at which the governmental body is authorized to exercise its powers (a special meeting scheduled under the procedures set out in *Ala. Code* § 11-3-8).

The definition of “meeting” found in *Ala. Code* § 36-25A-2(6) includes circumstances other than a regular or special meeting where a quorum of the body gathers to deliberate matters expected to come before the body at a later date. However, this is **not** a meeting at which the body can take any official action or properly vote on any issue including whether or not to convene an executive session. Therefore, the body cannot properly convene an executive session during such a gathering.

HOW IS EXECUTIVE SESSION CONVENED?

Ala. Code § 36-25A-7 details steps for convening an executive session, outlined below.

Noticed Meeting Called to Order

As discussed above, the decision to convene an executive session can only be made while a **quorum of the body is in session at a meeting** where it is authorized by law to take official action.

Motion to Convene

Once a quorum is present for conducting business, a motion to convene an executive session must be made. The **motion must state the purpose** for executive session and must identify **with specificity which of the 9 permissible purposes** for calling the executive session applies. The 9 permissible purposes are explained below.

Recorded Vote

There must be a recorded vote to convene the executive session, and the motion must **pass by a majority** of the members of the body present. The **vote of each member** must be **recorded in the minutes**. Therefore, this motion cannot be adopted by voice vote.

Statement of Applicability

There are 4 circumstances under which the law sets out a special requirement that the governmental body be advised, **prior to convening the executive session**, that the executive session is necessary and/or proper to protect confidential information. This advice must be **provided in writing or by an oral declaration made on the record, prior to the vote, and included in the minutes of the meeting**. The circumstances and specific requirements are as follows:

(1) Pending or Threatened Litigation

The governmental body must be advised by an attorney licensed in Alabama that an executive session is authorized for the planned discussion. See *Ala. Code § 36-25A-7(a)(3)*.

(2) Criminal Investigations or Revealing Undercover Agents

The governmental body must be advised from one of the following that the discussion would “imperil effective law enforcement” if disclosed outside of an executive session:

- A law enforcement officer with arrest powers,
- A district attorney or assistant district attorney, or
- The Attorney General or an assistant attorney general.

See *Ala. Code § 36-25A-7(a)(5)*.

(3) Matters of Commerce or Trade

The governmental body must be advised that, if not held in executive session, the discussions:

- (a) Would have a detrimental effect upon the competitive position of a party to the negotiations or the location, retention, expansion, or upgrading of a public employee or business entity in the area, **or**
- (b) Would disclose information protected by the Alabama Trade Secrets Act.

This advice must be provided by a person who is involved in the recruitment or retention effort or who has personal knowledge that the discussion will involve information protected by the Alabama Trade Secrets Act. See *Ala. Code* § 36-25A-7(a)(7).

(4) Public Employee Negotiation Strategy

The governmental body must be advised by a person representing the interests of the governmental body in the negotiations that the discussions would have a detrimental effect on the negotiating position of the governmental body if disclosed outside of an executive session. See *Ala. Code* § 36-25A-7(a)(8).

Statement on Reconvening “Open” Portion of the Meeting

Prior to calling the executive session to order, the chairperson shall state **on the record** whether the governmental body will reconvene after the executive session and, if so, the approximate time the body expects to reconvene.

WHO CAN PARTICIPATE IN AN EXECUTIVE SESSION?

With a few exceptions, the Open Meetings Law does not directly address who can be present during an executive session of the governmental body. However, the Attorney General issued opinions under the old law, which likely still apply under the current law.

The general rule, at least with regard to discussions of “good name and character,” has been that only persons whose presence is needed in “an official capacity” should be present in an executive session. See *e.g.*, *AG’s Opinion ## 99-247 and 89-011*. There are exceptions, such as where due process requires that the person whose good name and character is at issue be given notice of the meeting and an opportunity to be heard. See, *e.g.*, *AG’s Opinion # 89-190 and # 99-247*. This would generally apply in the case of a personnel proceeding where the person’s employment or position is at risk.

