

# Why You Should Try to Avoid Having Closed Sessions



**E**arlier this year I was sitting in the monthly board meeting of a local small utility. It was a cold and rainy night and coffee and fresh cookies sat on the table, obligingly provided by the board president's wife. Based on refreshments alone, it was a great meeting! I was there to update them on a legal matter involving an engineering dispute and was a little disappointed not to see that item on the agenda. But this was my first face to face meeting with the board and the manager assured me that we would take up the matter. I didn't work for this utility as their permanent attorney but up until this point I had been impressed by their professionalism. It was almost as if they had read my previous articles and taken them to heart! On the engineering matter in question, they had requested an RFP/RFQ, identified a clear scope of work, had me help them negotiate a fair contract and were all set to update their system map in anticipation of a bond election, issuance of revenue bonds and system expansion. Right on track in my book.

There were even a couple of interested citizens in the room. Folks who seemed to take a genuine interest in the system operations and regularly attended the meetings. (Or maybe they were there for the cookies; I reminded myself that I really needed to get the recipe.) So we proceeded through the typical agenda: operational updates, treasurer's report, routine old business items, some new business items concerning employee training and some proposed expenditures. I gave a contented sigh. Nothing like a good group of folks working together efficiently to provide utility services to their friends and neighbors. And fresh cookies. THIS is what makes rural life good, I thought. Then my happy bubble

burst. The board president announced that the board needed to talk to the lawyer about some things. Another board member chimed in and said that a developer had approached him after hearing about the possible system expansion and he wanted to update the board because he was worried that the location of the development could impact real estate prices for a new utility office. And another board member said that he had received a tip about improper multiple connections at a property owned by a prominent local businessman and wanted to discuss that. And ANOTHER board member said he wanted to discuss who might run for his seat in the fall as he wasn't going to be able to serve again. Then the board president uttered those fateful words: "Well if we've got all the routine business out of the way, I guess we'll go ahead and go into our closed session. Thanks as always for coming folks. If you'll go ahead and leave, we'll get on with things. Hey, feel free to take some cookies for the road." And they docilely trooped out into the rain, cookies in hand. The manager locked the door behind them and we sat down to discuss all the items mentioned above, NONE OF WHICH, including my matter, SHOULD HAVE BEEN DISCUSSED IN CLOSED SESSION.

I was stunned. Clearly this otherwise well-run district had absolutely no idea how to handle closed sessions. How

could they be so far off the mark? That made me think that maybe it's time to revisit closed sessions and open meetings. Not necessarily all the case law and statutes but just the general concepts and procedures that should be followed. State law requirements will vary but there are some very basic concepts that a system should follow. Start with asking yourself IF you need to have a closed meeting at all. If you

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do then HOW do you have one? (Please note that almost every state has online resources for governmental bodies on sunshine laws, so it's easy to get specific information for your state.)

### If You Have To Have One . . .

Generally, the best overall way to think about closed meetings (executive sessions) is that you really don't want to have them. Sometimes you have no choice, but where at all possible, closed meetings should be avoided. Even properly closed meetings can cause controversy and citizens' complaints. Improperly closed meetings are the number one reason that an attorney general or state auditor will investigate a city or water district. I believe strongly that the best way to be clear and transparent and accountable to your customers is to avoid closed meetings if at all possible. And you have to think about the underlying reason to have a closed meeting in the first place – to protect the interests of the utility. A closed meeting gives a board or council the chance to discuss certain sensitive topics without public commentary before the results are made public. That's the key here. Closed meetings are NEVER a place for a board to take secret actions that they think are permanently hidden.

### How You Have One . . .

Ironically, this is often the trickiest part of the closed meeting process. Even boards that are justified in holding a closed meeting fail to follow their respective state laws, which normally set out specific procedures. Here is a basic checklist: Announce, Conduct, Report.

First, we all know that as a well-run utility, you will have a meeting notice and draft agenda posted in a public place no less than 24 hours prior to the meeting. Even if not a requirement, it's a good idea to provide that agenda. If a portion of that public meeting will be closed, that should appear on the agenda, along with a reference to the exact section of the state law that authorizes you to close the meeting. See KSA 75-4319 for more.

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## Reasons to hold an executive session are limited

Of course sometimes a closed meeting is necessary to preserve the best interests of the utility. Here are the three most common reasons for a utility to have a closed meeting.

1. If it involves litigation, a legal dispute or attorney-client communications about such a matter, then you should go into closed session. However, after that matter is resolved, the terms of the settlement, including any money paid, must be disclosed.
2. If the utility is leasing, purchasing, or selling real estate, and as would commonly be the case, disclosing the details would impact the price of the land. Again, after the deal is done, all the details of the deal must be made public.
3. If the utility is hiring, firing or promoting an employee and information relating to their performance or merit is discussed. This is the trickiest area for closed meetings, and for board action in general, because employment issues are such a minefield under the best of circumstances. Employment issues are usually the largest cause of legal disputes for employers and cost more than almost any other area in legal fees. In Kansas there can be no binding action taken in a closed session, and there should be no minutes. The meeting returns to open session automatically at the time specified in the motion to go into executive session, not on a motion to re-enter regular session. See KSA 75-4319 for more information.

