Are Conversations Held in Executive Sessions Confidential?

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While there is no explicit statutory requirement for conversations that occur in executive session to remain confidential, disclosing them could pose a very real harm to those who are subjects of the conversations, the town itself, or even to relationships amongst board members. Revealing executive session discussions also undermines the purpose of opting to use executive session in the first place.

> The existence of executive session reflects a balancing by the Legislature of the need for transparency – which is an essential element of an open and democratic government at any level – with the rights of individuals and the interests of their community.

Vermont's Open Meeting Law governs meetings of public bodies. A "meeting" is defined as "a gathering of a quorum of the members of a public body for the purpose of discussing the business of the public body or for the purpose of taking action." 1 V.S.A. § 310(3)(A). An executive session is considered a closed portion of an open meeting during which the law allows public bodies to discuss certain sensitive matters privately. There can be no executive session without first warning and opening a public meeting. A motion to enter executive session must be made during an open meeting of a public body and must indicate the nature of the business to be discussed. A public body can only enter executive session to discuss one of the enumerated topics listed under 1 V.S.A. § 313(a). These topics range in subject matter from pending litigation to security response measures, but a common element is that they each deal with highly sensitive information, the public disclosure of which could do real harm. After a motion to enter executive session is introduced, a public body may move into executive session upon majority approval of its members present.

The existence of executive session reflects a balancing by the Legislature of the need for transparency – which is an essential element of an open and democratic government at any level – with the rights of individuals and the interests of their community. As U.S. Supreme Court Justice Louis Brandeis famously wrote, "sunlight is said to be the best disinfectant." Unfortunately, too much can prove harmful; as

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Vermont's own Supreme Court wrote, "[a]s objectionable as the image is of government conducted in secrecy's darkened chambers, it is hard to imagine a government functioning with no opportunity for private exchange among its ministers, with no moments of speculation, venturesome alternatives, or retractable words." *Killington, Ltd. v. Lash*, 153 Vt. 628 (1990). For example, if a municipality were in the midst of a contract negotiation, its selectboard would not want to discuss the proposed terms in public as that would give the other side a clear advantage at the bargaining table. In that instance, premature public knowledge of the subject would place the municipality at a substantial disadvantage by potentially costing taxpayers thousands of dollars.

Although nothing explicitly in the law requires discussions held in executive session to be kept confidential, nor is any legal penalty imposed for disclosing its contents, everything regarding its structure contributes to the oft shared impression that conversations in executive session should stay in executive session. For example, attendance in executive sessions is limited to the members of the public body and, in its discretion, its staff, clerical assistants, legal counsel, and/or anyone else who is the subject of the discussions or whose information is needed. Acting as gatekeeper to these sessions allows the public body to control who has access to the information disclosed. Once a majority has decided these conversations should be limited to those people included, the information should stay between only those people to preserve this intent.

> The subjects discussed in executive session must be handled with care as there may be harm associated with public knowledge of the matters discussed whether to the town itself or to private parties.

Moreover, once convened, no other matter may be considered other than that for which the executive session was convened. This safeguard prevents executive session from being used as a mere pretext for discussions that otherwise would have

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to take place in public. It's also worth noting that even though executive session allows for the discussion of a very limited number of topics, any resulting actions must still be taken in open session. The law forbids public bodies from taking any formal or binding action in executive session except for actions relating to the securing of real estate options. These measures ensure that executive session is only used for the purpose for which it was intended – to privately discuss a limited number of sensitive subjects. Whereas minutes are required to be taken for every public meeting, they are not required of executive session; if they are taken, they're considered exempt from public copying and inspection under Vermont's Public Records Act. No official public record is required due to the overtly sensitive nature of the proceedings.

Executive session carries with it an implicit expectation of confidentiality as disclosing its contents would undermine its very purpose: to freely discuss information meant to be kept private. The confidentiality of these conversations is why executive session was created and why it is used. The subjects discussed in executive session must be handled with care as there may be harm associated with public knowledge of the matters discussed whether to the town itself or to private parties. Given these considerations, members of public bodies are likely to share an expectation of confidentiality. Although the law does not affirmatively prevent such disclosures, there is a likely deterrent factor to consider: what one member may wish to disclose today, they may not wish to be disclosed tomorrow. Another possible factor to consider is one's own conscience. As is often the case in matters such as these, what's in the best interests of the public may be open to debate. The decision of whether to disclose conversations that took place in executive session can be a very personal one as some may feel that disclosing certain information would better serve the public. As a servant of the people, these decisions need to be made with the best interests of your municipality foremost in mind.

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