Therefore, when the governmental body conducts an executive session, all media and all members of the public shall be excluded from the meeting. Additionally, all employees and

any other interested parties are excluded, unless their presence is essential to provide information to the body related to the issue being discussed. In this instance, the individual providing information should only attend the portion of the executive session where he or she is providing information, and when his or her “role” in the meeting is completed, he or she should leave the meeting.

There are a few specific references in the law to who should be present in an executive session convened for a particular purpose.

- Where the discussion involves pending or threatened litigation, the attorney representing the governmental body in the legal matter at issue must be present.
- Where the discussion involves the sale or purchase of property, only the person representing the interests of the governmental body in the transaction may be present during the executive session.
- If a member of the governmental body has a personal interest in a real estate transaction wherein the price will be discussed in executive session, he or she cannot attend or participate in the executive session concerning that transaction.
- Where discussion of security matters involves critical infrastructure or critical energy infrastructure information, the owners and operators of such infrastructure must be given notice of the meeting and an opportunity to attend the executive session.

HOW DOES THE GOVERNMENTAL BODY CONDUCT ITSELF DURING THE EXECUTIVE SESSION?

With the one limited exception related to administrative hearings, **no deliberation and no votes** can take place during the executive session. The executive session is for **discussion and information-gathering purposes only**, and must be concluded before the body begins to deliberate or make decisions about its course of action.

Deliberation

It is important to understand the difference between “discussion” and “deliberation” to understand what conduct is appropriate in an executive session. *Ala. Code* § 36-25A-2(1) defines “**deliberation**” as:

An exchange of information or ideas among a quorum of members of a subcommittee, committee, or full governmental body intended to arrive at or influence a decision as to how any members of the subcommittee, committee, or full governmental body should vote on a specific matter that, at the time of the exchange, the participating members expect to come before the subcommittee, committee, or full body immediately following the discussion or at a later time.

Simply put, this means that when the body is ready to vote – or ready to debate how it should vote – the executive session must come to an end. Decisions **cannot** be made during the executive session. The body also **cannot poll members** on how they intend to vote or attempt to persuade them on how they should vote.

Proper Discussion

When an executive session is properly convened, the discussion held by the governmental body must be limited to the subject matter for which the closed meeting is convened, even if there are other issues for which an executive session could properly be convened. As set out above, as part of the motion for convening the executive session, the specific purpose for convening the closed meeting must be stated on the record before the executive session is convened. Therefore, the body cannot decide once it is in the session that it wishes to discuss other matters which were not included in the motion to convene the session. Moreover, the body can never discuss in executive session any issue which is not covered by one of the 9 purposes set out in the law.

Keep in mind also that, while an issue may fall within one of the purposes for executive session, as will be discussed in the section detailing the purposes for executive session, the discussion authorized by the law may be limited. For example, it is not proper to discuss any aspect of a proposed plan to purchase or sell property. The law only allows a closed-door session to discuss the purchase or sale price. Discussion about whether the property is appropriate for its suggested purpose, whether the location is convenient, or whether there are alternatives to the purchase or sale of property must all be discussed in the “open” portion of the meeting.

Terminating Executive Session

When the discussion authorized to be held in executive session has concluded and the body is ready to debate or vote on the issue, or to table any action, the executive session must be adjourned. If the governmental body is reconvening the “open” portion of the meeting, the chairperson shall call the open meeting back into order and the media and public shall be allowed to return for the remainder of the meeting. If the body has moved to a different location for the executive session, it shall return to the body’s original meeting location for the remainder of the meeting.

If the chairperson announced prior to convening the executive session that the body would not reconvene the open meeting upon conclusion of the executive session, the meeting of the governmental body will be adjourned once the “closed-door” discussion is completed. The body cannot change its mind and reconvene the open meeting if the media and the public have been advised that the body would not return to the open portion of the meeting following the executive session.

HOW CAN MEMBERS OF THE GOVERNMENTAL BODY PROTECT AGAINST BEING SUED OR FINED?

