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PUBLIC MEETINGS
AND
PUBLIC RECORDS

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INTRODUCTION

The Alabama Legislature in 2005 repealed the state's 1920s-era Sunshine Law, *Ala. Code* § 13A-14-2, and replaced it with a modern, comprehensive law. The new law, Title 36, Chapter 25A, is known as the Open Meetings Act (OMA).

The public policy behind both laws is the same: Governmental bodies, including school boards, are required to conduct their deliberations in public meetings for which public notice has been given, except on those specifically defined occasions when executive sessions are authorized.

This guide to the OMA is just that: a guide. It is not the law, and it is being written at a time when OMA has yet to be construed by courts or even attorney general opinions. Consequently, school boards should remain alert for new understandings of the OMA that inevitably will follow in the years to come and should consult their board attorney before making decisions about how the OMA applies to a particular situation.

The OMA defines and uses certain terms. Correct application of the OMA depends on correct understanding of these terms, which are included in the glossary in Appendix A at the end of this booklet. It is recommended that the reader review these definitions.

THE OMA

The fundamental provision of the OMA is that

The deliberative process of governmental bodies shall be open to the public during meetings. ... Except for executive sessions ... or as otherwise expressly provided by other federal or state statutes, all meetings of a governmental body shall be open to the public and no meetings of a governmental body may be held without providing notice ...

In short, the OMA requires that a board's deliberations be public, unless an executive session is specifically authorized by the OMA or another federal or state statute.

The OMA covers not only the school board but also board committees, subcommittees and any advisory group or task force appointed by the board. Task forces and advisory groups need not have any school board members as members: Merely being appointed by the board brings it under the purview of the law. Thus, the school board textbook committee comes under the OMA, but an advisory panel appointed by the superintendent does not. A board-appointed advisory group is not required under the OMA to notify the public of its

meetings, unless members are compensated with public funds. Still, the better practice is for such advisory groups and task forces to comply with the OMA's notice provisions.

WHAT IS A MEETING?

For school boards, "meeting" is:

- A prearranged gathering of a quorum of a board, board committee or board subcommittee, during which the board (or committee or subcommittee) is authorized to exercise the powers it possesses to approve the expenditure of public funds. For example: a school board's regular or called meetings.
- A gathering, prearranged or not, when members deliberate specific matters that, at the time, the participating members expect to come before the board at a later date. For example: If board members attend a work session or retreat or gather if board members attend at a local restaurant and, for example, agree who will be the new football coach at the local high school, that constitutes a meeting under the OMA.

A "meeting" does not include occasions when a quorum of a board (or committee, or subcommittee):

- Attends social gatherings, conventions, conferences, training programs, press conferences, media events, or otherwise gathers, so long as the members do not deliberate matters that they expect to come before the board at a later date; or
- Gathers, in person or electronically, with state or federal officials to make a report, obtain information, or seek support for issues of importance to the board.

Notice that a "meeting" requires a "quorum" of a board, committee or subcommittee. For the purpose of OMA only, "quorum" is a majority of the voting members, of any such body, except that, for ad hoc meetings, newly elected or appointed members who have not taken office count toward determining if a quorum is present. Thus, if a board has a quorum of three and one sitting member meets with two newly elected members who have not yet taken office, a quorum is present, and any discussion about board matters constitutes a "meeting" under the OMA. In other words, newly elected/appointed board members cannot, prior to taking office, team up with existing board members to decide issues which are (or will be) before the board.

NOTICE

A board cannot have a "meeting" without giving public notice. Different types of meetings as defined under the OMA have different notice requirements.

MEETINGS REQUIRING SEVEN WORK DAYS' NOTICE (annual organizational meetings)

If a governmental body is required by law to meet at a specified time and place, it must post notice of this meeting at least seven days in advance. County boards are required to have an organizational meeting annually in November (*Ala. Code* § 16-8-4). City boards are required to meet annually in May (*Ala. Code* § 16-11-5). These statutes broadly specify a time for the meetings – November and May – but they do not specify a location. Nonetheless, it is recommended that boards provide seven days' advance notice for annual organizational meetings.

MEETINGS REQUIRING 24-HOUR NOTICE (regular and called meetings, budget hearings)

For non-emergency meetings, notice must be given "as soon as practicable" after the meeting is called, but always at least 24 hours before the meeting. If, during a meeting, a board sets the date for its next meeting, it seems "practicable" to post notice of the next meeting at the end of its current meeting or not long thereafter.

MEETINGS REQUIRING ONE-HOUR NOTICE (emergency meetings and meetings to accept a resignation)

With all the meetings, the OMA specifies that notice should be given "as soon as practicable." But it does allow a minimum of one-hour notice in two situations. These are:

- When emergency circumstances require immediate action to avoid physical injury to persons or property.
- When a board meets solely to accept the resignation of a public official or employee.

NO NOTICE REQUIRED (non-meetings)

Public notice is not required for these gatherings, which do not meet the definition of a “meeting” under the OMA:

- Gatherings for advisory boards or task forces created solely to make recommendations on public policy issues and composed of people who are not compensated for their service with public funds.
- “Non-meetings” when a quorum of the board or a committee gathers for social events, conventions, conference, training programs, press conferences, media events or other occasions but does not deliberate specific matters that are expected to come before the board or committee later.
- Occasions when a quorum of the board gathers with state or federal officials to make a report, obtain information or seek support for issues of local importance to the board.

