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LAMB & BARNOSKY, LLP

ATTORNEYS AT LAW

MEMORANDUM

TO: OUR PUBLIC SECTOR CLIENTS

FROM: LAMB & BARNOSKY, LLP

DATE: NOVEMBER 2, 2011

RE: OPEN MEETINGS LAW AND THE PROCEDURE FOR ENTERING INTO AND EXITING FROM AN EXECUTIVE SESSION

As a general rule, New York's Open Meetings Law ("OML") requires that all meetings and/or sessions of a public body remain open to the public. Given the ever increasing demands for transparency of public entities, this memorandum reviews procedures for public bodies to move into and out of an executive session.

PUBLIC BODY

A "public body" is defined as an "entity for which a quorum is required in order to conduct any business and that includes two or more members performing a government function." This includes, but is not limited to, public meetings of state agencies, departments, village boards, town boards or councils, city councils, county legislatures and boards of education. It also includes all committee or subcommittee meetings held by these public bodies.

EXECUTIVE SESSION

The OML details some very narrow exceptions pursuant to which a public body is allowed to enter executive session to discuss certain sensitive matters. These are specifically enumerated by the OML to include the following:

- Subjects which would jeopardize public safety if disclosed to the public;
- Any issue that might disclose the identity of a law enforcement agent or informer;
- Information relating to current or future investigations or prosecution of a criminal offense that would imperil effective law enforcement if disclosed;
- Discussions regarding proposed, pending or current litigation;
- Discussions regarding collective labor negotiations;

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- Discussions regarding the medical, financial, credit or employment history of a particular person, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;
 - The preparation, grading or administration of examinations; and
 - The proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by the public body, but only when publicity would substantially affect the value of the property at issue.

Additionally, some judicial or quasi-judicial proceedings (excluding proceedings conducted before a zoning board of appeals or a public service commission), discussions which take place during political caucus meetings, and discussions involving an issue deemed confidential by a specific state or federal statute may be conducted in executive session. Issues which have been deemed confidential by statute include, but are not limited to:

- communications through which the public body obtains legal advice from its attorney;
- public health issues specifically deemed confidential by public health statutes; and
- education records of a particular student pursuant to the Family Education Rights & Privacy Act.

PROCEDURES

Prior to the commencement of an executive session, the public body must consider a motion to enter executive session. The member of the public body making the motion must specifically articulate the general area(s) that will be discussed and the minutes must reflect the actual stated reason for the executive session. The motion and the minutes need to provide enough detail to enable both the other members of the body and the public to know the subject matter.

It is important to ensure that the details of the reason for entering into executive session are included in the actual motion and subsequent meeting minutes. For example, when entering into an executive session to discuss pending litigation, the motion should specify the matter being discussed. For example, the motion may state that it is “to discuss pending litigation in the matter of Jones v. ____ School District.”

When entering into an executive session to discuss a particular personnel issue, the motion must specify that the executive session is needed to discuss a particular person. However, the motion does not need to include the person’s name or position. A motion to enter

into executive session to discuss negotiations should state that it is a motion “to discuss negotiations conducted pursuant to the Taylor Law involving the _____ Unit.”

For your use, a template of commonly made motions to adjourn into executive session is attached to this memorandum

Although a public body may legally be allowed to take formal action during an executive session, we recommend, as a general rule, that public bodies only take formal action during an executive session if specifically permitted or required by statute.¹ If action is taken by a public body during an executive session, the vote must be recorded in the meeting minutes available to the public. Information that is not required to be made public pursuant to the Freedom of Information Law does not need to be included in the minutes of an executive session (*e.g.*, the name of the employee against whom disciplinary charges have been preferred).

At the end of the executive session, there should be a motion to exit the executive session and return to the public meeting; *e.g.*, “I move to exit executive session and return to the public meeting.”

PENALTIES FOR VIOLATION OF OML

In connection with findings that a public body violated the OML, courts have: (1) declared that the public body violated the law; (2) declared void the action taken in violation of the OML; (3) ordered the public body to participate in a training session conducted by the Committee on Open Government; and/or (4) ordered the public body to pay the costs and attorneys’ fees of the successful party.

If you have any questions regarding executive sessions and/or the Open Meetings Law in general, please do not hesitate to contact us.

THIS MEMORANDUM IS MEANT TO ASSIST IN GENERAL UNDERSTANDING OF CURRENT LAW. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. THOSE WITH PARTICULAR QUESTIONS SHOULD SEEK THE ADVICE OF COUNSEL.

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¹ With the exception of boards of education, a public body may take formal action, except an action to appropriate public moneys, during an executive session. For example, a public body may enter into an executive session to discuss whether to fire an employee and make a final determination to fire that person during the executive session. Likewise, a public body could enter into an executive session to discuss whether to bring disciplinary charges against an employee and prefer the charges against the employee during the executive session.

A board of education cannot take formal action during an executive session except if specifically permitted or required by statute (*e.g.*, preferring of Education Law Section 3020-a charges).

**TEMPLATE FOR COMMONLY MADE
MOTIONS TO ADJOURN INTO EXECUTIVE SESSION
(Municipalities)**

1. **Pending Litigation:** “I move to adjourn into executive session to discuss pending litigation in the matter(s) of – Jones v. _____Village; Smith v. _____ Village; etc.”
2. **Collective Bargaining:** “I move to adjourn into executive session to discuss negotiations conducted pursuant to the Taylor Law involving the [name of union].”
3. **Personnel Issues:** “I move to adjourn into executive session to discuss the [medical history], [financial history], [credit history], [employment history], [matters leading to the appointment], [matters leading to the employment], [matters leading to the promotion], [matters leading to the demotion], [matters leading to the discipline], [matters leading to the suspension, dismissal, removal] of a particular person or corporation.”
4. **Acquisition, Sale or Lease of Buildings:** “I move to adjourn into Executive Session to discuss the potential [acquisition], [sale] or [lease] of property because public discussion would substantially affect the value of the property at issue.”
5. **Attorney-Client Privilege:** “I move to adjourn into Executive Session for the purpose of seeking legal advice from the Board’s attorney.”

**TEMPLATE FOR COMMONLY MADE
MOTIONS TO ADJOURN INTO EXECUTIVE SESSION
(School Districts)**

1. **Pending Litigation:** “I move to adjourn into executive session to discuss pending litigation in the matter(s) of Jones v. _____ District; Smith v. _____ District; etc.”

If litigation involves a student, the resolution should state only “pending litigation against the District involving a particular student.”

2. **Collective Bargaining:** “I move to adjourn into executive session to discuss negotiations conducted pursuant to the Taylor Law involving the [name of union].”
3. **Personnel Issues:** “I move to adjourn into executive session to discuss the [medical history], [financial history], [credit history], [employment history], [matters leading to the appointment], [matters leading to the employment], [matters leading to the promotion], [matters leading to the demotion], [matters leading to the discipline], [matters leading to the suspension, dismissal, removal] of a particular person or corporation.”
4. **Acquisition, Sale or Lease of Buildings:** “I move to adjourn into Executive Session to discuss the potential [acquisition], [sale] or [lease] of property because public discussion would substantially affect the value of the property at issue.”
5. **Attorney-Client Privilege:** “I move to adjourn into Executive Session for the purpose of seeking legal advice from the Board’s attorney.”
6. **3020-a charges:** “I move to adjourn into Executive Session to discuss pending 3020-a charges against a tenured employee.”
7. **Special Education Students:** “I move to adjourn into Executive Session to discuss issues involving a special education student.”
8. **Student Discipline:** “I move to adjourn into Executive Session for the purpose of discussing a disciplinary matter involving a particular student.”