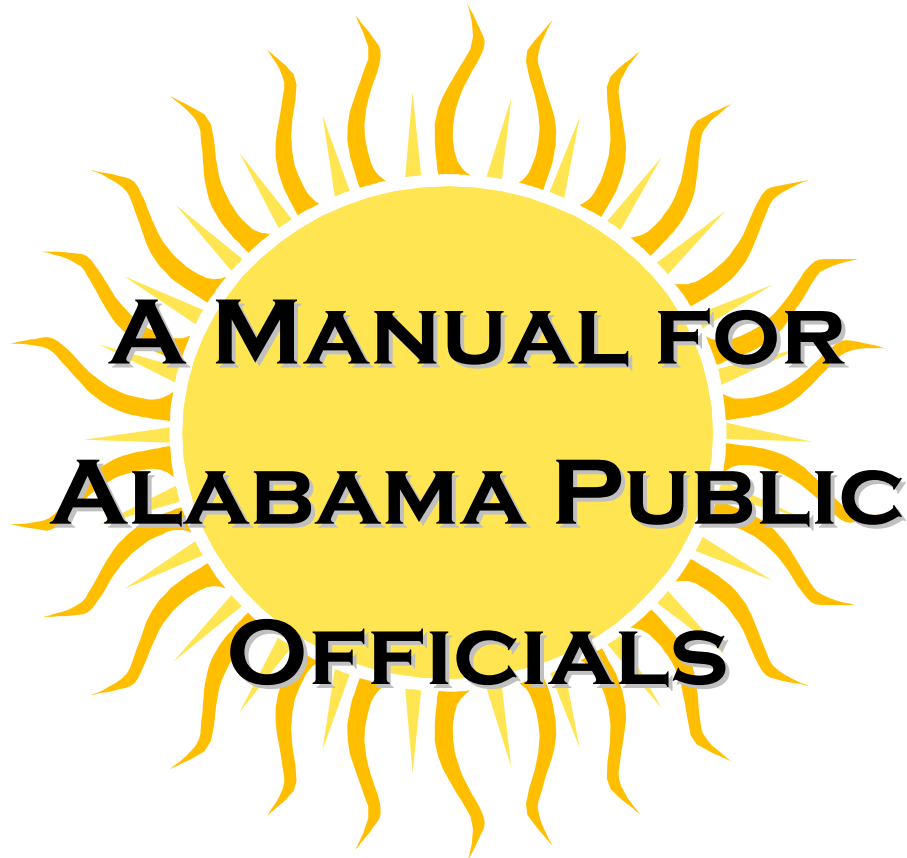


THE ALABAMA OPEN MEETINGS

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 public employee who must file a Statement of Economic Interest under Section 36-25-14 of the Code of Alabama
 - A copy of this section is attached to this manual.
 - In addition to 24 specified types of public employees/officials, it includes all public employees who make \$50,000+ per year.
 - Note: The definitions of “public employee” and “public official” are discussed in the definitions section of this manual.
 - Salaries/Compensation: The OMA specifically provides that discussions concerning salaries, compensation, and “job benefits” of specific public employees and officials do not come under this subsection and *cannot* be discussed in an executive session.
2. **Formal Complaints or Charges Against an Individual or Legal Entity**
- An executive session may be called to discuss or hear “formal written complaints or charges” against any of the following:
 - A public employee
 - A student at a public school or college
 - An individual, corporation, partnership, or other legal entity subject to the body’s regulation
 - These discussions must be “expressly allowed by federal or state law”.
3. **Discussions with the Government Body’s Attorney**
- A body may discuss its legal options, or the legal ramifications of, any of the following with the body’s attorney in an executive session:
 - Pending Litigation
 - Controversies not currently being litigated, but likely to be litigated if the body takes a proposed course of action

- 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>	Page 21	Section IV (A) 2
a. General Reputation and Character, Job Performance, or Salaries / Compensation	Page 21	Section IV (B) 1
b. Formal Complaints or Charges Against an Individual or Legal Entity	Page 23	Section IV (B) 2
c. Discussion with the Government Body’s Attorney	Page 23	Section IV (B) 3
d. Security Plans and Measures	Page 24	Section IV (B) 4
e. Criminal Investigation and the Identity of an Undercover Agent or Informer	Page 25	Section IV (B) 5
f. Negotiations to Buy / Sell / Lease Real Property	Page 25	Section IV (B) 6
g. Preliminary Negotiations in Trade Competition	Page 26	Section IV (B) 7
h. Negotiations Between The Body and a Group of Public Employees	Page 27	Section IV (B) 8
i. Discuss and Vote Upon a Public or Contested Case Hearing	Page 27	Section IV (B) 9
<input type="checkbox"/> 3. Receive a Written or Oral Declaration (if necessary).	Page 20	Section IV (A) 4
a. Written Declarations are required for these Executive Sessions: 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.		
<input type="checkbox"/> 4. Vote to go into Executive Session	Page 20	Section IV (A) 4
a) The vote must be open/public; and b) Each member must openly give his/her individual vote.		
<input type="checkbox"/> 5. Enter a Statement Concerning Reconvocation	Page 21	Section IV (A) 5