

Open Meetings Manual for Alabama Counties

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Section 1

Meeting and Deliberation Handout

“MEETINGS” AND “DELIBERATION” UNDER ALABAMA’S OPEN MEETINGS LAW

The new open meetings act (Act 2005-40) is designed to bring some clarification to an almost century-long debate between public officials and the news media. Alabama’s current open meetings law, which is repealed effective Oct. 1, 2005, has no definition of “meeting.” Because there has been no direct legal pronouncement regarding what is and what is not a meeting, public officials and the news media have clashed when trying to determine whether informal “gatherings” of public officials constitute “meetings” and, therefore, must conform to the requirements of the open meetings act.

The new statute recognizes that there are a variety of circumstances during which public officials may “deliberate” on the public’s business. The act also goes to great length to ensure that all such occasions are open to the public and are conducted **ONLY** after the body has provided notice to the public. The opening section of the new law states:

“It is the policy of this state that the deliberative process of governmental bodies shall be open to the public during meetings as defined in Section 2(6) of this act. Except for executive sessions permitted in Section 7(a) of this act or as otherwise expressly provided by other federal or state statutes, all meetings of a governmental body shall be open to the public and no meetings of a governmental body may be held without providing notice pursuant to the requirements of Section 3. No executive sessions are required by this act to be held under any circumstances. Electronic communications shall not be utilized to circumvent any of the provisions of this act.” (Emphasis added)

While the existing law is written very broadly, the new statute that is effective Oct. 1, 2005 includes very detailed rules governing every aspect of a meeting conducted by governmental bodies in Alabama. The new law includes important definitions to assist in understanding how the new provisions will be applied. It is essential that public officials recognize that the definitions utilized in this act apply **ONLY** to this act. For example, a “gathering” of county commissioners may be a “meeting” as defined in and for the purposes of this act. However, that does not mean the county commission can conduct public “business” at such a gathering.

The act also prohibits the utilization of “electronic communications” to “circumvent any of the provisions” of the new act. Efforts by public officials to use the telephone, e-mail or even internet chat rooms to avoid compliance with the act will constitute a violation and will likely gain statewide media attention and criticism.

WHAT IS A “MEETING”?

For the purposes of this act, there are three separate circumstances which will constitute a meeting of the county commission (or a committee or subcommittee of the commission). Once any one of these conditions is met and the existence of a meeting is established, the county commission is required to comply with the provisions of the act – including the posting of notice.

1. A pre-arranged gathering of a quorum of the commission required by law;
 - This will be the “regular” county commission meeting

2. A pre-arranged gathering of a quorum of the commission where the body is authorized by law to exercise its powers;
 - This will be any special or emergency meeting called under the procedures set out in Code of Alabama 1975, § 11-3-8 (as amended by Act No. 2004-384)
 - This section could also apply to the administrative or agenda-setting meeting, if the county commission routinely takes action during these meetings. Otherwise, these administrative meetings are more likely to fall under category 3 as explained below.

3. Any other gathering of a quorum of the commission (whether or not it was pre-arranged) where the body will deliberate on specific matters which the body believes it will vote on, either immediately following the gathering or at a later time.
 - This will be any administrative or agenda-setting meeting at which the body does not take action but only deliberates the agenda for the upcoming regular commission meeting.
 - This will also be any informal session or occasion during which commissioners deliberate how they will vote on a specific issue that they expect to be addressed at a meeting of the body

The new act specifically provides that a meeting is **not** any of the following

- Social or other gatherings attended by a quorum of the body provided the members do not deliberate on matters the members believe the body will act on later
- Conventions, conferences, media events, and trainings attended by a quorum of the body provided the members do not deliberate on matters the members believe the body will act on later

- Gatherings of a quorum to meet with state or federal officials, such as legislators and state agency heads
- Gatherings of less than a quorum

The question of “deliberation” is the key to determining whether or not a “gathering” of the body becomes a “meeting” of the body. It is the clear intent of the law to draw a distinction between those occasions when members of the body gather to discuss matters and those occasions when the members of the body gather and “deliberate” on matters that are expected to come before the body for action at a future date.

Should members of a public body begin “deliberation” during these information gatherings, the gatherings will (by operation of law) become “meetings” for the purpose of this act. When such deliberation begins, the public officials involved will have committed a violation of the open meetings law if no “notice” of the meeting was given by the governing body. Because the members of the commission do not intend these informal gatherings to be actual “meetings” for the purpose of taking votes on public matters, there will be no “notice” of the time and place of the informal gathering. Without this notice, the members who move from discussion to “deliberation” will have committed an easy-to-prove violation of the new statute.

WHAT IS “DELIBERATION”?

Because the issue of “deliberation” is at the heart of determining when social or other “gatherings” turn into “meetings”, it is important to closely examine the definition of “deliberation” in the new act:

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

Deliberation does *not* include every conversation between members of the county commission regarding an issue which may or may not come before the body. Deliberation takes place when a number of members of the body constituting a quorum exchange information on how they intend to vote on a specific matter, and/or the appropriate action to take on a specific issue that is expected to come before the body.

County officials must be careful in their communication to ensure that, when a quorum is present, they do not “exchange” information about how they intend to vote or that they do not “exchange” information intended to influence how another member of the body will

vote. The determination of whether or not “deliberation” has occurred will, in the end, be a decision which can only be made by a judge. However, county officials should be careful and avoid the obvious situations in which they are being asked how they will vote on a specific matter.

WHAT IS A “QUORUM”?

A “meeting”(as defined in this act) that results from the act of “deliberation” between members of a public body can occur only when a quorum of the body is involved. The act includes its own definition of a quorum:

“Unless otherwise provided by law, a "quorum" is a majority of the voting members of a governmental body. Except where a governmental body is prohibited from holding a non-emergency meeting as defined in Section 2(6)a.1. between the date of election of members and the date such members take office, any person elected to serve on a governmental body shall be counted in the determination of whether a quorum of that governmental body is present, except for any meeting as defined in Sections 2(6)a.1. and 2., beginning on the date of certification of the results of the general election. In the case of appointment to a governmental body, any person shall be counted in the determination of whether a quorum of that governmental body is present, except for any meeting as defined in Sections 2(6)a.1. and 2., from the date that the appointment is made or issued whether or not the appointment is effective on that date.” (Emphasis added)

In most circumstances, a quorum of a county commission as defined under this act will be the number of members representing a quorum of the commission. Commissions which include the Judge of Probate or county-wide elected chairman as the presiding officer, should include such presiding officer in the number of commission members when determining the number of persons necessary to constitute a quorum for the purposes of this act.

The definition of quorum also establishes a procedure that includes persons who have been elected or appointed to public positions but have not yet taken office. County commissions are exempted from this requirement, but other public bodies associated with county government are not exempted. For example, this provision would mean that persons who have been elected to the local school board but have not yet taken office cannot “deliberate” with other members of the body or others who have been elected to the school board without triggering the open meeting statute.

WHAT IS A “GOVERNMENTAL BODY”?

The act says governmental bodies must comply with the open meeting requirements. Although county commissions and their committees and sub-committees are included within this definition, members of other local groups should review the definition closely

to determine whether or not the group is a “governmental body” and therefore subject to the act:

All boards, bodies, and commissions of the executive and legislative departments of the state or its political subdivisions or municipalities which expend or appropriate public funds; all multimember governing bodies of departments, agencies, institutions, and instrumentalities of the executive and legislative departments of the state or its political subdivisions or municipalities, including, without limitation, all corporations and other instrumentalities whose governing boards are comprised of a majority of members who are appointed or elected by the state or its political subdivisions, counties or municipalities; and all quasi-judicial bodies of the executive and legislative departments of the state and all standing, special, or advisory committees or subcommittees of, or appointed by, the body. The term "governmental body" does not include any of the following:

- a. Legislative party caucuses or coalitions.
- b. Alabama appellate or trial courts, except as required by the constitution of this state or any body governed by rules of the Alabama Supreme Court.
- c. Voluntary membership associations comprised of public employees, counties, municipalities, or their instrumentalities which have not been delegated any legislative or executive functions by the Legislature or Governor.

It is also important to note that any boards or commissions which are exempt from the old open meetings law (such as solid waste authorities and health care authorities) will also be exempt from the new statute that is effective on Oct. 1, 2005.

Section 2

Notice Handout

NOTICE REQUIREMENTS

Establishment of Meeting Dates

Section 11-3-8 requires County Commissions to establish their regular meeting dates during the first meeting in November following the election of any of the members of the commission.

This meeting date, time and location must be posted in the courthouse and the members of the news media who have filed a written request must be advised of the regular meeting date when it is established.

It is not necessary to contact members of the media in advance of your regular commission meeting once the regular date has been established and the media has been initially notified.

Holidays

When the regular meeting date falls on a holiday, the county commission may meet “on any day” of that week or on another date or time established by the commission. As required in Section 11-3-8, this substitute meeting date must be posted in the courthouse at least five days before the meeting. The commission must notify the members of the media who have filed a written request with the commission for such notification.

Special Meetings

Special meetings of the commission can be called with five days notice upon written request of a majority of the members of the county commission. As required in Section 11-3-8, the time, date and location of the special meeting along with the “purpose for and agenda of the meeting” must be posted in the courthouse at least five days before the meeting. The commission must notify the members of the media who have filed a written request with the commission for such notification.

Items that are not listed on the agenda may not be considered during the special meeting.

Emergency Meetings

The commission chairman may call an emergency meeting. The five day notice requirement does not apply. However, the meeting time, date and location should be posted in the courthouse, as required in Section 11-3-8. The commission must notify the members of the media who have filed a written request with the commission for such notification.

Items that are not part of the “emergency” resulting in the calling of the meeting may not be added to the agenda for action during the emergency meeting.

Meetings of Commission Committees or Sub-Committees

The county commission may establish committees and sub-committees. Act 2005-40 specifically applies to meetings of such committees and sub-committees. Therefore, notice of the meetings must also be given in the same fashion as regular commission meetings.

Once the meeting time, location and date of a committee or sub-committee meeting is established, it must be posted in the courthouse. This posting should occur at least five days before the meeting, unless the meeting is an emergency. The commission must also notify the members of the media who have filed with the commission a written request for such notification.

Complying with Notice Requirements in the Open Meetings Law

Act 2005-40 includes a detailed notice requirement for other public bodies. The notice procedure outlined in the open meetings law DOES NOT apply to county commissions, if the commissions follow the requirements of Section 11-3-8, as outlined above.

Specifically, the new open meetings law includes the following language:

“County commissions which provide proper notice in conformance with Section 11-3-8, Code of Alabama 1975, shall not be required to comply with subsections (a), (b), and (c) of this section, nor shall committees or subcommittees of such commissions so long as the committees also comply with the notice procedures applicable to the full commission in Section 11-3-8, Code of Alabama 1975.”

Media Requests for Notification

Section 11-3-8 requires that the commission notify those local media outlets that have made a written request for notification of commission meeting dates, times and locations. Counties that receive oral requests for notification should advise the media that such requests should be made in writing. The written requests should be kept on file in the commission office.

Record Keeping

Although Act 2005-40 does not require county commissions to keep records of the posting of notice or its communication with representatives of the media, such records will be very important in the courtroom.

Once the county commission establishes its regular commission meeting, the commission is encouraged to confirm that the notice is posted in the courthouse once each week. This confirmation should be recorded on the attached form and retained by the county commission.

Likewise, should the commission alter its meeting dates, call a special meeting or otherwise make changes to the posted notice, such actions should be recorded on the attached form.

To ensure that the commission can document that it has complied with the requirements to notify those media outlets who have requested notification concerning commission meetings, the commission is encouraged to utilize the attached form to record contacts to representatives of the news media.

Section 3

Executive Session Handout

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’ new open meetings law (Act No. 2005-40). Act No. 2005-40 defines “executive session” as, “That portion of the meeting of a governmental body from which the public is excluded for one or more reasons prescribed in Section 7(a) of this act.” A detailed description of these “reasons” is set out 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 vacate 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 *Code of Alabama 1975, § 11-3-8*).

The definition of “meeting” found in Act No. 2005-40 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 DOES THE GOVERNMENTAL BODY CONVENE AN EXECUTIVE SESSION?

Act No. 2005-40 sets out detailed steps for convening an executive session, which are outlined below.

Noticed Meeting Called to Order

First of all, 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 nine permissible grounds for the calling the executive session applies. The nine permissible grounds 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 four 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 and included in the minutes of the meeting. (Sample statements for this purpose are attached). Each of these circumstances will be discussed below in connection with the proper grounds for convening an executive session. In brief, however, 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

(2) Criminal Investigations or Revealing Undercover Agents

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

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

(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.

(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.

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, Act No. 2005-40 does not directly address who can be present during an executive session of the governmental body. However, the attorney general has issued opinions on this issue under the current law, which will likely apply under the new Act as well.

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 person providing information should only attend the portion of the executive session wherein he or she is providing information, and when his or “role” in the meeting is completed, he or she should leave the meeting.

Current law only authorizes executive session for discussion of “good name and character” and pending or threatened litigation, so there are no cases or opinions addressing the other circumstances where executive session will be appropriate under the new Act. However, it seems likely that the same principles applied in the above-referenced opinions will be controlling under Act No. 2005-40. Therefore, only those persons essential to the discussion should be permitted to participate in the executive session.

There are a few specific references in the Act 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 the 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?

Under the Act, 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. The Act defines “*deliberation*” as:

“An exchange of information or ideas among a quorum of members of a governmental body intended to arrive at or influence a decision as to how the members of the governmental body should vote on a specific matter that, at the time of the exchange, the participating members expect to come before the 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 ground 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 nine grounds set out in the Act.

Keep in mind also that, while an issue may fall within one of the grounds for executive session, as will be discussed in the section detailing the grounds for executive session, the discussion authorized by the Act 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 new Act. Some examples are:

- 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 any fine for violating the Act, each member of the body must consider carefully 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
- 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, remember that 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 proper grounds, 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 GROUNDS FOR EXECUTIVE SESSION?

There are nine grounds for convening an executive session under the Act. 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 ground, 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 nine grounds, 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

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 Act. 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 Act 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
- Any public employee required to file a Statement of Economic Interests with the Alabama Ethics Commission pursuant to *Code of Alabama 1975, § 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. Additionally, 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.

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
- An individual, corporation, partnership, or other legal entity subject to the regulation of the governmental body

This ground 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.

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 ground, 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. A sample opinion letter is attached.

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 act 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.

**SAMPLE "OPINION LETTER" REGARDING EXECUTIVE SESSION ON A
LEGAL MATTER**

ATTORNEY LETTERHEAD

(Insert Date)

Members of the _____ County Commission
(Insert Address)

RE: Opinion on Applicability of Executive Session

Dear _____ County Commission Members:

This is to advise the members of the _____ County Commission that I have reviewed the matter on which the County Commission is considering convening an executive session for discussion with legal counsel regarding a legal matter or to meet or confer with a mediator or arbitrator, and have determined that, in my legal opinion, this matter is appropriate for executive session under Section 7(a)(3) of Act No. 2005-40

Pursuant to Section 7(a)(3) of Act No. 2005-40, a copy of this letter should be attached to the minutes of the County Commission meeting wherein the body considers a motion to convene an executive session to discuss this matter.

Sincerely,

County Attorney (Alabama Bar No. _____)*

** The attorney should include his or her Bar Number as proof that he or she is licensed to practice in the State of Alabama as required in Section 7(a)(3) of Act No. 2005-40.*

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
- 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.

The authority to convene an executive session to discuss security matters was actually enacted into Alabama law during the 2004 legislative session. The provision in Act No. 2005-40 is virtually identical to the authority enacted in 2004.

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
- To discuss whether or not to file a criminal complaint

Before convening an executive session under this ground, 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
- 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. A sample statement is attached.

**SAMPLE “OPINION LETTER” REGARDING EXECUTIVE SESSION ON
A CRIMINAL INVESTIGATION**

LETTERHEAD OF PERSON OR ENTITY GIVING ADVICE

(Insert Date)

Members of the _____ County Commission
(Insert Address)

RE: Opinion on Applicability of Executive Session

Dear _____ County Commission Members:

I have been advised that the _____ County Commission proposes to discuss matters related to a criminal investigation and/or matters which may reveal the identity of an undercover law enforcement agent or informer. I am writing to advise the _____ County Commission that this discussion would imperil effective law enforcement if conducted outside of executive session, and that under authority granted under Section 7(a)(5) of Act No. 2005-40, this body may convene an executive session for this discussion.

Pursuant to Section 7(a)(5) of Act No. 2005-40, a copy of this letter should be attached to the minutes of the County Commission meeting wherein the body considers a motion to convene an executive session to discuss this matter.

Sincerely,

Attorney General/Assistant Attorney General/District
Attorney/Assistant District Attorney/Law Enforcement
Officer with arrest powers*

** This letter must be signed by one of these persons.*

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 act 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 Act 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.

Matters of Commerce or Trade

A governmental body may convene an executive session to discuss “preliminary negotiations” involving matters of trade or commerce in which the governmental body is in competition with private individuals or entities or other governmental bodies, either in Alabama, in other states, or in foreign nations. The Act 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 (Code of Alabama 1975, § 8-27-1 et seq.). Under Code of Alabama 1975, § 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 ground, 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. A sample statement is attached.

**SAMPLE "OPINION LETTER" REGARDING EXECUTIVE SESSION ON
NEGOTIATIONS RELATED TO TRADE OR COMMERCE**

LETTERHEAD OF PERSON OR ENTITY GIVING ADVICE

(Insert Date)

Members of the _____ County Commission
(Insert Address)

RE: Opinion on Applicability of Executive Session

Dear _____ County Commission Members:

Please be advised that I have reviewed the commerce or trade matter which the _____ County Commission proposes to discuss in executive session. It is my opinion that an executive session is authorized for this discussion under Section 7(a)(7) of Act No. 2005-40, and that it will have a detrimental effect upon the competitive position of the _____ County Commission or will reveal information protected by the Alabama Trade Secrets Act if the discussion is conducted outside of executive session.

