

**OPEN MEETINGS LAW SERIES:
CLOSED SESSIONS**



Frayda Bluestein
bluestein@sog.unc.edu




Kara Millonzi
millonzi@sog.unc.edu

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW 

About the Series

- Overview ([On-Demand Purchase](#))
 - Definitions, scope, and basic requirements.
- Meeting Mechanics ([On-Demand Purchase](#))
 - Managing the process: Notice, cancelation, recessing, minutes, agendas, hearings, public comments, and more.
- Closed Sessions
 - Analysis of closed session authority, general accounts, voting in and talking about closed sessions, who can attend.

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW 

About this Webinar

- Closed Sessions
 - Closed Session Overview
 - Role of attorney and clerk
 - Discussion of key closed session types
 - Attorney-client privilege
 - Real property acquisition
 - Location of industries and businesses
 - Personnel and public officials

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW 



Kara Millonzi
millonzi@sog.unc.edu

CLOSED SESSION OVERVIEW

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

Closed Session Procedures

- Provide notice of meeting
- Start meeting in open session
- Make motion to go into closed session
 - Must state purpose(s) of closed session
 - Additional requirements for some closed session purposes
- Once closed session complete, return to open session to adjourn meeting

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW



Closed Session Purposes (G.S. 143-318.11)

1. Protect confidential, privileged information, or information that is not a public record under G.S. Ch. 132
2. Preserve attorney-client privilege
3. Discuss business location or expansion
4. Discuss real property acquisition terms
5. Discuss employment contract terms
6. Discuss certain personnel matters
7. Plan, conduct, or hear reports on investigations of alleged criminal misconduct
8. Formulate school violence response and school safety plans
9. Formulate anti-terrorism plans


UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

Additional Procedural Requirements



1. Protect confidential, privileged information, or information that is not a public record under G.S. Ch. 132
 - Motion must state name or citation of law that render information privileged or confidential
2. Preserve attorney-client privilege
 - If existing lawsuit, motion must identify parties to lawsuit
3. Discuss business location or expansion
4. Discuss real property acquisition terms
 - If requested, public body must disclose the property's current owner and its location, and the purposes for which the public body intends to use the property before it goes into closed session
5. Discuss employment contract terms
6. Discuss certain personnel matters
7. Plan, conduct, or hear reports on investigations of alleged criminal misconduct
8. Formulate school violence response and school safety plans
9. Formulate anti-terrorism plans


OPEN MEETINGS LAW


Several county commissioners are made aware of allegations that the county manager has embezzled funds from the county. They want to know what legal authority (and responsibility) the board has to take action to protect the county. Three members (of a five-member board) meet with the county attorney to determine what actions they legally can take to discipline or suspend the county manager.




- Is this an official meeting?
 - **Yes**
- Is this the type of discussion that can be held in closed session?
 - **Likely Yes**
- Was this a proper closed session?
 - **No! The board members did not follow the proper procedural requirements.**


OPEN MEETINGS LAW


Disclosing Closed Session Discussions

- Generally board members are free to disclose substance of closed session discussions
 - But cannot disclose information or records that are protected by the public records laws or other federal or state laws.
- Board likely cannot legally enforce policy to prohibit disclosure of closed session discussions
- Board members may be able to contractually agree not to disclose closed session discussions


OPEN MEETINGS LAW


Frayda Bluestein
Bluestein@sog.unc.edu

CLOSED SESSION OVERVIEW

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

Voting and Taking Actions in Closed Sessions

- Permitted actions
 - Tentative votes or consensus check; final action to be taken in open session
 - Final action in closed session, as authorized



UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

Voting and Taking Actions in Closed Sessions

- Examples of specific action authority:
 - When necessary to protect confidential information under subsection (a)(1)
 - Instructing the attorney under (a)(3)
 - Agreeing on tentative list of incentives under (a)(4)
 - Instructing an agent as to negotiating position under (a)(5)
 - Disciplinary actions other than discharge or removal under (a)(6) and (a)(1) (ex: administrative leave)

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW



Trey Allen

tallen@sog.unc.edu

REMEDIES FOR UNAUTHORIZED CLOSED SESSIONS



OPEN MEETINGS LAW

Remedies: Injunction

- Injunctive Relief = court order entered to prevent threatened, recurring, or continuing violations of open meetings law.
- Members of public body who violate such an order may be held in contempt of court.



