

- **EXECUTIVE SESSIONS**

The proper motion to go into executive session would be one of the following:

1. TO DISCUSS MATTERS, THE IMMEDIATE KNOWLEDGE OF WHICH WOULD ADVERSELY AFFECT THE FINANCES OF THE MUNICIPALITY
2. TO DISCUSS SUBJECTS THAT TEND TO PREJUDICE THE REPUTATION AND CHARACTER OF ANY PERSON.  
  
.....with the proviso that the person to be discussed could require that the matter be discussed in public.
3. TO DISCUSS MATTERS WHICH BY LAW, MUNICIPAL CHARTER, OR ORDINANCES ARE REQUIRED TO BE CONFIDENTIAL.
4. TO DISCUSS COMMUNICATIONS WITH THE MUNICIPAL ATTORNEY OR OTHER LEGAL ADVISORS CONCERNING LEGAL MATTERS AFFECTING THE MUNICIPALITY OR LEGAL CONSEQUENCES OF PAST, PRESENT OR FUTURE ACTIONS.

L E G A L

MEMO

DEPARTMENT

To: Ken Creamer, Chairman  
Police and Fire Commission

From: Clifford J. Groh, II, City and Borough Attorney *CJG*

Subject: Executive Sessions

Date: April 9, 2001

You have asked about the law concerning executive sessions, including those called to consider subjects that tend to prejudice the reputation and character of a person. Executive sessions are of course allowed for any governmental body to which the Alaska Open Meetings Act applies, although the subjects for which they are allowed are construed narrowly in order to maximize open government and avoid unnecessary executive sessions.<sup>1</sup> There are four essential requirements for going into an executive session:

(1) a body can only go into an executive session if the body is already convened in a public meeting of the body;

(2) a member of the body must make a motion to go into executive session that clearly and specifically describes the subject of the proposed executive session without defeating the purpose of addressing the subject in private;

(3) the proposed subject of the executive session must fall into one of five categories—

- matters which if they were made public immediately would clearly have an adverse impact on the City and Borough,
- subjects that tend to prejudice the character and reputation of any person, provided that the person may request a public discussion,
- matters which by law, the Charter, or ordinance are required to be confidential,
- matters involving consideration of governmental records that by

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<sup>1</sup>AS 44.62.310-.312. There are similar provisions concerning executive sessions in the Sitka General Code, but those ordinances are pre-empted to the degree that they conflict with the state statutes. See *Walleri v. City of Fairbanks*, 964 P.2d 463, 468 (Alaska 1998).

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law are not subject to public disclosure, or communications between the body and a lawyer for the body if revelation of the communications will injure the public interest or if there is some other recognized purpose in keeping the communication confidential; and

(4) a majority of the body must vote for the motion to go into executive session.<sup>2</sup>

The executive session called for the purpose of considering subjects that tend to prejudice the character and reputation of a person is one of the most frequently litigated of all types of executive sessions.<sup>3</sup> The law requires both that the person involved must be notified in advance of the executive session and given an opportunity to request a public discussion unless the body can show that the person has received notice and has chosen not to exercise the right to request a public discussion.<sup>4</sup>

After the body goes into executive session, care must be taken to avoid any consideration of

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<sup>2</sup>AS 44.62.310 (b)-(c); and *Cool Homes v. Fairbanks North Star Borough*, 860 P.2d 1248, 1259-62 (Alaska 1993) (lawyer-client privilege is permissible basis to go into executive session even though it is not mentioned in Open Meetings Act, but privilege should not be applied blindly).

<sup>3</sup>See *Ramsey v. City of Sand Point*, 898 P.2d 917, 133-35 (Alaska 1995); *Geistauts v. University of Alaska*, 666 P.2d 424, 429 (Alaska 1983); *von Stauffenberg v. Committee for Honest and Ethical School Board*, 903 P.2d 1055, 1060 (Alaska 1995); and *City of Kenai v. Kenai Peninsula Newspapers*, 642 P.2d 1316, 1325-26 (Alaska 1982).

<sup>4</sup>*Ramsey v. City of Sand Point*, 898 P.2d at 133-35. This requirement that a person be given advance notice and opportunity to request a public discussion does not appear to apply in one narrow class of executive sessions called to discuss a subject that tends to prejudice the character and reputation of a person, and that is when a governing body goes into executive session to discuss the personal characteristics of the applicants for the position of city manager. See *City of Kenai v. Kenai Peninsula Newspapers*, 642 P.2d at 1325-26. There appears to be no requirement that the City Council—or City and Borough Assembly—notify in advance each applicant of the executive session and the right to ask for an executive session. See *id.*

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any subject not mentioned in the motion unless that subject is auxiliary to the main question.<sup>5</sup> Additionally, the body should take no action at the executive session except to give direction to an attorney or labor negotiator regarding the handling of a specific legal matter or pending labor negotiation.<sup>6</sup>

Finally, a person who violates the confidentiality of the executive session may both be subject to disciplinary procedure and also may face a lawsuit for defamation (libel or slander).<sup>7</sup>

cc: Mayor Nelson and Members of the Assembly  
Members of Boards and Commissions  
Gary L. Paxton, Administrator

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<sup>5</sup>AS 44.62.310(b).