Pursuant to Section 7(a)(7) of Act No. 2005-40, a copy of this letter should be attached to the minutes of the County Commission meeting wherein the body considers a motion to convene an executive session to discuss this matter.

Sincerely,

_____*

** This letter must be signed by a person involved in the recruitment effort or, if the ground is that the information is protected by the Alabama Trade Secrets Act, by someone with personal knowledge that the discussion regards information covered by the Alabama Trade Secrets Act.*

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 ground, 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. A sample statement is attached.

**SAMPLE "OPINION LETTER" REGARDING EXECUTIVE SESSION ON
PUBLIC EMPLOYEE NEGOTIATIONS**

LETTERHEAD OF PERSON GIVING ADVICE

(Insert Date)

Members of the _____ County Commission
(Insert Address)

RE: Opinion on Applicability of Executive Session

Dear _____ County Commission Members:

This is to advise the members of the _____ County Commission that, as the person representing the interests of the county commission in pending negotiations with a group of county employees, it is my opinion that under Section 7(a)(8) of Act No. 2005-40, the _____ County Commission may properly convene an executive session for this discussion, and that there would be a detrimental effect upon the negotiating position of the _____ County Commission if discussion of these matters was conducted outside of an executive session.

Pursuant to Section 7(a)(8) of Act No. 2005-40, a copy of this letter should be attached to the minutes of the County Commission meeting wherein the body considers a motion to convene an executive session to discuss this matter.

Sincerely,

Person representing County Commission in
negotiations with employees

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 grounds for executive session in that it does allow the body to deliberate in the closed session provided that the body will vote in open session or issue a written decision which could be appealed to a body which 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.

Section 4

Enforcement Handout

ENFORCEMENT OF ALABAMA'S OPEN MEETINGS LAW

What Kind of Action Will Be Brought for Violation of the Act?

The current open meetings law is a criminal statute. Act No. 2005-40, on the other hand, is a civil statute, with civil penalties imposed for violation of its provisions. The party or parties bringing the suit against members of a governmental body may seek any of the following remedies:

- Monetary penalties against each member found to have violated the Act
- A preliminary injunction or temporary restraining order preventing the body from proceeding with certain meeting(s) or activities pending final outcome of the case
- A declaratory judgment whereby the court will issue an order regarding whether or not the conduct or action(s) of the body is proper under the Act
- A permanent injunction prohibiting the governmental body from certain conduct or action(s)

Who Can Bring the Action?

The lawsuit can be filed in the circuit court of the county where the governmental body is located by any of the following:

- The attorney general
- The district attorney
- Any media organization
- Any Alabama citizen

The Act specifically provides that suit *cannot* be brought by a member of the governmental body against other members of the body on which he or she serves. This would not prevent a member of the governmental body from testifying against other members regarding an alleged violation. However, as shown below, if a member of the body participates in the alleged illegal activity, he or she must be named in the lawsuit, and may be subject to payment of the fines in the event that the alleged violation is proven in court.

Who Gets Sued?

The Act requires that the lawsuit be filed against all members of the governmental body who are alleged to have participated or remained in attendance at an alleged meeting held in violation of the Act.

- The lawsuit is brought against the members in their official capacity
- There is no provision for bring action against employees or other participants in the meeting

What are the Grounds for Bringing Suit?

There are four possible grounds for bringing suit, and the Act requires that a person filing the lawsuit include in the initial complaint the specific violation or violations alleged to have taken place. This will ensure that the members of the governmental body sued will know from the beginning what they are charged with, so that they can properly prepare the defense.

Additionally, the final order from the court must state with specificity the ground or grounds upon which the ruling is based, which, among other things, will assist the members and the county attorney in determining whether there are grounds for appeal.

The grounds for filing suit against members of the governmental body are set out below.

1. The members of the governmental body named in the lawsuit “disregarded the requirements for proper notice of the meeting” as required by the Act.

This would cover the circumstance where the governmental body set a meeting but did not post the notice as required by law or did not provide notice to members of the media who had filed a written request for notice of all meetings. This would not include the situation where an employee failed to follow the governmental body’s instructions to give notice or where a posted notice had been removed from the bulletin board without the knowledge of the governmental body.

In essence, to prevail on this violation, the plaintiff would have to show that the members of the governmental body knew or should have known that they were required by law to post notice and either intentionally failed to give the notice required or failed to take reasonable steps to ensure that notice was properly given.

Counties can easily protect themselves against most lawsuits on these ground if they establish standard procedures for providing notice and keep written documents and records of when and how notice of all meetings is given.

2. The members of the governmental body named in the lawsuit “disregarded provisions of the Act” during the open portion of the meeting”.

This would cover any claims that the public officials disregarded specific provisions of the Act, such as:

- Voting by secret ballot
- Refusing to allow a member of the press or general public to record the meeting under reasonable circumstances

- Failing to conduct the meeting pursuant to the body’s rules of procedure
- Failing to follow the procedures for convening an executive session

This provision does *not* cover any activity which takes place during an executive session. Actions claiming violations of the executive session portions of the Act must be proved as explained below.

3. The members of the governmental body named in the lawsuit “voted to go into executive session and while in executive session discussed matters other than those subjects included in the motion for executive session”.

This violation would occur if the body went into executive session to discuss one issue, and while in executive session discussed subjects other than those covered by the motion to convene the executive session. For example, if an executive session is convened to discuss pending litigation, the governmental body cannot also discuss whether or not to fire the county engineer while in the executive session. This would apply even if there are other issues for which executive session is proper. If the motion to convene only addressed one of those issues proper for executive session, only that issue can be discussed. If there are several “executive session items” to be discussed, there must be a proper motion and affirmative vote to convene the closed door session for each separate subject – even if they will all be discussed in the same executive session.

However, this provision would *not* cover the circumstance where the body deliberated during an executive session. That circumstance is covered by the fourth possible ground for suit, which is set out below.

4. The members of the governmental body named in the lawsuit “intentionally” violated a provision of the Act not covered by one of the other three grounds.

This ground would apply where the governmental body intentionally failed to take certain action required by the Act, such as:

- Refusing to adopt parliamentary rules of procedure
- Refusing to maintain an accurate record of the meeting
- Refusing to include in the record of the meeting, the date, time, place, members present or absent, and action taken at the meeting
- Refusing to make the record of the meeting available to the public as soon as practicable after approval of the minutes
- Knowingly deliberating or voting during an executive session
- Using electronic communications to circumvent the law

The “failure to act” involved here must be intentional. While this will likely be an issue for the court to decide, this would not cover a circumstance where the governmental body

was acting in good faith, but did not realize what was required or did not realize that the requirements had not been met.

What Should Members of the Governmental Body do if they are sued?

The law requires that the defendants (the members of the governmental body sued) file their initial response within seven business days of personal service of the lawsuit. Therefore, when a member of the governmental body is served with legal papers, he or she must contact the county attorney and the county's insurance carrier *immediately*. In the event that service is made to the county commission office, and the members of the body named are not present at the office, the county administrator should contact each member as soon as possible and forward the legal papers to the county attorney immediately upon receipt.

The law also provides that a preliminary hearing on the lawsuit must be held no later than 10 business days after the defendants' initial response, or if no initial response is filed, no later than 17 business days after the lawsuit is filed. The purpose of this hearing is for the plaintiff to convince the court that there is enough evidence to proceed with a trial on the allegations made in the lawsuit. Therefore, the members of the governmental body must be prepared to defend their actions early in the case.

This lawsuit is complicated and is designed to move very quickly, so the county attorney must be involved from the outset. Unless a longer period is agreed to by the parties and the court, a final order on the merits of the case must be issued by the court within 60 days after the preliminary hearing. Therefore, each member of the county commission, and the county attorney, must move quickly to prepare the county's defense.

What are the Penalties if the Court determines that there has been a Violation of the Act?

The new law sets out monetary penalties to be paid where the court determines that there has been a violation of the open meetings law. Under the Act, each member of the governmental body found to have violated the Act can be assessed a penalty of up to \$1000 or one-half of his or her monthly salary for service on the body, whichever is less. Fines can be assessed for each separate violation of the Act.

Any penalties must be paid personally by each member of the governing body found to have violated the law. This means that the county commission cannot pay the fine on behalf of the members and cannot reimburse the members for any fines paid.

Where the violations are related to improper discussion during an executive session, the monetary penalties can *only* be assessed against members who voted to go into executive session *and* remained in the executive session during a discussion determined by the court not to have been authorized by the Act. Therefore, when considering an executive session, 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
- Whether or not to remain in the executive session once convened

Who Pays the Legal Fees?

The new Act states that a governmental body may pay or provide for the legal expenses of present or former members of the body named as defendants in a lawsuit filed for violation of the Act.

However, the Act does not have any provision requiring the members of the governmental body to pay the attorney's fees of the person or entity filing suit alleging violation of the Act. It also does not make any provision allowing the governmental body or the members sued to be reimbursed their legal fees from the plaintiff in the event the Court finds that there was no violation.

What Happens to the Actions Taken at a Meeting in the Event the Court Finds that there was a Violation of the Act?

Act No. 2005-40 provides that the court may invalidate any action taken during a meeting held in violation of the Act if:

- The lawsuit is filed within 21 days of the date when the action is made public,
- The violation was not the result of mistake, inadvertence, or excusable neglect, and
- Invalidating the action taken will not unduly prejudice third parties who have acted in good faith reliance upon the challenged action of the governmental body

However, the court cannot invalidate any action taken at an open meeting conducted in a manner consistent with the Act because of a violation which occurred prior to the meeting, which would include the failure to post notice or take other actions required under the law before the meeting.

Is there any Immunity Protection under the Act?

Act No. 2005-40 does include limited immunity protection for statements made during a meeting conducted in compliance with the Act by members of the governmental body *or* by employees of that body. The Act states that:

“In addition to any existing applicable immunity, members of a governmental body and any of its employees participating in a meeting conducted in conformance with this act shall have an absolute privilege and immunity from suit for any statement made during the meeting which relates to an action pending before the governmental body.”

This means that a person cannot sue any member of the governmental body or any governmental employee for statements made during a meeting of the body, if those statements are made during a matter pending before the body. For example, if the county commission is considering whether or not to award a bid to a local contractor, and a member of the commission states that the contractor is not reliable or not honest, the commissioner making that statement is protected against any lawsuit brought by the local contractor for the statements made.

The immunity protection granted *only* applies to statements made during a meeting which relate to a matter pending before the governmental body at the time the statement is made. This immunity does *not* authorize members of the county commission or county employees to use the county commission meeting as a protected forum to make inappropriate or unkind statements about other members of the body or any other persons. It is only intended to provide protection in the event that the open discussion required by the law may include sensitive or unflattering statements to be made about some person or entity, where the discussion is directly related to the subject “on the table” in the meeting.

IS THERE A TIME LIMIT FOR BRINGING SUIT?

The new Act states that the a lawsuit alleging a violation of the law must be brought within sixty (60) days of the date that the person or entity bringing suit knew or should have known of the activity which is believed to have been a violation of the Act.

Additionally, the law provides that the lawsuit must be filed no later than within two years of the alleged violation.

Section 5

Rules of Order

Rules of Procedure

_____ County Commission

I. Scope of Rules.

A. The following Rules of Procedures were duly adopted by the _____ County Commission as required by the Alabama Open Meetings Act (Act 2005-40) and shall govern the conduct of the meetings of the County Commission beginning on the ____ day of _____, 200_.

B. The following Rules of Procedure may be amended by affirmative vote of a majority of the members of the Commission. Provided; however, such changes in the Rules of Procedure shall not take affect until the next regular meeting of the Commission following the adoption of such change.

II. Access to Meeting Facilities.

A. Meetings Open to Public. All regular meetings of the Commission shall be open to the public as required by the Alabama Open Meetings Act (Act 2005-40).

B. Accessibility. All regular meetings of the Commission will be conducted in a building which is open to the public.

C. Signs, Placards, Banners. For public safety purposes, no signs or placards mounted on sticks, posts, poles or similar structures shall be allowed in County Commission meeting rooms. Other signs, placards, and banners shall not disrupt meetings or interfere with others' ability to observe the meeting.

D. Weapons. For public safety purposes, the County Commission may establish rules for the removal of weapons from inside the meeting chamber.

III. Quorum.

A. Quorum. A majority of the members of the Commission shall constitute a quorum. No ordinance, resolution, policy, or motion shall be voted on and approved by the Commission unless a quorum is present in the meeting chamber while the vote is taken and the matter is approved by an affirmative vote of the majority of the members present and voting, unless otherwise required by Alabama law.

B. Remaining in Chamber. During a Commission meeting, Commissioners should remain in the chambers at all times unless an emergency or illness should occur. A member of the Commission who leaves the meeting chamber shall not be included in the determination of quorum.

C. Abstaining from Voting. Any member of the Commission who is present in the meeting chamber may, when he or she determines it to be necessary, abstain from voting

or otherwise participating in the proceedings related to a particular matter. Such commissioner who abstains but remains in the chamber shall be deemed to be present for the purpose of constituting a quorum but he or she shall not be deemed to be “present and voting” for the purpose of determining whether a motion has received an adequate number of affirmative votes for passage.

D. Loss of Quorum. In the event that a Commissioner departs a Commission meeting prior to adjournment, and the departure causes a loss of quorum, no further official action may be taken until or unless a quorum is restored, except to vote on a motion to adjourn. If, after a reasonable time not to exceed 15 minutes, the commission still lacks a quorum of its members, the meeting shall be automatically adjourned.

E. Failure to Obtain Quorum. Should no quorum attend within 30 minutes after the time appointed for the beginning of the meeting of the Commission, the Chair or the Vice Chair, or in their absence, another Commissioner, in order of seniority, shall announce that no quorum was present and that the meeting is cancelled. The names of the members present for the meeting shall be recorded in the minutes of the next meeting of the commission.

IV. Presiding Officer.

A. Chair. The Presiding Officer is the Chair of the County Commission. The Chair presides at all meetings of the Commission. The Chair’s responsibilities shall include, but not be solely limited to:

1. Open the meeting, ascertain that a quorum is present at the appropriate time and call the meeting to order, if a quorum is present.
2. Announce the business to come before the Commission, in accordance with the prescribed order of business.
3. Recognize all Commissioners, the County Administrator, the County Engineer and the County Attorney, who seek the floor pursuant to these procedures. All questions and comments are to be directed through the Chair and restated by him or her. The Chair shall repeat every motion and state every question coming before the Commission, call for the vote and announce the decision of the Commission on all matters coming before it.
4. Preserve decorum and order, and in case of disturbance or disorderly conduct in the Commission chambers, may cause the same to be cleared or cause any disruptive individual to be removed.
5. Call to order any member of the Commission who violates any of these procedures.
6. Expedite business in every way compatible with the rights of the members.

7. Remain objective. The Chair must remain objective and may only make a motion, second a motion or vote as provided in these Rules of Procedures.

8. Declare the meeting adjourned when the Commission so votes, when a quorum is no longer present or at any time in the event of an emergency affecting the safety of those present.

B. Vice Chair. In the absence of the Chair or in the event of the Chair's inability to serve, the Vice Chair (or other member designated by local law) shall perform the duties and functions of the Chair until the Chair's return. The Commission shall establish its own procedures for the election of a Vice Chair, provided that any such election of a new Vice Chair shall not take affect until the next regular meeting of the Commission.

V. Order of Business.

A. Official Agenda. There shall be an official agenda for every meeting of the Commission, including special and emergency meetings. As required by Alabama law, the official agenda for special and emergency meetings shall include only those items necessitating the holding of the special or emergency meeting.

The agenda for regularly-scheduled meetings shall identify the items to be considered and determine the order of business to be conducted at the meeting. All proceedings and the order of business at all meetings of the Commission shall be conducted in accordance with the official agenda. This agenda shall be established prior to each meeting under procedures to be adopted by the County Commission. Such procedures may include the conducting of an "administrative" or "agenda-setting" meeting prior to the Commission's regular meeting. These procedures may be amended or altered by the County Commission, but such changes shall not take effect until the next regularly-scheduled meeting of the County Commission.

B. Agenda Format for Regularly-Scheduled Meetings. The official agenda for a regularly-scheduled Commission meeting shall be in substantially the form as set forth below:

1. Call to Order, Welcome
2. Public Comment from Citizens. Such comment shall be limited to 3-minutes per speaker and no more than two speakers may be heard on the same subject as provided elsewhere in the Rules of Procedure.
3. Public Comment from Other Elected Officials.
4. Call of Roll to Establish Quorum, Invocation and Pledge of Allegiance
5. Awards and Presentations
6. Consent Agenda

7. New Business

8. Reports from Staff:

- a. County Administrator
- b. County Engineers
- c. County Attorney
- d. Other

9. Old Business

10. Any Scheduled Public Hearings

11. Discussion Items by Commissioners. Discussion items may only be acted upon by affirmative vote of all commissioners in attendance.

12. Adjourn

C. Consent Agenda. On the portion of the agenda designated as "Consent," all items contained therein may be voted on with one motion. Consent items are only those items considered to be routine in nature, non-controversial and that do not deviate from past Commission direction or policy. However, any member of the Commission, including the Chair, may withdraw an item from the consent agenda, provided that such withdrawal is declared at least one (1) hour before the beginning time of the meeting. An item removed from the "Consent" agenda as provided herein shall be moved to the "New Business" portion of the agenda and it shall then be considered individually.

D. Public Comment from Citizens and Other Elected Officials. Citizens and other elected officials who wish to be heard by the Commission shall be afforded such opportunity during the portion of the meeting so designated. The comment shall conform to the requirements of decorum and order that apply to the members of the commission and the Chair shall take whatever steps are necessary (including the removal of any citizen or other elected official) to preserve such decorum and order. Comments shall be addressed to the County Commission and shall not include any personal or other comments addressed at any member of the County Commission or commission employee. There shall be no debate and no action by the County Commission during this portion of the agenda.

