OPEN MEETINGS LAW SERIES: CLOSED SESSSIONS UNC OPEN MEETINGS LAW **About the Series** Overview (On-Demand Purchase)

About this Webinar

Closed Sessions

more. Closed Sessions

attend.

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- Closed Session Overview
- Role of attorney and clerk
- Discussion of key closed session types

- Definitions, scope, and basic requirements. Meeting Mechanics (On-Demand Purchase) - Managing the process: Notice, cancelation, recessing, minutes, agendas, hearings, public comments, and

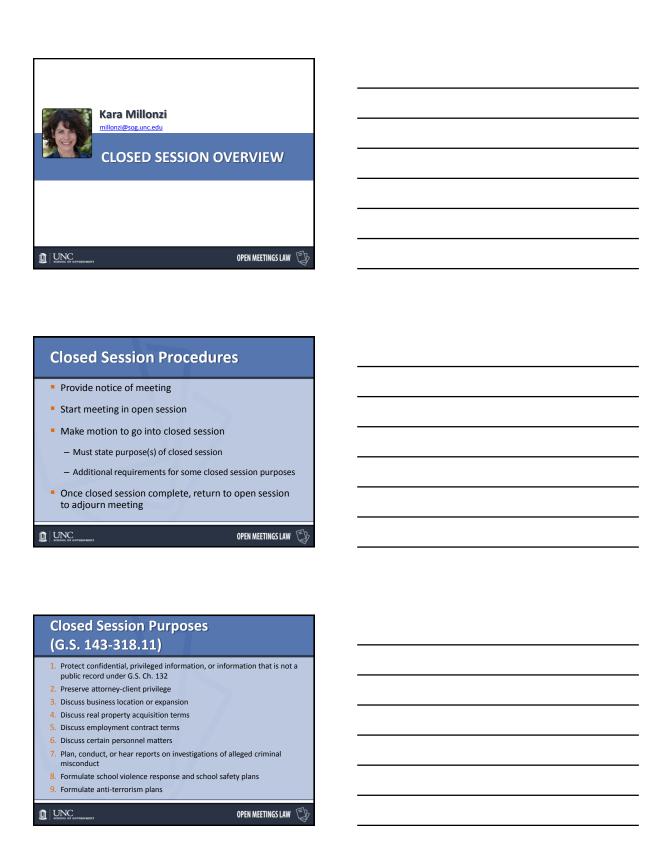
- Analysis of closed session authority, general accounts, voting in and talking about closed sessions, who can

- Attorney-client privilege
- Real property acquisition
- · Location of industries and businesses
- · Personnel and public officials



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Additional Procedural Requirements 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 Preserve attorney-client privilege If existing lawsuit, motion must identify parties to lawsuit Discuss business location or expansion 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 Discuss employment contract terms Discuss certain personnel matters Plan, conduct, or hear reports on investigations of alleged criminal misconduct Formulate school violence response and school safety plans Formulate anti-terrorism plans

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?

- 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.



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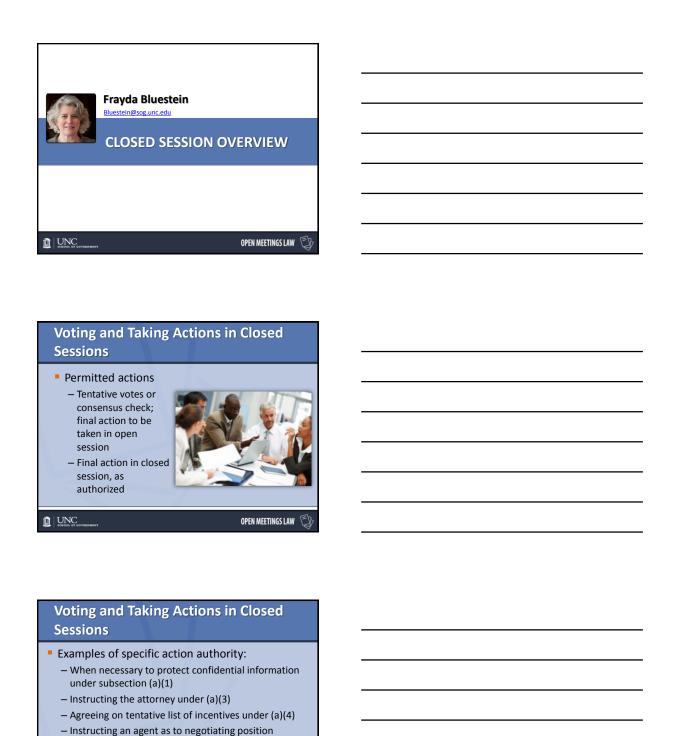