There are several ways that a member of a governmental body can be sued and/or fined for violating the executive session provisions of the law. Some examples include:

- Voting to go into executive session **and** remaining in the executive session during a discussion on a subject not included in the motion to convene the executive session.
- Intentionally violating the prohibition against deliberation or voting during the executive session.
- Intentionally participating in an executive session on a subject for which there is no authority to convene an executive session.
- Failing to follow the proper procedures for convening an executive session.

To protect against being sued or having to pay a fine for violating the Open Meetings Law, each member of the body must carefully consider each of the following:

- Whether or not to vote for the body to convene an executive session;
- Whether or not to participate in an executive session; and
- Whether or not to remain in the executive session once convened.

The law states that each member of a governmental body who remains in attendance at an alleged “illegal” meeting shall be named in a lawsuit filed over the alleged violation. Therefore, if a member believes that the governmental body is **intentionally** violating the law with regard to executive sessions, such as by deliberating or voting in an executive session, he or she should leave the meeting.

Furthermore, the law says that to be fined for discussing a subject other than the subject covered in the motion to convene the executive session, the member must have both voted for executive session **and** remained in the closed-door session during the “illegal” discussion. Therefore, if the member voted to convene the executive session on a proper purpose, but following the proper discussion, the governmental body begins to discuss another issue, the member should leave the meeting. However, if the member did not vote for the executive session, he or she may “legally” remain in the closed-door meeting and should not be subject to assessment of fines for discussing subjects not covered by the motion.

WHAT ARE THE PURPOSES FOR EXECUTIVE SESSION?

There are 9 purposes for convening an executive session under the law. Each is written as narrowly as possible to ensure that an **executive session is only allowed in very limited circumstances**. It is important to become familiar with each purpose, and to understand the limited applicability in each area. It is also important to keep in mind that an executive session is **never required**, but is **simply authorized** under the limited circumstances set out below.

The 9 purposes, each of which is discussed separately below, are as follows:

1. General Reputation and Character
2. Employee Disciplinary Matters
3. **Pending or Threatened Litigation and Mediation/Arbitration**
4. Security Matters
5. **Criminal Investigations**
6. Purchase or Sale of Property
7. **Matters of Commerce or Trade**
8. **Public Employee Negotiations Strategy**
9. Administrative Hearing Matters

The purposes that require a **Statement of Applicability** are bolded above and bolded and italicized below.

1. General Reputation and Character/Job Performance

A governmental body may convene an executive session to discuss:

- The general reputation and character of an individual
- The physical condition of an individual
- The professional competence of an individual
- The mental health of an individual
- The job performance of a public employee who is not required by Alabama law to file a Statement of Economic Interests

To understand the scope of this authority for executive session, it is important to fully understand the definitions of terms set out in the law. Those definitions are as follows:

General reputation and character -- “Characteristics or actions of a person directly involving good or bad ethical conduct, moral turpitude, or suspected criminal activity, **not including job performance.**”

Job performance -- “The observed conduct or actions of a public employee or public official while on the job in furtherance of his or her assigned duties. [It] includes whether a person is meeting, exceeding, or failing to meet job requirements or whether formal employment actions should be taken by the governmental body. [It] does not include the general reputation and character of the person being discussed.”

Professional competence -- “The ability of an individual to **practice a profession** within the profession's acceptable standards of care and responsibility. A profession is a vocation requiring certification by the State of Alabama or passage of a state licensing examination that may only be granted to or taken by persons who have completed at least three years of college-level education and obtained at least a college-level degree.”

Although the definition of “general reputation and character” specifically excludes job performance, with important exceptions noted below, **the law does authorize an executive session to discuss the job performance of public employees.** However, the job performance of the following persons **cannot** be discussed in an executive session:

- Any elected or appointed public official,
- Any appointed member of a state or local board or commission, or
- A public employee required to file a Statement of Economic Interests with the Alabama Ethics Commission under *Ala. Code* § 36-25-14.

Additionally, the governing body cannot generally discuss the salary, compensation, and job benefits of these public officials and public employees in executive session.