E. New Business. New Business items are items of a general nature that require Commission action or pertain to Commission policy. Items of New Business that are neither approved or defeated by action of the Commission shall be considered under Old Business at the next regular meeting of the Commission.

F. Reports from Staff. The senior staff members shall make reports to the County Commission as directed by the Chair or by majority vote of the commission. The Commission may, by majority vote of those members in attendance at the meeting, take action on any items contained in the report of the staff members.

G. Old Business. Any item which was included on the "New Business" portion of the previous meeting, but was not approved, defeated or tabled by majority vote of the

members of the County Commission present and voting. Motions postponed or carried over to a day certain shall be included on the agenda under “Old Business” on the next regular meeting following the conclusion of the time for which the motion was postponed or carried over.

H. Scheduled Public Hearings. The County Commission may conduct any public hearings during this portion of the commission meeting. Any notice required by law prior to the conduct of the public hearing shall be given by the County Commission.

Individual speakers are required to adhere to a three (3) minute time limit when speaking on issues scheduled for public hearing. The Commission may, by majority vote, either extend or reduce time limits, based on the number of speakers. The comment shall conform to the requirements of decorum and order that apply to the members of the commission and the Chair shall take whatever steps are necessary (including the removal of any citizen or other elected official) to preserve such decorum and order. Comments shall be addressed to the County Commission and shall not include any personal or other comments addressed at any member of the County Commission or commission employee.

I. Discussion Items by Commissioners. On the portion of the agenda designated as “Discussion Items by Commissioners,” no assignments shall be given to the County Administrator, County Engineer, County Attorney or other staff members without the affirmative vote of the majority of the members of the Commission present and voting. The Commission shall take no action on an item raised during this discussion portion of the agenda unless such is accomplished through a motion adopted by an affirmative vote of all members of the Commission present at the meeting.

J. Departure from Order of Business. Any departure from the order of business set forth in the official agenda shall be made only upon affirmative vote of all the members of the Commission present at the meeting.

L. Additions, Deletions, or Technical Corrections to Agenda. Deletions or technical corrections to the agenda may be considered by the Commission and adopted by the passage of a single motion approved by majority vote of those members in attendance at the meeting. Additions to the agenda shall only be made by affirmative vote of all the members of the Commission present at the meeting.

M. Announcing Agenda Items. The Chair shall announce each item on the agenda. The County Administrator, County Engineer, County Attorney or other appropriate staff member shall then be called to present the item to the Commission, when appropriate.

VI. Rules of Debate.

A. Decorum.

1. Every Commissioner desiring to speak should address the Chair, and upon said recognition by the Chair, should confine discussion to the question under debate, avoiding all personalities and unprofessional language.

2. Commissioners shall refrain from: attacking a member's motives; speaking on a prior motion not pending; speaking while the Chair or other Commission members are speaking; speaking against their own motions; and disturbing the Commission.

3. A member once recognized should not be interrupted when speaking unless said member is being called to order. The member should then cease speaking until the question of order is determined, without debate, by the Chair. If in order, said member shall be at liberty to proceed.

4. A member shall be deemed to have yielded the floor when he or she has finished speaking. A member may claim the floor only when recognized by the Chair.

B. Motions.

1. A motion and a second to the motion is to precede any action or debate on an agenda matter unless there are speakers (who are not members of the Commission) to be heard on the agenda matter.

2. All motions shall be made and seconded before debate may proceed.

3. When a motion is presented and seconded, it is under consideration and no other motion shall be received thereafter, except motions to adjourn, to lay on the table, to postpone, to carry over, to substitute, or to amend which shall have preference in the order in which they are listed.

4. Motions to "lay on the table" are made to end debate on a matter and to "remove" it from consideration by the body. The adoption of a motion to "lay on the table" has the affect of defeating the original motion and that item shall not be considered again during the same meeting unless a motion to "reconsider" is adopted as provided herein.

5. Motions to "postpone" or "carry over" must be made by stating the date or time for which the item shall be postponed or carried over. Should such a motion be adopted, the matter will be back before the commission under "Old Business" at the first regular meeting of the Commission following the expiration of the time for which it was postponed or carried over.

6. Motions to "substitute" or "amend" a motion are used to make changes or revisions in the original motion. Such motions are made only after the original motion has received a second but prior to the adoption of the original motion. If the motion to "substitute" or "amend" is approved, the Commission then must take a second vote to approve the motion "as substituted" or "as amended", as the case may be.

7. Any Commissioner may move to close, or end, debate and "move the question" on the motion being considered. This motion to "move the question" shall be

non-debatable. A successful vote on the motion to “move the question” will end discussion of the item and a vote on all pending motions shall be taken immediately without the offering of any other motions. The Commissioner moving the adoption of the original motion shall have the privilege of making closing remarks (of not more than one minute) before the vote on the motion to “move the question” is taken.

8. Presiding officers who serve by virtue of holding the office of Judge or Probate or County Commission Chair, may not make or second a motion unless specifically authorized by law. Only those persons who represent a district on the Commission and hold the position of presiding officer by virtue of election by the Commission or because of a rotating system may make a motion or offer a second. If such a presiding officer wishes to put forth or second a motion, he or she shall relinquish the chair to the Vice Chair until the main motion, which he or she “moved” or “seconded”, has been disposed.

If a motion or second is made by the Chair as authorized above, the gavel shall be relinquished in the following order:

- (a) to the Vice Chair; or
- (b) in the absence of the Vice Chair to the next Commissioner based upon seniority.

A presiding officer who relinquishes the chair for the purpose of making a motion shall not return to it until the pending main question has been disposed of, since he or she has shown himself or herself to be partisan as far as that particular matter is concerned.

9. The following motions are not debatable and must be voted upon without debate: to adjourn; to lay on the table; and to move the question.

C. Motions to Amend

An amendment to a motion must be germane, that is, it must relate to the substance of the main motion. An amendment may not introduce an independent question, and an amendment may not serve as the equivalent of rejecting the original motion. A Commissioner may amend the main motion in either of the following two ways:

1. By Consent of the Members. The Chair, or another Commissioner through the Chair, may ask for certain changes to be made to the main motion. If there are no objections from the maker of the motion, the motion shall stand as amended.
2. Formal Amendment. An amendment may be presented formally by moving to amend the motion in some way. If it is in the form of a formal motion to amend, a second shall be required and discussion shall follow on the amendment. If an amendment passes, the main motion shall be the

motion as amended. If it fails, the motion shall be the motion as it was before the amendment was presented.

D. Motions to Reconsider

A motion to reconsider any vote or proceeding of the Commission may only be made and seconded by a Commission Member who had previously voted on the prevailing side. Such motion must be made before the conclusion of the meeting during which the original motion was made and approved. A motion to reconsider must be adopted by a majority of those members of the Commission present and voting.

VII. Voting.

A. Voice Vote; Secret Ballots. Unless otherwise directed by the Chair or requested by a member of the Commission, all votes shall be taken by voice and the result shall be announced by the Chair, whose decision shall be final. Such ruling may not be appealed. No vote may be taken by secret or paper ballot.

B. Tabulating the Vote. Should a roll call vote be directed by the Chair or requested by a member of the Commission, the person designated by the Chair shall call the Commissioners, in numerical order of their district numbers, for the purpose of each Commissioner announcing his or her vote. The Chair shall announce the results. Upon any roll call, there shall be no discussion by any Commissioner after the roll call has begun.

C. Voting. Every member in the Commission meeting room or chamber when the question is put must give his or her vote, unless the member has publicly stated that he or she is abstaining. A Commissioner who is serving as Chair by virtue of his or her being elected by the members of the commission or by virtue of a rotating procedure shall vote when his or her district number is called. Such Chair shall only vote once on each motion and shall not cast an additional vote to make or break a tie vote.

D. Voting by Chair. Unless otherwise authorized by law, Probate Judge Chairs and officials holding the office of County Commission Chair who do not represent a district shall only vote in those cases when his or her vote would break a tie vote. Commissioners who represent a district and also serve as Chair shall be entitled to one vote on all questions but shall not cast a second vote to break a tie vote.

D. Absent for Vote; Changing Vote. Any Commissioner absent for a vote on a particular item may record his or her vote, and any Commissioner may change his or her vote before the next item is called for consideration, or before a recess or adjournment is called, whichever occurs first, but not thereafter, except with the consent of all the Commissioners who voted thereon.

E. Majority Vote; Extraordinary Majority Vote; Tie Vote. The passage of any motion, policy, ordinance or resolution shall require the affirmative vote of at least the majority of the members of the Commission who are present and voting. If an extraordinary majority

vote is required by Alabama law, this shall require the affirmative vote of an extraordinary majority of the members of the Commission who are present and eligible to vote. In the case of a tie in votes on any proposal, the proposal fails.

VIII. Public Input: Addressing the County Commission.

A. Public Input. The Commission recognizes the importance of allowing citizens, including other elected officials, to express their opinions on the operation of County government and encourage public participation in the local government process. The Commission also recognizes the necessity for conducting orderly and efficient meetings in order to complete County business in a timely manner. Public Input during the Commission meeting, from both citizens and other elected officials, shall only be given during the time provided in the agenda and only within the procedures set out herein. Citizens or other elected officials shall not address the commission at any time other than as specifically provided in the agenda unless authorized by unanimous consent.

B. Procedure for Public Input

1. At regularly scheduled County Commission meetings, the Commission provides comment periods for citizens and other elected officials to speak and to offer input and comments on items pending before the commission as well as items that are of concern to the public. The remarks of each speaker shall be limited to no more than three (3) minutes, unless the Chair extends the time, and no more than two (2) speakers may be heard on each subject unless authorized by affirmative vote of all members of the commission who are present.
2. A form will be provided for those citizens who wish to make comments. Each person wishing to speak must sign this form prior to the beginning of the Public Comment portion of the agenda.
3. Any citizens wishing to make written comments may provide those to the County Administrator before the conclusion of the meeting. A copy of the written comments will then be provided to the members of the commission.
4. Members of the public are encouraged to communicate directly with their Commissioner prior to or after the commission meeting.

C. Addressing the Commission.

1. When the person's name is called, the person shall step up to the speaker's lectern and shall give the following information in an audible tone of voice for the minutes:
 - (a) name;
 - (b) place of residence or business address;
 - (c) if requested by the Chair, the person may be required to state whether the person speaks for a group of persons or a third party, if the person represents an organization, whether the view expressed by the person

represents an established policy or position approved by the organization, and whether the person is being compensated by the organization.

2. All remarks shall be addressed to the Commission as a body and not to any member thereof.

3. No person, other than a member of the Commission, and the person having the floor, may be permitted to enter into any discussion, either directly or through a member of the Commission, without permission of the Chair. No question may be asked except through the Chair.

4. Speakers should make their comments concise and to the point, and present any data or evidence they wish the Commission to consider. No person may speak more than once on the same subject unless specifically granted permission by the Chair.

D. Decorum.

1. Order must be preserved. No person shall, by speech or otherwise, delay or interrupt the proceedings or the peace of the Commission, or disturb any person having the floor. No person shall refuse to obey the orders of the Chair or the Commission. Any person making irrelevant, impertinent, or slanderous remarks or who becomes boisterous while addressing the Commission shall not be considered orderly or decorous. Any person who becomes disorderly or who fails to confine remarks to the identified subject or business at hand shall be cautioned by the Chair and given the opportunity to conclude remarks on the subject in a decorous manner and within the designated time limit. Any person failing to comply as cautioned shall be barred from making any additional comments during the meeting by the Chair, unless permission to continue or again address the Commission is granted by the majority of the Commission members present.

2. If the Chair declares an individual out of order, he or she will be requested to relinquish the podium. If the person does not do so, he or she is subject to removal from the Commission Chamber or other meeting room.

3. Any person who becomes disruptive or interferes with the orderly business of the Commission may be removed from the Commission Chambers or other meeting room for the remainder of the meeting.

X. Executive Session.

The Commission is authorized to enter into executive session as provided in The Alabama Open Meetings Act (Act 2005-40).

XI. Committees.

The Chair, with the consent of the Commission, may appoint committees as may be needed to assist in the business of the Commission. The meetings of the Committees shall be governed by the Rules of Procedures. All such committees shall be provided a formal charge and shall report to the Commission its findings and recommendations, unless otherwise directed. The Chair shall designate the Chair for each committee appointed. Agendas for committee meetings shall be furnished to all members of the Commission.

XII. Adjournment.

No meeting should be permitted to continue if a quorum is not present. The commission may adjourn by majority vote.

Section 6

Recording Policy

POLICY FOR RECORDING PROCEEDINGS OF THE _____ COUNTY COMMISSION

In order to maintain the proper decorum required for conducting the business of the county while, at the same time allowing members of the media or general public to record the proceedings of the county commission, the _____ County Commission hereby adopts the following policy for the recording of any such proceedings:

The use of audio or video recording equipment shall be allowed during any county commission meeting provided that the use of such equipment does not disrupt or disturb the proceedings or interfere with the ability of others in attendance to observe and understand the proceedings. All equipment shall be in proper working condition, and if any malfunction of equipment causes disruption to the proceedings, use of the equipment shall be immediately discontinued. Any persons desiring to record the proceedings shall do so openly and shall sign in with the county commission at the outset of the proceedings.

Video recording shall only be allowed to the extent that there is adequate space in the meeting facilities to accommodate the recording equipment without disturbing or inconveniencing the members of the county commission or those in attendance at the proceedings. The chairperson may limit or prohibit the use of tripods or other video recording accessories if space limitations warrant such restrictions. Unless the equipment can be operated from a seat without unduly disrupting or disturbing the proceedings or others in attendance, all video recording shall take place in the area along the back or side of the room designated for that purpose. No one will be allowed to obstruct the view of others in attendance.

Persons who are video recording the proceedings may leave the meeting room with their equipment during the proceedings provided there is no undue disruption. However, such persons shall only be allowed to return and resume recording if this can be accomplished without disrupting the proceedings or disturbing those in attendance.

If any set up of equipment is required, the set up shall be completed prior to the beginning of the proceedings or during a recess. Persons may be allowed to dismantle the equipment during the proceedings only if done without disruption to the proceedings and without interfering with the ability of others in attendance to observe and hear the proceedings.

Any persons desiring to place microphones or recording devices at the commission table, at the podium, or at any other location within the meeting room shall obtain permission from the chairperson prior to the beginning of the proceedings, and shall make arrangements with the county administrator or other designated county personnel for placement of all equipment. The microphones or recording devices cannot be removed during the proceedings, unless there is a recess of the proceedings called by the chairperson, and the equipment can be removed within the time frame of that recess.

No audio or video recording equipment shall be allowed during any executive session proceedings.

All persons or organizations, including any media organization, shall fully comply with these procedures at all times. Any person or organization violating this policy or otherwise causing undue disruption to the proceedings shall be instructed by the chairperson to discontinue the use of the recording equipment, and any person or organization that refuses to cooperate will be instructed to vacate the proceedings. Failure to comply with instructions to leave may result in removal by law enforcement personnel.

Section 7

Appendix

Copy of Act 2005-40

Copy of Section 11-3-8

Copy of AG Overview of Open Meetings Law

ALABAMA'S OPEN MEETINGS LAW

§ 36-25A-1 – Purpose and Title

(a) It is the policy of this state that the deliberative process of governmental bodies shall be open to the public during meetings as defined in Section 36-25A-2(6). Except for executive sessions permitted in Section 36-25A-7(a) or as otherwise expressly provided by other federal or state statutes, all meetings of a governmental body shall be open to the public and no meetings of a governmental body may be held without providing notice pursuant to the requirements of Section 36-25A-3. No executive sessions are required by this chapter to be held under any circumstances. Electronic communications shall not be utilized to circumvent any of the provisions of this chapter.

(b) This chapter shall be known and may be cited as the "Alabama Open Meetings Act."

§ 36-25A-2 – Definitions

As used in and for determining the applicability of this chapter, the following words shall have the following meanings solely for the purposes of this chapter:

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

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

(3) 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.

(4) GOVERNMENTAL BODY. All boards, bodies, and commissions of the executive and legislative departments of the state or its political subdivisions or municipalities which expend or appropriate public funds; all multimember governing bodies of departments, agencies, institutions, and instrumentalities of the executive and legislative departments of the state or its political subdivisions or municipalities, including, without limitation, all corporations and other instrumentalities whose governing boards are comprised of a majority of members who are appointed or elected by the state or its political subdivisions, counties or municipalities; and all quasi-judicial bodies of the executive and legislative departments of the state and all standing, special, or advisory committees or subcommittees of, or appointed by, the body. The term "governmental body" does not include any of the following:

- a. Legislative party caucuses or coalitions.
- b. Alabama appellate or trial courts, except as required by the constitution of this state or any body governed by rules of the Alabama Supreme Court.
- c. Voluntary membership associations comprised of public employees, counties, municipalities, or their instrumentalities which have not been delegated any legislative or executive functions by the Legislature or Governor.

(5) **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. Job performance 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. Job performance does not include the general reputation and character of the person being discussed.

(6) **MEETING.** a. Subject to the limitations herein, the term meeting shall only apply to the following:

1. The prearranged gathering of a quorum of a governmental body or a quorum of a committee or subcommittee of a governmental body at a time and place which is set by law or operation of law.

2. The prearranged gathering of a quorum of a governmental body or a quorum of a committee or subcommittee of a governmental body during which the body, committee, or subcommittee of the governmental body is authorized, either by law or otherwise, to exercise the powers which it possesses or approve the expenditure of public funds.

3. The gathering, whether or not it was prearranged, of a quorum of a governmental body or a quorum of a committee or a subcommittee of a governmental body during which the members of the governmental body deliberate specific matters that, at the time of the exchange, the participating members expect to come before the body, committee, or subcommittee at a later date.

b. The term "meeting" shall not include:

1. Occasions when a quorum of a governmental body, committee, or subcommittee attends social gatherings, conventions, conferences, training programs, press conferences, media events, or otherwise gathers so long as the governmental body does not deliberate specific matters that, at the time of the exchange, the participating members expect to come before the governmental body at a later date.