NO NOTICE REQUIRED (quasi-judicial actions, formal hearings)

Notice is not required when the board gathers as a quasi-judicial body for a conference that could properly be conducted as an executive session under the OMA or other state law.

Notice of all meetings must be posted “on a bulletin board, at a place convenient to the public” in the board's central administrative office. In addition, the notice must be sent directly to any member of the public or news media who registers with the board to receive notice of meetings. Notice may be sent by e-mail, telephone, fax, U.S. mail, or any other method reasonably likely to provide the notice. A board may establish reasonable rules for registering for direct notice and for payment of any associated cost, such as postage. It also may – but is not required to – submit notice of meetings to the Secretary of State for posting on a web site. Additional forms of notice may be provided at the board's discretion.

All notices must identify the board by name and include the date, time and place for the meeting. The notice also must include a general description of the nature and purpose of the meeting. If a preliminary agenda is drafted, it must be posted in the same manner as the notice of the meeting. The OMA does not appear to require the board to send the preliminary agenda to parties who receive direct notification of the meeting but doing so is the better practice, particularly if the agenda can be mailed easily. Matters that were not included on the preliminary agenda may be discussed at the meeting, consistent with board policy.

PARLIAMENTARY PROCEDURE

Meetings must be conducted according to rules of parliamentary procedure adopted by the board, except in particular cases when statutes provide otherwise. It is recommended that meetings of boards, committees and subcommittees follow parliamentary procedures adopted by the board, unless state law requires a different procedure. For example, the OMA defines procedures that must be used to go into executive session; these must be followed instead of the board's parliamentary procedures, if there is a conflict.

VOTING

Voting must be public. It may not occur in executive session, except when the board is acting in a quasi-judicial capacity as defined by the OMA. Voting may be by voice or written ballot, provided that each member's vote is identified publicly. Secret votes are forbidden. Boards must record in the minutes how each member votes on a motion to convene an executive session. However, boards also should record members' votes on other motions, as evidence that voting was not secret.

RECORDS OF THE MEETING

The OMA requires boards to maintain accurate minutes for every meeting, except executive sessions. The minutes must include the time, date and place of the meeting, the members who were present, and the actions taken at the meeting. It is recommended that the minutes also include a statement that notice for the meeting was properly posted and provided to those who requested direct notification.

After the minutes are approved by the board, they become a public document and must be made available to the public “as soon as practicable.” Usually, minutes are approved at the board's next regular meeting.

In addition, the OMA allows the public, including news media, to attend and openly record (audio or video) and/or photograph public meetings so long as the meeting is not disrupted. Boards may adopt reasonable rules to regulate this activity. There is no right to record or photograph executive sessions.

EXECUTIVE SESSIONS

The OMA allows boards to go into executive session for 10 reasons only. In order to convene an executive session for any reason except to conduct a quasi-judicial proceeding (*as discussed on page 9*) or a formal hearing (*as discussed on page 6*), a board must:

- have a quorum present;
- convene for a properly noticed, prearranged public meeting;

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- consider a motion to go into executive session for one of the 10 reasons authorized by the OMA;
 - in certain circumstances, receive an opinion that the executive session complies with the OMA;
 - pass the motion by majority vote;
 - record in writing each member's vote; and
 - announce whether it will reconvene in public after the session and, if so, approximately what time.

These steps are mandatory, and minutes should reflect they were all taken. An executive session may be convened for the board to discuss any of these 10 topics:

Personal/Professional. The general reputation and character, physical condition, professional competence, mental health or job performance of certain public employees may be discussed in executive session. However, the job performance of an elected or appointed official or public employee who is required to file a Statement of Economic Interests by *Ala. Code* § 36-25-14 (which would include superintendents, board members, principals and administrators as well as employees who make \$50,000 a year or more) must be discussed in public. The salary, compensation and job benefits of such individual public officials or public employees may not be discussed in executive session, except as allowed by other provisions of the OMA.

The OMA defines certain key terms, including “general reputation and character,” “professional competence,” “job performance,” “public official,” and “public employees.” In some instances, a correct understanding of these definitions is needed to correctly apply the OMA. Nor is it clear how these definitions may interact. For example, the OMA allows a board to discuss the health problems of an appointed official in executive session, but it must discuss that official's job performance in open session. Thus, it is unclear whether the impact of that health problem on the official's job performance also may be discussed in executive session. Situations such as this underscore the need for a board to consult with its attorney before going into executive session.

Formal Hearings. To hold an executive session using this exception, the discussion must be “expressly allowed by federal or state law” to consider discipline or dismissal or to hear formal, written complaints or charges against an employee or student.

For example, under the Family Educational Rights and Privacy Act, a board is generally barred from publicly discussing non-directory student information. But discussions about a written complaint or disciplinary action would, by necessity, involve such information. Thus, under FERPA, a student expulsion hearing would be conducted in an executive session using the Formal Hearings exception. Another example would be the *Loudermill* conference provided by the Teacher Tenure and Fair Dismissal Acts before an employee can be terminated or disciplined.

The Formal Hearing exception also allows executive sessions to discuss such charges against an individual corporation, partnership or other legal entity subject to regulation by the board.