Although an executive session is generally prohibited to discuss the job performance of public employees required to file a Statement of Economic Interests, such discussion may be allowed in executive session if it fits into one of the other categories for executive session. For example:

- If the “job performance” discussion involves “professional competence” as that term is defined, an executive session of that aspect of the job performance is permitted.
- If the job performance circumstances to be discussed are the subject of a pending or threatened lawsuit or a personnel hearing where the body is serving in a quasi-judicial capacity, the discussion in executive session would likely be appropriate despite this prohibition.

Clearly, this is a limited exception to the prohibition against closed-door meetings involving these specific employees, and the general rule is that the job performance of these individuals cannot be discussed in executive session. It is also important to note that this

exception applies **only** to the specific employees named above. There are no circumstances under which the job performance of public officials can be discussed in executive session.

2. Employee Disciplinary Matters

When expressly allowed by federal or state law, a governmental body may convene an executive session to consider the discipline or dismissal of, or to hear formal written complaints or charges brought against:

- A public employee,
- A student at a public school or college, or
- An individual, corporation, partnership, or other legal entity subject to the regulation of the governmental body.

This purpose for executive session will have **very limited applicability for county government**. There must be a specific federal or state law allowing for a “closed-door” meeting in order for this to apply.

3. Pending or Threatened Litigation/Mediation and Arbitration

A governmental body may convene an executive session:

- To discuss with their attorney the legal ramifications of and legal options regarding pending litigation,
- To discuss with their attorney controversies where litigation is imminently likely if the body pursues a proposed course of action, or
- To meet or confer with a mediator or arbitrator regarding any litigation or decision concerning matters within the jurisdiction of the governmental body involving another party, group, or body.

Before convening an executive session under this purpose, the governmental body must be advised by an Alabama attorney that the planned discussion fits into this category. This can be a written opinion or an oral declaration entered into the minutes of the meeting.

The executive session is authorized for discussion **only**. The body may meet with the attorney in private, wherein he or she can explain things like the status of the case, the legal issues involved, and the applicable laws at play. The body can ask the attorney questions about the case and the likely or possible consequences of taking certain actions. However, the body **cannot** deliberate while in executive session. This means that the body cannot vote on any matter, poll the members on how they intend to vote, attempt to persuade other

members of the commission, grant settlement authority, or otherwise instruct the attorney on how to proceed with the case.

The law states specifically that “if any deliberation begins among the members of the governmental body regarding what action to take relating to pending or threatened litigation based upon the advice of counsel the executive session shall be concluded and the deliberation shall be conducted in the open portion of the meeting or the deliberation shall cease.”

It is also important to keep in mind that this provision only authorizes the executive session to discuss legal ramifications or options **with the body’s attorney**. The law does not allow members of the body to meet alone in executive session to discuss legal matters or to meet with other parties involved or with members of the county commission staff.

4. Security Matters

A governmental body may convene an executive session to discuss each of the following security matters if public disclosure could reasonably be expected to be detrimental to public safety or welfare:

- Security plans, procedures, assessments, measures, or systems,
- The security or safety of persons, structures, facilities, or other infrastructures, or
- Critical energy infrastructure information, as defined by federal law.

The only specific requirement for use of an executive session under this provision is that, when the discussion involves critical infrastructure or critical energy infrastructure information, the owners and operators of such infrastructure shall be given notice and an opportunity to attend the session.

5. Criminal Investigations

A governmental body may convene an executive session related to criminal investigations under the following circumstances:

- To discuss information that would disclose the identity of an undercover law enforcement agent or informer,
- To discuss a criminal investigation of someone who is not a public official where there are allegations or charges of specific criminal misconduct, or
- To discuss whether or not to file a criminal complaint.

Before convening an executive session under this purpose, the governmental body must be advised that the discussions would imperil effective law enforcement if disclosed outside of an executive session from one of the following:

- A law enforcement officer with authority to make an arrest,
- A district attorney or assistant district attorney, or
- The attorney general or an assistant attorney general.

This statement can be given either in writing or by oral declaration entered into the minutes of the meeting.

