

**Buffalo Niagara Coalition
for
Open Government**

BEHIND CLOSED DOORS
EXECUTIVE SESSIONS
&
THE PUBLIC'S RIGHT TO KNOW

October 25, 2017

The Buffalo Niagara 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 Buffalo Niagara 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 Buffalo Niagara 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.

Buffalo Niagara Coalition for Open Government

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The following members also contributed to the completion of this report: **Nancy Correa, and Ken Foit, Esq.**

Our meetings are held at 5:30 p.m. the first Thursday of the month, at the Williamsville Library on Main Street. 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 Meeting Law must be open to the public. There are two ways that a public body can legally discuss public business in private. Under Section 102(3) of the Open Meetings Law an executive session can be held. Another way that the public can be excluded involves exemptions 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 Buffalo Niagara Coalition for Open Government reviewed the meeting minutes of sixteen local governments in Erie and Niagara County. 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;
- How much time is spent in executive sessions.

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.

2. Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body.

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.

Our Study

The Buffalo Niagara Coalition for Open Government reviewed the executive sessions that took place during work sessions and board meeting of sixteen municipalities in Erie and Niagara County from January 1, 2017 to July 1, 2017.

During this six-month period, seventy-eight executive sessions were held, for an average of five per municipality.

Number of Executive Sessions Held by Municipality:

Town of Lewiston	11
Cheektowaga	10
Town of Tonawanda	9
Town of Lockport	9
Town of Hamburg	8
West Seneca	7
Amherst	7
Town of Lancaster	7
Wheatfield	6
Niagara County	2
Village of Lewiston	2* (minutes from 1/17 to 4/17, were not online)
Erie County Legislature	0
Buffalo Common Council	0
North Tonawanda	0
Niagara Falls	0
City of Lockport	0

Kudos to the Erie County Legislature, Buffalo Common Council, North Tonawanda City Council, Niagara Falls City Council and the Lockport City Council, for not holding any executive sessions!

Hours Spent in Executive Session (Avg. 6.7 hours)

(.1 equals six minutes)

West Seneca	12.5
Town of Tonawanda	9.1
Town of Lewiston	8.7
Town of Hamburg	7.6

Town of Lancaster	5.3
Town of Lockport	4.5
Amherst	4.2
Wheatfield	2.1
Village of Lewiston	?*
Cheektowaga	?*
Niagara County Leg.	?*

*Cheektowaga, the Niagara County Legislature and the Village of Lewiston do not document the time an executive session starts or ends in their meeting minutes. Meeting minutes for the Village of Lewiston from January 2017 to May 2017, were not available online because they were sent to a document management firm for the purpose of making them available electronically.

Attached as Appendix A, listed in alphabetical order are the executive session motions that were made for each municipality, as documented in their meeting minutes.

In five out of seven sessions held in West Seneca, the executive session lasted longer than the public portion of their meeting.

In seven out of nine sessions held in the town of Tonawanda, the executive session lasted longer than the public portion of their meeting.

The Three Most Common Reasons Given for Holding an Executive Session

- 1) To discuss litigation
- 2) To discuss a personnel matter
- 3) To discuss a contract

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. **Only two of the seventy-eight executive session motions reviewed described the subject being discussed with particularity.**

The two motions done correctly were by the Town of Amherst and the Niagara County Legislature.

In seventy-six other instances, when a motion for executive session was made, the subject of the litigation or contract being discussed was not stated with specificity. Time after time the motion for executive session stated the reasons being discussed as:

- litigation
- pending litigation
- contract negotiations
- proposed litigation
- personnel matters
- legal matter
- contractual matter
- employee issue

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

While litigation is the most common reason for holding an executive session it is important to note that Court decisions have held that the purpose of discussing pending litigation privately is so that litigation strategy can be discussed without disclosing it to an adversary.

The belief that a decision may lead to litigation does not justify conducting the public’s business in an executive session.

An update on the status of a legal proceeding does not rise to the level of a discussion regarding strategy and therefore would not be an appropriate basis for an executive session.

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 executive session to discuss our litigation strategy in the case of the XYZ Company v. the Town of Tonawanda.”

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

“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.

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.

Conclusion

During the six-month period studied, 97% of the time a motion for an executive session was made incorrectly (76 out of 78). 97% of the time the public is being left in the dark as to what is being discussed behind closed doors by motions that do not describe the legal matter, personnel matter or contractual matter being discussed.

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

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 goal of this report is to educate local government officials and municipal attorneys that changes need to be made in how executive sessions are conducted.

Over the year's incorrect customs and traditions regarding executive session motions have taken hold. Executive session motions are 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 Buffalo Niagara Coalition for Open Government looks forward to working with elected officials and municipal attorneys to ensure that the public is made aware of what matters are being discussed behind closed doors in executive sessions. We hope that changes can be made without having to resort to litigation or mandated training.