Litigation. Under this exception, a board can meet in executive session to discuss legal ramifications of and legal options for pending litigation, controversies not yet being litigated but imminently likely to be litigated or those imminently likely to be litigated if the board pursues a proposed course of action. A board may meet with its attorney, mediator or arbiter, as appropriate, to discuss these matters in executive session. Before the board goes into executive session, it must receive a written or oral declaration from an attorney licensed to practice in Alabama that this exception applies to the planned discussion. The declaration must be included in the minutes of the meeting. When such an executive session is held, the board must deliberate the action it will take based on its attorney's advice in public.

The term “imminently likely” comes from the Alabama Supreme Court's decision in *Auburn University v. The Advertiser Co.*, 867 So.2d 293 (Ala. 2003), in which the court said:

The attorney-client privilege exception of the Alabama Sunshine Law [§ 13A-14-21] includes a meeting between a board, body, or commission and its attorney to discuss the legal ramifications of, and legal options for, not only pending litigation but also controversies not yet being litigated but imminently likely to be litigated, or imminently likely to be litigated if the board pursues a proposed course; provided, however, that the discussion at the meeting may not include the deliberations among the board, body, or commission toward its decision on what option to choose or option to follow.

Id. at 305, citing with approval *Van Hooser v. Warren County Bd. of Ed.*, 807 S.W.2d 230 (Tenn. 1991) and *Baltrip v. Norris*, 23 S.W.3d 336 Tenn., App. 2000).

The facts in *Van Hooser* illustrate the application of the “imminently likely” standard. In that case, a school board met in executive session with its lawyer to discuss settlement of a dispute with one of its teachers, Van Hooser. She had paddled a number of students in violation of board policy and the specific instructions of her principal. At the time of the meeting, no charges had been brought against her under Tennessee’s Teacher Tenure Act, and no lawsuit was pending. Nevertheless, the Tennessee Supreme Court said, “We agree . . . that the board had a right to meet with its attorney to discuss the pending controversy pertaining to [Van Hooser].”

Security. This exception covers discussion of security plans, procedures, assessments, measures or systems as well as the security or safety of people, structures, facilities and infrastructure. These issues may be discussed in executive session if public disclosure “could reasonably be expected to be detrimental to public safety or welfare.” If the discussion involves “critical infrastructure” or “critical energy infrastructure information,” as defined by federal law, the owners and operators of the infrastructure must be given notice and an opportunity to attend.

Criminal Investigations. This exception covers discussion that would disclose an undercover law enforcement agent or informer or that involves the criminal investigation of a person (excluding public officials) in which allegations of specific misconduct have been made. This exception also allows executive sessions to discuss whether to file criminal charges. Before a board can discuss criminal investigations in executive session, the attorney general, assistant attorney general, district attorney, assistant district attorney or a law enforcement officer with the power to make arrests must tell the board, orally or in writing, that public discussion of the matter “would imperil effective law enforcement.” This statement must be entered into the minutes of the meeting.

Land Acquisition. This exception allows the board to discuss in executive session what consideration it is willing to offer or accept for the purchase, sale, exchange, lease or market value of real property. In addition to board members, only persons representing the interests of the board, such as a real estate agent or the board attorney, may be present during the executive session. Before the board can enter into a contract to purchase, exchange or lease real property, the “material terms” of the contract must be disclosed in a public meeting. This exception may not be used if a condemnation action has begun to acquire the real

property. If a board member with a personal interest in the real property attends or takes part, “land acquisition” cannot be used to justify an executive session.

It appears that, as a prerequisite for going into executive session, board members should declare whether each member has an interest in the real property, even if the identity of the real property owner is not disclosed to the public. These declarations should, of course, be recorded in the minutes.

Trade Negotiations. The board may meet in executive session to discuss negotiations involving matters of trade or commerce where it is in competition with private industry or entities. Before the board votes to go into executive session, a person involved in a recruitment or retention effort or someone with personal knowledge that the discussion will involve matters protected by the Alabama Trade Secret Act must declare (orally or in writing) that public discussion of the matter would be detrimental to the board’s position or negotiations or the “location, retention, expansion or upgrading of a public employee or business entity” in the area served by the board or would disclose information protected by the Alabama Trade Secrets Act. (*Ala. Code* § 8-27-1, *et seq.*) The declaration must be included in the board’s minutes.

Collective Negotiations. This exception covers discussion of strategy to prepare for negotiations between the board and a group of its employees. Before the board goes into executive session, its representative in the negotiations must declare (orally or in writing) that public discussions of this matter would be detrimental to the board’s negotiating position. The declaration must be included in the minutes of the meeting.

Quasi-Judicial. This exception covers deliberation and discussion of evidence or testimony presented during public or contested cases when the board is acting in its quasi-judicial capacity. It also covers the board’s vote on such matters. In order to go into executive session citing the quasi-judicial exception, the board must either:

- vote upon its decision in an open meeting; or
- issue a written decision that can be reviewed by a hearing officer, administrative board, court, or other body with authority to conduct a hearing or an appeal of the matter that is open to the public.

For example, under the newly revised Teacher Tenure and Fair Dismissal Acts, an employee must be given an opportunity to address the board in response to charges against him or her or a proposed action that the employee challenges.

This meeting takes the form of what is commonly referred to as a *Loudermill* hearing. It may be closed – or in executive session – under the terms of those statutes. If the *Loudermill* hearing is closed to the public, then it stands to reason that the board's discussion of the employee's responses also must be closed to the public even though neither statute expressly authorizes deliberations in executive session. Moreover, the board could deliberate the employee's responses under the exception for quasi-judicial hearings, so long as it votes in public. Further justification for an executive session might be found under the exception related to professional competence, mental health, etc., depending on the employee and the particular circumstances of a case.