2. Occasions when a quorum of a governmental body gathers, in person or by electronic communication, with state or federal officials for the purpose of reporting or obtaining information or seeking support for issues of importance to the governmental body.

(7) **OPEN OR PUBLIC PORTION OF A MEETING.** The open or public portion of a meeting is that portion which has not been closed for executive session in accordance with this chapter, for which prior notice was given in compliance with this chapter, and which is conducted so that constituents of the governmental body, members of the media, persons interested in the activities of the governmental body, and citizens of this state could, if they desired, attend and observe.

(8) **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.

(9) **PUBLIC EMPLOYEE.** Any person employed at the state, county, or municipal levels of government or their instrumentalities, including governmental corporations and authorities, who is paid in whole or in part from state, county, or municipal funds. A public employee does not include a person employed on a part-time basis whose employment is limited to providing professional services other than lobbying, the compensation for which constitutes less than 50 percent of the part-time employee's income.

(10) PUBLIC FUNDS. Taxes or fees charged or collected by a governmental body or from the sale of public property including, but not limited to, matching funds from the federal government or income derived from the investment of taxes or fees.

(11) PUBLIC OFFICIAL. Any person elected to public office, whether or not that person has taken office, by the vote of the people at state, county, or municipal levels of government or their instrumentalities, including governmental corporations, and any person appointed to a position at the state, county, or municipal levels of government or their instrumentalities, including governmental corporations.

(12) QUORUM. Unless otherwise provided by law, a quorum is a majority of the voting members of a governmental body. Except where a governmental body is prohibited from holding a non-emergency meeting as defined in subdivision (6)a.1. between the date of election of members and the date such members take office, any person elected to serve on a governmental body shall be counted in the determination of whether a quorum of that governmental body is present, except for any meeting as defined in subdivisions (6)a.1. and 2., beginning on the date of certification of the results of the general election. In the case of appointment to a governmental body, any person shall be counted in the determination of whether a quorum of that governmental body is present, except for any meeting as defined in subdivisions (6)a.1. and 2., from the date that the appointment is made or issued whether or not the appointment is effective on that date.

§ 36-25A-3 – Notice Requirements

(a) Unless otherwise specified by law and as provided herein, any governmental body subject to this chapter, except for an advisory board, advisory commission, advisory committee, task force, or other advisory body created solely to make recommendations on public policy issues and composed of persons who do not receive compensation for their service from public funds, shall post notice of all meetings, as defined in Section 36-25A-2(6)a.1., at least seven calendar days prior to the meeting as follows:

(1) The respective houses of the Alabama Legislature shall develop rules consistent with the Constitution of Alabama of 1901, providing for access to and prior notice of all sessions and standing committee and standing subcommittee meetings and all meetings of permanent and joint legislative committees.

(2) Any governmental body with statewide jurisdiction shall submit notice of its meeting to the Secretary of State. The Secretary of State shall post the notice on the Internet for at least seven calendar days prior to the day of the meeting. The Secretary of State shall also send electronic mail notifications to anyone who has registered with the Secretary of State to receive notification of meetings. The Secretary of State may promulgate reasonable rules and regulations necessary for the uniform receipt and posting of notice and of registration for electronic mail notification. The Secretary of State shall provide during regular office hours a computer terminal at a place convenient to the public in the office of the Secretary of State that members of the public may use to view notices of meetings posted by the Secretary of State. Any governmental body with less than statewide jurisdiction may also submit notice to the Secretary of State for posting on the website. Nothing shall prevent a governmental body subject to this subsection from posting notice in any additional manner.

(3) A municipal governmental body shall post notice of each meeting on a bulletin board at a place convenient to the public in the city hall, provided, however, that a corporation a majority of whose governing board is appointed or elected by a municipality and that has a principal office

separate from the city hall may, in lieu of posting notice in the city hall, post notice of each meeting on a bulletin board at a place convenient to the public in the principal office of the corporation or other instrumentality.

(4) A local school board shall post notice of each meeting on a bulletin board at a place convenient to the public in the central administrative office of the board.

(5) Any other governmental body shall post notice of each meeting in a reasonable location or shall use a reasonable method of notice that is convenient to the public. Any change of the location or method for posting notices of meetings shall not take effect until the change has been approved at an open meeting by the members of the governmental body and announced to the public at an open meeting.

(6) If practicable, a governmental body other than those with statewide jurisdiction, in addition to the posting requirements, shall provide direct notification of a meeting, as defined in Section 36-25A-2(6)a., to any member of the public or news media covering that governmental body who has registered with the governmental body to receive notification of meetings. A governmental body may promulgate reasonable rules and regulations necessary for the uniform registration and payment for direct notice and for the distribution of the notices. The governmental body may choose to transmit a notice using electronic mail, telephone, facsimile, the United States Postal Service, or any other method reasonably likely to provide the requested notice. The actual cost of issuing notices, if there is one, may be required to be paid in advance by the person requesting notice by the governmental body. Direct notice to persons who have registered with the governmental body shall, at a minimum, contain the time, date, and place of the meeting.

(b) Unless otherwise specified by law directly applicable to the governmental body, notice of a meeting, as defined in Section 36-25A-2(6)a.2. and 3. as well as meetings called pursuant to Section 11-43-50 shall be posted as soon as practicable after the meeting is called and in no event less than 24 hours before the meeting is scheduled to begin, unless such notice (i) is prevented by emergency circumstances requiring immediate action to avoid physical injury to persons or damage to property; or (ii) relates to a meeting to be held solely to accept the resignation of a public official or employee. In such situations, notice shall be given as soon as practical, but in no case less than one hour before the meeting is to begin. At the same time general notice is given, special notice shall be directed to any person who has registered to receive direct notices pursuant to the provisions of subsection (a)(6).

(c) Posted notice pursuant to this section shall include the time, date, and place of meeting. If a preliminary agenda is created, it shall be posted as soon as practicable in the same location or manner as the notice given pursuant to this section. A governmental body may discuss at a meeting additional matters not included in the preliminary agenda. If a preliminary agenda is not available, the posted notice shall include a general description of the nature and purpose of the meeting.

(d) County commissions which provide proper notice in conformance with Section 11-3-8 shall not be required to comply with subsections (a), (b), and (c) of this section, nor shall committees or subcommittees of such commissions so long as the committees also comply with the notice procedures applicable to the full commission in Section 11-3-8.

(e) Governmental bodies may give, but shall not be required to give, notice of quasi-judicial or contested case hearings which could properly be conducted as an executive session under this chapter or existing state law.

(f) A governmental body is authorized, but not required, to provide notice in addition to that specified in this section and to provide notice for gatherings which are not meetings as defined in Section 36-25A-2(6).

§ 36-25A-4 – Maintenance of Records

A governmental body shall maintain accurate records of its meetings, excluding executive sessions, setting forth the date, time, place, members present or absent, and action taken at each meeting. Except as otherwise provided by law, the records of each meeting shall become a public record and be made available to the public as soon as practicable after approval.

§ 36-25A-5 – Rules of Parliamentary Procedure and Voting

(a) Unless otherwise provided by law, meetings shall be conducted pursuant to the governing body's adopted rules of parliamentary procedure not in conflict with laws applicable to the governmental body.

(b) Unless otherwise permitted by this chapter or directed by provisions in the Constitution of Alabama of 1901, or other existing state law applicable to the governmental body, all votes on matters before a governmental body, including, but not limited to, votes to appropriate or to authorize a governmental body's designated employee, within limits prescribed by the governmental body without further authorization of the governmental body, to spend public funds, to levy taxes or fees, to forgive debts to the governmental body, or to grant tax abatements, shall be made during the open or public portion of a meeting for which notice has been provided pursuant to this chapter. Voice votes may be allowed. Unless permitted by this chapter, existing statute, or constitutional amendment, no votes shall be taken in executive sessions. Unless otherwise directed by provisions in the Constitution of Alabama of 1901, or other existing state law applicable to a governmental body, a governmental body may not vote by secret ballot.

§ 36-25A-6 – Recording of Meetings

A meeting of a governmental body, except while in executive session, may be openly recorded by any person in attendance by means of a tape recorder or any other means of sonic, photographic, or video reproduction provided the recording does not disrupt the conduct of the meeting. The governmental body may adopt reasonable rules for the implementation of this section.

§ 36-25A-7 – Executive Sessions

(a) Executive sessions are not required by this chapter, but may be held by a governmental body only for the following purposes:

(1) To discuss the general reputation and character, physical condition, professional competence, or mental health of individuals, or, subject to the limitations set out herein, to discuss the job performance of certain public employees. However, except as provided elsewhere in this section, discussions of the job performance of specific public officials or specific public employees may not be discussed in executive session if the person is an elected or appointed public official, an appointed member of a state or local board or commission, or a public employee who is one of the classification of public employees required to file a statement of economic interests with the Alabama Ethics Commission pursuant to Section 36-25-14. Except as provided elsewhere in this section, the salary, compensation, and job benefits of specific public officials or specific public employees may not be discussed in executive session.

(2) When expressly allowed by federal law or state law, 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.

(3) To discuss with their attorney the legal ramifications of and legal options for pending litigation, controversies not yet being litigated but imminently likely to be litigated or imminently likely to be litigated if the governmental body pursues a proposed course of action, or to meet or confer with a mediator or arbitrator with respect to any litigation or decision concerning matters within the jurisdiction of the governmental body involving another party, group, or body. Prior to voting to convene an executive session under this exception the governmental body shall receive a written opinion or oral declaration reflected in the minutes from an attorney licensed to practice law in Alabama that this exception is applicable to the planned discussion. Such declaration shall not otherwise constitute a waiver of the attorney-client privilege. Notwithstanding the foregoing, 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.

(4) To discuss security plans, procedures, assessments, measures, or systems, or the security or safety of persons, structures, facilities, or other infrastructures, including, without limitation, information concerning critical infrastructure, as defined by federal law, and critical energy infrastructure information, as defined by federal law, the public disclosures of which could reasonably be expected to be detrimental to public safety or welfare. Provided, however, 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) To discuss information that would disclose the identity of an undercover law enforcement agent or informer or to discuss the criminal investigation of a person who is not a public official in which allegations or charges of specific criminal misconduct have been made or to discuss whether or not to file a criminal complaint. Provided, however, that prior to such discussions a law enforcement officer with authority to make an arrest or a district or assistant district attorney or the Attorney General or assistant attorney general shall advise the governmental body in writing or by oral declaration entered into the minutes that the discussions would imperil effective law enforcement if disclosed outside of an executive session.

(6) 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. Provided, however, 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. If an executive session is utilized pursuant to this exception in addition to the members of the governmental body, only persons representing the interests of the governmental body in the transaction may be present during the executive session. This real property discussion exception shall not apply if:

a. Any member of the governmental body involved in the transaction has a personal interest in the transaction and attends or participates in the executive session concerning the real property.

b. A condemnation action has been filed to acquire the real property involved in the discussion.

(7) To discuss preliminary negotiations involving matters of trade or commerce in which the governmental body is in competition with private individuals or entities or other governmental bodies in Alabama or in other states or foreign nations or to discuss matters or information of the character defined or described in the Alabama Trade Secrets Act. Provided, however, that prior to such discussions a person involved in the recruitment or retention effort or who has personal knowledge that the discussion will involve matter or information of the character defined or described in the Alabama Trade Secrets Act advises the governmental body in writing or by oral declaration entered into the minutes that the discussions would have a detrimental effect upon the competitive position of a party to the negotiations or 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 would disclose information protected by the Alabama Trade Secrets Act.

(8) To discuss strategy in preparation for negotiations between the governmental body and a group of public employees. Provided, however, that prior to such discussions a person representing the interests of a governmental body involved in such negotiations advises the governmental body in writing or by oral declaration entered into the minutes that the discussions would have a detrimental effect upon the negotiating position of the governmental body if disclosed outside of an executive session.

(9) To deliberate and discuss evidence or testimony presented during a public or contested case hearing and vote upon the outcome of the proceeding or hearing if the governmental body is acting in the capacity of a quasi-judicial body, and either votes upon its decision in an open meeting or issues a written decision which may be appealed to a hearing officer, an administrative board, court, or other body which has the authority to conduct a hearing or appeal of the matter which is open to the public.

(b) A governmental body desiring to convene an executive session, other than to conduct a quasi-judicial or contested case hearing, shall utilize the following procedure:

(1) A quorum of the governmental body must first convene a meeting as defined in Section 36-25A-2(6)a.1. and 2.

(2) A majority of the members of the governmental body present must adopt, by recorded vote, a motion calling for the executive session and setting out the purpose of the executive session, as provided in subsection (a). If subsection (a) requires an oral or written declaration before the executive session can begin, such oral or written declaration shall be made, prior to the vote.

(3) The vote of each member shall be recorded in the minutes.

(4) Prior to calling the executive session to order, the presiding officer shall state whether the governmental body will reconvene after the executive session and, if so, the approximate time the body expects to reconvene.

§ 36-25A-8 -- Immunity

In addition to any existing applicable immunity, members of a governmental body and any of its employees participating in a meeting conducted in conformance with this chapter shall have an

absolute privilege and immunity from suit for any statement made during the meeting which relates to an action pending before the governmental body.

§ 36-25A-9 -- Enforcement

(a) Enforcement of this chapter may be sought by civil action brought in the county where the governmental body's primary office is located by any media organization, any Alabama citizen, the Attorney General, or the district attorney for the circuit in which the governmental body is located; provided, however, that no member of a governmental body may serve as a plaintiff in an action brought against another member of the same governmental body for an alleged violation of this chapter. The complaint shall be verified, shall state specifically the applicable ground or grounds for the complaint as set out in subdivisions (b)(1) through (4) of subsection (b), and shall name in their official capacity all members of the governmental body remaining in attendance at the alleged meeting held in violation of this chapter. Members of a governmental body who are named as a defendant in a complaint under this chapter shall serve an initial response to the complaint within seven business days of personal service of the complaint. A preliminary hearing on the complaint filed shall be held no later than 10 business days after the date of the filing of the defendant or defendants' initial response to the complaint or, if no response is filed, no later than 17 business days after the filing of the complaint, or on the nearest day thereafter as the court shall fix, having regard to the speediest possible determination of the cause consistent with the rights of the parties.

(b) In the preliminary hearing on the complaint, the plaintiff shall establish by a preponderance of the evidence that a meeting of the governmental body occurred and that each defendant attended the meeting. Additionally, to establish a prima facie case the plaintiff must present substantial evidence of one or more of the following claims:

(1) That the defendants disregarded the requirements for proper notice of the meeting pursuant to the applicable methods set forth in Section 36-25A-3.

(2) That the defendants disregarded the provisions of this chapter during a meeting, other than during an executive session.

(3) That the defendants voted to go into executive session and while in executive session the defendants discussed matters other than those subjects included in the motion to convene an executive session as required by Section 36-25A-7(b).

(4) That, other than a claim under subdivisions (1) through (3), the defendants intentionally violated other provisions of this chapter.

(c) If the court finds that the plaintiff has met its initial burden of proof as required in subsection (b) at the preliminary hearing, the court shall establish a schedule for discovery and set the matter for a hearing on the merits. If, at the preliminary hearing, the plaintiff has presented its prima facie case that an executive session appears to have been improperly conducted as set out in subsection (b)(3), the defendants shall bear the burden of proof at the hearing on the merits to prove by a preponderance of the evidence that the discussions during the executive session were limited to matters related to the subjects included in the motion to convene an executive session required in Section 36-25A-7(a).

(d) During a proceeding involving claims brought under subsection (b)(3), the court shall conduct an in camera proceeding or adopt another procedure as necessary to protect the confidentiality of the matters discussed during the executive session, and if there is a determination that the executive session was authorized by this chapter, the matters shall not be disclosed or utilized in any other legal proceeding by any individual or attorney who attends the in camera portion of the proceedings.

(e) Upon proof by a preponderance of the evidence of a defendant's violation of this chapter, the circuit court shall issue an appropriate final order including, if appropriate, a declaratory judgment or injunction. Prior to a final determination of the merits, temporary restraining orders or preliminary injunctions may be issued upon proper motion and proof as provided and required in the Alabama Rules of Civil Procedure. A final order on the merits shall be issued within 60 days after the preliminary hearing unless a longer period is consented to by all parties and the court.

(f) The court may invalidate the action or actions taken during a meeting held in violation of this chapter, provided that the complaint is filed within 21 days of the date when the action is made public, the violation was not the result of mistake, inadvertence, or excusable neglect, and invalidation of the governmental action taken would not unduly prejudice third parties who have changed their position or taken action in good faith reliance upon the challenged action of the governmental body; provided, further however, that any action taken at an open meeting conducted in a manner consistent with this chapter shall not be invalidated because of a violation of this chapter which occurred prior to such meeting.

(g) A final order issued against a defendant shall state specifically upon which claim or claims in subdivisions (1) through (4) the ruling is based. For each meeting proven to be held in violation of this chapter for one or more reasons, the court shall impose a civil penalty. The maximum penalty for each meeting shall not exceed one thousand dollars (\$1,000) or one half of the defendant's monthly salary for service on the governmental body, whichever is less. With regard to claims related to improper discussions during executive sessions, monetary penalties may only be assessed against defendant members of a governmental body who voted to go into an executive session and who remained in the executive session during a discussion determined by the court not to have been authorized by this chapter. Penalties imposed against a member of a governmental body found to have acted in violation of this chapter shall not be paid by nor reimbursed to the member by the governmental body he or she serves.

(h) A governmental body is authorized to pay for or provide for the legal expenses of present or former members of the body named as defendants in a proceeding under this chapter.

§ 36-25A-10 – Limitation Period

An action under this chapter must be brought within 60 days of the date that the plaintiff knew or should have known of the alleged act which brings rise to the cause of action; provided, however, that any action under this chapter must be brought within two years of the alleged act which brings rise to the cause of action.