<sup>6</sup>*Id.*

<sup>7</sup>Robert's Rules of Order, Newly Revised (10<sup>th</sup> ed.), p. 630-31, 638.

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LEGAL

DEPARTMENT

To: Mayor Reeder and Assembly Members  
From: Clifford J. Groh, II, City and Borough Attorney *CSG*  
Subject: Executive Sessions and the Sitka Community Hospital Board  
Meeting of February 26  
Date: March 12, 2004

Introduction

Assembly Member Marko Dapcevich has asked some questions that seem appropriate to answer rapidly given that they seem to arise repeatedly. This memorandum starts with some important points about the law of executive sessions and then applies them to the Sitka Community Hospital Board's executive session on February 26, 2004. I will address in a separate memorandum his question about the relationship between the Hospital Administrator, the Hospital Board, and the Assembly.

Open Meetings Act and Executive Sessions

The Alaska Open Meetings Act provides that meetings of governmental bodies are open unless (a) the law specifically excludes certain kinds of meetings from the application of the law or (b) the meeting of the governmental body fits in a narrow exception for executive sessions. As to (a), an example of a meeting to which the Open Meetings Act does not apply is that portion of a Hospital Board addressing credentialing of physicians. (AS 44.62.310(d)(5).) As to (b), the authorized reasons for an executive session under the Open Meetings are four:

- (1) matters, the immediate knowledge of which would clearly have an adverse impact upon the finances of the public entity;
- (2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;
- (3) matters which by law, municipal charter, or ordinance are required to be confidential;
- (4) matters involving consideration of government records that by law are not subject to public disclosure. (AS 44.62.310(c).)

Note that the exception involving adverse impact upon finances would not allow a governmental body to go into executive session to negotiate with an entity with which it had

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a dispute, although the governmental body could go into executive session to develop a strategy for dealing with that other entity. Note also that the exception involving prejudice to the reputation and character of any person gives that person the right to get advance notice of the possibility of the executive session (assuming the person is not attending the meeting) so that the person can demand a public discussion, but this exception does not give that person the right to go into an executive session. (The governmental body does have the right, however, to invite whomever it wants into the executive session as long as the presence of a person would not be inconsistent with the purpose of the executive session.)

To comply with the law regarding executive sessions, a board must

- (1) be convened in a public session before considering whether to go into executive session;
- (2) consider a motion to go into executive session for one of the permissible reasons set out above—note that the motion to convene in executive session “must clearly and with specificity describe the subject of the proposed executive session without defeating the purpose of addressing the subject in private”; and
- (3) go back into public session when the executive session is over. (AS 44.62.310(b).)

It is a good practice to give advance notice to the public by advertising on a published agenda specific topics that might be considered in an executive session, and in the case of particularly important or complex topics such notice would seem to be legally required. *Cf. Anchorage Independent Longshore Union Local 1 v. Municipality of Anchorage*, 672 P.2d 891, 894-95 (Alaska 1983) (“The timing and specificity of ‘reasonable notice’ is necessarily dependent upon the complexity and importance of the issue involved.”) The legal requirement would go to naming the specific topic on the agenda—not a general announcement that one or more topics may be the subject of an executive session—although such an announcement of a possible executive session is often seen as a courtesy to the public and the press.

Mayor Reeder and Assembly Members  
March 12, 2004  
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**Executive Session on February 26, 2004**

The minutes of the February 26, 2004 meeting of the Hospital Board reflect that the Board adopted a motion "to go into executive session to discuss subjects that tend to prejudice the reputation and character of any person, and to discuss matters the immediate knowledge of which would adversely affect the finances of the hospital." After a 25-minute executive session, the Board reconvened in public and adopted two motions that gave information and/or requests to attorneys for the City and Borough and/or Hospital.

Given the law set out above, the Board should have set out more detail to make clear and specific each of the reasons offered in the motion to go into executive session. The person to be discussed should have been identified both in the motion as made in the public session and in the minutes. This identification should have been done because such identification could have been done without damaging the person's reputation or character, because it would help make sure that the person was notified in advance, and because it would eliminate any doubt about who it was. Similarly, the matters whose public discussion would hurt the Hospital's finances should have been described more fully—although not so fully as to defeat the purpose of the motion.

Having said that, though, my opinion is that under the law and the facts a court would not void the two motions under the Open Meetings Act. If a court finds that these actions were voidable, before actually voiding these actions a court must consider whether under all the circumstances the public interest in compliance with the Open Meetings Act outweighs the harm that would be caused to the public interest and to the public entity by voiding the action. AS 44.62.310(f). Given that the only actions appear to be the giving of information and direction to attorneys in publicly adopted motions, there is little to void and little public interest in doing so.

I have given additional advice to the Hospital Administrator on the Open Meetings Act after this matter arose, and I am of course happy to advise the Board and the Assembly about it in greater detail if there is interest.

cc: Hugh Bevan, Administrator  
Members of the Sitka Community Hospital Board  
Bill Patten, Administrator, Sitka Community Hospital