

ASK THE LEAGUE

What is the difference between deliberative and executive session?

Deliberative and executive sessions are both exceptions to Vermont’s Open Meeting Law, which declares that all meetings of a public body (including all municipal boards, commissions, and committees) are to be open to the public. 1 V.S.A. §§ 312(e), 313.

Selectboards may occasionally vote to enter executive session in the course of their regular business, but they will generally only enter deliberative session when they are sitting as the local board of health or liquor control commissioners, or holding a hearing on a vicious dog complaint, an employee termination matter, or reclassification of a town highway. In contrast, other boards – such as zoning boards of adjustment, development review boards, boards of civil authority, and boards of abatement – will frequently use deliberative session in the course of their regular business, but will hardly ever have reason to use executive session.

The reason for this difference is that deliberative sessions may only be entered in conjunction with “quasi-judicial proceedings.” The definition of a quasi-judicial proceeding is a case in which the legal rights of one or more persons are adjudicated, which is conducted in such a way that all parties have an opportunity to present evidence and to cross-examine witnesses, and which results in a written decision that is appealable to a higher authority. In other words, a deliberative session occurs only when a board or commission is acting like a court.

The exception to the Open Meeting Law that allows for deliberative sessions is in recognition of the fact that a public body may need to weigh, examine, or discuss the reasons for or against a decision based on the evidence received at a quasi-judicial hearing. This same reasoning does *not*, on its own, justify entering into executive session. Executive sessions may be used only when the public body is considering a matter that is specifically exempted by law.

The acceptable reasons to go into executive session are listed in [1 V.S.A. § 313](#), and the ones most pertinent to municipal officials are listed below:

- (1) Contracts, labor relations agreements with employees, arbitration, mediation, grievances, civil actions, or prosecutions by the State, where premature general public knowledge would clearly place the State, municipality, other public body, or person involved at a substantial disadvantage;¹
- (2) The negotiating or securing of real estate purchase options;
- (3) The appointment or employment or evaluation of a public officer or employee;
- (4) A disciplinary or dismissal action against a public officer or employee; but nothing in this subsection shall be construed to impair the right of such officer or employee to a public hearing if formal charges are brought;
- (5) A clear and imminent peril to the public safety;

¹ This category requires a special review before an executive session is justified. Not only must the topic be listed here, but you must also make a specific determination, on a case-by-case basis, that some person or entity will suffer a “substantial disadvantage” if the matter is discussed in public. The timing of the disclosure must be an issue. If the subject is already well known to the community, there is less justification for entering into executive session and the board should proceed very cautiously.

- (6) Discussion or consideration of records or documents excepted from the access to public records provisions of [1 V.S.A. § 317].²

Executive session is an optional tool that should be used sparingly by municipal boards. Just because an issue is one of those included in the above list does not mean that the body must go into executive session to discuss it. In fact, a board or commission may only enter into executive session when the topic is one that is permitted by statute, and there is a motion to go into executive session that indicates the nature of the business of the executive session and is approved by a majority vote of the members present. Only the matter indicated in the motion may be discussed in executive session. 1 V.S.A. § 313(a).

Should executive session appear on the agenda?

While some think that it is poor form to warn an executive session because it presupposes that an executive session will be held, the League holds a different opinion. We believe that listing an item as “possible executive session” merely signifies that the public body may discuss and then enter into executive session and therefore it is a courtesy to anticipated attendees. It also serves as a reminder that the public body is required to take a public vote prior to entering executive session. The level of detail that is provided on the agenda will depend on the particular situation, but the agenda item should provide as much detail as possible without undermining the purpose for going into the executive session. The specific statutory citation should be provided.

Can a board take action in a deliberative or executive session?

A board may take action (make a decision) in a deliberative session if that action is documented and explained in a written decision issued by the board that will become a public record. Note: Boards can also use deliberative session to determine whether additional evidence is needed before closing a hearing. That decision (that additional evidence was warranted) wouldn’t necessitate a written decision. A board may *not* take action in an executive session except to exercise a real estate option. In all other cases, the board must come out of executive session and take a vote within the context of a public meeting.

What about minutes?

Minutes in either executive or deliberative session need not to be taken. 1 V.S.A. §§ 312(e), 313(a). If minutes are taken, they will be exempt from inspection and copying under Vermont’s Public Records Act. 1 V.S.A. § 317(24).

As a matter of course, members of municipal boards, committees, and commissions should always conduct themselves in an open and transparent manner. The Vermont Supreme Court has made it clear that the exceptions to the Open Meeting Law will be liberally construed in favor of openness and accessibility to meetings for the public. VLCT’s motto is “**When in doubt, stay out!**” And, of course, call the Municipal Assistance Center if you have any questions.

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² There are additional provisions in the statute, but the ones listed here are those that are most likely to apply to municipal bodies.