§ 36-25A-11 – Repealer and Construction

Section 13A-14-2, is repealed. All specific references in the Code of Alabama 1975 to Section 13A-14-2 shall be considered a reference to this chapter and where expressly excluded or included from application of Section 13A-14-2, the exclusion or inclusion from application shall remain as it applies to these new sections. The Code Commissioner, when appropriate, shall implement these changes in the Code of Alabama 1975. Nothing in this chapter shall be construed to repeal or amend any portion of the Code of Alabama 1975, in effect on October 1, 2005, except as expressly provided herein.

Code of Alabama 1975, § 11-3-8

Scheduling Regular and Special County Commission Meetings

(a) At the first county commission meeting held pursuant to Section 11-3-1 following each election of county commissioners, the county commission shall establish the day or days of each month on which regular meetings of the county commission shall be held. The county commission, by resolution, may alter the regular meeting days as necessary. The regular meeting days and the time and place where the meetings will be held shall at all times be posted in a public and conspicuous location in the courthouse and in other public buildings determined appropriate by the county commission and shall be forwarded to all local news media who have on file with the county commission a written request for notification of the schedule of regular meetings of the county commission.

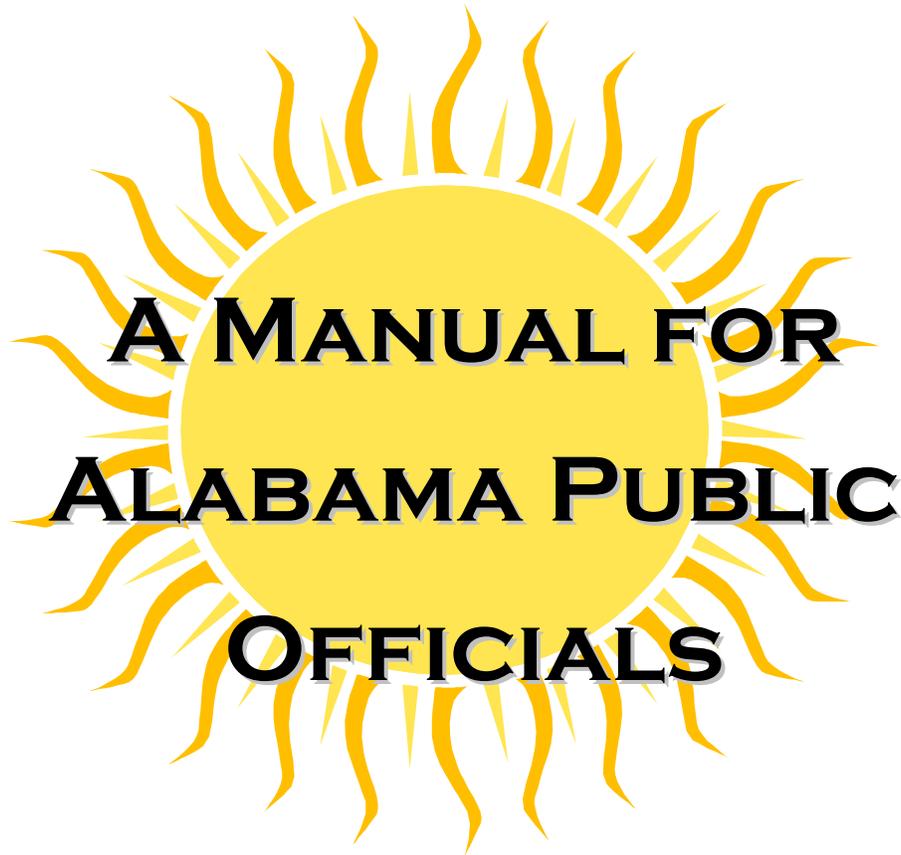
(b) The county commission may schedule a special meeting when determined necessary in writing by a majority of the members of the commission, or in case of an emergency, upon call of the chair. The purpose for and agenda of the meeting shall be included in all public notices of the meeting, and no other items shall be considered at the special meeting. Upon scheduling, except in an emergency, at least five days prior to the special meeting, notice of the meeting time, place, and agenda shall be posted in a public and conspicuous location in the courthouse and in other public buildings determined appropriate by the county commission and shall be forwarded to all local news media who have on file with the county commission a written request for notification of special meetings of the county commission.

(c) When a regular meeting day of a county commission falls on a legal public holiday, the county commission may meet on any day of the following week instead of on the holiday, or at another time determined by the county commission, provided that at least five days prior to the meeting, notice of the meeting time and place shall be posted in a public and conspicuous location in the courthouse and in other public buildings determined appropriate by the county commission and shall be forwarded to all local news media who have on file with the county commission a written request for notification of the schedule of regular meetings of the county commission.

THE ALABAMA OPEN MEETINGS

ACT

ACT No. 2005-40



COMPLIMENTS OF:

THE ALABAMA PRESS ASSOCIATION

AND



ALABAMA ATTORNEY GENERAL

FORWARD



A new day has dawned in Alabama, and the light is shining brighter than ever on our state government. The Office of Attorney General has long supported the right of the public to attend meetings of governing bodies and governmental agencies, boards, commissions, and institutions. With the passage of Alabama's new Sunshine Law, the "Alabama Open Meetings Act," we have taken a huge step in bringing about the kind of transparency and openness in government that leads to public confidence in its operation.

I believe that all questions involving the right to attend meetings of governmental entities should be decided in favor of public access, with very narrow exceptions.

I have faith that every public official in this state seeks to serve in compliance with the law. Because our law now contains greater clarity and requires unprecedented openness, I believe our public officials will comply with these requirements. It is my hope that this manual, prepared by my office and the Alabama Press Association, will assist them in more effectively performing their duties as public officials.

I greatly appreciate your continued dedication to public service.

A handwritten signature in black ink that reads "Jeff King". The signature is stylized and cursive.

Attorney General

INTRODUCTION

The Alabama Press Association is the oldest trade association in the State of Alabama. Its members comprise almost every daily and weekly newspaper in the state. The Office of the Attorney General is the chief legal advisor to our state government and has issued opinions concerning the rights of citizens to attend government meetings for many years. The Press Association and the Attorney General have combined their efforts to create this manual, which aids elected and appointed government officials by outlining their responsibilities under the Alabama Open Meetings Act of 2005.

Because litigation is expensive for everyone, and can usually be avoided with proper guidance, our hope is that this manual will provide invaluable assistance in avoiding unnecessary conflicts between the members of the press and elected officials.

Please remember, however, *this manual is not the law*. While we have attempted to provide a detailed outline of the OMA, and answer most of the obvious questions it raises, it is impossible to answer every question or address every possible scenario in this manual.

Accordingly, we remind you that government agencies have the ability to seek advice from the Office of the Attorney General. Opinions of the Attorney General are published on the Internet at www.ago.alabama.gov. Furthermore, the Alabama Press Association's legal manual is available to members of the Press Association at www.alabamapress.org.

Should you have any questions that are not addressed in this manual, and are unclear under the provisions of the OMA, please remember these two guidelines . . .

- 1) Most conflicts should be resolved in favor of public access, and
- 2) If possible, ask for legal advice before acting in unclear circumstances.

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The Alabama Open Meetings Act

Act No. 2005-40

A QUICK OVERVIEW

I. The Law: Act No. 2005-40 // Open Meetings Act

- Previously, Alabama's Sunshine Law was vague on many aspects because most details of the law were not set forth in statutes. Instead, public officials and the press often had to wait on Court interpretations of the law before understanding their rights and obligations.
- The Alabama Open Meetings Act of 2005 ("OMA") remedies much of this problem by placing specific details and regulations on all facets of public meetings inside the four corners of the Alabama Code. Accordingly, public officials now have the answers to many previously unanswered questions. While new and unforeseen questions interpreting the OMA will certainly arise, the OMA is a huge step forward toward making Alabama's Sunshine laws more accessible.
- The Act that makes the OMA law is Act No. 2005-40. A full version of Act No. 2005-40 can be obtained on-line through the Alabama Secretary of State's website at <http://arc-sos.state.al.us/CGI/sosact02.mbr/input>

II. Effective Date: October 1, 2005

- The OMA becomes effective on October 1, 2005.
- Accordingly, even if a meeting is scheduled beyond October 1, 2005, the appropriate governmental body must still follow the new notice requirements for that future meeting beginning October 1.
- While the OMA becomes mandatory on October 1, 2005, all affected bodies and organizations should attempt to conform to the OMA by establishing internal rules and procedures *as soon as possible*. In the opinion of the authors, compliance with the OMA would also constitute compliance with existing Sunshine Law.

III. Changes and Additions Under the OMA

- The following are notable changes and additions of the OMA to prior Alabama Sunshine Law. While these changes and additions are discussed in detail in their appropriate sections, it is worthwhile to highlight these portions of the OMA because many represent significant changes in Alabama law:
 1. Committees and Subcommittees: The OMA covers meetings of committees and sub-committees of a government body.
 2. Job Performance: The “Character and Good Name” exception to the prior Sunshine Law has been narrowed, and “Job Performance” discussions of all public officials and clearly defined managerial level public employees must be conducted in public.
 3. No Secret Ballots: The OMA prevents all voting by secret ballots.
 4. Quorum: The counting of persons towards a quorum now includes elected/appointed persons who have not officially taken office in an effort to prevent “pre-swearing-in” meetings.
 5. Notice: Clearly defined deadlines for notice of meetings have been established. Generally, the notice requirements are 7 days for regular meetings, 1 day for special meetings, and 1 hour for emergency meetings.
 6. Recording: The OMA sets forth guidelines for what must be recorded by the body during an open meeting.
 7. Electronic Communications: The OMA prevents the use of electronic media and communications to circumvent the goal of an open meeting.
 8. Taping: All open meetings can be (openly) taped by the media.
 9. Penalties and Immunity: The OMA prescribes civil -- rather than criminal -- penalties for violations of the OMA. Officials acting within the parameters of the OMA will be immune from liability for their statements made during the meetings.

THE LAW

Section 1 of Act No. 2005-40 sets forth the general rule of law for Open Meetings:

The Deliberative Process of governmental bodies shall be open to the public during meetings [as defined by this Act]. Except for executive sessions . . . or as otherwise expressly provided by other federal or state statutes, all meetings of a governmental body shall be open to the public and no meetings of a governmental body may be held without providing notice [as defined by this Act].

No executive sessions are required by this Act to be held under any circumstances. Electronic communications shall not be utilized to circumvent any provisions of this Act.

Here are the important, and simplified, aspects of the law:

1. All meetings in which government bodies meet to deliberate must be open to the public.
2. Under the OMA, the *only* exception to an Open Meeting is an “Executive Session.”
 - a. As shown later, Executive Sessions must be noted in the public meeting and can only be entered into for a limited number of statutorily-defined reasons.
 - b. Some pre-existing laws require otherwise “Open Meetings” to be discussed in private (for example, laws that forbid the disclosure of statutorily privileged information).
 - c. Executive Sessions are never *required* by the OMA, although they should – if not must – be called for in the situations discussed above in subsection (b).
3. No meeting – even an emergency meeting – can properly be held under the OMA without the proper notice.
4. Electronic communications, such as teleconferencing, cannot be used to circumvent the OMA.

IMPORTANT DEFINITIONS

Section 2 of ACT NO. 2005-40 outlines the legal definition of important terms in the OMA, and it is attached in its entirety to the back of this manual. Additionally, each important term is defined and simplified in its appropriate section of this outline. Some terms, however, are important to understanding the general rule of law before discussing the details of the OMA. They are listed below.

I. Governmental Body: *Who is subject to the OMA?*

A. The following are legally bound to follow the OMA:

- All boards, bodies, and commissions of the executive and legislative departments of the state (and its political subdivisions) or municipalities, which expend or appropriate public funds; and,
- All multi-member governing bodies of departments, agencies, institutions, and instrumentalities of the executive and legislative departments of the state (and its political subdivisions) or municipalities.
 1. This includes (but is not limited to) all corporations and other instrumentalities whose governing boards are comprised of a majority of members who are appointed or elected by the state, its political subdivisions, counties, or municipalities.
- All quasi-judicial bodies of the executive and legislative departments of the state
- Special Note: “*All standing, special, or advisory committees or subcommittees*” of these bodies are also bound to OMA regulations.

B. The following are not legally bound by the OMA:

- Legislative party caucuses or coalitions;
- Alabama appellate or trial courts; and,
- Voluntary membership associations comprised of public employees, counties, municipalities, or their instrumentalities which have not been delegated any legislative or executive functions by the Legislature or Governor

II. Meeting: *What must be open to the public?*

- A. Meetings *only* include the following under §2(6)a of the OMA:
1. 2(6)a1: Prearranged gatherings of a quorum of the body, committee, or sub-committees described above which occurs at a time and place which is “*set by law or operation of law*”;
 2. 2(6)a2: Prearranged gatherings of a quorum of the body, committee, or sub-committees described above to “*exercise the powers it possesses or approve the expenditure of public funds*”; and,
 3. 2(6)a3: Gatherings of a quorum of the body, committee, or sub-committees described above – whether or not prearranged – to “*deliberate specific matters that, at the time of the exchange, the participating members expect to come before the body, committee or subcommittee at a later date.*”
- B. Meetings *do not* include the following:
1. Occasions when a quorum of the body attends a
 - a. Social Gathering;
 - b. Convention, Conference, or training program; or,
 - c. Press conference or media event.
 2. Occasions when a quorum gathers with state or federal officials to report, obtain information, or seek support for issues of importance to the body; or,
 3. Any other gathering in which the body discusses specific matters that the body does not expect to come before the body at a later date.

III. Deliberation: *What must be discussed openly during the meeting?*

- Unless it can be taken into executive session, the following must be discussed openly at a meeting of a quorum of the body, committee, or sub-committee:
 - Any “exchange of information or ideas among [the] quorum” that is “intended to arrive at or influence a decision” as to how the body members should vote on a specific matter

- The matter discussed by the quorum can be an issue before the body at the current meeting *or* “at a later time”; or,
- Any discussion during a meeting about any issue that members expect to be before the body at some point in time should be conducted openly unless the body can go into executive session.

IV. Quorum: *How many members are necessary?*

A. General Rule: “A majority of the voting members”

1. Simply put, if there are 10 voting members, 6 gathered members equals a quorum.

B. Newly Elected/Appointed Members

1. A special problem arises when new members are elected, but have yet to officially take office. Before the OMA, newly elected or appointed officials could hold secret meetings with remaining members to discuss matters that would arise for a vote after they received voting power. Because these “non-voting” members did not count against the quorum numbers, this allowed the body to side-step the quorum rules and hold secret meetings.
2. Under the OMA, newly-elected or appointed voting members *do* count toward the majority number required to constitute a “meeting.”
 - **Example:** There are 10 voting members, and 2 newly-elected members have yet to take office. If the 2 newly-elected members meet with 4 current members, then a quorum of 6 is present; thus, any discussion among the 6 constitutes a “meeting” under the OMA.
 - **Exceptions:** There are two types of excepted meetings, where newly elected or appointed members do not count toward a quorum because newly-elected members cannot legally participate in such meetings until they are sworn into office:
 - §2(6)a1: Pre-arranged Meetings required by law; and,

- §2(6)a2: Pre-arranged Meetings to exercise power or possess or expend public funds.
- Essentially, this quorum rule applies to ad hoc meetings between existing officials and those elected/ appointed, but not yet sworn into office.

V. Public Employee

- *Definition*: Any person employed at the state, county, or municipal level of government or its instrumentalities (including corporations and authorities).
- *Compensation*: An employee must be paid in full, or in part, by state, county, or municipal funds.
- *Exception*: Employees are not persons who work part-time to provide professional services (other than lobbying) and receive less than ½ of their income from the part-time service.

BEFORE THE MEETING

One of the key innovations of the OMA is statutory guidelines/requirements for providing notice of *all* open meetings. Section 3 of the OMA details who must give notice, when it must be given, where it must be posted, and how long before the meeting notice is required. Below is a detailed outline of the pre-meeting notice requirements.

I. **Notice**

A. Who must give notice?

1. Generally, all government bodies that come under the OMA
2. *Exceptions to who must give notice*
 - i. §2(6)a.1 Pre-arranged meetings set by law : Advisory boards, advisory commissions, advisory committees, task forces, or other advisory boards that

1. Are created solely to make recommendations on public policy issues; *and*,
2. Are composed of persons who are not compensated by public funds for their work.
3. County Commissions: No notice under the OMA is required to be given by County Commissions (or their (sub)committees) because County Commissions must already comply with the notice requirements of Section 11-3-8 of the Code of Alabama, which apply specifically to County Commissions.

3. *Instances When Notice is not Required by Government Bodies*

i. Quasi-Judicial or Contested Case Hearings

1. Simple definition: An executive body issuing judicial decisions for the body.
2. Explanation: Some state boards or agencies must occasionally act like a court and/or a jury in deciding administrative hearings or appeals. For example, under existing statutes, some agencies and boards are allowed to conduct hearings on the removal or suspension of professional licenses in private. Because the public cannot attend these meetings, the government body is not required to provide notice of these meetings under existing law or the OMA.
3. Example: The State Bar committee convenes to hear a grievance against a private attorney.

ii. Non-Meetings under the OMA

1. Occasions when a quorum of the body attends
 - a. A Social Gathering;
 - b. Convention, Conference, or training program; or,
 - c. Press conference or media event; and,

2. Occasions when a quorum gathers with state or federal officials to report, obtain information, or seek support for issues of importance to the body.

B. What Must Be Contained in a Notice?

1. Absolutely Required: Time, date, and place of the meeting
2. Required when available: Preliminary Agendum
 - Once created and available, a preliminary agendum must be posted in the same manner and place as the notice.
 - If no preliminary agendum is created, the posted notice must contain a general description of the “nature and purpose” of the meeting.
 - Government bodies can discuss additional matters not included in the preliminary agendum. Bodies should include, however, all known matters in the preliminary agendum.