OPEN MEETINGS LAW

Remedies: Declaratory Judgment

- Judicial declaration that public body took, considered, or deliberated action in violation of open meetings law.
- If the court finds that a violation occurred, it may – but doesn't have to – invalidate the public body's action.



OPEN MEETINGS LAW

Remedies: Factors for Invalidation

- When deciding whether to invalidate action, court must consider the following and “any other relevant factors”:
- Extent to which violation affected substance of the challenged action;
- Extent to which violation thwarted or impaired public’s access to meetings or proceedings;
- Extent to which violation prevented or impaired public knowledge or understanding of people’s business;



OPEN MEETINGS LAW

Remedies: Factors for Invalidation(cont’d)

- Whether violation was part of continuing pattern of violations;
- Extent to which persons relied on validity of challenged action & effect on them of declaring action void; and
- Whether public body committed violation in bad faith or for purpose of evading or subverting open meetings law.




OPEN MEETINGS LAW

Remedies: Attorneys’ Fees

- Court may award attorneys’ fees to prevailing party or parties
- If court finds that public body’s member(s) “knowingly or intentionally” committed violation, it may order the member(s) to pay all or some of opposing party’s attorneys’ fees.
- But not if member(s) sought and followed attorney’s advice.



OPEN MEETINGS LAW



Norma Houston
nhouston@sog.unc.edu

KEEPING THINGS LEGAL

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

Keeping Things Legal

- Stay within scope of closed session topic



What do you think about giving our employees a 20% raise?

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

Keeping Things Legal


- Remind members of restrictions on matters that can be discussed
- Monitor discussion
- Tactfully interrupt conversations that wander beyond scope



UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

Keeping Things Legal

- If member continues to wander beyond scope, admonish (tactfully!) and note admonishment in minutes to protect board




UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

Keeping Things Legal

- Review closed session matter with board chair/mayor prior to meeting
- Conduct training with board members on closed session requirements



UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW





Frayda Bluestein
bluestein@sog.unc.edu

MINUTES AND GENERAL ACCOUNTS

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW



Minutes and General Accounts

- Required for every official meeting, including committees and advisory boards.
- Minutes:
 - document legal requirements for valid meeting (quorum present)
 - Record of actions taken
 - Need not contain summary of discussion
- General Accounts:
 - Summary of meeting; a person who did not attend can have a reasonable understanding of what transpired


OPEN MEETINGS LAW




Closed Session Minutes: Status as Public Records

- Minutes and general accounts are public unless their release will frustrate the purpose of the closed session.
- Process options:
 - Decide during the meeting whether they should be sealed
 - Review periodically
 - Review upon receipt of a request
- Statutes do not set time frame for approval or release


OPEN MEETINGS LAW


Framework for Reviewing Closed Session Minutes

- 1. Was the closed session validly held?
- 2. What is the nature of the matter that was the subject of the session, and what is its status at the time of the request for or decision to release?
- 3. What specific information is included in the minutes/accounts, and what is its status at the time of the request for or decision to release?


OPEN MEETINGS LAW


Specific Types of Closed Sessions

- Attorney Client Privilege
- Acquisition of Real Property
- Location of industries and businesses
- Personnel and public officials
- What may be discussed?
- Who may be present?
- What actions can be taken?
- What is public/confidential after the meeting?


OPEN MEETINGS LAW






Chris McLaughlin
mclaughlin@sog.unc.edu

ATTORNEY-CLIENT PRIVILEGE


OPEN MEETINGS LAW


What is the ACP?