6. Purchase or Sale of Property

A governmental body may convene an executive session to discuss the consideration the governmental body is willing to offer or accept when considering the purchase, sale, exchange, lease, or market value of real property. Only persons representing the interests of the governmental body in the transaction may be present during the executive session.

The law specifically states that this provision authorizing an executive session shall not apply if:

- Any member of the governmental body has a personal interest in the transaction and attends or participates in the executive session
- A condemnation action has been filed to acquire the real property involved in the discussion

This closed-door session may only be held for discussion of the price to offer or accept. The law states that, “the material terms of any contract to purchase, exchange, or lease real property shall be disclosed in the public portion of a meeting prior to the execution of the contract.” This means that the governmental body cannot execute the contract while in the executive session. The governmental body must make all decisions related to the real estate transaction in an open meeting, and all terms of the contract it intends to enter into must be disclosed in an open meeting before the contract is signed.

7. Matters of Commerce or Trade

A governmental body may convene an executive session to discuss “preliminary negotiations” involving matters of trade or commerce where the governmental body is in competition with private individuals or entities or other governmental bodies in Alabama, in other states, or in foreign nations. The law does not define “preliminary negotiations.”

An executive session may also be convened to discuss matters or information as defined or described in the Alabama Trade Secrets Act (*Ala. Code § 8-27-1 et seq.*). Under *Ala. Code § 8-27-2*, a “trade secret” is defined as information that:

- a. Is used or intended for use in a trade or business;
- b. Is included or embodied in a formula, pattern, compilation, computer software, drawing, device, method, technique, or process;
- c. Is not publicly known and is not generally known in the trade or business of the person asserting that it is a trade secret;
- d. Cannot be readily ascertained or derived from publicly available information;
- e. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy; and
- f. Has significant economic value.

Before convening an executive session under this purpose, the governmental body must be advised that the discussions:

- Would have a detrimental effect upon the competitive position of a party to the negotiations if disclosed outside of an executive session, or
- Would have a detrimental effect upon the location, retention, expansion, or upgrading of a public employee or business entity in the area served by the governmental body if disclosed outside of an executive session, or
- Will involve matters or information of the character defined or described in the Alabama Trade Secrets Act.

This statement must come from a person who is involved in the recruitment or retention effort or who has personal knowledge that the discussions would disclose information protected by the Alabama Trade Secrets Act. It can be given either in writing or by oral declaration entered into the minutes of the meeting.

8. Public Employee Negotiation Strategy

A governmental body may convene an executive session to discuss strategy in preparation for negotiations between the governmental body and a group of public employees.

This would generally apply where the governmental body is negotiating with a union or other employee interest group, and as such, will have limited applicability for county government.

Before convening an executive session under this purpose, the governmental body must be advised from a person representing the interests of the governmental body in such negotiations that the discussions would have a detrimental effect upon the negotiating

position of the governmental body if disclosed outside of an executive session. This statement can be given either in writing or by oral declaration entered into the minutes of the meeting.

9. Administrative Hearing Matters

If the governmental body is acting as a “quasi-judicial body,” the body may convene an executive session to deliberate and discuss evidence or testimony presented during a public or contested case hearing, provided that the body either:

- Votes upon its decision in an open meeting or
- Issues a written decision which may be appealed to a body which has the authority to conduct a hearing or appeal which is open to the public

There is no clear definition of what a “quasi-judicial body” is, but in essence, it means that the governmental body is making judicial decisions, such as in the case of a personnel hearing conducted by or before the governmental body or a committee created by the body. This provision would apply to any state agency conducting administrative hearings on matters governed by the agency, and will likely have limited applicability for county governments. However, this provision would apply in any instance where the county commission conducts an administrative hearing regarding disciplinary or other personnel issues. It would also apply to any personnel board created by the county commission or pursuant to local law.

This provision differs from the other eight purposes for executive session in that it does allow the body to deliberate in the closed session provided the body will vote in open session or issue a written decision which could be appealed to a body that would conduct an open hearing.

In fact, the governmental body acting as a quasi-judicial body can actually vote in the executive session if there will be a written appealable decision.