This list is not exhaustive and it's not written in stone, but it is a great basic jumping off spot for most utilities.

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Second, okay so you've announced it, but how do you conduct it? Some states allow you to have an entirely closed meeting and some states, like Kansas allow you to have a portion of the open meeting that is reserved strictly for closed or executive discussion. For a purely closed meeting, you should always use a roll call vote to go into and out of the meeting. In Kansas, any motion to recess for a closed or executive meeting must include a statement of (1) the justification for closing the meeting, (2) the subjects to be discussed during the

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closed or executive meeting and (3) the time and place at which the open meeting shall resume. That motion, including the required statement, must be recorded in the minutes of the meeting. The meeting automatically returns to open status at the time specified in the motion, so no vote is needed to come out of closed session.

Again, in Kansas, the executive session is for discussion only. No binding action or votes are taken in closed session. You discuss the matter in executive session but you vote in open session. Members of

the public get to come back at the time specified in the motion, so ideally you have a reception area where they can wait, or the board itself can leave the room and return. Sometimes this all seems like a Chinese fire drill, with people coming and going, but you **MUST** let the public back in when the closed session ends! Closed meetings are where board members can speak openly and frankly about sensitive topics and hopefully work through the issues. It is not where decisions are made.

Now how about calling a closed meeting on the fly, during a public meeting? In most states it would be a violation of state law, because no 24-hour notice was posted. Theoretically, as long as the proper motion was made you can do this in Kansas. But it is a bad idea! Even if it isn't a violation, it is a bad, bad idea. If an issue should arise that panics the board so much that it feels the need to go into a closed meeting, then stop, drop and roll. Let's say that a customer stands up in the middle of the public comments section and claims that they saw a utility employee stealing items from a neighbor's tool shed (true story). The board president needs to stay in control of the meeting. Instead of quickly and improperly closing the meeting so that the board could "interview" the accuser (which is what happened and was the beginning of a slippery slope that led to an expensive wrongful termination dispute with the employee), the board should have asked the accuser to have a private discussion with the utility manager after the meeting. Then if needed, a closed meeting could have been scheduled to discuss the merits of the accusations. It is perfectly acceptable to notify a member of the public that the board is not going to have a discussion, either publicly or privately about a topic until the matter has been investigated and the board has been briefed. I know that board members can feel like a target in a shooting gallery at times, but knowing

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the law and the procedures will allow you to remain in control of meetings.

So now that we have some basic skills, let's analyze the board meeting I attended with the pop up closed meeting. What went wrong?

Well, first there was no notice. I'm a stickler for noticing up executive sessions. It forces the board to plan the meeting and really decide whether or not a closed session is necessary or allowed. So it was one of those meetings where the board slightly panicked and was worried about what to do with information they had received. Even if there were grounds for an executive session, there was no proper motion made to go into the meeting. And if you look at the issues, none of them qualified for a closed meeting, including my legal update.

- **Legal update** – with the goal being to avoid going into a closed meeting, the legal update really didn't need to be discussed in a closed meeting. The issue was really just a dispute over the scope of work, no suit had been filed, and all I really planned on doing was explaining about the letter that I had received from the engineer and suggesting some ways forward. Technically, yes a legal matter, but realistically, not one that HAD to be discussed privately. In fact, it wouldn't have hurt to have the engineer hear that we were discussing legal options!
- **System expansion** – okay, I think that this board member thought that maybe this fell under the real estate exception, but quite frankly it was too speculative to really impact real estate prices on any tract of land. We didn't even have a concrete plan to build a satellite office in the area of the expansion. Heck we hadn't even finished arguing over the work with the engineer that involved the first step in getting the revenue bonds to build the expansion!
- **Improper multiple connections** – I realize that the board thought this was touchy topic, given the identity of the property owner, but what they needed to do was ask the manager (outside of the

meeting) to check it out. NOT bring up the guy's name and then go into a closed meeting to discuss it! That was probably guaranteed to upset the guy!

- **Board vacancy?** I understand; really I do. You want to hand pick possible candidates so that the board is effective and dissension-free. But you simply cannot go into closed session to discuss this. It simply does not fall under ANY of the reasons to have a closed meeting. In fact, it is the reason that we have open meeting laws. The citizens deserve to know about board vacancies in order to decide if they want to run. It's the building block of democracy.

So what, you may ask, came of the improperly closed meeting? Well, I asked the board president if I could address the board about closed meeting topics because I was concerned about the situation. Instead of discussing any of the topics in detail, I explained why they should NOT discuss them. Then they agreed to have the minutes reflect that the closed meeting was called in error and that no discussion was held. And now they call me if they want to hold a closed meeting in order to see if it makes sense. And I almost always say no.

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*Elizabeth Dietzmann is an attorney who has worked with rural and municipal utility boards across the country as general and special counsel on various issues. She can be reached at [edietzmann@earthlink.net](mailto:edietzmann@earthlink.net).*



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