Statutory. This exception covers any discussion that federal or state law requires to be held in executive sessions.

See pullout chart titled “Possible Grounds for Executive Sessions” for an analysis of how the statutory grounds for executive sessions can be applied to specific factual situations depending on the classification of personnel involved. The chart, beginning on page 24, also looks at how the statutory grounds for executive sessions can be applied to situations commonly encountered by school boards.

PRIVILEGE

The OMA grants board members and employees absolute privilege and immunity from suit for any statement made during a meeting that relates to an action pending before the board, so long as the meeting is conducted in conformance with the OMA. Consequently, a board should document in its minutes the steps it takes to ensure compliance with the OMA's requirements for that meeting.

ENFORCEMENT

School boards that violate the OMA may be sued by any Alabama citizen, the local district attorney, attorney general or any media organization (whether located in Alabama or not). The suit must be filed in the county where the board has its office. However, a board member cannot file such an action against other members of the same board. The members who allegedly violated the OMA must be named as defendants in their official capacities.

The complaint must be signed and sworn by the plaintiff and must allege that:

- proper notice of a “meeting” was not given; or
- the defendants disregarded provisions of the act in a public meeting; or

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- while in executive session, the defendants discussed matters other than those included in the motion to convene an executive session; or
 - the defendants violated some other provision of the OMA.

The lawsuit must be filed within 60 days after the plaintiff learned of (or should have known about) the alleged violation and no later than two years after the alleged violation.

The complaint must be served on the defendants personally. They have seven business days from the date of service to file an initial response, and the court must hold a preliminary hearing within 10 business days after that (or, if no initial response is filed, not later than 17 business days after the filing of the complaint).

At the hearing, the plaintiff must establish by a preponderance of the evidence that the meeting occurred and that each defendant attended. In addition, the plaintiff must present substantial evidence of one of the four claims identified above. If the court finds the plaintiff has met these burdens, the court sets a schedule for discovery and a hearing on the merits.

At the merits hearing, if the alleged violation occurred in a public meeting, the plaintiff must prove all allegations by a preponderance of the evidence.

On the other hand, if the violation is alleged to have occurred in an executive session, the defendants must prove by a preponderance of the evidence that the discussion was limited to matters contained in the motion to convene the executive session. They may present documents to show what was discussed in the session, which the court will review in chambers or otherwise outside public view. If the defendants prevail, every person who attends the in-chambers proceeding is barred from disclosing the matters revealed or from using them in another legal proceeding.

Within 60 days of the preliminary hearing, the court must enter a final order, unless the parties and the court agree to waive the 60-day limit. The order can impose declaratory and injunctive relief. The court also may enter temporary restraining orders or preliminary injunctions before entering a final order. The final order must specify the violation(s) on which the ruling is based.

For each meeting held in violation of the OMA, the court is required to enter a civil penalty of up to \$1,000 or half of each defendant's monthly salary on the board, whichever is less. These penalties cannot be paid or reimbursed by the board. If the violation relates to an executive session, monetary penalties can be imposed only against board members who voted to go into executive session and who remained in it while the board discussed matters beyond the scope of the motion to convene the executive session.

In certain circumstances, the court may invalidate action taken in a meeting that violates the OMA. For that to happen, the complaint must be filed within 21 calendar days after public discovery of the illegal act, and the act must not be the result of mistake, inadvertence or excusable neglect. However, the action cannot be invalidated if that would “unduly prejudice” third parties who have relied “in good faith” on the act and changed their position. Action taken in a public meeting conducted as required by the OMA cannot be invalidated because of a violation that occurred before the public meeting.

A board is authorized by the OMA to pay for the legal defense of members who are charged with violating the act.

OPEN RECORDS ACT

Alabama's Open Records Act (*Ala. Code* § 36-12-40) provides in pertinent part as follows:

Every citizen has a right to inspect and take a copy of any public writing of this state

State law (*Ala. Code* § 41-13-1) defines “public records” as:

All written, typed or printed books, papers, letters, documents and maps made or received in pursuance of law by public officers of the state, counties, municipalities and other subdivisions of government in the transactions of public business.

WHAT IS A PUBLIC WRITING?

The sweeping language (i.e., “any” and “all”) used in these statutes and the increasing demands of the media for access to seemingly private documents raise legitimate questions regarding the types of records a board may shield from public scrutiny. The Alabama Supreme Court in *Stone v. Consolidated Publishing Co.*, taking both of the quoted statutes into account, defined a “public writing” as a record “reasonably necessary to record the required business and activities of a public office so that the status and condition of such business and activities can be known.”

The Alabama appellate courts have said financial records (*Stone*), resumes and employment applications (*Chandler v. The Birmingham News*), reports from attorneys (*The Advertiser Company v. Auburn University*), and audit reports (*Bedingfield v. The Birmingham News Company*) may be “public writings” within

the meaning of the statute. According to the courts, each of these types of records may be reasonably necessary to record a public entity's required business and activities. All records, however, do not appear to be covered. For example, memoranda of conversations or notes of board members or the superintendent, as well as most routine correspondence, are probably excluded. They are simply not reasonably necessary to record the board's required business. On the other hand, personnel files, records of purchases, financial records, minutes of meetings, student records and employee discipline records probably are “public writings.”

