

Executive Sessions:

What You Need to Know

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Although most borough council meetings take place before the public, the Sunshine Act does permit a council to go “behind closed doors” on certain, limited occasionsⁱ for “executive sessions.” The public is excluded from these meetings, although the council may admit those persons necessary to carry out the purpose of the meeting.

Only the following topics can be discussed during a council’s executive session:

- Any aspect of employment of specific public officers or employees;
- Receiving information on and talking over strategy and negotiations related to collective bargaining agreements, labor relations, or arbitration;
- Consideration of the purchase or lease of real property, up to the time an option to purchase is obtained;
- Consultations with an attorney or other professional adviser about information or strategy about litigation or issues on which identifiable complaints have been or are expected to be filed; and

- Agency business that, if conducted in public, would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law.

A meeting in an executive session to discuss an issue that does not fit into one of these five narrow categories would be in violation of the Sunshine Act.

Once in executive session, discussion should be limited and focused to the specific issue(s) for which it was called. An executive session cannot be used by a borough council to discuss any/all topics.

Despite the fact executive sessions can be held without public participation and attendance, the public nonetheless has a right to

know generally what the topic of the discussion will be, or was. Accordingly, one of the above reasons must be announced to the public with sufficient specificity.

Usually, executive sessions are held either right before, during, or immediately after, a regularly scheduled meeting. The announcement is to be made at that meeting.

However, if the executive session is held between meetings, the executive session must be announced at the next public meeting. Additionally, during an executive session, the council cannot take official action (i.e., binding votes).

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The Pennsylvania Courts have provided guidance for announcing executive sessions for litigation purposes. Based on relevant case law,¹¹ it is recommended that for matters already in litigation, council announce to the public the names of the parties involved in the litigation, the docket number of the case, and where the case is filed.

Similarly, for expected legal matters not already in suit, a borough council should announce to the public the nature of the complaint (e.g., “to discuss a threatened personal injury suit”). The identity of the complainant should not be announced.

In short, the council should avoid merely indicating to the public that they met in executive session to discuss “litigation matters.”

Although third parties may be invited into an executive session “to carry out the purpose of the meeting,” the borough council must be cognizant of who participates in an executive session and how it interacts with the third party.

In *Trib Total Media, Inc. v. Highlands School District*,ⁱⁱⁱ the Commonwealth Court held that by including local business owners in a closed executive session with the school board and the solicitor to discuss possible resolution of pending tax assessment litigation, the meeting was outside the scope of a permissible executive session.

Noting that the executive session had been called for the purpose of seeking legal advice, the court stated that nothing in the Sunshine Act suggested that opposing parties are necessary participants. This meeting, in essence, provided “a private audience with the board” and gave the third parties “an opportunity to lobby the board to support its position.”

The court indicated that an executive session called to discuss pending litigation is confined to private consultations between the agency and its counsel or advisers regarding litigation strategy and information – subjects that must be kept confidential to protect an agency’s ability to settle or defend the legal matters – and the presence of opposing parties would undermine the essential purpose of such a meeting.

It is important to conduct executive sessions correctly. Otherwise, a borough council runs the risk of disclosing privileged information and/or facing litigation from a member of the public.

The presence of the third parties also destroyed any claim of attorney-client privilege.

As a general rule, if a third party is present at an executive session, it is recommended that the council receive information from the third party, but hold off any discussion (especially with the solicitor) until after the third party is no longer in the executive session.

Executive sessions provide an opportunity to discuss certain limited topics outside of the public setting. This serves an important function in some limited situations.

However, it is important to conduct executive sessions correctly. Otherwise, a borough council runs the risk of disclosing privileged information and/or facing litigation from a member of the public. Borough council members should be aware that the Sunshine Act does give a

court the discretion to invalidate any and all official action taken in an improper executive session, and also permits a court to issue a monetary fine on an agency member after a summary conviction.

Consultation with the borough solicitor is always recommended to ensure proper compliance with the law.

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ⁱ 65 Pa.C.S.A. § 708.

ⁱⁱ *Reading Eagle Company v. Council of the City of Reading*, 627 A.2d 305 (Pa. Cmwlth. 1993).

ⁱⁱⁱ 3 A.3d 695 (Pa. Cmwlth. 2010).