C. When Is Notice Required?

The OMA’s notice deadlines are broken into three categories: 7-day requirements, 1-day requirements, and 1-hour requirements. While the OMA encourages notice to be given as soon as possible, these deadlines are absolute, statutory minimums.

1. 7-day Notice: §2(6)a.1 Meetings
 - Notice of all pre-arranged meetings required by law to be held at a certain time or place must be given at least seven days in advance.
2. 1-Day Notice: §2(6)a.2, §2(6)a.3, and §11-43-50 Meetings
 - §2(6)a.2: Notice of pre-arranged body meetings to exercise the body’s powers to possess or approve the expenditure of public funds.
 - §2(6)a.3: Notice of all meetings – regardless of whether it was pre-arranged – to deliberate matters the body members expect to come before the body at a later date or time.
 - § 11-43-50: Notice of statutorily required City and Town Council Meetings under Section 11-43-50 of the Code of Alabama (1975).
3. 1-Hour Notice: Emergency meetings and Resignations

- Meetings that cannot wait 24 hours to be held for notification purposes can be held with 1-hour notice if . . .
 1. One-Day notice is “prevented by emergency circumstances requiring immediate action to avoid physical injury to persons or damage to property”; *or*,
 2. The meeting is held solely to accept the resignation of a public official or employee.

D. How Must Notice Be Given?

Under the OMA, the manner of notice is determined by what type of group is giving the notice. While these specific manners of posting only appear in the OMA section concerning 7-day notices, it is best to adhere to the following requirements for all required notices -- *i.e.* 7-day notices, 1-day notices, and 1-hour notices.

1. Houses of the State Legislature
 - The respective Houses of the Legislature must develop rules that are consistent with current Alabama Constitutional law.
 - The rules for notice must apply to all sessions, meetings of standing committees and subcommittees, and meetings of all permanent and joint legislative committees.
2. Government Bodies with Statewide Jurisdiction
 - *Required:* Notice must be submitted to the Secretary of State (“SOS”) in time for the SOS to post the notice within the required OMA deadline.
 - The SOS will post the notice on his/her website for public viewing.
 - As of the date of this publication, the SOS has not promulgated procedures and deadlines for submitting notice. These procedures will be available at the SOS website, www.sos.state.al.us, as soon as they become available.

- *Optional:* Notice can also be posted “in any additional manner” desired by the body.
3. Municipal Government Bodies
- *Required:* Notice must be posted “on a bulletin board at a place convenient to the public in the city hall”.
 - *Exception:* Corporations
 - If a corporation, which has a majority of governing members elected/appointed by the municipality, has a principle office outside of city hall, notice can be posted instead on a bulletin board “at a place convenient to the public in the principle office of the corporation.”
4. Local School Boards
- *Required:* Notice must be posted on a bulletin board convenient for public viewing in the “central administrative office of the board”.
5. All Other Government Bodies (except County Commissions)
- *Required:* Notice must be posted “in a reasonable location” or the body “shall use a reasonable method of notice that is convenient to the public”.
 - *Changing the Method*
 - Changing the method is allowed, but only after the body approves the change in an open meeting and announces the new method at an open meeting.
6. County Commissions
- *Required:* As previously discussed, County Commissions must follow the notice requirements of Section 11-3-8 of the Code of Alabama, instead of the provisions of the OMA.
 - Section 11-3-8 requires a county commission to
 - i. Establish at its first meeting a schedule for all of its regular meetings, publish this schedule in the county courthouse,

and forward the schedule to news media that have filed a written request for such notice.

- ii. Special meetings may be called by special vote of the commission or, in an emergency, by the chair. Unless the meeting is the result of an emergency, the notice must include the agenda; it must be posted in the courthouse; and it must be forwarded to the registered media 5 days before the meeting. Section 11-3-8 does not define the term “emergency.”

E. Direct Notification: When Is It Required?

- Under the OMA, a member of the public and/or the media may request direct notification of all meetings defined under §2(6)a, in addition to the required public notification. “If practicable,” the government body is *required* to directly notify registered parties.
- *Rules for Direct Notification:* The body can set “reasonable rules and regulations” necessary for uniform registration and payment.
- *Costs of Direct Notification:* The costs of direct notification are the responsibility of the requesting party, not the government body. If there is a cost for direct notification, the body can (reasonably) require advance payment from the requesting party.
- *Methods of Direct Notification:* The body can use any reasonable method, including e-mail, telephone, facsimile, and U.S. Mail.
- *Contents of Direct Notification:* Time, Place, Nature, and Purpose of the meeting

DURING THE MEETING

While the OMA does not strictly mandate the exact manner in which an open meeting is to be conducted, it does set forth guidelines and requirements for recording the events of an open meeting (by the body and the public), conducting a vote during a public meeting, and conducting certain meetings out of the presence of the public -- *i.e.* executive sessions. This section specifies the guidelines for conducting a meeting under the OMA.

I. PROCEDURE

- Unless otherwise provided by law, meetings must be conducted “pursuant to the governing body’s adopted rules of parliamentary procedure.”
 - Accordingly, every body must adopt a set of parliamentary procedures that will guide each open meeting.
- The OMA does not specify what these procedures must be, simply that the adopted procedures must not “conflict with laws applicable to the governmental body.”

Nevertheless, there are several generally accepted publications of parliamentary procedure from which to choose.

II. VOTING

- Unless otherwise permitted by law, *all* votes on matters before the body in an open meeting “shall be made during the open or public portion of a meeting”.
 - While the OMA says that all votes must be given openly, it gives these specific examples of votes which must be given openly.
 - Appropriation
 - Authorizing of the body’s designated employee
 - Spending of public funds
 - Levying taxes or fees
 - Forgiving debts
 - Granting tax abatements

- Voice voting: While the OMA does not mandate a particular type of voting, it does specify that voice voting is allowed.
- No voting in Executive Session: While a body can vote to go into executive session, no voting can be done *in* the executive session.
 - Accordingly, if the body goes into executive session to discuss privileged information, negotiations, etc., the body still must reconvene into an open meeting before voting on the ultimate issue discussed during the executive session.
 - The vote to go into executive session must also be done openly.
- No secret ballots
 - The OMA strictly forbids secret balloting unless the body is specifically granted the ability under existing law applicable to the body.
 - Example of the Exception: The election of trustees at the University of Alabama is required to be held by secret ballot under the Alabama Constitution.
 - Note: Very few, if any, other government bodies are granted the authority to use secret ballots under the Alabama Constitution.
 - While the OMA does not specifically forbid the use of “written ballots,” the term “secret ballots” severely limits the use of a written ballot.
 - Even if a body intends to use a written ballot, *each member’s vote* must be revealed openly to those in attendance (as a result, each member’s written vote would not be a “secret” ballot).
 - Accordingly, while some use of written ballots may survive the OMA, individual voice voting would be the easiest -- and safest -- form of voting to comply with the OMA.

III. RECORDING THE MEETING

The OMA *requires* the government body preserve, in writing, certain aspects of the meeting (Section 4), and *allows* members of the media and public to *openly* record the meeting in several fashions (Section 6).

A. The Body's Required Record of the Meeting (Section 4)

- The OMA requires each of the following be recorded by the body:
 - Date, time, place
 - Members present and Members absent
 - The action taken by the body during the meeting
- The OMA also requires the body to *maintain* these records, although the OMA does not prescribe where, or for how long, the records must be maintained. Accordingly, the preservation of such records would fall under the purview of existing laws relating to the maintenance of public records.
- These records must be made available to the public “as soon as practicable after approval”.
- A body does not have to record the actions taken in Executive Session. There is no requirement that the body record any portion of an open meeting with audio or video equipment.

B. Recording by the Public and Media (Section 6)

- All persons in attendance at an open meeting can *openly* record the meeting through any of the following means:
 - Tape Recorder (or other “sonic” recording device)
 - Video Camera
 - Photographic Camera
- The recording of the meeting cannot “disrupt the conduct of the meeting”
 - To ensure the meeting is not disrupted, the body may “adopt reasonable rules” governing the use of recording devices during an open meeting.
- The public and media *do not* have the right to record executive sessions.

IV. EXECUTIVE SESSIONS

An “Executive Session” is the *only* enumerated exception to the OMA’s requirement that a government body’s meeting must be held openly. As discussed in detail below, the OMA

strictly limits the reasons a body may call an executive session, defines the manner in which it may be called, and forbids any voting during an executive session.

A. Calling an Executive Session

Section 7(b) sets forth the required procedure for calling an executive session. Note that, under Section 7(b), a body *cannot* go into executive session at any time – even if the reason is statutorily allowable – unless the body follows this procedure, which first requires an open meeting with the usual notice requirements.

1. *Convene an Open Meeting*

- A quorum of the body must first be convened in an open meeting (as defined by §2(6) a.1 or §2(6) a.2).
- This, of course, necessitates the mandatory notice requirements.

2. *A Motion Stating the Reason for the Executive Session*

- The body must move to go into executive session.
- The motion must set forth the reason for requiring an executive session, which must be one of the 9 statutory reasons set forth in Section 7(a).

3. *Written or Oral Declaration*

- Four of the nine statutory reasons for calling an executive session require that a designated person certify that an executive session is warranted before the body votes to go into executive session. While these declarations are discussed in further detail with their respective §7(a) “reasons for an executive session,” they are briefly listed below:
 - Discussions with the body’s attorney concerning options for, and ramifications of, litigation, mediation, and arbitration (§7(a)(3));
 - Discussions that would disclose the identity of an undercover informer or that focus on criminal investigations of non-public officials (§7(a)(5));
 - Discussions concerning matters of trade or commerce in which the body is competing against private entities (§7(a)(7)); and,
 - Discussions concerning the negotiations between the body and a group of public employees (§7(a)(8)).

4. *Voting to go into Executive Session*
 - During the open meeting, a majority of the members must vote on the motion to go into executive session.
 - This vote must be open/public, and each member must openly give his/her individual vote.
 - Each individual member's vote must be recorded in the minutes.
5. *Statement Concerning Reconvention*
 - Before entering into the executive session, the presiding officer of the body must state during the open meeting:
 - i. Whether the body will reconvene after the executive session, *and*
 - ii. If so, the approximate time the body will reconvene in an open meeting.

B. Reasons for an Executive Session

In Section 7(a), the OMA lists 9 exclusive reasons for calling an executive session, and they are listed below. (Notice, however, that the Section 1(a) of the OMA allows an executive session to be called as otherwise required by law. This exception is discussed in subsection (C).)

1. **Job Performance, General Reputation and Character, Physical Condition, Professional Competence, and Mental Health**
 - The first statutory reason includes each type of discussion about an individual listed above. The general terms “physical condition” and “mental health” are not defined by the OMA, but it is certain that any discussion clearly falling into these categories – about *any* person - is an appropriate subject for an executive session.
 - The key distinction under this subsection is between discussions concerning “general reputation and character” and those concerning “job performance.” Under the OMA, these terms are mutually exclusive.
 - General rule: Discussions concerning an individual's “general reputation and character” are subject to executive session for *all* individuals – except when the discussion (also) concerns the

individual's "job performance," *i.e.* observed activities on the job of certain high level public employees and officials. Any discussion concerning an individual's "job performance" must be held openly. Thus, the OMA defines each of these terms, and sets forth the classes of persons whose "job performance" cannot be discussed in an executive session.

○ General Reputation and Character

- Defined: "characteristics or actions of a person directly involving good or bad ethical conduct, moral turpitude, or suspected criminal activity, *not including job performance*"
- Thus, all discussions, for any individual, that 1) fall under this definition, and 2) do not meet the definition of "Job Performance," can be discussed in an executive session.

○ Job Performance

- Defined: "The observed conduct or actions of a public employee or public official while on the job in furtherance of his or her assigned duties."
 - This 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".
- If a discussion is based on conduct or actions that meet this definition, then the body can call an executive session *only if* the individual being discussed does not fall into any of the following categories:
 - An elected or appointed public official
 - An appointed member of a state or local board or commission

- A body may also meet in executive session with a mediator or an arbitrator “with respect to any litigation or decision concerning matters within the jurisdiction of the governmental body involving another party, group, or body”.
- Deliberation after the Attorney’s Advice
 - Any deliberation by the body of what action to take concerning pending or threatened litigation, which is based upon the attorney’s advice, must be conducted in the re-opened portion of the meeting (*i.e.* not in the executive session).
- **Certification Before Voting to Enter An Executive Session
 - Before the body can *vote* to go into executive session under this subsection, the body must receive a “written opinion or oral declaration” from a licensed Alabama attorney that “this exception is applicable to the planned discussion”.
 - This declaration must be reflected in the minutes of the open meeting.

4. **Security Plans and Measures**

- An executive session may be called to discuss the following, in an attempt to protect the secrecy of safety measures for government buildings, etc:
 - Security plans, procedures, methods, and systems
 - Other security “infrastructures,” including information concerning “critical infrastructure” and “critical energy infrastructure” as defined by federal law.
 - This exception mirrors the exception incorporated into Alabama’s Homeland Security Act passed by the Legislature in the wake of September 11, 2001. The precise definitions of a “critical infrastructure” and “critical energy infrastructure” can be found at 42 USC §5195c(e) and 18 CFR §388.113(c)(1) respectively.

- To be able to go into executive session, the body must conclude that a public discussion of the material “could reasonably be expected to be detrimental to public safety or welfare.”
- Mandatory Notice to Owners and Operators: If the executive session discussion involves a “critical infrastructure” or “critical energy infrastructure,” the owner or operator of the infrastructure, generally a utility company, must be given advance notice and the opportunity to be present during the executive session.

5. **Criminal Investigation and the Identity of an Undercover Agent or Informer**

A. *Identity of an Undercover Agent or Informer*

- Any discussion that might disclose the identity of an undercover agent or informer is properly held in an executive session.

B. *Criminal Charges Against a Non-Public Official*

- The body may discuss in an executive session the “criminal investigation of a person *who is not a public official* in which allegations or charges of specific criminal misconduct have been made to discuss whether or not to file a criminal complaint”.
- **Certification Before Voting to Enter An Executive Session
 - Before voting to enter executive session to discuss a criminal investigation, the body must be advised -- in writing or by oral declaration -- that open discussions “would imperil effective law enforcement”.
 - The declaration must be recorded in the minutes of the meeting.
 - This declaration can be made by
 - A law enforcement official with the ability to make an arrest;
 - A district attorney or an assistant district attorney;
 or by

- The Attorney General or an Assistant Attorney General.

6. **Negotiations to Buy/Sell/Lease Real Property**

- The body may go into executive session to discuss the consideration the body is willing to offer or accept when considering to buy, sell, lease, or exchange real property or when considering the market value of real property.
- Exceptions: The body cannot go into executive session under this subsection if . . .
 - Any member of the body has a personal interest in the transaction and attends or participates in the executive session, *or*
 - A condemnation action has been filed to acquire the property in question.
- Terms of the Contract: The body *must* openly discuss, however, the material terms of any contract to purchase, exchange, or lease real property before executing the contract.

7. **Preliminary Negotiations in Trade Competition**

- A body may discuss in executive session “preliminary negotiations involving matters of trade or commerce” when the body is in competition with
 - i. Private individuals or entities;
 - ii. Other Alabama government bodies; or,
 - iii. Other states or foreign nations.
- A body may also discuss “matters or information” of the type defined under the Alabama Trade Secrets Act.
- ****Certification Before Voting to Enter An Executive Session**
 - Before going into executive session, the body must receive, in writing or by oral declaration, a declaration that . . .
 1. An open discussion would have a detrimental effect upon the competitive position of a party to the negotiation;

2. An open discussion 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 body; or,
 3. An open discussion would disclose information protected by the Alabama Trade Secrets Act.
- The certification must come from a person
 1. Involved in the recruitment or retention effort, or
 2. That has personal knowledge that the discussion will involve matters or information covered under the Alabama Trade Secrets Act.
 - This declaration must be entered into the minutes of the meeting.
8. **Negotiations Between The Body and A Group of Public Employees**
- The body can discuss in executive session its strategy in preparing for a negotiation between the body and a “group of public employees.” Generally speaking, this exception involves labor negotiations.
 - ****Certification Before Voting to Enter An Executive Session**
 - Before entering into executive session, the body must receive, in writing or by oral declaration, a certification that “the discussions would have a detrimental effect upon the negotiating position of the governmental body” if discussed openly.
 - The certification must come from a “person representing the interests of a governmental body involved in such negotiations”.
 - This declaration must be recorded into the minutes of the meeting.
9. **Discuss and Vote Upon A Public or Contested Case Hearing**
- A government body may go into executive session to
 - i. Discuss and deliberate the evidence/testimony presented during a public or contested case hearing; *and*
 - ii. Vote upon the outcome of the proceeding or hearing if the body is acting in its “quasi-judicial” role.

- Requirements of the Outcome: To be able to go into executive session under this subsection, the body must either
 - i. Vote upon the decision in an open meeting; *or*
 - ii. Issue a written decision which can be reviewed by a hearing officer, an administrative board, court, or any other body that is able to conduct a hearing or an appeal of the matter.

C. Non-Statutory Reasons for Non-Public Discussions

- Section 1(a) of the OMA also states that, besides executive sessions, deliberations do not have to be open to the public when “otherwise expressly provided for by law”.
- The OMA does not list these other reasons provided by law, nor does it give the proper procedure for conducting such deliberations. Accordingly, there is no law (in the OMA) concerning whether the body must openly inform the public if the body is holding private discussions under this exception or why.
 - While not expressly required under the OMA, if the body is required to conduct a private discussion under other statutory provisions, it is suggested that the body (before entering into private discussions)
 - i. Openly vote to go into an “Executive Session;”
 - ii. If possible, state the reason (*i.e.* law) why an executive session is necessary; *and*,
 - iii. Not vote during this executive session unless required by law.
 - Example: AG Opinion 2005-125
 - i. Under Section 15-22-36(b) of the Alabama Code, the Board of Pardons and Parole must grant parole in a public meeting, but must also protect most portions of an inmate’s file as privileged.
 - ii. Accordingly, while the Board’s deliberation and vote must be conducted in an open meeting, any discussion of the

privileged material must be conducted in an executive session.

iii. Thus, the Board must openly vote to go into executive session to discuss the privileged material, then reconvene to deliberate and vote.