One area of concern is performance evaluations. Generally, employee evaluations are subject to public disclosure, particularly summaries that are part of the state Board of Education's evaluation program for certified staff: Professional Education Personnel Evaluation (PEPE). Since PEPE exclusively covers areas of professional competence, PEPE summary sheets are public documents and generally are subject to disclosure. However, if a Social Security number is included on it or other similar documents that are generally considered “public writings,” the Social Security number must be redacted before any document or copy is released to the public. The public records law does not specifically *require* redacting information, but it seems to be within the “rule of reason” a court would use to determine whether the record should be disclosed. In other words, what would otherwise be a disclosable document with the information redacted should still be considered a disclosable document if the information can be redacted with minimal administrative burden. Consultation with your school board attorney is advised.

WHAT ARE THE EXCEPTIONS?

“Public writings” are subject to disclosure unless the document in question falls within one of the four exceptions listed in *Stone*. The four types of “public writings” which need not be disclosed are:

1. Recorded information received by a public officer in confidence;
2. Sensitive personnel records;
3. Pending criminal investigations; and
4. Records the disclosure of which would be detrimental to the public's best interest.

In the case of *Chambers v. The Birmingham News Company*, the court tells public officials:

The exceptions set forth in *Stone* must be strictly construed and must be applied only in those cases where it is readily apparent the

disclosure will result in undue harm or embarrassment to an individual, or where the public interest will clearly be adversely affected, when weighed against the public policy considerations suggesting disclosure.

Moreover, the court in *Chambers* declared a *presumption of required disclosure* and imposed upon the party refusing disclosure the burden of proving that the writings or records sought fall within one of the *Stone* exceptions and warrant non-disclosure. This is, to say the least, a heavy burden.

There are circumstances, however, when one of the four exceptions allows a board to withhold a “public writing” from public scrutiny. Confidential reports and correspondence from the board attorney are the most obvious examples. In *The Advertiser Co. v. Auburn University*, the trial court held that an attorney’s report was a “public writing.” Normally, however, attorney reports are received in confidence. In that case, Auburn University had waived the attorney-client privilege by furnishing copies of the report to others. The court appears to have said that confidential communications to and from attorneys, if not disclosed to third parties, fall within an exception to the statute. Another case dealing with exceptions to the general rule of disclosure is *Birmingham News Co. v. Muse*, which should be read for a more complete picture of the law in this area.

Generally, information in personnel files such as employee background, date of hire, discipline records, promotions and salary is subject to disclosure. However, there may be information in such files which may be withheld. In *Blankenship v. City of Hoover*, the court held that, while the rate of pay of individual employees must be provided, federal W-2 income tax forms may be withheld because such forms contain sensitive information such as whether the employee has elected to participate in income-deferral plans, insurance plans, or similar benefits which are more personal than public. Other examples of “personal” records contained in personnel files which probably can be withheld include health records and records regarding religious preferences or practices.

One difficulty school officials will encounter in this area is the release of information related to termination or discipline of a school employee. Usually, this information is considered a public record subject to disclosure. Whether this information is subject to immediate public disclosure while the employment action is pending will depend on the grounds for board action and surrounding circumstances. The due process concept of a “liberty interest” might, in certain circumstances, make superintendents, board members, and other board employees targets for lawsuits by employees who allege injury as a result of making public false or incorrect information of a stigmatizing nature. (*The*

Water Works and Sewer Board of the City of Talladega v. Consolidated Publishing, Inc., 2004 WL 68538 (Ala. 2004)).

Stigmatizing statements are those likely to tarnish the employee’s good name, reputation, honor, or integrity, or those that seriously damage the employee’s standing and associations in the community and would likely foreclose or limit future employment. Under current case law, a statement need not involve a matter of “moral turpitude” in order to be stigmatizing. (*Clemons v. Dougherty County*, 684 F.2d (11th Cir. 1982)) Nonetheless, lack of professional competence, reputation alone, or being labeled “hard to get along with” are insufficient to implicate a liberty interest under current case law.

The Alabama Supreme Court has ruled that records containing stigmatizing information are sensitive personnel records and can be withheld until the employee has had a meaningful opportunity to clear his or her name. Once that has occurred, the court held the information is no longer a sensitive personnel record and is subject to disclosure. Alabama courts have yet to define what constitutes a “meaningful opportunity,” but a pending case in Montgomery County likely will provide additional guidance.

At a minimum, under state education employment laws it appears no disclosure could occur until after the employee’s conference with the board and board action, if the grounds are stigmatizing. (A strong argument can be made that an employee who elects to have a public conference has waived his or her privacy interest.) However, case law could be construed as prohibiting disclosure until the arbiter rules and the time to file an appeal has expired or an appellate court has ruled. School boards should consult with their board attorney before releasing information related to a termination case or other disciplinary action. In such circumstances, the board should discuss with its lawyer whether this

information may be withheld from public disclosure until the employee has completely exhausted the opportunity to respond to the stigmatizing information, including the completion of any appeal. Withholding this information may provoke a challenge from news media who disagree with this interpretation of the law.

CASE CITATIONS

Miglionico v. The Birmingham News Company, 378 So.2d 677 (Ala. 1979).

Dale v. The Birmingham News Company, 452 So.2d 1321 (Ala. 1984).

Stone v. Consolidated Publishing Co., 404 So.2d 678 (Ala. 1981).

