

New York Coalition



For Open Government, Inc.

Advocating for timely access to information & meaningful citizen participation

www.nyopengov.org

**SCHOOL BOARDS
ACROSS NEW YORK STATE
HOLD IMPROPER
EXECUTIVE SESSIONS**

February 10, 2021

The New York Coalition For Open Government is a nonpartisan charitable organization comprised of journalists, activists, attorneys, educators, news media organizations, and other concerned citizens who value open government and freedom of information.

Mission Statement:

Through education and civic engagement, the New York Coalition For Open Government advocates for open, transparent government and defends citizens' right to access information from public institutions at the city, county, and state levels.

Statement of Purpose:

We believe that, if government is of the people, by the people and for the people, then it should also be open *to* the people. Government exists to serve its citizens, so access to public information should be simple. Freedom of Information Laws and the New York Open Meetings Law make access to public records a right.

When government operates openly and honestly, we, the people, can hold our elected officials accountable, fulfilling our duties as an informed citizenry. The New York Coalition For Open Government works to ensure that all people have full access to government records and proceedings on the city, county, and state levels. Such access fosters responsive, accountable government, stimulates civic involvement and builds trust in government.

New York Coalition for Open Government

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The following members also contributed to the completion of this report: **Susan Kims**

Our meetings are held at 6:30 p.m. the second Thursday of the month through Zoom. Board President Paul Wolf, Esq. can be contacted at (716) 435-4976, or by email at paulwolf2@gmail.com. Our website is www.nyopengov.org and we have a Facebook page.

New York's Open Meetings Law

Every meeting of a public body under the New York State Open Meetings Law must be open to the public. There are two ways that a public body can legally discuss public business in private. 1) Under Section 102(3) of the Open Meetings Law an executive session can be held. 2) Through an exemption under Section 108, where the Open Meetings Law does not apply.

Executive sessions under the law are limited to certain subjects. A motion to conduct an executive session must be made in an open meeting, with the subject matter sufficiently described, and upon a majority vote of the members.

Section 108 of the Open Meetings Law contains exemptions where the Open Meetings Law does not apply. The most common exemption is attorney-client privilege. Communication between a public body and their attorney are confidential. A public body can consult with their attorney and when doing so an executive session is not required.

This report focuses on the holding of executive sessions by local governments. Members of the New York Coalition For Open Government reviewed the meeting minutes of twenty school districts across New York State. The purpose of this study was to determine the following:

- How often executive sessions are being held;
- The basis for holding executive sessions;
- Whether motions for executive sessions are being done properly;

The Open Meetings Law sets forth the following reasons that an executive session can be held:

§ 105. Conduct of executive sessions.

1. Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys:

- a. matters which will imperil the public safety if disclosed;
- b. any matter which may disclose the identity of a law enforcement agent or informer;
- c. information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;
- d. discussions regarding proposed, pending or current litigation;
- e. collective negotiations pursuant to article fourteen of the civil service law;
- f. the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;
- g. the preparation, grading or administration of examinations; and
- h. the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.

New York State Committee on Open Government

The New York State Committee on Open Government was created by the State Legislature to provide advice, opinions and recommendations regarding items such as the Open Meetings Law. The Committee on Open Government opinions and Court decisions have determined that a public body must identify the subject matter to be discussed in an executive session with some degree of particularity. Merely reciting the language in the law is insufficient. The motion to conduct an executive session must be sufficiently detailed to enable the public to ascertain whether there is a proper basis for entry into the closed session.

Attached as **Appendix B** to this report are several opinions by the Committee on Open Government, regarding the proper way to do a motion for an executive session.

Our Study

In 2017, the New York Coalition For Open Government reviewed the executive sessions of fourteen local governments in Western New York and determined that ninety-seven percent (97%), of executive sessions were held incorrectly. Every single local government reviewed received a grade of zero, with the exception of the Town of Amherst which received a score of 25%, for getting two out of eight executive sessions correct.

In 2018, a follow-up report reviewing the same local governments determined 25% of local governments received a passing grade. Despite the fact that the 2017 report received front page coverage in the Buffalo News and the report was sent to every local elected official and their attorneys, 75% of local governments continued to receive a failing grade for how they conduct executive sessions!

For this study, the meeting minutes of twenty school boards were viewed from January 1, 2020 through June 30, 2020. Every motion for an executive session was reviewed to determine if it complied with the legal requirement to identify the subject matter to be discussed with some degree of particularity. Merely reciting the language in the law is insufficient. The motion to conduct an executive session must be sufficiently detailed to enable the public to ascertain whether there is a proper basis for entry into the closed session.

It should be noted that two school boards we sought to review did not post all their meeting minutes during the time period reviewed. The Panel for Educational Policy, which is the name of the New York City Board of Education, did not post the minutes of their January, February and March 2020 meetings. The Niagara Falls School Board did not post minutes for their May and June meetings.