Disclosing Closed Session Discussions

- 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



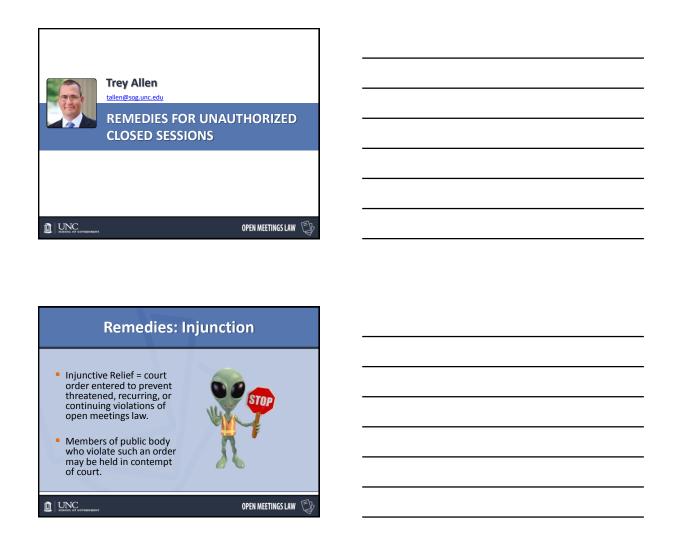




under (a)(5)

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 Disciplinary actions other than discharge or removal under (a)(6) and (a)(1) (ex: administrative leave)



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.



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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;



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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.



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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.













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



Minutes and General Accounts

- Required for every official meeting, including committees and advisory boards.
- - 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



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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



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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?





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

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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

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

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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 DPEN MEETINGS LAW 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)

ACP: What actions may be taken?
 Instructions to attorney re: litigation/claim
– Settlement– Litigation strategy
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ACP: Who must be present?
Attorney employed or retained by board
No attorney = no ACP closed session!!
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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
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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 UNC OPEN MEETINGS LAW ACP: Who may not be present? Employees not involved with ACP issue Opposing parties or their attorneys Taxpayers, citizen groups, developers UNC SCHOOL OF GOY 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

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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?

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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

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Real Property Acquisition: Who May Be Present? - No express limitations, but... - Seller? Image source: http://impurl.com/p?w/wyk





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

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://tinyarl.com/g7vdyuk











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)	
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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).	
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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)	
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May be about an employee or officer. May be by an employee or officer. 2. Complaint or grievance About an employee Citizen may speak publicly at a meeting. Board may go into closed session to investigate. 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 □ OPER METHOS LIN □	2. Complaint or grievand	ce		
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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) UNC 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 UNC SCHOOL OF GO 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 UNC SCHOOL OF GOT

3. Evaluating an employee
Must concern a particular employeemay 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.
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ML Saint Westmann
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)
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Personnel actions in closed session
"final action"
"appointment or discharge"
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Personnel actions in closed session	
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"final action"	
Straw vote OK in closed session. Open session vote can be simple.	
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Personnel actions in closed session	
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suspend reduce pay	
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"Personnel" closed sessions	
3 kinds	
Job offer negotiations	
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	
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QUESTIONS?
QOLSTIONS:
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Webinar Series On-Demand
Overview (<u>On-Demand Purchase</u>)
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Please complete our evaluation: https://unc.az1.qualtrics.com/SE/?SID=SV_734eD2j230xRI5D
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