Chambers v. The Birmingham News Company, 552 So.2d 854 (Ala. 1989).

The Advertiser Company v. Auburn University, 579 So.2d 645 (Ala. Civ. App. 1991).

Bedingfield v. The Birmingham News Company, 595 So.2d 1379 (Ala. 1992).

Blankenship v. City of Hoover, 590 So.2d 245 (Ala. 1991).

Slawson v. Alabama Forestry Commission, 631 So.2d 953 (Ala. 1994).

Dunn v. Alabama State University Board of Trustees, 628 So.2d 519 (Ala. 1993).

Auburn University v. The Advertiser Company, 2003 WL 21205832 (Ala. 2003).

Birmingham News Co. v. Muse, 638 So.2d 853 (Ala. 1994).

The Water Works and Sewer Board of the City of Talladega v. Consolidated Publishing, Inc., 2004 WL 68538 (Ala. 2004).

Clemons v. Dougherty County, 684 F.2d 1365 (11th Cir. 1982).

APPENDIX A

DEFINITIONS

The following definitions are from the OMA. As used in and for determining the applicability of the OMA, the following words shall have the following meanings:

DELIBERATION: An exchange of information or ideas among a quorum of members of a governmental body intended to arrive at or influence a decision as to how the members of the governmental body should vote on a specific matter that, at the time of the exchange, the participating members expect to come before the body immediately following the discussion or at a later time.

EXECUTIVE SESSION: That portion of a meeting of a governmental body from which the public is excluded for one or more of the reasons prescribed in Section 7(a) of this act.

GENERAL REPUTATION AND CHARACTER: Characteristics or actions of a person directly involving good or bad ethical conduct, moral turpitude or suspected criminal activity, not including job performance.

GOVERNMENTAL BODY: All boards, bodies and commissions of the executive and legislative departments of the state or its alleged subdivisions or municipalities which expend or appropriate public funds; all multimember governing bodies of departments, agencies, institutions and instrumentalities of the executive and legislative departments of the state or its political subdivisions or municipalities, including, without limitation, all corporations and other instrumentalities whose governing boards are comprised of a majority of members who are appointed or elected by the state or its political subdivisions, counties or municipalities; and all quasi-judicial bodies of the executive and legislative departments of the state and all standing, special or advisory committees or subcommittees of, or appointed by, the body. The term

“governmental body” does not include any of the following:

1. Legislative party caucuses or coalitions.
2. Alabama appellate or trial courts, except as required by the constitution of this state or any body governed by rules of the Alabama Supreme Court.
3. Voluntary membership associations comprised of public employees, counties, municipalities, or their instrumentalities which have not been delegated any legislative or executive functions by the legislature or governor.

JOB PERFORMANCE: The observed conduct or actions of a public employee or public official while on the job in furtherance of his or her assigned duties. Job performance includes whether a person is meeting, exceeding or failing to meet job requirements or whether formal employment actions should be taken by the governmental body. “Job performance” does not include the general reputation and character of the person being discussed.

MEETING:

1. Subject to the limitations herein, the term “meeting” shall only apply to the following:
 - A. The prearranged gathering of a quorum of a governmental body, a quorum of a committee or a quorum of a subcommittee of a governmental body at a time and place which is set by law or operation of law.
 - B. The prearranged gathering of a quorum of a governmental body, a quorum of a committee or a quorum of a subcommittee of a governmental body during which the body, committee or subcommittee of the governmental body is authorized, either by law or otherwise, to exercise the powers which it possesses or approve the expenditure of public funds.
 - C. The gathering, whether or not it was prearranged, of a quorum of a governmental body, a quorum of a committee, or a quorum of a subcommittee of a governmental body during which the members of the governmental body deliberate specific matters that, at the time of the exchange, the participating members expect to come before the body, committee or subcommittee at a later date.
2. The term “meeting” shall not include:
 - A. Occasions when a quorum of a governmental body, committee, or subcommittee attends social gatherings, conventions, conferences, training programs, press conferences, media events or otherwise gathers as long as the governmental body does not deliberate specific matters

that, at the time of the exchange, the participating members expect to come before the governmental body at a later date.

- B. Occasions when a quorum of a governmental body gathers, in person or by electronic communication, with state or federal officials for the purpose of reporting or obtaining information or seeking support for issues of importance to the governmental body.

OPEN OR PUBLIC PORTION OF A MEETING: The “open” or “public” portion of a meeting is that portion which has not been closed for executive session in accordance with this Act, for which prior notice was given in compliance with this Act, and which is conducted so that constituents of the governmental body, members of the media, persons interested in the activities of the governmental body, and citizens of this state could, if they desired, attend and observe.

PROFESSIONAL COMPETENCE: The ability of an individual to practice a profession within the profession's acceptable standards of care and responsibility. A profession is a vocation requiring state certification or passage of a state licensing examination that may only be granted to or taken by persons who have completed at least three years of college-level education and obtained at least a college-level degree.

PUBLIC EMPLOYEE: Any person employed at the state, county or municipal levels of government or their instrumentalities, including governmental corporations and authorities, who is paid in whole or in part from state, county or municipal funds. A public employee does not include a person employed on a part-time basis whose employment is limited to providing professional services other than lobbying, the compensation for which constitutes less than 50 percent of the part-time employee's income.

PUBLIC FUNDS: Taxes or fees charged or collected by a governmental body or from the sale of public property, including, but not limited to, matching funds from the federal government or income derived from the investment of taxes or fees.

