

**MEMORANDUM**

**TO:** Mayor Ruby, City Council, Management and Clerk  
**FROM:** Sam Severin, MCS, City Attorneys  
**RE:** Executive Session Limitations and Notice Requirements  
**DATE:** January 26, 2025

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Executive Sessions are governed by Alaska’s Open Meetings Act. The Dillingham City Code largely mirrors the Open Meetings Act. Consistent implementation and adherence to the rules really starts with understanding the policy behind the rules. When in doubt as to the application and interpretation of the specific rules, the statutory policies clearly dictate that doubt must be resolved in favor of public meetings.

**Sec. 44.62.312. State policy regarding meetings.**

(a) It is the policy of the state that

(1) the governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the people's business;

(2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;

(3) the people of this state do not yield their sovereignty to the agencies that serve them;

(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

(5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created;

(6) the use of teleconferencing under this chapter is for the convenience of the parties, the public, and the governmental units conducting the meetings.

(b) AS 44.62.310(c) [executive sessions] and (d) shall be construed narrowly in order to effectuate the policy stated in (a) of this section and to avoid exemptions from open meeting requirements and unnecessary executive sessions. (emphasis added).

This policy statement is unusually strong language for the Alaska Legislature. Use of the executive session must be considered against this backdrop. Subsection (b) specifically states that the use and propriety of executive sessions is to be construed narrowly – with the underlying assumption that meetings are public and that it is not up to the government to determine what the people should know.

The Dillingham City Code States:

**2.08.010 Meetings—Public participation.**

Meetings of all municipal bodies shall be public as provided in AS 44.62.310 and AS 44.62.312. The council or other municipal body shall provide reasonable opportunity for the public to be heard at regular and special meetings.

**2.09.050 Executive sessions.**

A. The following subjects may be discussed in an executive session, from which the public is excluded:

1. Matters the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit;
2. Subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;
3. Matters which by law are required to be confidential.

B. The following shall be discussed in executive session when the best interests of the city so require:

1. Negotiations with labor organizations representing city employees;
2. Discussions of pending or threatened lawsuits in which the city has an interest.

C. If excepted subjects are to be discussed, the council may go into a closed or executive session by a vote of four members taken at a public meeting, at which session only those subjects shall be considered as mentioned in the motion for the executive session, and no ordinance, resolution or order shall be passed or voted upon or claim allowed at such session.

**Specificity is Required:**

AS 44.62.310(b): The motion to convene in executive session must clearly and with specificity describe the subject of the proposed executive session without defeating the purpose of addressing the subject in private.

Citing the code is not legally sufficient. For example, executive sessions are often used to consider settlement of a lawsuit. An agenda statement or a motion to go into executive session which states “Matters the immediate knowledge of which would clearly have an adverse effect upon the finances of the government unit” is not an appropriate title. Nor is “Discussion of lawsuit.” Instead, “To provide settlement authority to the City attorney in case 3DI-10000-CI” may be appropriate, depending on the context. If settlement has not been discussed in the case, and the very mention of it puts the city at a tactical disadvantage, that would not be appropriate. Of course, stating the amount of a contemplated offer, or the reasons, will usually defeat the purpose of the executive session by revealing negotiation strategy.

Simply citing the code and restating the law provides no indication to the public what its government is doing. There is not a single right way to style the motion, but it must be “clear” and “specific.” Again, considering the policy reasons, or the “why,” can be helpful while crafting a motion. We will provide sample motion language.

### **The Executive Session Must Stay on the Noticed Topic:**

It can be hard to avoid discussions spilling over into related topics. But doing so erodes public trust and is contrary to state and city law. The code states:

DMC 2.09.050C: If excepted subjects are to be discussed, the council may go into a closed or executive session by a vote of four members taken at a public meeting, *at which session only those subjects shall be considered as mentioned in the motion for the executive session*, and no ordinance, resolution or order shall be passed or voted upon or claim allowed at such session. (emphasis added)

In the context of hiring decisions, the Alaska Supreme Court has provided some guidance. A city council is authorized to hold an executive session under the reputation provision of the Open Meeting Act to discuss an applicant's "personal characteristics and habits."<sup>1</sup> However, "Ordinarily an applicant's reputation will not be damaged by a public discussion of his or her qualifications relating to experience, education and background or by a comparison of them with those of other candidates."<sup>2</sup>

In other words, if the rationale for executive session is "matters which tend to prejudice the reputation and character of any person," then the executive session is limited to harmful, embarrassing, or particularly private matters. Discussion of the hiring process itself, for example, would not be permitted.

To avoid the lengthy executive sessions, it may make sense to include a suggested time limit in the motion. Then the council could return to open session and vote to extend the executive session, as necessary. Alternatively, using a timer in the executive session and entertaining a motion to adjourn at a certain time would avoid the potential for inadvertent "creep" outside the noticed topic.

### **The Right to Request a Public Session:**

A common reason for executive sessions is personnel matters such as hiring, termination or employee evaluations. The most applicable code section is DMC A.2: Subjects that tend to prejudice the reputation and character of any person, *provided the person may request a public discussion*. (emphasis added)

In finding the University of Alaska violated the Open Meetings Act, the Alaska Supreme Court stated, "We therefore hold that the University was under the implied statutory obligation to inform Geistauts of the time and place of all meetings in which his application would be considered and to inform him that he had the right to request that the meetings be open to the public."<sup>3</sup>

This individual notice can be accomplished with an e-mail from the clerk, for example, in advance of the meeting, notifying the individual of the right to request a public discussion. The person who is being discussed has the right to request the discussion be public. To exercise

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<sup>1</sup> *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316, 1326 (Alaska 1982).

<sup>2</sup> *Id.*

<sup>3</sup> *Univ. of Alaska v. Geistauts*, 666 P.2d 424, 429 (Alaska 1983).

that right, they must be aware they are being discussed. A clear statement in the agenda and/or clear and specific motion also ensures the individual understands their rights may be implicated.

**Remedies:**

The primary statutory remedy for violation of the Open Meetings Act is that the council's action may be voided.<sup>4</sup> Regardless of whether an action is voided, any challenge would be expensive and diminish public trust.

Allegations of violations of OMA are also sufficient grounds for recall.<sup>5</sup> Violation of the Open Meetings Act (or city code) constitutes a prima facie showing of misconduct in office and/or failure to perform prescribed duties sufficient to justify recall for cause. Misconduct in office, for purposes of recall, is construed broadly. There is not a "scienter" requirement, meaning it is not necessary to show intent to violate the law for a recall petition.<sup>6</sup> There is "no de minimis exception under Alaska law mandating that an alleged ground for recall must reach a certain threshold of severity to be certified."<sup>7</sup>

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<sup>4</sup> AS 44.62.310 (f)

<sup>5</sup> Meiners v. Bering Strait Sch. Dist., 687 P.2d 287, 302 (Alaska 1984).

<sup>6</sup> Jones v. Biggs, 508 P.3d 1121, 1126 (Alaska 2022).

<sup>7</sup> *Id.*