- *Special Note:* If the body is unclear whether it is legally required to hold discussions outside the presence of the public, the body should ask its counsel or the Attorney General's Office for advice before the meeting, if at all possible.

AFTER THE MEETING

After every meeting, it is suggested that the government body take two steps:

1. Public Record: The body must ensure that an adequate record is made to comply with Section 4 of the OMA. Essentially, the body must keep some form of minutes of the open meeting.
 - a. This record must be made available to the public "as soon as practicable after approval".
 - b. The requirements of this public record are outlined in pages 21-27 of this manual.
2. Future Notice: When a meeting concludes, the body should know the date of its next scheduled meeting. Accordingly, while not expressly required or discussed by the OMA, it is suggested that the body should begin preparing its notice for the next meeting as soon as possible.
 - a. *Reminder:* While the OMA sets firm deadlines for posting, it also encourages notice be posted as soon as practicable – regardless of the deadline. There is no penalty for early posting, and it is always good practice to post notice early to avoid possible legal questions/problems.

ENFORCING THE O.M.A.

One of the major changes of the OMA to the prior Alabama Sunshine Law is the creation of civil penalties *in lieu of* criminal charges. There have been no reported cases of criminal charges being brought against voting members under the pre-OMA sunshine law. With the introduction of a civil action -- rather than criminal charges -- against individual members of the body, it is extremely likely

that more claims will be raised against government bodies and agencies under the OMA. Thus, it is important for members of government bodies to understand their possible liabilities, and more importantly, how to protect themselves against liability (*i.e.* compliance with the OMA).

1. VIABLE ACTIONS UNDER THE OMA

- The following are actionable grounds under the OMA:
 1. Disregarding the proper notice requirements;
 2. Disregarding the provisions of the OMA during an open meeting (not during an executive session);
 3. Voting to go into executive session and, while in the executive session, discussing matters other than the subject openly voted upon to enter the executive session; or,
 4. Intentionally violating the OMA in a way other than listed in (1) through (3). For example, blatantly disregarding the OMA by holding a secret meeting would constitute an actionable ground.

2. HOW TO RAISE A CIVIL CLAIM

- A. When must a claim be raised?
 - A claim must be raised within both of the following:
 1. 60 days from the date in which the plaintiff knew or should have known of the alleged actionable ground, *and*
 2. 2 Years of the alleged actionable ground.
- B. Who may raise an action?
 - Any Alabama citizen, media organization, the local District Attorney, or the Attorney General.
 - *Exception:* A member of the body cannot raise a civil claim against another member of the same body.
- C. Where is it raised?
 - A complaint must be filed in the county where the body has its principle office.
- D. What is in a Complaint?

- The complaint must specify at least one of the four applicable grounds for the action.
- It must contain the names of *all* members of the body that remained at the non-conforming meeting. Accordingly, a plaintiff cannot selectively sue certain members that remained at the meeting.
- It must be verified – *i.e.* sworn to by the plaintiff with a notarized signature -- that the allegations are true to the best of the plaintiff’s knowledge, information, and belief.

3. **RESPONDING TO THE CIVIL COMPLAINT**

- Within 7 days of receiving personal service of the complaint, members of the body must file an “initial response” to the complaint.
- The initial response should contain a preliminary explanation as to why the member(s) did or did not commit the alleged violation.

4. **THE PRELIMINARY HEARING**

- Within 10 days of the defendant’s response, or 17 days of the complaint if there is no response, a preliminary hearing will be held.
- At the hearing, the complaining party must establish:
 1. That the meeting occurred;
 2. That each of the named members was present at the meeting; and,
 3. That substantial evidence exists of the complained of violation.
- If the court finds that the plaintiff met his/her burden, the judge will set a discovery schedule (a schedule for the sharing of information and evidence) and set the matter for a hearing on the merits.

5. **MERITS HEARING**

- If the alleged violation occurred during an open meeting or in notice:

- The plaintiff has the burden of proving the allegation by a preponderance of the evidence.
- If the alleged violation occurred during an Executive Session:
 - The defendants (members of the body) must prove by a preponderance of the evidence that the matters discussed during the executive session were limited to the matters voted upon as the sole agenda for the executive session.
 - The court will review all documents presented by the body members to prove the matters discussed in executive session *in camera* (i.e. outside of the public).
 - If the defendants (the voting members of the body) successfully prevail in the action, no person who viewed the *in camera* evidence can disclose or use the evidence in any other legal proceeding.
- Final Order: The court must enter a written order within 60 days of the preliminary hearing, unless a later date is agreed upon by all parties.
 - If the finding is for the plaintiffs, the final order must contain the specific violations.

6. POSSIBLE PENALTIES / REMEDIES

- Financial Penalties: The maximum penalty for each member of the body for each violation is the lesser of \$1000 or ½ of the defendant’s monthly salary for serving on the body.
 - The government body cannot reimburse its individual members for violations of the OMA.
 - If the violation concerns matters in an executive session, only the members who voted to enter the executive session and remained in the executive session are liable.
- Temporary Restraining Orders: A court can enter a temporary restraining order or preliminary injunction against the body *before* the entering of the final order.
- Invalidation of the Meeting: The court can invalidate the actions that occurred during the violative meeting if:

1. The complaint was filed within 21 days of the action being made public;
 2. The action was intentional – *i.e.* it was not “the result of mistake, inadvertence, or excusable neglect”; *and*,
 3. Invalidating the actions will not harm a third party who acted in good faith in relying on the results of the meeting.
- Any action of the body that was conducted in an open meeting cannot be invalidated due to a prior invalid action by the body.

7. PAYMENT OF ATTORNEY’S FEES

- While the State/body cannot pay for the individual defendant’s penalties, the body can pay for each defendant’s legal expenses.

8. IMMUNITY FROM LIABILITY FOR STATEMENTS MADE DURING A MEETING

- In addition to existing immunities, members of a government body who participate in an OMA-conforming open meeting are absolutely immune from liability for any statement made during the meeting that relates to an action pending before the body.

THIS MANUAL WAS PREPARED BY:

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ATTACHMENTS

A: OMA §2: DEFINITIONS

**B: SECTION 36-25-14: PERSONS REQUIRED TO FILE A
STATEMENT OF ECONOMIC INTERESTS**

C: AGO-OPINION 2005-125

D: CHECKLIST:

**“QUESTIONS YOUR GOVERNMENTAL BODY SHOULD
ANSWER ABOUT YOUR PUBLIC MEETING”**

E. CHECKLIST: “EXECUTIVE SESSIONS”

ATTACHMENT A: OMA §2: DEFINITIONS

Section 2. As used in and for determining the applicability of this act, the following words shall have the following meanings solely for the purposes of this act:

- (1) **DELIBERATION.** An exchange of information or ideas among a quorum of members of a governmental body intended to arrive at or influence a decision as to how the members of the governmental body should vote on a specific matter that, at the time of the exchange, the participating members expect to come before the body immediately following the discussion or at a later time.
- (2) **EXECUTIVE SESSION.** That portion of a meeting of a governmental body from which the public is excluded for one or more of the reasons prescribed in Section 7(a) of this act.
- (3) **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.
- (4) **GOVERNMENTAL BODY.** All boards, bodies, and commissions of the executive and legislative departments of the state or its political subdivisions or municipalities which expend or appropriate public funds; all multimember governing bodies of departments, agencies, institutions, and instrumentalities of the executive and legislative departments of the state or its political subdivisions or municipalities, including, without limitation, all corporations and other instrumentalities whose governing boards are comprised of a majority of members who are appointed or elected by the state or its political subdivisions, counties or municipalities; and all quasi-judicial bodies of the executive and legislative departments of the state and all standing, special, or advisory committees or subcommittees of, or appointed by, the body. The term "governmental body" does not include any of the following:
 - a. Legislative party caucuses or coalitions.
 - b. Alabama appellate or trial courts, except as required by the constitution of this state or any body governed by rules of the Alabama Supreme Court.
 - c. Voluntary membership associations comprised of public employees, counties, municipalities, or their instrumentalities which have not been delegated any legislative or executive functions by the Legislature or Governor.
- (5) **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. Job performance 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. "Job performance" does not include the general reputation and character of the person being discussed.
- (6) **MEETING.** a. Subject to the limitations herein, the term "meeting" shall only apply to the following:
 1. The prearranged gathering of a quorum of a governmental body, a quorum of a committee or a quorum of a subcommittee of a governmental body at a time and place which is set by law or operation of law.
 2. The prearranged gathering of a quorum of a governmental body, a quorum of a committee or a quorum of a subcommittee of a governmental body during which the body, committee, or subcommittee of the governmental body is authorized, either by law or otherwise, to exercise the powers which it possesses or approve the expenditure of public funds.
 3. The gathering, whether or not it was prearranged, of a quorum of a governmental body, a quorum of a committee, or a quorum of a subcommittee of a governmental body during which the members of the governmental body deliberate specific matters that, at the time of the exchange, the participating members expect to come before the body, committee, or subcommittee at a later date.b. The term "meeting" shall not include:
 1. Occasions when a quorum of a governmental body, committee, or subcommittee attends social gatherings, conventions, conferences, training programs, press conferences, media events, or otherwise gathers as long as the governmental body does not deliberate specific matters that, at the time of the exchange, the participating members expect to come before the governmental body at a later date.
 2. Occasions when a quorum of a governmental body gathers, in person or by electronic communication, with state or federal officials for the purpose of reporting or obtaining information or seeking support for issues of importance to the governmental body.
- (7) **OPEN OR PUBLIC PORTION OF A MEETING.** The "open" or "public" portion of a meeting is that portion which has not been closed for executive session in accordance with this Act, for which prior notice was given in compliance with this Act, and which is conducted so that constituents of the governmental body, members of the media, persons interested in the activities of the governmental body, and citizens of this state could, if they desired, attend and observe.
- (8) **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.
- (9) **PUBLIC EMPLOYEE.** Any person employed at the state, county, or municipal levels of government or their instrumentalities, including governmental corporations and authorities, who is paid in whole or in part from state, county, or municipal funds. A public employee does not include a person employed on a part-time basis whose employment is limited to providing professional services other than lobbying, the compensation for which constitutes less than 50 percent of the part-time employee's income.
- (10) **PUBLIC FUNDS.** Taxes or fees charged or collected by a governmental body or from the sale of public property including, but not limited to, matching funds from the federal government or income derived from the investment of taxes or fees.
- (11) **PUBLIC OFFICIAL.** Any person elected to public office, whether or not that person has taken office, by the vote of the people at state, county, or municipal levels of government or their instrumentalities, including governmental corporations, and any person appointed to a position at the state, county, or municipal levels of government or their instrumentalities, including governmental corporations.
- (12) **QUORUM.** Unless otherwise provided by law, a "quorum" is a majority of the voting members of a governmental body. Except where a governmental body is prohibited from holding a non-emergency meeting as defined in Section 2(6)a.1. between the date of election of members and the date such members take office, any person elected to serve on a governmental body shall be counted in the determination of whether a quorum of that governmental body is present, except for any meeting as defined in Sections 2(6)a.1. and 2., beginning on the date of certification of the results of the general election. In the case of appointment to a governmental body, any person shall be counted in the determination of whether a quorum of that governmental body is present, except for any meeting as defined in Sections 2(6)a.1. and 2., from the date that the appointment is made or issued whether or not the appointment is effective on that date.

ATTACHMENT B:
SECTION 36-25-14: PERSONS REQUIRED TO FILE A STATEMENT OF ECONOMIC INTERESTS

Page 1

Citation/Title
Ala. Code 1975 Sec. 36-25-14, Filing of statement of economic interests.

Ala.Code 1975 § 36-25-14

CODE OF ALABAMA
TITLE 36. PUBLIC OFFICERS AND EMPLOYEES.
CHAPTER 25. CODE OF ETHICS FOR PUBLIC OFFICIALS, EMPLOYEES, ETC.

Current through End of 2003 Organizational Session

§ 36-25-14. Filing of statement of economic interests.

(a) A statement of economic interests shall be completed and filed in accordance with this chapter with the commission no later than April 30 of each year covering the period of the preceding calendar year by each of the following:

- (1) All elected public officials at the state, county, or municipal level of government or their instrumentalities.
- (2) Any person appointed as a public official and any person employed as a public employee at the state, county, or municipal level of government or their instrumentalities who occupies a position whose base pay is fifty thousand dollars (\$50,000) or more annually.
- (3) All candidates, simultaneously with the date he or she becomes a candidate as defined in Section 17-22A-2, or the date the candidate files his or her qualifying papers, whichever comes first.
- (4) Members of the Alabama Ethics Commission; appointed members of boards and commissions having statewide jurisdiction (but excluding members of solely advisory boards).
- (5) All full-time nonmerit employees, other than those employed in maintenance, clerical, secretarial, or other similar positions.
- (6) Chief clerks and chief managers.
- (7) Chief county clerks and chief county managers.
- (8) Chief administrators.
- (9) Chief county administrators.
- (10) Any public official or public employee whose primary duty is to invest public funds.
- (11) Chief administrative officers of any political subdivision.
- (12) Chief and assistant county building inspectors.
- (13) Any county or municipal administrator with power to grant or deny land development permits.
- (14) Chief municipal clerks.
- (15) Chiefs of police.
- (16) Fire chiefs.
- (17) City and county school superintendents and school board members.
- (18) City and county school principals or administrators.
- (19) Purchasing or procurement agents having the authority to make any purchase.
- (20) Directors and assistant directors of state agencies.
- (21) Chief financial and accounting directors.
- *48481 (22) Chief grant coordinators.
- (23) Each employee of the Legislature or of agencies, including temporary committees and commissions established by the Legislature, other than those employed in maintenance, clerical, secretarial, or similar positions.
- (24) Each employee of the Judicial Branch of government, including active supernumerary district attorneys and judges, other than those employed in maintenance, clerical, secretarial, or other similar positions.

(b) Unless otherwise required by law, no public employee occupying a position earning less than fifty thousand dollars (\$50,000) per year shall be required to file a statement of economic interests. Notwithstanding the provisions of subsection (a) or any other provision of this chapter, no coach of an athletic team of any four-year institution of higher education which receives state funds shall be required to include any income, donations, gifts, or benefits, other than salary, on the statement of economic interests, if the income,

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donations, gifts, or benefits are a condition of the employment contract. Such statement shall be made on a form made available by the commission. The duty to file the statement of economic interests shall rest with the person covered by this chapter. Nothing in this chapter shall be construed to exclude any public employee or public official from this chapter regardless of whether they are required to file a statement of economic interests. The statement shall contain the following information on the person making the filing:

(1) Name, residential address, business; name, address, and business of living spouse and dependents; name of living adult children; name of parents and siblings; name of living parents of spouse. Undercover law enforcement officers may have their residential addresses and the names of family members removed from public scrutiny by filing an affidavit stating that publicizing this information would potentially endanger their families.

(2) A list of occupations to which one third or more of working time was given during previous reporting year by the public official, public employee, or his or her spouse.

(3) A listing of total combined household income of the public official or public employee during the most recent reporting year as to income from salaries, fees, dividends, profits, commissions, and other compensation and listing the names of each business and the income derived from such business in the following categorical amounts: less than one thousand dollars (\$1,000); at least one thousand dollars (\$1,000) and less than ten thousand dollars (\$10,000); at least ten thousand dollars (\$10,000) and less than fifty thousand dollars (\$50,000); at least fifty thousand dollars (\$50,000) and less than one hundred fifty thousand dollars (\$150,000); at least one hundred fifty thousand dollars (\$150,000) and less than two hundred fifty thousand dollars (\$250,000); or at least two hundred fifty thousand dollars (\$250,000) or more. The person reporting shall also name any business or subsidiary thereof in which he or she or his or her spouse or dependents, jointly or severally, own five percent or more of the stock or in which he or she or his or her spouse or dependents serves as an officer, director, trustee, or consultant where the service provides income of at least one thousand dollars (\$1,000) and less than five thousand dollars (\$5,000); or at least five thousand dollars (\$5,000) or more for the reporting period.

*48482 (4) If the filing public official or public employee, or his or her spouse, has engaged in a business during the last reporting year which provides legal, accounting, medical or health related, real estate, banking, insurance, educational, farming, engineering, architectural management, or other professional services or consultations, then the filing party shall report the number of clients of such business in each of the following categories and the income in categorical amounts received during the reporting period from the combined number of clients in each category: Electric utilities, gas utilities, telephone utilities, water utilities, cable television companies, intrastate transportation companies, pipeline companies, oil or gas exploration companies, or both, oil and gas retail companies, banks, savings and loan associations, loan or finance companies, or both, manufacturing firms, mining companies, life insurance companies, casualty insurance companies, other insurance companies, retail companies, beer, wine or liquor companies or distributors, or combination thereof, trade associations, professional associations, governmental associations, associations of public employees or public officials, counties, and any other businesses or associations that the commission may deem appropriate. Amounts received from combined clients in each category shall be reported in the following categorical amounts: Less than one thousand dollars (\$1,000); more than one thousand dollars (\$1,000) and less than ten thousand dollars (\$10,000); at least ten thousand dollars (\$10,000) and less than twenty-five thousand dollars (\$25,000); at least twenty-five thousand dollars (\$25,000) and less than fifty thousand dollars (\$50,000); at least fifty thousand dollars (\$50,000) and less than one hundred thousand dollars (\$100,000); at least one hundred thousand dollars (\$100,000) and less than one hundred fifty thousand dollars (\$150,000); at least one hundred fifty thousand dollars (\$150,000) and less than two hundred fifty thousand dollars (\$250,000); or at least two hundred fifty thousand dollars (\$250,000) or more.