PUBLIC OFFICIAL: Any person elected to public office, whether or not that person has taken office, by the vote of the people at state, county or municipal levels of government or their instrumentalities, including governmental corporations, and any person appointed to a position at the state, county or municipal levels of government or their instrumentalities, including governmental corporations.

QUORUM: Unless otherwise provided by law, a “quorum” is a majority of the voting members of a governmental body. Except where a governmental body is prohibited from holding a non-emergency meeting as defined in Section 2(b)a.1. between the date of election of members and the date such members take office, any person elected to serve on a governmental body shall be counted in the determination of whether a quorum of that governmental body is present, except for any meeting as defined in Section 2(6)a.1. and 2., beginning on the date of certification or the results of the general election. In the case of appointment to a governmental body, any person shall be counted in the determination of whether a quorum of the governmental body is present, except for any meeting as defined in Section 2(6)a.1. and 2., from the date that the appointment is made or issued whether or not the appointment is effective on that date.

APPENDIX B

SAMPLE PROVISIONS TO INCLUDE IN MINUTES FOR BOARD MEETINGS TO DOCUMENT COMPLIANCE WITH THE OMA

Documenting that the requirements were met:

- [An/A organizational/regular/called] meeting of the _____ Board of Education was held at [location] on [date], commencing at [time].
- Present at the meeting were the following board members: [list board members who are present].
- The superintendent affirmed to the board that notice of this meeting was posted on the public bulletin board in the central office on [date notice was posted] and that notice of the meeting also was sent to all persons and entities who properly requested it by [e-mail or other medium] on [date]. A copy, showing to whom and when notice was sent, is attached to these minutes.
- A preliminary agenda for the meeting was available on [date]. The superintendent affirmed the preliminary agenda was posted on the public bulletin board in the central office on [date] and was sent to all persons and entities who properly requested it by [e-mail or other medium] on [date]. A copy, showing to whom and when it was sent, is attached to these minutes.

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- The following person and entities attended and [videotaped/ audio taped/ photographed] the meeting: [names of persons doing such]. *(Note: This is not required but can help protect the board from allegations later.)*

Documenting executive sessions:

- During the public part of the meeting, [name] moved the board to go into executive session for the purpose of [name the OMA exception that applies, e.g., to discuss the general reputation and character of an employee]. [Name] seconded the motion. The following members voted in favor of the motion: [names]. The following members voted against the motion: [names]. The following members abstained from voting: [names].
- **If the litigation exception applies** - The purpose of the executive session was to discuss litigation or matters not being litigated but imminently likely to be litigated if the board follows a proposed course of action, mediation or arbitration. The board's attorney, [name], who is licensed to practice law in the state of Alabama, told the board [orally/in writing] that this exception is applicable to the planned discussion. [A signed copy of the attorney's declaration is attached to the minutes.]
- **If the security exception applies** - [Name], being the [owner/registered agent of the owner], and [name], being the [operator/registered agent of the operator], of a “critical infrastructure” relevant to the board's discussion in executive session, were notified of the meeting and invited to attend. A copy of the notice is attached to the minutes.
- **If the crime investigation exception applies** - [Name], being a [law enforcement officer with the power to make arrests/district attorney/assistant district attorney/attorney general/ assistant attorney general] has told the board [orally/in writing] that public discussion of the matters to be discussed in executive session would imperil effective law enforcement if disclosed outside the executive session. [A signed copy of [name's] statement is attached to the minutes.]
- **If the land acquisition exception applies** - The purpose of this executive session was to discuss what the board will [offer/accept] for the [purchase/sale/exchange/lease] of real property. Before the executive session, each of the following board members stated that he or she has no personal interest in the real property under consideration: [names of board

members]. Only these board members attended or participated in the executive session. The following board member(s) stated that he or she had a personal interest in the real property under consideration and did not attend or participate in the executive session: [name(s)]. The following person(s), who represent(s) the interest of the board in the proposed transaction, also attended the executive session: [name(s)]. No person attending the executive session is aware of a condemnation proceeding having been filed to acquire the real property.

- **If the trade negotiations exception applies** - The purpose of this meeting was to discuss preliminary negotiations involving matters of trade or commerce in which the board is in competition with private individuals or entities or other government entities, or to discuss matters or information of the character defined or described in the Alabama Trade Secrets Act. [Name], who is involved in the retention or recruitment effort or who had personal knowledge that the discussion involved matters protected by the Alabama Trade Secrets Act, advised [orally/in writing] that holding the discussion in public would have been detrimental to the competitive position of a party to the negotiations or to the location, retention, expansion or upgrading of a public employee or business entity in the area served by the board, or that it would have disclosed information protected by the Alabama Trade Secrets Act. [A signed copy of [name's] statement is attached to the minutes.]
- **If collective negotiations applies** - The purpose of the executive session was to discuss strategy in preparation for negotiations between the board and a group of public employees. [Name], who [will represent/represents] the interests of the board in the negotiations, advised the board [orally/in writing] that having this discussion in public would be detrimental to the negotiating position of the board. [A signed copy of [name's] statement is attached to the minutes.]

Note: There is no requirement under the OMA to convene a regular board meeting and vote to conduct an executive session when the board is operating under the quasi-judicial or formal hearing exceptions (*See pages 6 to 9*). As a result, there would not be minutes in which to document the session.