Attached as Appendix A, listed in alphabetical order are the executive session motions that were made for each school district, as documented in their meeting minutes. **Incorrect motions are highlighted in bold type.**

The grading criteria used was:

F	0 to 64%
D	65 to 69%
C	70 to 79%
B	80 to 89%
A	90 to 100%

Using the above grading criteria only 30% (5 out of 17) of the school districts we were able to fully review received a passing grade for how they conducted executive sessions. 70% of the school districts reviewed (12 out of 17) received a failing grade!

Executive Session Grades

School District	# of Sessions Done Correct	%	Grade
Utica	Meeting Minutes not posted	unable to rate	
New York City	0 out of 0	?	*
Niagara Falls	0 out of 1	?	**
Brookhaven-Comsewogue	0 out of 5	0%	F
Schenectady	0 out of 11	0%	F
Ogdensburg	0 out of 8	0%	F
Syracuse	0 out of 6	0%	F
Yonkers	0 out of 3	0%	F
Binghamton	0 out of 3	0%	F
Hempstead	1 out of 18	5%	F
Albany	2 out of 17	12%	F
Watertown	1 out of 4	25%	F
Auburn	2 out of 8	25%	F
Canandaigua	6 out of 10	60%	F
Jamestown	10 out of 17	60%	F
Elmira	6 out of 8	75%	C
Amsterdam	8 out of 11	75%	C
Rochester	8 out of 10	80%	B
Kingston	14 out of 14	100%	A
Buffalo	4 out of 4	100%	A

*Panel for Educational Policy Minutes for the 1/29, 2/26, 3/30, meetings were not posted online, which did not allow for a complete review.

**Niagara Falls, Minutes not posted for May and June, so rating is incomplete.

Niagara Falls**0/1****F**

An executive session was held to discuss “contract negotiations with a particular vendor.” The public has a right to know the name of the particular vendor. Meeting minutes for May and June are not posted online.

Hempstead**1/18****F**

Seventeen executive sessions were improperly held to discuss “personnel”, and “a particular individual. The same motion was made in boilerplate fashion each time. The Hempstead School Board held the most executive sessions at 18, which was double the average number of sessions held. A motion should specify whether a particular person is being considered for appointment, discipline, etc.

One executive session was correctly held to discuss the advice of legal counsel.

Albany**2/17****F**

Improper executive sessions were held to discuss:

- “current litigation”, without identifying the litigation;
- “collective negotiations”, without identifying the contract or union;
- “pending or current litigation”, without identifying the litigation;
- “The Board President may request a motion to enter an executive session of the Board, if necessary, for the purpose of discussing personnel matters such as the employment history or matters leading to the appointment, employment, promotion, demotion, discipline, suspension , dismissal, or removal of a particular person; proposed acquisition, sale, or lease or real property; collective bargaining; potential or pending litigation matters; or, other matters permitted by law.”, a general boilerplate motion that simply recites the Open Meetings Law statute is not proper.

Executive sessions were correctly held to discuss:

- “employment of a particular person”;

Watertown**1/4****F**

Executive sessions were held to discuss:

- “a legal matter”, which is too vague and does not identify the legal matter;
- “discussion of public comments regarding personnel”, this is not a reason under the law for holding an executive session;
- “a proceeding having to do with an individual employee”, not a reason under the law for holding an executive session;
- “Superintendent’s mid year evaluation”, is a valid reason

Auburn**2/8****F**

Executive sessions were held to discuss:

- “contract negotiations”, “proposed negotiation of a contract”, “collective bargaining negotiations”, without identifying the union or collective bargaining contract;
- “personnel issue”, which is not sufficient without specifying whether the hiring, firing or discipline of an employee is being discussed.
- Executive sessions were correctly held to discuss the “discipline of a particular person” and the “appointment of a particular person”.

Canandaigua**6/10****F**

Four executive sessions were improperly held to discuss:

- “proposed, current litigation”, without disclosing the name of the litigation;
- “collective negotiations”, without disclosing the name of the collective bargaining agreement or union;

Six executive sessions were properly held to discuss:

- “employment history of particular persons leading to their employment”;

Jamestown**10/17****F**

Seven executive sessions were improperly held to discuss:

- “personnel”, “particular personnel” , “potential personnel reductions”

Kingston

14/14

A

The Kingston School District appears to have conducted all fourteen of their executive sessions properly. The stated reasons for executive sessions were:

- “Matters leading to the employment of particular individual(s); employment history of particular individual(s) or corporations(s); and to seek legal advice”; this motion was made twelve times;
- “to discuss employment history of a particular individual”.

The concern is that the number of executive sessions held significantly exceeded the overall average and that making the same exact motion twelve times gives the appearance of doing a boilerplate routine motion.

Buffalo

4/4

A

The Buffalo Board of Education did a great job detailing all four of their executive session motions. The fact that only four executive sessions occurred is also a positive.

Compliance with the Open Meetings Law

The Open Meetings Law requires that when a motion is made to hold an executive session the subject matter being discussed must be described with some particularity.