- Covers communications made in confidence between an attorney and a client for purposes of giving or receiving legal advice
- Evidentiary privilege: attorney and client cannot be forced to testify about these communications at trial or in deposition
- G.S. 143-318.11(a)(3) recognizes government ACP


OPEN MEETINGS LAW



ACP: What may be discussed?

- Consideration of and instructions to attorney concerning handling or settlement of:
 - Claim
 - Judicial action
 - Mediation
 - Arbitration
 - Administrative Procedure
- General legal advice

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

ACP: What may NOT be discussed?

- General policy matters
- No potted plants!*



"Well, sir, I'm not a potted plant. I'm here as the lawyer. That's my job." Brendan Sullivan, counsel to Oliver North

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW



ACP: What may be discussed?

- Example: board considers noise ordinance
- Appropriate for closed session:
 - Discussion of constitutionality, possible legal challenges, and wording
- Not appropriate for closed session:
 - Merits of the ordinance (e.g., impact on local businesses and homeowners)

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW



ACP: What actions may be taken?

- Instructions to attorney re: litigation/claim
 - Settlement
 - Litigation strategy

 OPEN MEETINGS LAW 



ACP: Who must be present?

- Attorney employed or retained by board
- No attorney = no ACP closed session!!

 OPEN MEETINGS LAW 



ACP: Who may be present?

- Only parties covered by ACP (“in confidence”)
- Unclear what local government employees are covered by ACP under NC law
- Best approach: assume ACP covers senior management and employees whose job duties relate to the legal communications at issue

 OPEN MEETINGS LAW 



ACP: Who may be present?

- Manager & deputies
- Clerk
- Department heads (if issue relates to their departments)
- Attorney's paralegal or other assistants
- Possibly agents/experts hired by attorney/board

 **OPEN MEETINGS LAW** 



ACP: Who may not be present?

- Employees not involved with ACP issue
- Opposing parties or their attorneys
- Taxpayers, citizen groups, developers

 **OPEN MEETINGS LAW** 

ACP: What info is confidential?

- ACP continues indefinitely if not waived
- Minutes/general account (probably) remain confidential if ACP not waived by board
- Should make minutes/general account public if information contained therein becomes public

 **OPEN MEETINGS LAW** 

ACP: What info is public?

- Terms of a settlement
- Subsequent communications from attorney to third-parties
- Minutes/general account if board waives ACP
 - individual board member?

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW



Tyler Mulligan
mulligan@sog.unc.edu
 REAL PROPERTY ACQUISITION
 LOCATION/EXPANSION OF BUSINESSES
 AND INDUSTRIES

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

**Acquisition of Real Property:
 What May Be Discussed?**

- G.S. 143-318.11(a)(5)
- Acquisition of real property by “purchase, option, exchange, or lease.”



UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

Acquisition of Real Property: What Actions May Be Taken?

- Establish the public body's negotiating position
- Instruct the public body's staff or agents concerning the negotiating position
- Presumably authorizes staff/agent to execute if seller agrees to terms




Image Source: <http://tinyurl.com/q4ez2xm>

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

Acquisition of Real Property: Negotiating Position

- What aspects of negotiating position?
 - “price and other material terms” of purchase contract
 - REMOVED in 1994: “to consider the selection of a site”




Image source: <http://tinyurl.com/ja7aav>

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

Acquisition of Real Property: Material Terms Subject to Negotiation

- Boney Publishers, Inc. v. Burlington City Council, 151 N.C. App. 651 (2002)
 - “terms are material to the contract and also *actually subject to negotiation*.”
 - “not a material term” so “required to disclose ... revealed in open session”
 - location of the property
 - Identity of the owners
 - Intended purpose of acquisition
 - If “acquisition involved different tracts of land with different owners, such facts could be protected ... because they would be material...”



UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

Real Property Acquisition: Who May Be Present ?

- Who may be present?
 - No express limitations, but..
 - Seller?