Before convening in executive session:

- Before the board went into executive session, [name of the presiding officer] announced to the public that the board [would/would not] reconvene at [approximately [time]].

**APPENDIX C
SAMPLE NOTICE FOR BOARD MEETING**

The next meeting of the Board of Education is [date], 200____, at [time] a.m./p.m. at [location]. A preliminary agenda includes these items:

- a.
- b.
- c.
- d.

The _____ board meets on the first [day of the week] of each month at [time] o'clock at [location].

**APPENDIX D
SAMPLE CERTIFICATION**

_____ (insert name), an attorney licensed to practice in the state of Alabama, certifies that the executive session proposed by the _____ Board of Education involves:

- _____ pending litigation
- _____ imminently likely litigation
- _____ imminently likely litigation if the board chooses a particular course of action
- _____ mediation
- _____ arbitration

And thereby is covered by the Alabama Open Meetings Law, *Ala. Code* § 36-25A-1, *et seq.* The purpose of the session is to discuss with me the designated item.

Attorney

Date

APPENDIX E

Can an Executive Session be Held to Discuss the Issue?

The grounds cited here are thought to be the most likely statutory grounds for the particular issue. Depending on the facts, other grounds for executive sessions under to the Open Meetings Act also might apply. See pages 6-9 for complete discussions of the grounds. Your school board attorney can advise you regarding the applicable statutory grounds for your situation.

Issue	Circumstance	Possible Statutory Grounds
Alleged embezzlement	If discussed under litigation exception, issue must be imminently likely to be litigated or imminently likely to be litigated if the board pursues a certain course of action. It also could involve reputation (personal/professional exception).	Litigation Personal/Professional
Architect selection	If discussion involves the general reputation or professional competence of the architect.	Personal/Professional
Audit findings	If findings point to financial improprieties by personnel.	Personal/Professional
Board self-evaluation	Generally not permissible.	N/A
Central office reorganization	If discussion involves general reputation and character, professional competence or job performance of employees ¹ earning less than \$50,000 who are not administrators or principals.	Personal/Professional
Gang activity at certain school	If discussion involves the safety or security of people or facilities.	Security
Job candidate background	If discussion involves general reputation and character; professional competence of certified staff; or job performance of employees ¹ earning less than \$50,000 who are not administrators or principals.	Personal/Professional
Land purchase	Material terms must be discussed in a public meeting prior to contract execution. Prohibited if either 1) condemnation	Land Acquisition

Issue	Circumstance	Possible Statutory Grounds
Mediation of lawsuit	Discussion must be with respect to litigation or issues within the board's jurisdiction.	Litigation
Office of Civil Rights investigation of racial discrimination	Matter must be imminently likely to be litigated or imminently likely to be litigated if the board pursues a certain course of action. It could also involve the reputation (personal/professional) exception.	Litigation Personal/Professional
Offer to purchase surplus building	Material terms must be discussed in a public meeting prior to contract execution. Prohibited if either 1) condemnation involved or 2) board member has financial interest in the transaction and participates in session.	Land Acquisition
Offer to settle lawsuit	Permissible because litigation pending.	Litigation
Personnel report	If discussion involves general reputation and character; professional competence of certified staff; or job performance of employees ¹ earning less than \$50,000 who are not principals or administrators.	Personal/Professional
Questionable purchases	Reputation or, if job performance is an issue, employee must earn less than \$50,000 and cannot be an administrator or principal.	Personal/Professional
Report on lead in school water fountains	When imminently likely to be litigated or imminently likely to be litigated if the board pursues a certain course of action.	Litigation
Report on student drug testing program	Generally not permissible.	N/A

¹ The term employee excludes the superintendent who is considered a public official. Public officials, administrators, principals and employees earning \$50,000 or more must file a statement of economic interest under the state ethics law and are treated differently under the state Open Meetings Act in regard to executive sessions for job performance.

Issue	Circumstance	Possible Statutory Grounds
Reduction in Force	Generally not permissible.	N/A
School board officer selection	Generally not permissible.	N/A
School expansion due to new industrial prospect	Generally not permissible.	N/A
School Safety Plan	Disclosure reasonably must be expected to be detrimental to public safety.	Security
Student expulsion	Hearing should be private to protect student identity unless an open hearing is requested on behalf of student.	Formal Hearing
Threat to sue school board	Issue must be imminently likely to be litigated or imminently likely to be litigated if the board pursues a certain course of action.	Litigation

ALABAMA ASSOCIATION OF SCHOOL BOARDS

The Alabama Association of School Boards is the official voice of the state's local school boards and other boards governing K-12 education agencies. AASB is dedicated to improving educational opportunities for all Alabama public school students through the improvement of local lay management of public schools.

By pooling resources through its membership, AASB provides a wide range of services to local school boards which one school board could not provide economically.

Among the services available to school boards are:

- Boardmanship training and development;
- Risk management programs;
- Policy research, review and development; and
- Legal assistance.

AASB also represents school boards before state government, promoting local lay control of public education. Alabama's school board interests, too, are represented on the national scene through AASB's participation in the National School Boards Association. Information on successful programs, innovative management techniques and the latest government action is available through several AASB publications regularly sent to members.

AASB is continually striving to provide members with the resources and services they need to be effective education leaders.

For more information on AASB and its services, please contact AASB at www.theaasb.org; 334/277-9700; or P.O. Drawer 230488, Montgomery, AL 36123-0488.