The Four Most Common Reasons Given for Holding an Improper Executive Session

- 1) To discuss a personnel matter without specifying whether for hiring, discipline, (47 instances)
- 2) Collective bargaining negotiations, collective bargaining, without identifying the contract or union being discussed (31 instances)
- 3) No reason stated (17 instances)
- 4) To discuss litigation without identifying the legal matter (13 instances)

The general reasons stated above do not in any way inform the public as to what particular legal matter or personnel matter is being discussed behind closed doors. The word “personnel” is not stated in the Open Meetings Law, as a reason for holding an executive session, yet it is cited by school boards all the time.

The New York State Committee on Open Government has provided the following examples of correctly moving to hold an executive session:

“I move to enter into an executive session to discuss the employment history of a particular person (or persons).” The identity of the particular person(s) does not have to be stated.

“I move to enter into executive session to discuss the collective bargaining negotiations involving the police union.”

“I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the Town of Tonawanda.”

Attached to this report as **Appendix B**, are copies of four opinions of the New York State Committee on Open Government regarding executive sessions, which may be of assistance to elected officials and municipal attorneys. The reference numbers for the attached opinions are: July 23, 2001- #3339; April 29, 2008- #4616; September 9, 2009-#4809; September 16, 2009-#4813.

Recommendations

The New York State Legislature has amended the Open Meetings Law twice to create sanctions for public bodies that violate the law. In 2008, the Legislature allowed courts to award attorney fees to citizens who successfully challenge a board action for violating the Open Meetings Law. In 2010, Courts were granted the authority to require the members of a public body to receive Open Meetings Law training by the New York State Committee on Open Government.

The reality is that other than citizen lawsuits which are expensive and difficult to undertake there is no entity that ensures compliance with the New York State Open Meetings Law. The New York State Committee on Open Government is a state created agency that serves as a tremendous resource for information but the Committee does not have any enforcement power. State legislation that provides enforcement power to the New York State Committee on Open Government or some other entity would be a great benefit to addressing the clear lack of

compliance with the Open Meetings Law identified in this report and others completed by the New York Coalition For Open Government.

The Massachusetts Attorney General since 2009 has had a division dedicated to addressing open government issues. The Attorney General in Massachusetts investigates open government complaints from citizens and by law has the authority to impose \$1,000 fines on local governments that violate the law. If the local governments disagree with the Attorney General's decision they can sue in Court. State Attorney General's across the country have sued local governments for violating open meeting laws, but no such lawsuits have ever been filed by the New York State Attorney General's Office.

While other Attorney General websites have information regarding their open meeting laws and online forms to file a complaint, no such information or forms exist on the New York State Attorney General's website.

The Attorney General and the State Comptroller have broad powers and an elected position, which could be used to educate, monitor, and report local government officials that are not complying with the Open Meetings Law.

We would welcome the Attorney General and the State Comptroller becoming more involved as statewide elected officials with open government matters.

Conclusion

Just because the legal ability to meet behind closed doors exists, does not mean that it has to occur. It is shocking how rare it is for any objection to be made for holding an executive session. A negative vote to holding an objection is almost as rare as a unicorn sighting!

Out of the more than 150 executive session motions made only one failed on a tie 2 to 2 vote. On June 2, 2020 at the Hempstead School Board meeting a motion for an executive session actually failed.

There is a culture among elected officials that when discussing the hiring of an individual, a legal matter or a union negotiation that these discussions must occur behind closed doors. Such discussions can and should occur in public more than they do.

Out of the 158 executive session motions reviewed, 61% were not in compliance with the Open Meetings Law (96 out of 158).

During the six month period studied only 39% of executive session motions were made correctly (62 out of 158).

61% of the time the public is being left in the dark as to what is happening behind closed doors by motions that do not specifically describe the matter being discussed.

70% of the school districts reviewed received a failing grade for how they handled executive session motions. With 30% of school districts getting none of their executive session motions correct.

This is not the first time we have reported such terrible compliance with the Open Meetings Law.

In 2017, the New York Coalition For Open Government reviewed the executive sessions of fourteen local governments in Western New York and determined that **ninety-seven percent (97%), of executive sessions were held incorrectly.**

In 2018, a follow-up report reviewing the same local governments determined 25% of local governments received a passing grade. Despite the fact that the 2017 report received front page coverage in the Buffalo News and the report was sent to every local elected official and their attorneys, **75% of local governments continued to receive a failing grade for how they conduct executive sessions!**

New York State Committee on Open Government opinions and several State Court decisions have made it clear that motions reiterating general terms like personnel, contract negotiations and litigation are not sufficient when seeking to hold an executive session.

The goal of this report is to educate school board officials and their attorneys that changes need to be made in how executive sessions are conducted.

Over the years incorrect customs and traditions regarding executive session motions have taken hold. Executive session motions are often made the way they are because that is how they have been done for years. New elected officials come on board and the improper procedures get passed on.

The New York Coalition For Open Government looks forward to working with school boards to ensure that the public is made aware of what matters are being discussed behind closed doors in executive sessions.