Image source: <http://tinyurl.com/p7wfgk>

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

Real Property Acquisition: What is Confidential after Meeting?

- What is confidential after the meeting?
 - Minutes of closed session conducted "in compliance with" open meetings law.
 - "... until disclosure would no longer frustrate the purpose of the closed session."
(Boney v. Burlington)



Image source: <http://tinyurl.com/qpexkm>

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

Location or Expansion of Industries or Businesses: What May Be Discussed?

- G.S. 143-318.11(a)(4)
- "To discuss matters relating to the location or expansion of industries or other businesses in the area served by the public body"
- 1997 addition (following *Maready v. Winston-Salem* (1996): Agree on "tentative list of economic development incentives"
- Approval of economic development commitment or expenditures "shall be taken in open session"



UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

Location or Expansion of Businesses: What May Be Discussed?

- 1979 Legislative Study Commission
 - Recommended exception for “Industrial Prospects” to protect confidentiality of industry “contacts with public groups.”
 - Proposed language (enacted): “industries or other businesses”
 - Prior to *Maready v. Winston-Salem* (1996) approving direct incentives



Image source: <http://tinyurl.com/sj342b>


OPEN MEETINGS LAW 

Location or Expansion of Businesses: What Actions May Be Taken?

- Discussion and “contacts with public groups” in closed session
- Tentative agreement on incentives
- NO final approval
 - Approval of economic development commitment or expenditures “shall be taken in open session”



Image source: <http://tinyurl.com/p7wfwgk>


OPEN MEETINGS LAW 

Location or Expansion of Businesses: Examples

- Are these “matters relating to the location or expansion of industries or other businesses?”
 - Residential real estate developer
 - Government facility
 - Economic development incentive policy
 - Incentive to retain company






Image source: <http://tinyurl.com/sj342b>


OPEN MEETINGS LAW 

Location or Expansion of Businesses: Who May Be Present?

- Who may be present?
 - No express limitations, but..
 - NDAs and trade secrets?



Image source: <http://tinyurl.com/p7wfvqk>


OPEN MEETINGS LAW


Location or Expansion of Businesses: What is Confidential after Meeting?

- What is confidential after the meeting?
 - Trade secrets are always confidential
 - Minutes “may be withheld”
 - Companies seek NDAs



Image source: <http://tinyurl.com/qpsixm>


OPEN MEETINGS LAW



Industry Location and Real Estate Acquisition Together: Industrial Parks

- Is siting of industrial park an “acquisition of real property” or a “matter relating to location or expansion of industries?”
- Attorney General Advisory Opinion 171 (Feb 13, 1995)
 - Noted 1994 amendments
 - Repealed: Authority to consider different sites
 - Retained: Discuss matters related to industry location and expansion
 - Conclusion: Open session unless
 - Deciding among multiple tracts is a matter to be negotiated
 - For limited purpose of discussing which businesses prefer which sites



Image Source: <http://tinyurl.com/3nn6fgh>


OPEN MEETINGS LAW

Bob Joyce
joyce@sog.unc.edu

PERSONNEL/PUBLIC OFFICIALS

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

“Personnel” closed sessions

“Employee”
 “Public officer”

- Sheriff—yes, officer and employee
- Register of deeds—yes, officer and employee
- Attorney—yes and no; officer yes, employee maybe
- Members of the board itself—statute says no
- Members of other boards—statute says no

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

3 kinds of personnel closed sessions

1. Developing a job offer to a candidate.
2. Investigating a complaint about or grievance by an employee.
3. Evaluating an employee.

The last one is the big one.

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

1. Developing a job offer

Establish, or instruct your negotiator about, “the amount of compensation and other material terms of employment contract or proposed employment contract.”
 GS 143-318.11(a)(4)

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

1. Developing a job offer

Need not contemplate a written contract.
 Must be an “employee”—not, for instance, a contracted attorney (this is why attorney was “yes and no” earlier).

