

ASK THE LEAGUE, OCTOBER 2016

Can a selectboard conduct employee interviews in executive session?

The institutions that we've built up over the years to protect our individual privacy rights from the government don't apply to the private sector. The Fourth Amendment doesn't apply to corporations. The Freedom of Information Act doesn't apply to Silicon Valley. And you can't impeach Google if it breaks its 'Don't be evil' campaign pledge.

Senator Al Franken (D-Minn.)

If you're one of those people who thinks the problem with the public sector (i.e., the government) could be solved if it just functioned more like the private sector, then you've probably experienced trying to hire a municipal employee.

To answer the stated question, yes, selectboards (as they are the only municipal public bodies that may hire employees) have the authority to conduct interviews of prospective employees in executive session pursuant to 1 V.S.A. § 313(a)(3). This process, however, is not nearly as simple as one may assume. This provision of law – which by the way has much broader application than just conducting employee interviews – permits any public body to hold an executive session from which the public is excluded to consider “the appointment or employment or evaluation of a public officer or employee, provided that the public body shall make a final decision to hire or appoint a public officer or employee in an open meeting and shall explain the reasons for its final decision during the open meeting.” The inclusion of the words “hire” and “employee” makes it clear that the statute allows the use of executive session for interviews with and discussions about applicants for jobs with the municipality.

For background purposes, executive session is an exception to Vermont's Open Meeting Law's requirement that “(a)ll meetings of a public body are declared to be open to the public at all times ...” 1 V.S.A. § 312(a). The Open Meeting Law applies whenever a quorum of the total membership of a public body is gathered to discuss the business of the public body or for the purpose of taking action. The term “public body” includes all municipal boards, councils, commissions, committees, and subcommittees and therefore applies when any of them are “meeting.” In short, executive session is a closed portion of an otherwise open meeting of a public body.

Entering executive session requires a motion and a vote. 1 V.S.A. § 313(a). The motion to go into executive session must indicate the nature of the business to be discussed and should, as a best practice, recite the specific statutory basis permitting use of executive session for that purpose. We strongly recommend the latter because public bodies can only enter executive session for one of the express reasons articulated in law. For purposes of transparency in your decision making, it would ordinarily make sense for your motion to provide as much detail as possible regarding the reason for entering executive session. On the other hand, it doesn't make sense to provide so much detail that you undermine the very reason for entering executive

session in the first place. In this instance the reason is to protect the privacy of the candidates for the open position. For this reason, it would legally suffice for a selectboard member to state, “I move that we enter executive session to consider an applicant for the position of [insert municipal position] pursuant to Title 1, Section 313(a)(3) of the Vermont Statutes.”

Attendance in executive session is limited to the members of the public body and, in its discretion, its “staff, clerical assistants and legal counsel, and persons who are subjects of the discussion or whose information is needed.” 1 V.S.A. § 313(b). The law does not require that the motion for executive session specifically identify any of the candidates for employment. Hence, we advise stating for the meeting minutes that “a candidate” for the position under consideration is invited into executive session with the selectboard (rather than stating that “Mr. Smith” is invited into executive session) after the motion is approved.

The law requires that the motion to enter executive session must be made during the open portion of a meeting and must obtain the approval of a majority of the members of the public body present. The result of the vote on this motion must also be recorded in the minutes of the meeting at which it was entertained. While in executive session, “no other matter may be considered.” 1 V.S.A. § 313(a).

Public bodies are not obligated to use executive session for any reason, even when not doing so could potentially put the public body or the municipality at a substantial disadvantage. Whether applicant interviews should be conducted in executive session is a multi-factored analysis and will likely depend upon the expectations of the community served, the preference of the majority of selectboard members, and whether conducting such interviews in public will deter any potential candidates from pursuing the open position. And while the overuse of executive session can contribute to, or exacerbate, public perception of governmental secrecy and distrust, there will likely be occasion where candidates for municipal employment may be at risk for losing their current employment if their candidacy with the municipality is made public. It is at these times that a selectboard must weigh the advantages of protecting a candidate’s current employment status – and the possibility of gaining their services for the benefit of the community – against the risk of potentially deepening the divide between government and those it governs. Even when not confronted with such a political atmosphere, it is wise for the selectboard chair to state publicly, and for the meeting minutes, that the reason underlying the motion to enter executive session is that one or more of the applicants may suffer negative consequences if their present employer learns that they are interviewing for another job.

The legislative allowance for entering executive session for this reason is unique in that a public body’s adherence to the statutory requirements for properly entering into executive session does not end its legal obligations. Once the discussion regarding “the appointment or employment or evaluation of a public officer or employee” ends, a public body is still required to make its final decision whether to hire a candidate for municipal office in open session and to furthermore “explain the reasons for its final decision during the open meeting.” We recommend when reciting the reason(s) for making a hire, the selectboard should only reference those reasons supporting the chosen candidate, not the shortcomings of the rest of the applicant pool.

And finally, because the law requires you to make your ultimate decision of whether to hire a candidate in public session, this necessarily precludes you from knowing with 100 percent confidence if your preferred candidate will actually accept your offer in open session before you

make it. There are two ways to address this from a practical standpoint. You could simply make a motion in open session to offer a position to “candidate A” (rather than identifying the candidate by name) and then announce that candidate’s decision and his or her identity at the next public meeting. Alternatively, you could make a conditional offer to the preferred candidate in executive session if you clearly communicate that the selectboard cannot make (and therefore won’t be legally bound to) a final, formal decision until it reconvenes in public session. The advantage of the latter approach is that you will at least have some measure of confidence as to whether your offer will be accepted before making it in public. After all, a job offer that is made in public and later rejected will not instill public confidence in the administration and management of the municipal workforce.

Given the length of this answer, you might think that this is the full explanation of your legal obligations in hiring public sector employees. Unfortunately, that is not the case. For instance, in trying to find the most qualified candidate, you will have undoubtedly interviewed more than one qualified candidate. This due diligence that you have exercised in pursuit of the best interests of your municipality will naturally give rise to the question of “who didn’t you hire?” This question may then turn into a public records request for the resumes of all those candidates you did not hire. The answer to the question of whether you must release that information is [here](#).

In the end, the public sector *could* operate more like the private sector ... if the public wasn’t a consideration.

Note: For guidance as to how to enter executive session for other reasons, please see VLCT’s [FAQs: Open Meeting Law](#).

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