(5) If retainers are in existence or contracted for in any of the above categories of clients, a listing of the categories along with the anticipated income to be expected annually from each category of clients shall be shown in the following categorical amounts: Less than one thousand dollars (\$1,000); at least one thousand dollars (\$1,000) and less than five thousand dollars (\$5,000); or at least five thousand dollars (\$5,000) or more.

(6) If real estate is held for investment or revenue production by a public official, his or her spouse or dependents, then a listing thereof in the following fair market value categorical amounts: Under fifty thousand dollars (\$50,000); at least fifty thousand dollars (\$50,000) and less than one hundred thousand dollars (\$100,000); at least one hundred thousand dollars (\$100,000) and less than one hundred fifty thousand dollars (\$150,000); at least one hundred fifty thousand dollars (\$150,000) and less than two hundred fifty thousand dollars (\$250,000); at least two hundred fifty thousand dollars (\$250,000) or more. A listing of annual gross rent and lease income on real estate shall be made in the following categorical amounts: Less than ten thousand dollars (\$10,000); at least ten thousand dollars (\$10,000) and less than fifty thousand dollars (\$50,000); fifty thousand dollars (\$50,000) or more. If a public official or a business in which the person is associated received rent or lease income from any governmental agency in Alabama, specific details of the lease or rent agreement shall be filed with the commission.

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Ala. Code 1975 Sec. 36-25-14, Filing of statement of economic interests.

(7) A listing of indebtedness to businesses operating in Alabama showing types and number of each as follows: Banks, savings and loan associations, insurance companies, mortgage firms, stockbrokers and brokerages or bond firms; and the indebtedness to combined organizations in the following categorical amounts: Less than twenty-five thousand dollars (\$25,000); twenty-five thousand dollars (\$25,000) and less than fifty thousand dollars (\$50,000); fifty thousand dollars (\$50,000) and less than one hundred thousand dollars (\$100,000); one hundred thousand dollars (\$100,000) and less than one hundred fifty thousand dollars (\$150,000); one hundred fifty thousand dollars (\$150,000) and less than two hundred fifty thousand dollars (\$250,000); two hundred fifty thousand dollars (\$250,000) or more. The commission may add additional business to this listing. Indebtedness associated with the homestead of the person filing is exempted from this disclosure requirement.

***48483** (c) Filing required by this section shall reflect information and facts in existence at the end of the reporting year.

(d) If the information required herein is not filed as required, the commission shall notify the public official or public employee concerned as to his or her failure to so file and the public official or public employee shall have 10 days to file the report after receipt of the notification. The commission may, in its discretion, assess a fine of ten dollars (\$10) a day, not to exceed one thousand dollars (\$1,000), for failure to file timely.

(e) A person who intentionally violates any financial disclosure filing requirement of this chapter shall be subject to administrative fines imposed by the commission, or shall, upon conviction, be guilty of a Class A misdemeanor, or both.

Any person who unintentionally neglects to include any information relating to the financial disclosure filing requirements of this chapter shall have 90 days to file an amended statement of economic interests without penalty.

(Acts 1973, No. 1056, p. 1699, § 12; Acts 1975, No. 130, p. 603, § 1; Acts 1986, No. 86-321, p. 475, § 1; Acts 1995, No. 95-194, p. 269, § 1; Acts 1997, No. 97-651, p. 1217, § 1.)

HISTORICAL NOTES

Amendment notes:

The 1995 amendment, effective October 1, 1995, rewrote this section.

The 1997 amendment, effective October 1, 1997, in subsection (a), in subdivision (3) substituted "in Section 17-22A-2" for "herein".

Code Commissioner's Notes

In 1995, the Code Commissioner inserted "than" for "then" in subdivision (3) of subsection (b) to correct a typographical error.

REFERENCES

CROSS REFERENCES

As to submissions for public contracts and grants, and disclosure requirements, see Article 3B of Chapter 16 of Title 41.

RESEARCH REFERENCES

American Digest System:

Officers and Public Employees ☞ 110.

Corpus Juris Secundum:

C.J.S. Officers and Public Employees §§ 197-204.

ANNOTATIONS

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CASENOTES

Generally 1 SPR..... enter pPLK1
Constitutionality 2 SPR..... enter pPLK2
*48484 Particular circumstances 4 SPR..... enter pPLK4
Purpose 3 SPR..... enter pPLK3

1. Generally

Legislature has the authority to require as a condition of employment that those public employees who occupy a position of public trust must disclose their financial status. Gideon v. Alabama State Ethics Commission, 379 So.2d 570 (Ala.1980).

2. Constitutionality

Code of Ethics for Public Officials is not violative of § 173 of the Constitution, governing the impeachment and removal of certain public officials for the commission of designated crimes, in light of § 176 of the Constitution. Allen v. State, 382 So.2d 11 (Ala.Crim.App.1979), writ denied 382 So.2d 25, certiorari denied 101 S.Ct. 125, 449 U.S. 843, 66 L.Ed.2d 52.

In light of the legitimate state interests fostered, the disclosures required do not violate the United States Constitution by impinging on the employees' financial privacy. Gideon v. Alabama State Ethics Commission, 379 So.2d 570 (Ala.1980).

3. Purpose

This section's application to spouses and dependents is rationally related to the proper legislative purposes of preventing and detecting corruption among public employees and fostering the public's confidence in its government. Gideon v. Alabama State Ethics Commission, 379 So.2d 570 (Ala.1980).

Not only is disclosure by an employee of his or her spouse's financial interests reasonable, but it is necessary, as absent such a provision the purposes of the chapter could be thwarted by a public officer or employee concealing his economic interests by placing them in his spouse's name. Gideon v. Alabama State Ethics Commission, 379 So.2d 570 (Ala.1980).

4. Particular circumstances

State of Alabama was not required to submit statement-of-economic-interests form, required for qualification of candidates, for preclearance under the Voting Rights Act, where the statutes mandating that candidates for public office file a statement of economic interests and prescribing the contents of the form had been precleared and there were no substantive differences between the actual contents of the form and the contents prescribed by statute, as applied to candidates disqualified for failure to timely file the form. Ritter v. Bennett, 23 F.Supp.2d 1334 (M.D.Ala.1998).

*48485 Directors of county economic and industrial development authority were not required to file statements of economic interests, where directors did not receive salaries. Dobbs v. Shelby County Economic and Industrial Development Authority, 749 So.2d 425 (Ala.1999).

Cited in Muncaster v. Alabama State Ethics Comm'n, 372 So.2d 853 (Ala.1979).

**ATTACHMENT C:
AGO-OPINION 2005-125**



2005 - 125

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

TROY KING
ATTORNEY GENERAL

May 9, 2005

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Honorable William C. Segrest
Executive Director
State of Alabama
Pardons and Paroles
Post Office Box 302405
Montgomery, Alabama 36130-2405

Sunshine Law - Pardons and Paroles
Board - Privileged Information

The Board of Pardons and Paroles ("Board") must comply with parole statutes, the Sunshine Law, and victim statutes when conducting its meetings. Accordingly, the Board must meet and deliberate in an open public meeting, but may convene in an executive session to deliberate statutorily privileged portions of its files. The Board may convene the executive session in the meeting room and discuss those statutorily privileged portions of its files in a manner not audible to those present in the room.

Dear Mr. Segrest:

This opinion of the Attorney General is issued in response to your request on behalf of the Alabama Board of Pardons and Paroles.

QUESTION

Do individual board members of the Alabama Board of Pardons and Paroles have to speak audibly, when discussing portions of statutorily privileged files so that those in attendance at open public meeting can hear the Board's deliberations?

FACTS AND ANALYSIS

Your question contemplates the application of the Sunshine Law to meetings conducted by the Board of Pardons and Paroles. The Sunshine Law is codified at section 13A-14-2 of the Code of Alabama. ALA. CODE §13A-14-2 (Supp. 2004). The purpose of the Sunshine Law is to give the general public an opportunity to be present and to be heard in open, public meetings. In *Migliaonico v. Birmingham News Co.*, 378 So. 2d 677 (Ala. 1979), the Alabama Supreme Court ruled that “[i]t is intended that the whole deliberative process be open to public scrutiny, rather than that there be the mere formal announcement of decisions already made in private.” *Id.* at 680. In *Dale v. Birmingham News Co.*, 452 So. 2d 1321 (Ala. 1984), the Court again held that all meetings that are to be held under the Sunshine Law, “whether formal or informal, whether or not an official vote is taken, must be open to the public.” *Id.* at 1323.

The Board of Pardons and Paroles, however, has a duty not only to comply with the Alabama Sunshine Law, but also to comply with the parole statutes and the crime victim rights statutes, which work in harmony with one another. See Attorney General Opinion to Johnnie Johnson, Jr., Chairman of the Alabama Board of Pardons and Paroles, dated February 28, 2001, A.G. No. 2001-106. (This opinion is modified to the extent that it does not take into consideration statutorily privileged information and requires the entire deliberative process to remain open).

Specifically, section 15-22-23(b) of the Code of Alabama sets forth conditions that must be met for the Board to have authority to “tentatively approve, grant or order any pardon, parole, remission of fine or other forfeiture.” ALA. CODE § 15-22-23(b) (Supp. 2004). The first condition set forth in this subsection provides that this action must be “taken in an open public meeting of the board.” *Id.* Section 15-22-36(b), however, imposes strict limits on the Board’s ability to share information with the public from its parole consideration files. This section provides that the Board’s rationale in favor of granting a pardon, parole, etc., shall be in writing and the document shall be a public record, “but all other portions of the file shall be privileged.” ALA. CODE § 15-22-36 (b) (Supp. 2004). Likewise, section 15-22-53(b) imposes limits on the Board’s ability to share with the public information gathered for the use of the courts. This section provides that “[a]ll reports, records and data assembled by any probation officer and referred to the court shall be privileged and shall not be available for public inspection except upon order of the court to which the same was referred.” ALA. CODE § 15-22-53(b) (1995).

Where more than one code section is involved, each should be construed in harmony with the other code sections in effect, so far as is

practical. *Kinard v. Jordan*, 646 So. 2d 1380, 1383 (Ala. 1994). The courts have stated that in resolving conflict between statutory provisions, whenever possible, statutes must be construed in *pari materia* in the light of their application to the same general subject matter. *Opinion of the Justices No. 334*, 599 So. 2d 1166, 1168 (Ala. 1992); *Bynum v. Campbell*, 419 So. 2d 1370, 1374 (Ala. 1982). Specific provisions relating to specific subjects are understood as exceptions to general provisions relating to general subjects and the specific provisions relating to specific subjects control over the general provisions. *Ex parte Jones Mfg. Co. Inc.*, 589 So. 2d 208, 211 (Ala. 1991); *Murphy v. City of Mobile*, 504 So. 2d 243, 244 (Ala. 1987). Because the Board must comply with the specific pardon and parole statutes, it is the opinion of this Office that these more specific provisions apply over the general rules under the current Sunshine Law. Accordingly, the Board is required to meet and deliberate in an open public meeting, but would not be required to speak audibly during deliberations when discussing statutorily privileged portions of its files.

The Legislature has recently amended the Sunshine Law. This new amendment will take effect on October 1, 2005. Section 1 (a) of the Act amending the Sunshine Law states that “except . . . *as otherwise expressly provided by other federal or state statutes*, all meetings of a governmental body shall be open to the public. . . .” See, 2005 Ala. Acts No. 2005-40 (emphasis added). Section 7 of the act also provides that executive sessions may be held for certain enumerated purposes and when a governmental body desires to convene an executive session, the body shall state the purpose of the executive session before going into the executive session. *Id.* None of the enumerated exceptions authorizing executive sessions specifically apply to the meetings of the Board.

As stated above, the Board is required to meet and deliberate in an open public meeting and information in the Board’s files, except the reasons for granting a pardon or parole as set forth in writing, are privileged and not available for public inspection. Because the pardon and parole statutes specifically provide that the meetings to consider pardons and paroles shall be held in an open meeting and that certain information in the Board’s files are to remain confidential, under the provisions of the amended Sunshine Law, as is the case under the current Sunshine Law, the Board is required to meet and deliberate in an open public meeting, but would not be required to speak audibly during deliberations when discussing statutorily privileged portions of its files. Accordingly, under the amended law, the Board is entitled to discuss the statutorily privileged portions of its files in an executive session. Before the Board begins its deliberations, the Board should state that it is going into executive session to discuss the statutorily privileged portions of the file. The Board may convene the executive session in the meeting room and deliberate those statutorily privileged portions of its files in a manner not audible to those present in the room. Thereafter, the Board would be required to complete

Honorable William C. Segrest
Page 4

its deliberative process in a reconvened open meeting. Thus, under the current Sunshine Law, the amended Sunshine Law, and section 15-22-23(b) of the Code, the Board must meet and deliberate in an open public meeting, but may convene in an executive session to deliberate statutorily privileged portions of its files.

CONCLUSION

The Board of Pardons and Paroles must comply with parole statutes, the Sunshine Law, and victim statutes when conducting its meetings. Accordingly, the Board must meet and deliberate in an open public meeting, and may convene in an executive session to discuss statutorily privileged portions of its files. The Board may convene the executive session in the meeting room and discuss those statutorily privileged portions of its files in a manner not audible to those present in the room.

I hope this opinion answers your question. If this Office can be of further assistance, please contact Monet Gaines of my staff.

Sincerely,

TROY KING
Attorney General
By:


BRENDA F. SMITH
Chief, Opinions Division

TK/MMG
199620v1/79770

ATTACHMENT D:

**Questions Your Governmental Body
Should Answer About Your Public Meeting**

BEFORE THE MEETING:

Questions To Answer:	Yes	No	<i>For Guidance, please see the following pages of this manual</i>
Is our governmental body required to give notice of this meeting?			Page 8
If yes, has the notice been provided to the public in the required manner, and in the required time-frame?			Pages 11 – 16

DURING THE MEETING:

Questions To Answer:	Yes	No	<i>For Guidance, please see the following pages of this manual</i>
Will our governmental body be discussing items that will require us to go into Executive Session?			Pages 21-27
Has our governmental body checked to make sure that <u>all</u> matters discussed during the Executive Session are applicable to an executive session?			Pages 21-27
Has our governmental body discussed any matters others than the subject openly voted upon to enter the public session?			Pages 9 – 10
Were all votes resulting from the Executive Session taken in public?			Pages 17-18 Pages 19-29

AFTER THE MEETING:

Questions To Answer:	Yes	No	<i>For Guidance, please see the following pages of this manual</i>
Has our governmental body recorded an adequate record of our meeting that complies with Section 4 of the OMA?			Pages 18 – 19 Page 29
Has this public record of our meeting been made available to the public “as soon as practicable after approval”?			Page 29
Has our governmental body posted the date of our next scheduled meeting?			Page 29

IF A CIVIL CLAIM IS FILED RELATED TO THIS MEETING:

Questions To Answer:	Yes	No	<i>For Guidance, please see the following pages of this manual</i>
Has our governmental body, within 7 days of receiving personal service of the complaint, filed an “initial response” to the complaint?			Pages 30 – 33
Has each named defendant filed a separate response, even if it is substantially similar to the others’ responses?			Pages 30 – 33

ATTACHMENT E:

A Checklist for Conducting Lawful EXECUTIVE SESSIONS

	<i>For Reference, See</i>	
<input type="checkbox"/> 1. Convene An Open Meeting	Page 21	Section IV (A) 1
<input type="checkbox"/> 2. Enter a motion stating the reason for the Executive Session. <i>Executive Sessions may only be called for one of the following reasons:</i> <ol style="list-style-type: none"> a. General Reputation and Character, Job Performance, or Salaries / Compensation b. Formal Complaints or Charges Against an Individual or Legal Entity c. Discussion with the Government Body’s Attorney d. Security Plans and Measures e. Criminal Investigation and the Identity of an Undercover Agent or Informer f. Negotiations to Buy / Sell / Lease Real Property g. Preliminary Negotiations in Trade Competition h. Negotiations Between The Body and a Group of Public Employees i. Discuss and Vote Upon a Public or Contested Case Hearing 	<div style="text-align: center;">Page 21</div> <div style="text-align: center;">Page 21</div> <div style="text-align: center;">Page 23</div> <div style="text-align: center;">Page 23</div> <div style="text-align: center;">Page 24</div> <div style="text-align: center;">Page 25</div> <div style="text-align: center;">Page 25</div> <div style="text-align: center;">Page 26</div> <div style="text-align: center;">Page 27</div> <div style="text-align: center;">Page 27</div>	<div style="text-align: center;">Section IV (A) 2</div> <div style="text-align: center;">Section IV (B) 1</div> <div style="text-align: center;">Section IV (B) 2</div> <div style="text-align: center;">Section IV (B) 3</div> <div style="text-align: center;">Section IV (B) 4</div> <div style="text-align: center;">Section IV (B) 5</div> <div style="text-align: center;">Section IV (B) 6</div> <div style="text-align: center;">Section IV (B) 7</div> <div style="text-align: center;">Section IV (B) 8</div> <div style="text-align: center;">Section IV (B) 9</div>
<input type="checkbox"/> 3. Receive a Written or Oral Declaration (if necessary). <ol style="list-style-type: none"> a. Written Declarations are required for these Executive Sessions: <ol style="list-style-type: none"> I. Discussion with the body’s attorney concerning options for, and ramification of, litigation, mediation, or arbitration. II. Discussions that would disclose the identity of an undercover informant or that focus on criminal investigations of non-public officials. III. Discussions concerning the negotiations between the body and a group of public employees. b. It is required that a designated person certify that the Executive Session is warranted for these specific reasons before the body votes to go into Executive Session. 	Page 20	Section IV (A) 4
<input type="checkbox"/> 4. Vote to go into Executive Session <ol style="list-style-type: none"> a) The vote must be open/public; and b) Each member must openly give his/her individual vote. 	Page 20	Section IV (A) 4
<input type="checkbox"/> 5. Enter a Statement Concerning Reconvocation	Page 21	Section IV (A) 5