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

2. Complaint or grievance

Closed session OK “to hear or investigate a complaint, charge, or grievance by or against an individual public officer or employee.”
 GS 143-318.11(a)(6)

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

2. Complaint or grievance

May be about an employee or officer.
 May be by an employee or officer.

UNC
SCHOOL OF GOVERNMENT

OPEN MEETINGS LAW

2. Complaint or grievance

About an employee
 Citizen may speak publicly at a meeting.
 Board may go into closed session to investigate.

UNC
SCHOOL OF GOVERNMENT

OPEN MEETINGS LAW

2. Complaint or grievance



By an employee
 Law does not seem to give employee right to speak in public meeting about grievance.
 Board may insist this discussion take place in closed session.

UNC
SCHOOL OF GOVERNMENT

OPEN MEETINGS LAW

3. Evaluating an employee

Closed session OK to “consider the qualifications, competence, performance, character, fitness” of a public officer or employee, or prospective officer or employee.
 GS 143-318.11(a)(6)



 **OPEN MEETINGS LAW** 

3. Evaluating an employee

To consider:

- qualifications
- competence
- performance
- character
- fitness

All of this is likely to include personnel file info
 Must comply with personnel records privacy



 **OPEN MEETINGS LAW** 

3. Evaluating an employee

So, only individuals with lawful access to personnel file information should be in attendance.

Wider attendance is possible if none of the information discussed comes from the personnel file.

Special concern about consideration of applicants.

 **OPEN MEETINGS LAW** 

3. Evaluating an employee

Must concern a particular employee--may not be used to go to closed session to set personnel policies or rules generally.

Could be used to consider the compensation of a particular employee—may not be used to go to closed session to set a general salary plan.

Must concern public officer or employee—not independent contractor.

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

Personnel actions in closed session

“Final action making an appointment or discharge or removal by a public body having final authority for the appointment or discharge or removal must be taken in an open meeting.”

GS 143-318.11(a)(6)

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

Personnel actions in closed session

“final action”

“appointment or discharge”

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

Personnel actions in closed session

“final action”
 Straw vote OK in closed session.
 Open session vote can be simple.

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

Personnel actions in closed session

“appointment or discharge”
 suspend
 reduce pay
 demote
 censure
 warn

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

“Personnel” closed sessions

3 kinds
 1. Job offer negotiations
 2. Complaints and grievances
 3. Consider performance, character, qualifications

Must concern particular employee/officer
 Take care not to disclose personnel file info
 Final actions must be in open session
 Straw votes in closed session OK
 Other kinds of actions in closed session probably OK

UNC SCHOOL OF GOVERNMENT OPEN MEETINGS LAW

QUESTIONS?

UNC
SCHOOL OF GOVERNMENT

OPEN MEETINGS LAW

Webinar Series On-Demand

- Overview ([On-Demand Purchase](#))
 - Definitions, scope, and basic requirements.
- Meeting Mechanics ([On-Demand Purchase](#))
 - Managing the process: Notice, cancelation, recessing, minutes, agendas, hearings, public comments, and more.
- Closed Sessions
 - Analysis of closed session authority, general accounts, voting in and talking about closed sessions, who can attend.

UNC
SCHOOL OF GOVERNMENT

OPEN MEETINGS LAW

Contact Information and Evaluations

- Trey Allen (tallen@sog.unc.edu)
- Frayda Bluestein (bluestein@sog.unc.edu)
- Norma Houston (nhouston@sog.unc.edu)
- Bob Joyce (joyce@sog.unc.edu)
- Chris McLaughlin (mclaughlin@sog.unc.edu)
- Kara Millonzi (millonzi@sog.unc.edu)
- Tyler Mulligan (mulligan@sog.unc.edu)

Please complete our evaluation:
https://unc.az1.qualtrics.com/SE/?SID=SV_734eD2j230xR15D

UNC
SCHOOL OF GOVERNMENT

OPEN MEETINGS LAW
